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DEMOCRATIC POLICING

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Of all the agencies of executive government, those that police—that employ force and engage in surveillance—are the most threatening to the liberties of the American people. Yet, they are the least regulated. Two core requisites of American constitutionalism are democratic accountability and adherence to the rule of law. Democratic accountability ensures that policy choices are vetted in the public arena and have popular support; the rule of law requires that those choices be constitutional as well. Legislative enactments governing policing are few and far between. Although police departments have internal rules, these rules are rarely made public or publicly debated. When it comes to regulating policing, we rely primarily on ex post judicial review, which at best ensures policing practices are constitutional (though it often fails on this score), and does nothing to assure democratic accountability or sound policymaking.

This Article argues that it is fundamentally unacceptable for policing to remain aloof from the ordinary processes of democratic governance. All police practices—such as use of drones or other surveillance equipment; SWAT, Tasers, and other means of force; checkpoint stops, administrative inspections, and other warrantless searches and seizures—should be legislatively authorized, subject to public rulemaking, or adopted and evaluated through some alternative process that permits democratic input. In addition to spelling out the ways in which the ordinary processes of governance can be utilized to regulate policing, this Article fills in substantial gaps in the existing literature by analyzing why this has not been the case in the past, and explaining how, within the existing framework of administrative and constitutional law, courts can motivate change. It also directs attention to the manifold questions that require resolution in order to move policing to a more democratically accountable footing.

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[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.¹

INTRODUCTION

It would be difficult for anyone who has lived through the events of the last couple years to miss the fact that something is seriously awry with policing in the United States. In June of 2013 the nation learned, courtesy of Edward Snowden, that for many years the federal government had been surreptitiously gathering up the phone records, as well as email and Internet transactions, of as many Americans as it could.² Just two months later, Judge Shira Scheindlin of the Southern District of New York found that the New York City Police Department (NYPD) had violated the rights of potentially hundreds of thousands of New Yorkers with its aggressive “stop, question, and frisk” policy.³ Some eight months after that, in April 2014, the Los Angeles County Sheriff’s Office made headlines by conducting aerial surveillance of an entire city: Compton, California.⁴ During the summer of 2014 the country was treated to the spectacle of a highly militarized police training its weapons on the civilian population of Ferguson, Missouri.⁵ Over the following year, a series of incidents in which civilians died at police hands—including in Ferguson, Staten Island, Cleveland, Baltimore, and North Charleston—led to nationwide protests.⁶ This is just the highlight reel: It seems every week has

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¹ THE FEDERALIST NO. 51, at 256 (James Madison) (Oxford Univ. Press ed. 2008).

² Email collection supposedly terminated in 2011, though there is evidence this is not correct, and certainly does not include countless records of Americans being collected through overseas portals. See Glenn Greenwald & Spencer Ackerman, *NSA Collected US Email Records in Bulk for More than Two Years Under Obama*, GUARDIAN, June 27, 2013, <http://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorized-obama>.

³ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁴ See Conor Friedersdorf, *Eyes over Compton: How Police Spied on a Whole City*, ATLANTIC, Apr. 21, 2014, <http://www.theatlantic.com/national/archive/2014/04/sheriffs-deputy-compares-drone-surveillance-of-compton-to-big-brother/360954/>.

⁵ Milton J. Valencia, *Police Defend Use of Military-Style Equipment*, BOS. GLOBE, Aug. 17, 2014, at B1.

⁶ See Editorial, *The Lessons of Baltimore, and Ferguson, and Too Many Places*, L.A. TIMES, Apr. 29, 2015, <http://www.latimes.com/opinion/editorials/la-ed-baltimore-20150429->

brought a new, major story about government spying, or about police use of force gone awry. There have been detailed exposés of the abuse of forfeiture laws,⁷ and of the use of juveniles as drug informants.⁸ And there are many disturbing practices that slip entirely below the public radar, such as the warrantless forced catheterization of people suspected of driving under the influence of narcotics.⁹

The problem is that we often don't think about events such as these as one phenomenon. Rather, each is a pinprick, an isolated problem. Concerns about Ferguson focused on militarization resulting from massive transfers of war matériel to local police departments.¹⁰ Civilian shootings drew attention to racial bias, implicit or otherwise.¹¹ The events in Compton prompted concern about drones and surveillance (though the aircraft at issue actually was manned).¹² Forfeiture highlights the problem of policing for financial gain.¹³ The NSA's activities are viewed as isolated from the rest, as though intelligence gathering and street policing have nothing in common.

Still, it is possible to “connect the dots”—to use a phrase popularized by the 9/11 Commission Report in the context of intelligence gathering¹⁴—and see something fundamental that unites all this: a failure of democratic processes and accountability. In a nation that prides itself on the rule of law, that glorifies its system of checks and

story.html (listing incidents); Kenneth T. Walsh, *Obama Monitors Baltimore Rioting*, U.S. NEWS & WORLD REP., Apr. 28, 2015, <http://www.usnews.com/news/blogs/ken-walshs-washington/2015/04/28/obama-walks-fine-line-on-baltimore-riots> (same).

⁷ See Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, <http://www.newyorker.com/magazine/2013/08/12/taken>.

⁸ See Sarah Stillman, *The Throwaways*, NEW YORKER, Sept. 3, 2012, <http://www.newyorker.com/magazine/2012/09/03/the-throwaways>.

⁹ See Andrew M. Ironside, *After Breathalyzer and Blood Test, Man Suspected of Drunk Driving Subjected to Forced Catheterization*, C.R.L. & POL'Y BLOG (May 13, 2014), http://lawprofessors.typepad.com/civil_rights/2014/05/cp-man-seeking-11m-in-catheterization-lawsuit.html (discussing lawsuit alleging forced catheterization).

¹⁰ See Valencia, *supra* note 5 (using Ferguson to highlight problem of police militarization).

¹¹ See Chris Mooney, *Are You Racist?*, MOTHER JONES, Jan.–Feb. 2015, at 24 (explaining the prevalence of implicit bias in policing); Jason Zengerle, *Michael Brown's Death Was Shocking. So Are the Racial Profiling Stats We've Been Ignoring*, NEW REPUBLIC (Aug. 13, 2014), <http://www.newrepublic.com/article/119071/michael-brown-shooting-we-know-about-racial-profiling-dont-act> (noting incidence of racial profiling by Ferguson police in the wake of Michael Brown shooting). A Department of Justice report on its investigation of the Ferguson, Missouri police department likewise focused in part on the problem of implicit bias in policing. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–71 (2015).

¹² Friedersdorf, *supra* note 4.

¹³ Stillman, *supra* note 7 (highlighting abuses of civil forfeiture laws).

¹⁴ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 408 (2004) (using the phrase “connect the dots” to describe intelligence failure in the run-up to 9/11).

balances, that speaks endlessly of democratic engagement and the popular will, policing is a distinct outlier. Of all the agencies of executive government, those that “police”—*i.e.*, that engage in surveillance and employ force—are the most threatening to the liberties of the American people.¹⁵ Yet, from the standpoint of democratic governance, they are the least regulated.

Compared to the sprawling administrative codes that detail every aspect of agency practice, laws governing the police are notably sparse—if they exist at all.¹⁶ Policing agencies typically operate under age-old blanket authorizations to enforce the criminal law.¹⁷ Those authorizations were granted long before the methods and tactics of modern-day policing were even imaginable.

Policing agencies may not be entirely immune from democratic oversight—police chiefs typically serve at the pleasure of the mayor, police commission, or city council, and sheriffs are directly elected by the people¹⁸—but as we address in greater detail in Part I, these oversight mechanisms are no substitute for more granular regulation through legislative authorization and public rules.¹⁹ Given their incentives, executive officials to whom police report typically will grant policing agencies *carte blanche* so long as crime remains in check.²⁰

¹⁵ When we speak of policing agencies, we mean those organs of government that conduct surveillance on, or utilize force against, the population of the United States. Although seemingly very different, the Drug Enforcement Agency, the National Security Agency, and the local sheriff are united by the extraordinary powers we grant them. The use of surveillance and force is sometimes unavoidable, but in a society that calls itself free it is never welcome without clear necessity. Although some have argued that when the NSA or the FBI (or even the NYPD) engages in intelligence gathering against foreign nationals and foreign countries, they may indeed be doing something that plays by different rules, these debates rest outside the confines of the present project. Particularly when United States citizens are the target, constitutional government requires that policing adhere to our most fundamental norms.

¹⁶ See *infra* notes 63–80 and accompanying text (comparing state codes governing law enforcement with agency practices).

¹⁷ See, e.g., 28 U.S.C. §§ 531–533 (locating the FBI within the Department of Justice and authorizing the Attorney General to appoint officials to “detect and prosecute crimes against the United States”).

¹⁸ See HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 132 (1977) (discussing the traditional organizational means for citizens to influence the police).

¹⁹ See *infra* Part I.B.4.

²⁰ See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 8 (1st ed. 2005) (arguing that most elected officials are not very knowledgeable about police matters and are reluctant to provide guidance to law enforcement officials); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 657 (1997) (explaining that by distancing themselves from police administration, politicians are able to insulate themselves from controversial police practices).

Members of the public are often simply unaware of what police are up to until a particularly salient event brings existing practices to light.²¹

As a result, it has largely been left to courts to govern the police. The Supreme Court lays down the law, and lower courts adjudicate specific allegations of violations, mostly in the context of suppression motions. Yet few believe it makes sense for courts to be the primary supervisors of police agencies, particularly because judicial review is almost exclusively about constitutionality.²² Governing policing involves a host of prior questions: Are policing policies and procedures properly vetted? Are they efficacious? What harms do they impose? Do they make sense from a cost-benefit perspective? In short, largely neglected by courts and constitutional law are the very questions that concern us most with regard to the work of other agencies.

The central point is this: It is both unacceptable and unwise for policing to remain aloof from the democratic processes that apply to the rest of agency government. Rather than attempting to regulate policing primarily post hoc through episodic exclusion motions or the occasional action for money damages, policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking.²³ Rather than simply declaring various policing methods in or out of bounds after the fact, judicial review ought to be directed at ensuring that policing is based *ex ante* on democratically founded rules.

The fact that policing has been in the news the last year or more, and that the whiff of reform is in the air, should neither excuse consideration of the central claim here nor confuse what is at stake. As we explain below, policing has long operated without democratic governance, and this is not the first time in history that policing has proven

²¹ See *infra* notes 188–90 and accompanying text (highlighting instances in which police misconduct spurred pressure for more regulation of police).

²² See, e.g., Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) (emphasizing that constitutional law cannot fully address problems of police regulation); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972) (arguing that police departments, not courts, should formulate rules to govern policing); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721 (2014) (arguing that ordinary democratic processes of legislative authorization and police rulemaking should govern panvasive searches and seizures).

²³ We in no way intend to disparage the value of post hoc remedies. There are circumstances in which post hoc regulation makes the most sense. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609 (2012) (noting advantages of post hoc remedies in certain situations). But as Part II makes clear, the post hoc remedial regime alone does not meet the twin aims of accountability and the rule of law.

salient. Each time policing breaks into the public consciousness, some new approach or measure is adopted, some adjustment made. Most often the change is either philosophical—policing should be more “professional”²⁴ or the police should engage in “community policing”²⁵—or it involves some form of ex post “oversight,” such as court-ordered monitors, inspectors general, or civilian complaint review boards.²⁶ What we have *not* done as a nation is insist that those who police us be treated as the executive officials they are, subject to the same basic requisites of democracy—namely, transparent, publicly accountable, ex ante regulation.

We are hardly the first to suggest that policing is in need of ex ante democratic authorization. This drum has been beat, periodically, for at least the last fifty years. The authors of *The Challenge of Crime in a Free Society*—the Presidents’ Commission on Law Enforcement and the Administration of Justice—did much the same in the 1960s.²⁷ Noteworthy scholars and judges argued similarly during the 1970s.²⁸ At that time, a number of academic and professional organizations partnered with law enforcement groups to draft model rules.²⁹ Today, some scholars have again begun calling for administrative processes, or at least some reasonable facsimile, to govern the police. Much of this scholarship is aimed solely at intelligence gathering, and it too, once again, tends to describe various workarounds to address the

²⁴ See WALKER, *supra* note 20, at 21–22 (describing the “professionalization” movement); David Alan Sklansky, *The Persistent Pull of Police Professionalism*, NEW PERSPECTIVES IN POLICING, Mar. 2011, <http://www.hks.harvard.edu/content/download/67530/1242930/version/1/file/NPIP-ThePersistentPullOfPoliceProfessionalism-03-11.pdf> (noting that the idea of “police professionalism” dominated twentieth-century reform efforts).

²⁵ See Livingston, *supra* note 20, at 575–78 (describing community policing).

²⁶ See WALKER, *supra* note 20, at 36–38, 135–36 (describing various models). Oversight certainly is one tool in the democratic toolkit, but the very use of the term suggests after-the-fact review rather than before-the-fact rules.

²⁷ THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 103–06 (1967) [hereinafter PRESIDENT’S COMM’N] (recommending changes to police policies, attitudes, and complaint procedures).

²⁸ The key works of 1970s scholarship were: KENNETH CULP DAVIS, *POLICE DISCRETION* 98–120 (1975) (arguing that rulemaking is necessary to curb police discretion); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–28 (1974) (arguing in favor of police rulemaking for searches and seizures); McGowan, *supra* note 22, at 676–86 (arguing that formal rulemaking is often preferable to judicial oversight). These scholars were almost entirely prescriptive; none diagnosed why rulemaking did not apply. Davis’s work was aimed almost entirely at selective enforcement. Nonetheless, we stand on the shoulders of giants, particularly with regard to the work of Anthony Amsterdam.

²⁹ See *infra* notes 169–73 (describing these projects).

accountability deficit.³⁰ A very few scholars actually suggest something akin to traditional legislative or administrative processes to govern policing, but that scholarship tends to call for change without paying sufficient attention to the reasons why policing has heretofore remained ungoverned, and without addressing the details of how this should happen.³¹ Yet, obviously, both are essential.

The claim here is that policing agencies may only act pursuant to sufficient democratic authorization. Such authorization can come through specific legislation. It can be the product of administrative notice-and-comment rulemaking, in which public participation is welcomed. Or, given what is unique about policing—not the least of which is the fact that the vast majority of police forces have twenty-five officers or fewer and operate in equally small communities—new means of soliciting democratic engagement may be required. But, in one form or another, democratic authorization is vital.

³⁰ See, e.g., Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3 (2014) (suggesting how principles of administrative law might apply to domestic intelligence-gathering); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (proposing a system of internal checks and balances within the executive branch to govern intelligence gathering); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 576 (2010) (arguing for a regulatory approach to intelligence governance); Daphna Renan, *The Fourth Amendment as Administrative Procedure*, 68 STAN. L. REV. (forthcoming 2016) (manuscript at 3–4) (on file with authors) (arguing for administrative oversight of intelligence gathering).

³¹ Very few scholars have focused on applying rulemaking or administrative models to policing generally. Dan Kahan's work is directed to those instances in which police enforcement discretion affects the substantive content of the criminal law, Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996), while the focus here is primarily on the methods or tactics of policing. Daphna Renan calls for an administrative approach to the Fourth Amendment, but her nod to rulemaking and Administrative Procedure Acts (APAs) is brief, falling at the tail end of her elucidating piece. Renan, *supra* note 30 (manuscript at 53–56). Peter Swire and Erin Murphy briefly outline an administrative model in a four-page working paper. Peter P. Swire & Erin E. Murphy, *How to Address Standardless Discretion After Jones* (The Ohio State Univ. Moritz Coll. of Law Ctr. for Interdisciplinary Law & Policy Studies, Working Paper No. 177, 2012), <http://ssrn.com/abstract=2122941>. Erin Murphy elaborates somewhat more elsewhere. See Erin Murphy, *The Politics of Privacy in the Criminal Justice System*, 111 MICH. L. REV. 485, 537–44 (2013) (proposing a four-step procedural review of police action focused on compliance with clear preestablished police policies). John Rappaport argues in *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015), that rather than engaging in “first-order” regulation of police conduct, courts should encourage legislative bodies and police departments to regulate through rules. However, he offers no diagnosis of why this does not occur, and little about the specific tools to change this.

The closest counterpart to this Article is Chris Slobogin's excellent article on “panvasive” surveillance. Slobogin, *supra* note 22. Yet, as we note in the text, Slobogin does little to explain why the current state of affairs is as it is, or how to spark change. See also Harmon, *supra* note 22, at 763 (noting the limits of judicial review and emphasizing the importance of extrajudicial regulatory constraints on police).

Authorization should be required in any instance in which it is not plausible to infer that age-old, blanket delegations to enforce the criminal law cover current police actions. Courts should superintend the requirement of authorization by engaging in a variety of interpretive techniques, including withholding any sort of deference from policing not so authorized and denying authority to proceed until proper authorization is obtained. Policing should be rationalized, as is the rest of administrative practice, to avoid arbitrary and ill-advised decisions. As is true elsewhere in administrative law, after-the-fact justifications for policing practices that were not adopted pursuant to democratic authorization should not be accepted. The veil of secrecy over policing should be lifted except where operationally essential, because without transparency there is no hope of democratic governance.

Although that is our prescription, this Article does much more than simply prescribe. It fills substantial gaps in the extant scholarship by diagnosing why policing has remained underregulated for so long. It documents the costs of this neglect. And, importantly, it explains how—within the framework of constitutional and administrative law—we can motivate change. This comprehensive approach is essential because progress toward democratic policing will not be made until scholars and policymakers come to grips with *why* prior efforts to accomplish this have come to naught.

Part I of this Article compares the regulation of policing to the ordinary processes by which we govern executive officials and agencies. There are two core values to American democracy: democratic accountability and the rule of law. These are implemented in various ways at differing levels of government—from legislative authorization to notice-and-comment rulemaking to decisionmaking by local commissions and boards. When it comes to policing, however, there is largely a democratic vacuum: Policing agencies are authorized by breathtakingly broad delegations of power, and there is virtually no process that ensures democratic input into the means by which they go about their tasks. As a result, policing suffers from a failure of democratic accountability, of policy rationality, of transparency, and of oversight that would never be tolerated for any other agency of executive government. It is this democracy deficit that drives the need for policy reform.

Part II offers three explanations for the democracy deficit affecting policing. The first is “doctrinal”: The usual processes of democratic governance kick in only when agencies take actions that “alter” individual rights or impose new substantive obligations on the public. Police are authorized only to enforce the existing substantive

criminal law—they certainly are not permitted to alter people’s rights—and the methods they choose by which to do so escape rulemaking requirements. The second is historical: Popular control of the police—via urban machine politics—left a trail of corruption and incompetence that has caused us to grant the police enormous autonomy. Finally, as public choice theory would predict, legislative bodies and other governmental actors are loath to disturb that autonomy and pay the price should crime rates be blamed on them. As a result, the control of policing is largely left to courts.

Yet, as Part III explains, judicial regulation of the police is woefully inadequate. Judicial remedies are ill-adapted to addressing the “new” policing, which is proactive and regulatory, affecting us all. As a result, countless rights of citizens are violated without sufficient recourse. Even if that were not the case, judicial review—limited for the most part to constitutional questions—can never substitute for popular control. The regulation of the police involves profound policy questions that must be resolved in democratically accountable ways.

Part IV is aimed at implementation, addressing the hard questions surrounding moving policing agencies toward a democratically accountable footing, including the greater need for secrecy over certain aspects of policing, as well as the difficulty of deciding precisely when rulemaking ought to be required. Part IV also takes up perhaps the most complex challenge: how to scale democratic and administrative processes to account for the fact that there are well over ten thousand different police agencies in as many political subdivisions, many of which lack the resources to engage in robust rulemaking or draft rules from scratch.

Finally, Part V discusses how we can motivate government to make policing democratically accountable, given the public choice obstacles to regulating policing discussed in Part II. We suggest that courts can play a vital role in triggering police rulemaking. Many of the extant statutes that do regulate police are on the books in response to judicial decisions. Part V argues that rather than feeling compelled to rule “aye” or “nay” on the constitutionality of policing practices, courts should focus on identifying process failures, should refuse to defer to policing actions that lack a sufficient democratic pedigree, and offer safe harbors for those that are authorized through democratic means. As Part V makes clear, a variety of constitutional doctrines are available to courts to motivate democratically accountable policing.

Our focus here is on the core claim, because if that resonates, then change must come. A problem as intractable as policing accountability will not be solved easily or overnight; we do not pretend here

to have addressed every problem, worked out every possible approach. Policing's exceptionalism may require experimentation and creative solutions. But recent events surely have established that surveillance and the use of force are grave enough powers such that policing's lack of democratic accountability can no longer be swept under the rug. Indeed, if recent events have made anything clear, it is that an informed and aroused public will have views about how policing is conducted. Be it bulk data collection, drones, or the use of force, when the public is informed, and has a voice, policy changes.³² If for that reason alone, it is time to bring those public voices to policing.

I

POLICE EXCEPTIONALISM

A. *The Requisites of American Law*

There are two sides to the governance coin in the United States: democratic accountability and the rule of law. The first describes how we make rules that govern society.³³ The second sets out constraints on how we govern.³⁴

Accountability is primal to American democracy. Executive officials work *for* us, and are governed *by* us, not the other way around.³⁵ In a metaphysical sense, the decisions of government are of the people themselves. Ultimately, we are responsible for the decisions of those who act in our name.³⁶

At the same time, popular governance must adhere to rule of law principles.³⁷ In addition to respect for fundamental rights—the subject

³² See *infra* Part I.B.4 (providing examples of when public scrutiny led to changes in policing practices).

³³ See generally DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Adam Przeworski et al. eds., 1999) (discussing various models of democratic accountability); Jeremy Waldron, *Accountability: Fundamental to Democracy* 10–14 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14-13, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410812 (using a principal-agent model to describe a system of democratic accountability).

³⁴ See *infra* note 37.

³⁵ Government here is “of the people, by the people [and] for the people.” President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), <http://www.ourdocuments.gov/doc.php?flash=true&doc=36&page=transcript>.

³⁶ See Waldron, *supra* note 33, at 4 (portraying the government-citizen relationship as one between agent and principal).

³⁷ There are as many formulations of what the rule of law means as there are authors who write about it, yet they have a certain commonality. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193–95 (10th ed. 1961) (explaining that the rule of law guarantees against official arbitrariness); LON L. FULLER, THE MORALITY OF LAW 33–39 (rev. ed. 1964) (listing eight criteria necessary for law to exist); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2–3 (1997) (describing the function of the rule of law and

of Part III—two aspects of the rule of law are particularly important in any discussion of policing: transparency and generality. The people must be able to see what their agents are doing so they can evaluate those actions and exercise control as necessary.³⁸ The law also must treat all alike; to the extent people or groups are treated differently, such differential treatment must be based in rational reasons—it may not be arbitrary.³⁹

In the United States, we operationalize these twin ideas of accountability and the rule of law in various ways. Under the classical separation-of-powers model, democratically accountable legislators set down the laws that individuals are expected to follow; officials within the executive branch enforce these laws; and independent courts determine whether what the other branches did was authorized and permitted by law.⁴⁰ Around the turn of the twentieth century, the complexities of governing an industrial society led to the adoption of a variant “administrative” model of separation of powers.⁴¹ Under the administrative model, lawmaking, enforcement, and adjudication take place, to a large extent, within the executive branch—subject to various procedural safeguards that nonetheless ensure transparency and non-arbitrariness.⁴² Finally, at the level of local or municipal gov-

summarizing different formulations of rule of law principles); Matthew J. Hickman, *Democratic Policing: How Would We Know It if We Saw It?* (discussing the centrality of accountability and transparency to democratic policing), in *RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS* 489, 490 (Stephen K. Rice & Michael D. White eds., 2010); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (highlighting the importance of clear rules to maintaining the rule of law); Brian H. Bix, *Secrecy and the Nature of Law* (Oct. 21, 2013) (unpublished manuscript), <https://www.law.upenn.edu/live/files/2418-bixsecrecy-and-the-nature-of-law-full> (emphasizing that laws must be public to satisfy rule of law principles). Lon Fuller’s elaboration may be the most famous. See Fallon, *supra*, at 2 (“Lon L. Fuller argued that the Rule of Law requires publicly promulgated rules, laid down in advance, and adherence to at least some natural-law values.”).

³⁸ Waldron, *supra* note 33, at 31.

³⁹ See FULLER, *supra* note 37, at 46–49 (explaining the requirement of generality); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 219 (1979) (describing arbitrariness as the antithesis of the rule of law).

⁴⁰ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984).

⁴¹ See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986) (describing the beginning of the “modern age of administrative government” with the establishment of the Interstate Commerce Commission a century ago).

⁴² Although legislatures still “make law” by setting down at least in general terms the policies that agencies are to implement, they delegate to agencies the power to fill in many of the crucial details by formulating binding rules. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671–76 (1975) (describing the development of and early constraints on administrative agencies). Agencies then apply these rules to individual cases by issuing orders or adjudicating disputes. See 1

ernment—where much policing occurs—the separation-of-powers model also may be relaxed somewhat, utilizing mixed forms of legislative bodies and executive officials; but again, the basic principles of accountability and the rule of law nonetheless remain.⁴³ Public participation is central to executive governance at all levels of government.

At the state and federal levels, Administrative Procedure Acts (APAs) ensure that executive authority is both constrained and accountable through a combination of rulemaking procedures and robust judicial review. When an agency of executive government adopts a legislative rule—a rule that affects the rights and liberties of the people—the APAs require the agency to give both regulated entities and interested members of the public an opportunity to comment on the rule before it goes into effect.⁴⁴ In promulgating a final rule, the agency must respond to each substantive comment it receives, explaining why it chose either to adopt or disregard it.⁴⁵ This record of comments and agency responses becomes the basis for judicial review.⁴⁶

Under APAs, the function of courts is to ensure authorization and promote reasoned decisionmaking. Whether an agency decides to

RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.1 (5th ed. 2010) (defining agency adjudication).

⁴³ For a detailed description of various models of local governments, see Suzanne Leland & Holly Whisman, *Local Legislatures*, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT 415 (Donald Haider-Markel ed. 2014).

⁴⁴ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 472–73, 541–42 (2003) (describing the function of notice-and-comment rulemaking); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1635 (1985) (citing the benefits of public rulemaking); Stewart, *supra* note 42, at 1686 (noting the importance of outside input from organized interests). “Interpretive rules” are exempt from the rulemaking requirement, but courts construe the exception for interpretive rules narrowly. See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec., 653 F.3d 1, 6–7 (D.C. Cir. 2011) (construing a TSA policy as substantive and not interpretive); Hocter v. U.S. Dep’t of Agric., 82 F.3d 165, 169–71 (7th Cir. 1996) (rejecting the Department of Agriculture’s characterization of a rule as interpretive).

⁴⁵ RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.6b (6th ed. 2014); see also Ronald F. Wright, *It’s the Reply, Not the Comment: Observations About the Bierschbach and Bibas Proposal*, 97 MINN. L. REV. 2272, 2273 (2013) (noting importance of agency reply in promoting democratic accountability).

⁴⁶ See, e.g., United States v. Nova Scotia Food Prods., Corp., 568 F.2d 240, 252–53 (2d Cir. 1977) (invalidating agency rule due to agency’s failure to respond adequately to public comments); Auto. Parts & Accessories Ass’n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (noting agencies’ obligation to respond to public comments so as to facilitate judicial review). The upshot of these procedural requirements is that agency rulemaking is often but the last step in a drawn out negotiation among agency officials and various stakeholders. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 34 (1997) (explaining how rulemaking is often a consensus-based process in which stakeholders negotiate the substance of the rule).

proceed through rulemaking or case-by-case adjudication, judicial review ensures that the agency acts rationally and operates within the bounds of its statutory authority.⁴⁷ Similarly, courts hold out the promise of greater deference to agency interpretations of vague statutory terms when these interpretations are arrived at through more deliberative processes.⁴⁸ As Cass Sunstein suggests, judicial decisions involving deference to administrative actions establish a “pay me now or pay me later” regime—either the agency can promulgate a rule (or go through formal adjudication) and enjoy the benefits of substantial judicial deference, or it can choose to proceed informally but then be forced to persuade the court that its interpretation of the statute is in fact correct.⁴⁹ Finally—and critically—under *SEC v. Chenery Corp.*, agencies are not permitted to engage in post hoc rationalization, and must therefore keep detailed records and provide contemporaneous explanations for their decisions.⁵⁰

⁴⁷ The federal APA permits a court to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2012). Under the Supreme Court’s decision in *State Farm*, all agency actions are subject to “hard look review,” which asks whether the agency actually considered the salient aspects of the problem and arrived at a decision that is supported by the evidence. *See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))). The APA defines an “agency action” as “an agency rule, order, license, sanction, [or] relief.” 5 U.S.C. § 551(13) (2012). As we explain in Part II, *infra*, the APA exempts from rulemaking and judicial review certain kinds of agency actions (e.g. guidelines, enforcement decisions). At the very least, an agency must “articulate a rational connection between the facts found and the choices made.” *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983).

⁴⁸ Under *Skidmore*, *Chevron*, and *Mead*, courts adjust the level of deference they afford to agency interpretations based on the regularity of the procedures employed. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness” (footnotes omitted)); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[L]egislative regulations [by agencies] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration”); *see also* Bressman, *supra* note 44, at 536 (describing a sliding scale of deference pegged to the rigor of agency proceedings); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 214 (2006) (noting that agencies get *Chevron* deference when they use more formal procedures).

⁴⁹ Sunstein, *supra* note 48, at 225–26; *see also, e.g.*, *Estate of Landers v. Leavitt*, 545 F.3d 98, 106 (2d Cir. 2008) (noting that agency manuals typically are not entitled to *Chevron* deference); *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 453 (5th Cir. 2008) (holding that revenue rulings are not entitled to *Chevron* deference).

⁵⁰ 318 U.S. 80, 95 (1943) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its

At the local level, where decisionmaking processes are typically far more informal, state laws—as well as background state constitutional principles of due process and nondelegation—still impose a variety of procedural requirements to ensure transparency, accountability, and rationality.⁵¹ Although local governments are typically exempt from state APAs,⁵² a number of cities have enacted their own APAs requiring agencies to give the public an opportunity to submit their views before a proposed rule can go into effect.⁵³ State laws and local ordinances that delegate specific powers to local boards or administrative agencies also often include provisions specifying the manner in which the governing body must exercise its authority.⁵⁴ And even in the absence of explicit statutory provisions, a number of state courts have imposed analogous requirements as necessary to facilitate judicial review.⁵⁵

Finally, all fifty states have “sunshine” or “open meeting” laws, which require local governing bodies—including commissions, councils, and certain executive agencies—to grant the public access to all meetings where matters of public interest are voted upon or dis-

action can be sustained.”); see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 973 (2007) (noting that *Chenery* incentivizes agencies to provide a detailed explanation of their decisions).

⁵¹ On nondelegation as a limit on local government decisionmaking, see, for example, *Kwik Shop, Inc. v. City of Lincoln*, 498 N.W.2d 102, 108 (Neb. 1993), which struck down a state liquor licensing statute on the ground that it “does not provide the local governing bodies with adequate, sufficient, and definite standards within which they are to exercise their discretion.” We discuss state nondelegation doctrine (and the related *ultra vires* doctrine) in greater detail in Part V.B.1, *infra*.

⁵² See SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 26.08 (2d ed. 2014). This is not universally true. For example, municipal governments in Illinois, Missouri, and Utah must comply with state APAs in exercising at least certain functions. *Id.* § 26.08 n.8.

⁵³ See, e.g., N.Y.C., N.Y., CHARTER §§ 1041–47 (2012); SEATTLE, WASH., MUN. CODE § 3.02.030 (2015).

⁵⁴ See, e.g., CHL., ILL., MUN. CODE § 2-112-160(b)(6) (authorizing the Chicago Commissioner of Health to promulgate rules, but only with notice and a hearing); MD. CODE ANN., Local Government § 5-103 (authorizing municipalities to regulate junk yards but requiring local councils to hold a hearing prior to adopting any ordinance under the statute).

⁵⁵ See, e.g., *Citizens Against Lewis & Clark (Mowery) Landfill v. Pottawattamie Cnty. Bd. of Adjustment*, 277 N.W.2d 921, 925 (Iowa 1979) (requiring local zoning board to “make written findings of fact on all issues presented in any adjudicatory proceeding” while acknowledging that “[t]here is no statutory requirement that the board do so”); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 415–16 (Minn. 1981) (acknowledging “that city councils and zoning boards do not ordinarily make records of their proceedings as complete and as formal as those of a state administrative agency” but nonetheless holding that “at a minimum [a local board or council must have] the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion”).

cussed.⁵⁶ Although some states guarantee little more than the public's right to observe government proceedings,⁵⁷ others go a step further, requiring agencies to give interested members of the public a "reasonable opportunity to submit data, views, or arguments . . . prior to making a final decision that is of significant interest to the public."⁵⁸ State courts typically enforce open meeting laws by invalidating agency decisions arrived at behind closed doors⁵⁹—and in some states, officials who violate these provisions may also be subject to civil penalties or removal from office.⁶⁰

These administrative governance schemes are not without their shortcomings. As critics note, and as we discuss in greater detail in Part II, the APAs and their local counterparts exempt various kinds of agency enforcement decisions from their reach, thereby shielding that aspect of agency activity from formal mechanisms of democratic

⁵⁶ Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s*, 71 WASH. U. L. Q. 1165, 1165 (1993). Laws vary considerably from state to state, but typically apply to all agencies and governing bodies that have "the power to regulate the conduct of others" or disburse public funds. 4 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 13:10 (3d ed., rev. vol. 2011). Although states have adopted various exceptions to open meeting requirements, state courts typically insist that such exceptions be "strictly construed." *E.g.*, *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012); *see also* 4 MCQUILLIN, *supra*, § 13:10 ("[C]losed-session exceptions are to be strictly construed to limit the number of situations in which meetings will not be open to the public.").

⁵⁷ *See, e.g.*, *Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983) (requiring public access to a faculty committee meeting discussing university appointments, but noting that "nothing in this decision gives the public the right to be more than spectators"); *City of Coll. Park v. Cotter*, 525 A.2d 1059, 1064–65 (Md. 1987) (noting the same under Maryland law).

⁵⁸ MONT. CODE ANN. § 2-3-111 (2013); *see also* HAW. REV. STAT. § 92-3 (2012) (requiring all local boards to "afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item"); *Kanahele v. Maui Cnty. Council*, 307 P.3d 1174, 1196–97 (Haw. 2013) (interpreting Hawaii's statute to require that the public be given "a realistic, actual opportunity to participate in the board's processes"); *Citizens for Open Gov't, Inc. v. City of Polson*, 343 P.3d 584, 587–88 (Mont. 2015) (interpreting Montana's statute).

⁵⁹ *See, e.g.*, *Karol v. Bd. of Educ. Trs.*, 593 P.2d 649, 651–52 (Ariz. 1979) (en banc) (noting that the state's open meeting law permitted the court to set aside the board's decision but excusing a technical violation on the ground that the board had substantially complied with the act's requirements).

⁶⁰ *See, e.g.*, *Steele v. Honea*, 409 S.E.2d 652, 654 (Ga. 1991) (finding that county commissioners may be subject to recall for failure to comply with the state's open meeting requirements); *Claude v. Collins*, 518 N.W.2d 836, 842 (Minn. 1994) (noting that the state's open meeting law mandates a civil penalty of \$100 for each violation and "removal from office for three separate and unrelated violations of the law"). *See generally* 4 MCQUILLIN, *supra* note 56, § 13:10, at 1121–22 (enumerating various enforcement mechanisms). Recognizing the important interests served by these statutes, courts typically construe standing requirements broadly, permitting news outlets and other organizations without a direct stake in the outcome of specific proceedings to sue. *See, e.g.*, *Miglionico v. Birmingham News Co.*, 378 So. 2d 677, 680 (Ala. 1979) (holding that a newspaper has standing to enforce the state's "sunshine" law).

accountability and judicial review.⁶¹ Nevertheless, throughout executive government the core requirements of rulemaking, authorization, and substantive judicial review ensure—to a substantial extent—that agencies act rationally and are accountable to the people they serve.

B. Policing Exceptionalism

What matters for present purposes is that virtually none of this is true when it comes to policing. Policing agencies—for that is what they are, agencies of executive government—fail to play by the rules of administrative governance. Because the usual requisites of democratic authorization are lacking with policing, we can have little confidence that policing at present is efficacious, cost-effective, or consistent with the popular will.

1. Legislative and Administrative Lacunae

Policing in the United States is a diffuse business. There are major federal policing agencies such as the Federal Bureau of Investigation, and each state has its own police. But much of policing occurs at the local level. There are just under 18,000 separate police forces in the United States, and some 765,000 sworn officers.⁶²

There is remarkably little legislative direction for America's policing officials. Compared to the sprawling administrative codes that detail every aspect of agency practice, laws governing the police are notably sparse—if they exist at all. For example, in Florida statutory law governing when law enforcement may conduct searches without warrants remains skeletal,⁶³ although the state has enacted an entire administrative code devoted to the Department of Citrus, including rules concerning the allowable coloration of “Midseason Varieties,”⁶⁴

⁶¹ See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 216 (1969) (“The vast quantities of unnecessary discretionary power that have grown up in our system should be cut back”); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 896–97, 901 (2009) (proposing an administrative solution to the problem of prosecutorial discretion); Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 *NOTRE DAME L. REV.* 227, 256–58 (2006) (arguing for the use of audits to constrain excess executive discretion and promote accountability); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 *U. CHI. L. REV.* 653, 665–75 (1985) (criticizing the presumption of nonreviewability of agency inaction).

⁶² BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, *NCJ 233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008*, at 2 tbl.1 (2011), <http://www.bjs.gov/content/pub/pdf/cslea08.pdf>.

⁶³ FLA. STAT. ANN. §§ 901–985 (West 2001).

⁶⁴ FLA. ADMIN. CODE ANN. r. 20-32.006 (1998).

and several provisions that set guidelines for distinguishing between a Murcott Honey Tangerine and a Tangelo.⁶⁵

The typical enabling statute of a policing agency simply authorizes it to enforce the substantive criminal law—but says little or nothing about *what* enforcement actions police are permitted to take. For example, the statute enabling the Federal Bureau of Investigation establishes the Bureau within the Department of Justice and authorizes the Attorney General to appoint officers “to detect . . . crimes against the United States.”⁶⁶ That is pretty much it. The New York City charter authorizes police to “preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages . . . [and] protect the rights of persons and property.”⁶⁷

To be sure, there are specific statutes that govern particular aspects of policing. Federal provisions like the Stored Communications Act⁶⁸ and Title III of the Omnibus Crime Control and Safe Streets Act of 1968⁶⁹ regulate police use of wiretaps and access to stored wire and electronic communications held by Internet service providers. Some states—but not others—have laws to govern drones⁷⁰ or drunk-driving checkpoints.⁷¹ A small number of states have laws regulating the recording of custodial interrogations.⁷² More recently, legislatures in some thirty-four states have considered measures requiring police use of body-worn cameras.⁷³

The salient point, though, is that such legislation is episodic—a bit of a latticework, with many large holes. As compared with the regulation of almost any other aspect of society that fundamentally affects the rights and liberties of the people, rules adopted by democratic bodies to govern policing tend to be few and far between.⁷⁴ Such rules are usually adopted in the face of salient public events,

⁶⁵ FLA. ADMIN. CODE ANN. r. 20-13.006, .009 (1998).

⁶⁶ 28 U.S.C. §§ 531, 533(1) (2012).

⁶⁷ N.Y.C., N.Y., CHARTER § 435 (2012).

⁶⁸ 18 U.S.C. § 2518.

⁶⁹ 18 U.S.C. § 2703.

⁷⁰ See Allie Bohm, *Status of 2014 Domestic Drone Legislation in the States*, ACLU (Apr. 22, 2014, 10:32 AM), <https://www.aclu.org/blog/technology-and-liberty/status-2014-domestic-drone-legislation-states> (noting the status of drone legislation as of 2014).

⁷¹ See *Sobriety Checkpoint Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (Aug. 2015), http://www.ghsa.org/html/stateinfo/laws/checkpoint_laws.html (listing state-by-state rules governing sobriety checkpoints).

⁷² See *Law Enforcement Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 29, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx> (noting statutes).

⁷³ *Id.*

⁷⁴ See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44

or—as we will discuss in Part V—when courts limit what policing officials can do.⁷⁵ But the empty spaces are vast.

Although legislatures rarely govern police methods, policing also escapes regulation under any sort of administrative or rulemaking model. Policing agencies assuredly do have rules. There are internal policy manuals or General Orders. But even these manuals are often silent on critical aspects of policing.⁷⁶ There may be rules to govern the use of force,⁷⁷ the storage and disposition of confiscated property,⁷⁸ and strip searches of arrestees,⁷⁹ but none on informants, drones, consent searches, or other investigative tactics.⁸⁰

And critically, even when police have rules in place, these rules are virtually never made pursuant to some sort of democratic pro-

SYRACUSE L. REV. 1079, 1079 (1993) (noting that legislators have done little to regulate police).

⁷⁵ See *id.* at 1082–83 (arguing that legislatures rarely regulate police except when constrained by judicial decision or at the behest of influential interest groups).

⁷⁶ See, e.g., ACLU OF N. CAL., STUN GUN FALLACY: HOW THE LACK OF TASER REGULATION ENDANGERS LIVES 12–14 (2005), <https://www.aclunc.org/sites/default/files/Stun%20Gun%20Fallacy%20-%20How%20the%20Lack%20of%20Taser%20Regulation%20Endangers%20Lives.pdf> (noting gaps in police regulations governing the use of Tasers).

⁷⁷ CHI. POLICE DEP'T, GENERAL ORDER NOS. G03-02 to G03-02-07, <http://directives.chicagopolice.org/directives/> (last visited Aug. 16, 2015) (establishing guidelines for the use of both deadly and non-deadly force).

⁷⁸ CHI. POLICE DEP'T, SPECIAL ORDER No. S07-03-06 (2014), <http://directives.chicagopolice.org/directives/data/a7a57bf0-1348fc77-5f913-4901-b8eedf1b08ca4714.pdf> (governing the seizure and forfeiture of vehicles, vessels, and aircraft in the event of an arrest).

⁷⁹ CHI. POLICE DEP'T, GENERAL ORDER No. G06-01-03 (2012), <http://directives.chicagopolice.org/directives/data/a7a56e4b-12ccb26-df812-cbbe-2c1daf267a24daeb.pdf> (requiring reasonable suspicion for the strip search of an arrestee).

⁸⁰ The Chicago Police Department places virtually no limits on the use of informants, see CHI. POLICE DEP'T, GENERAL ORDER No. G02-01-01 (1989), <http://directives.chicagopolice.org/directives/data/a7a57be2-12be97cf-78912-bea6-a75df41ea0024729.pdf>, has no policy on drones or aerial surveillance (although Illinois recently adopted a statute regulating drone use, see Freedom from Drone Surveillance Act, 2013 Ill. Legis. Serv. 3930 (West) (codified at 725 ILL. COMP. STAT. ANN. 167/1 (West 2008 & Supp. 2015))), and specifically exempts consent searches during routine traffic or pedestrian stops from department rules and regulations, CHI. POLICE DEP'T, SPECIAL ORDER No. S04-19-01 (2015), <http://directives.chicagopolice.org/directives/data/a7a57be2-12a76ce1-24512-a773-3e562b92ee0b017f.pdf>. Chicago is of course but one example; police manuals in other jurisdictions have different gaps in coverage. See, e.g., Rappaport, *supra* note 31, at 214 (noting that 84% of law enforcement agencies lack rules on lineup procedures); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 17 (2003) ("Many critical areas of police work remain ungoverned by rules (e.g., the use of informants, other undercover tactics, deployment of the canine unit, etc.). Many departments, meanwhile, have rules on the use of force that are not as comprehensive as they could be").

cess.⁸¹ There is no opportunity for formal public comment—and certainly no requirement that police officials respond to public input on the record and justify the choices they’ve made. Indeed, the rules often are not even available to the public. As a result, there typically is no contemporaneous record to show why police officials thought a particular rule was necessary or prudent—or that officials even considered less intrusive alternatives and had good reasons to reject them.⁸²

Failure to subject police rules to the back-and-forth of public rulemaking not only deprives the public of an opportunity to shape policing policy before it goes into effect, it forestalls any sort of meaningful judicial review. At best, courts ask whether a practice is constitutional.⁸³ There is no “hard look review” of agency action, and no way of knowing whether the rationale offered for an officer’s actions reflects reasoned department policy or simply the creative efforts of a state’s attorney attempting to justify the decision after the fact. Is the use of a SWAT team really necessary to ensure officer safety in effectuating a misdemeanor search warrant or administrative inspection?⁸⁴ How likely is it that an arrestee’s confederates might try to “wipe” his cellphone remotely following arrest?⁸⁵ These are empirical, fact-bound questions, ones that in the administrative law context would have been answered *before* the policy at issue went into effect. Instead, courts are forced to take judicial notice of academic studies,

⁸¹ There appear to be a few limited exceptions. The Washington, D.C., police department occasionally subjects its policies to public rulemaking. *See, e.g.*, Metropolitan Police Department Use of Closed Circuit Television, 49 D.C. Reg. 8465 (proposed Sept. 6, 2002). Maine also requires police departments to adopt written policies on certain police practices and requires that agencies “certify . . . that attempts were made to obtain public comment during the formulation of policies.” ME. REV. STAT. ANN. tit. 25, § 2803-B(1) (2007).

⁸² *See* Wright, *supra* note 45, at 2273 (explaining why the requirement of agency reply is critical to promoting democratic accountability).

⁸³ *See, e.g.*, Harmon, *supra* note 22, at 776–78 (noting the limits of constitutional review).

⁸⁴ *See, e.g.*, Estate of Brown v. Thomas, 771 F.3d 1001, 1003 (7th Cir. 2014) (describing a SWAT raid used to serve a misdemeanor search warrant); Berry v. Leslie, 767 F.3d 1144, 1146–47 (11th Cir. 2014) (describing a SWAT raid used in an administrative inspection), *vacated pending reh’g en banc*, 771 F.3d 1316 (11th Cir.), *dismissed as moot*, 785 F.3d 553 (11th Cir. 2015); Bruce v. Beary, 498 F.3d 1232, 1236 (11th Cir. 2007) (describing the administrative inspection of an auto repair shop in which officers dressed in SWAT uniforms entered with guns drawn).

⁸⁵ *See* Riley v. California, 134 S. Ct. 2473, 2486–87 (2014) (discounting the government’s argument that the risk of remote wiping justifies the conduct of warrantless cell phone searches).

rely on the testimony of paid experts, or simply accept what attorneys say in their briefs.⁸⁶

Some might argue that in this respect, policing agencies are treated no differently than other administrative agencies, whose internal rules and enforcement decisions are exempt from both rulemaking requirements and meaningful judicial review. On any given day, agency officials decide which factories to inspect or tax returns to audit, when to bring an enforcement action or simply look the other way.⁸⁷ Agencies also regularly formulate policy through informal guidelines and agency opinions. All of these decisions, at least to the extent they are nonbinding, are likewise unreviewable.⁸⁸

Although we tend to agree with those scholars who have argued persuasively that these sorts of decisions should likewise be subject to more robust oversight,⁸⁹ there are at least strong arguments in favor of the status quo, none of which apply to the sorts of police decisions at issue here. Agency actions currently exempt from the APA fall primarily into two categories—decisions about enforcement *discretion* and choices about enforcement *methods*. Agency guidelines, policy manuals, and discrete decisions about which regulations to enforce and against whom all fall into the first camp—as do police decisions to aggressively enforce marijuana statutes in some neighborhoods but not in others, or to let someone off with a warning instead of issuing a citation or making an arrest.⁹⁰ One critical reason why these sorts of decisions escape the requirements of agency process is that whenever an agency *does* decide to prosecute, there will be judicial review of that decision. Likewise, decisions to threaten or initiate an enforce-

⁸⁶ *Estate of Brown*, 771 F.3d at 1004–05 (discussing an expert report criticizing police officers' use of SWAT); *United States v. Flores-Lopez*, 670 F.3d 803, 807–10 (7th Cir. 2012) (crediting the government's "remote wiping" argument).

⁸⁷ See Cuéllar, *supra* note 61, at 230 (citing examples of executive actions exempt from procedural requirements and judicial oversight).

⁸⁸ See Bressman, *supra* note 44, at 546 (criticizing excessive reliance on informal policymaking).

⁸⁹ See, e.g., Barkow, *supra* note 61 (proposing an administrative solution to the problem of prosecutorial discretion); Cuéllar, *supra* note 61 (arguing that executive discretion ought to be cabined through an audit process).

⁹⁰ Although a number of scholars have argued that police ought to be required to cabin such discretion through binding rules, see DAVIS, *supra* note 28, at 98–120 (arguing that police ought to engage in substantive rulemaking); Kahan, *supra* note 31, at 488–89 (proposing that the U.S. Department of Justice be permitted to engage in substantive rulemaking to govern enforcement decisions), others have questioned whether police presently have the authority to alter the scope of criminal statutes (and whether such grants of authority, if given, would survive judicial scrutiny under either state or federal nondelegation principles), see Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 67, 70 (1976) (noting various doctrinal objections to substantive rulemaking by law enforcement agencies).

ment action are cabined at least to some extent both by the substantive reach of the governing law and by the background procedural protections of the APA (or the criminal process).⁹¹

The chief focus here, however, is not on substantive enforcement discretion, but on decisions about enforcement *methods*—whether to set up drunk-driving checkpoints or rely on routine patrols; whether to send in a SWAT team or simply knock on a suspect’s door. As we make clear in Part III, it is exceedingly difficult—and sometimes altogether impossible—to obtain adequate review of the *methods* police use to enforce the law.⁹² Other agencies also exercise some discretion over their enforcement methods, but their techniques—sending letters, issuing cease-and-desist orders, deciding to bring an action—are limited and time-honored, have nowhere near the impact on individuals (outside of the prosecution itself), and often are bound up in the enforcement action that will be subjected to judicial review.

2. *A Lack of Transparency*

Transparency is critical to accountability—the people cannot supervise their officials unless they know what the officials are up to. Some confidentiality surrounding policing is both necessary and appropriate, but policing operates under a shroud of secrecy that is simply unjustifiable.⁹³ As Jeremy Waldron puts it: “In a democracy, the accountable agents of the people owe the people an account of what they have been doing, and a refusal to provide this is simple insolence.”⁹⁴

We know neither the law of policing as it is written down, nor the law as it is applied. Some departments, like the Seattle and Chicago police departments, post their manuals on the Internet.⁹⁵ Most seem

⁹¹ Although most individuals may prefer simply to comply with an informal agency order (even if they disagree on the merits), they retain the right to ignore the agency instruction and force the agency to initiate more formal enforcement proceedings subject to judicial review. For example, there is a great deal of concern about U.S. Department of Justice nonprosecution and deferred prosecution agreements in the corporate sector. See, e.g., ANTHONY S. BARKOW & RACHEL E. BARKOW, *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 4–5 (2011). But ultimately, any party to such agreement could simply stand on their rights and obtain adjudication. In short, agencies depend on voluntary compliance to alter the status quo.

⁹² Police decisions about enforcement methods likewise do not depend on voluntary compliance. There is no adjudicative alternative to a police department decision to deploy a SWAT team, send up a drone, put up a roadblock, or engage in bulk data collection—at best, all individuals can hope for is ex post remediation for violations of their Fourth Amendment rights.

⁹³ See *infra* Part IV.D.

⁹⁴ Waldron, *supra* note 33, at 27.

⁹⁵ CHI. POLICE DEP’T, *RULES AND REGULATIONS OF THE CHICAGO POLICE DEPARTMENT* (Apr. 16, 2015), <http://directives.chicagopolice.org/lt2015/data/a7a57bf0->

not to. Policing agencies fail to collect—or publicize if they do—even basic data that would allow for public supervision and sound cost-benefit analysis.⁹⁶ When the ACLU attempted to gather data on the use of SWAT, for example, nearly half of the 255 policing agencies contacted rejected the organization’s records request.⁹⁷

Police agencies also subvert transparency in more pernicious ways. Police officers are believed to lie so often in court that the practice has a familiar name: *testilying*.⁹⁸ Officials at the highest levels show disdain for the truth necessary to self-governance—the Director of National Intelligence misrepresented to Congress and the American people the scope of bulk data collection.⁹⁹ The New Jersey State Patrol engaged in a behind-the-scenes effort to limit what the U.S. Department of Justice uncovered in its investigation of racial profiling.¹⁰⁰ Federal officials strong-arm state and local governments to keep secret the uses of Stingray technology¹⁰¹ or to exempt intelligence “fusion centers” from open secrets laws.¹⁰²

12d7c186-a4912-d7c1-8b12822c2ca106c4.html; SEATTLE POLICE DEP’T, SEATTLE POLICE DEPARTMENT MANUAL, <http://www.seattle.gov/police-manual/> (last updated Oct. 1, 2015); see also L.A. POLICE DEP’T, LOS ANGELES POLICE DEPARTMENT MANUAL, http://www.lapdonline.org/lapd_manual/ (last visited Aug. 15, 2015); METRO. POLICE DEP’T, STANDARD OPERATING PROCEDURES, <http://mpdc.dc.gov/page/written-directives-standard-operating-procedures> (last visited Aug. 15, 2015).

⁹⁶ For example, Maryland and Utah are the only states ever to require policing agencies to report on the use of SWAT—over the objection of local police. ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* 28–29 (2014), https://aclu.org/sites/default/files/field_document/jus14-warcomeshome-report-web-rell_1.pdf.

⁹⁷ *Id.* at 27–28; cf. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 903–04 (2014) (detailing problems the author encountered in gathering data on police settlements and indemnification policies).

⁹⁸ COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF NEW YORK, COMMISSION REPORT 36 (1994) (“[T]he practice of police falsification . . . is so common . . . that it has spawned its own word: ‘testilying.’”); see also Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041–48 (1996) (describing the prevalence and likely causes of police perjury).

⁹⁹ Dashiell Bennett, *Both Sides Can Agree: America’s Top Spy Lied About Data Mining*, THE WIRE: NEWS FROM THE ATLANTIC (June 11, 2013), <http://www.thewire.com/politics/2013/06/both-sides-can-agree-americas-top-spy-lied-about-data-mining/66134/>.

¹⁰⁰ David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, at A1.

¹⁰¹ See Jessica Glenza & Nicky Woolf, *Stingray Spying: FBI’s Secret Deal with Police Hides Phone Dragnet from Courts*, THE GUARDIAN (Apr. 10, 2015), <http://www.theguardian.com/us-news/2015/apr/10/stingray-spying-fbi-phone-dragnet-police> (discussing the FBI’s confidentiality agreements with local police departments regarding the use of Stingray electronic surveillance technology).

¹⁰² See THE CONSTITUTION PROJECT, *RECOMMENDATIONS FOR FUSION CENTERS: PRESERVING PRIVACY & CIVIL LIBERTIES WHILE PROTECTING AGAINST CRIME & TERRORISM* 19 (2012), <http://constitutionproject.org/pdf/fusioncenterreport.pdf> (discussing the FBI’s requirement that states exempt fusion centers from open government laws).

3. *Unevaluated Policy*

The choice between different policing tactics and priorities ultimately is a matter of policy, which requires a careful weighing of costs and benefits. Many of these choices are also inherently value-laden, and ought therefore to be the subject of public debate. Yet, all too often we leave these decisions to police agencies themselves. The consequence is that we can have little confidence in the rationality, efficacy, or cost-effectiveness of the policing policies that affect our rights and liberties.

Take for example, SWAT teams, once reserved for emergencies, such as hostage situations or sniper attacks, and which are now regularly employed for tasks like serving search warrants.¹⁰³ By some estimates, police conduct as many as 50,000 raids each year.¹⁰⁴ Even if a SWAT mission goes well, there likely will be property damage and trauma.¹⁰⁵ Often they go wrong, resulting in injuries or even death to animals, civilians, and the police themselves. In January 2011, a SWAT team in Framingham, Massachusetts killed a sixty-eight-year-old grandfather when an officer's gun accidentally discharged during a raid. Officers had already arrested the suspect they were looking for—outside and without incident—but decided still to proceed with the raid.¹⁰⁶ A veteran of the war in Iraq was shot twenty-two times when he mistook a nighttime SWAT raid for a burglary; the team had conducted several raids that night and ultimately turned up a small bag of marijuana, in a different house.¹⁰⁷ There is a body of expert opinion that indicates SWAT intrusions happen far more often than they should—and that the good old-fashioned “come out with your hands up” is what is called for in most instances.¹⁰⁸ Even if the Constitution

¹⁰³ See ACLU, *supra* note 96, at 31 (noting the use of SWAT in routine drug cases).

¹⁰⁴ Matthew Harwood, *One Nation Under SWAT: How America's Police Became an Occupying Force*, SALON (Aug. 14, 2014, 9:28 AM), http://www.salon.com/2014/08/14/one_nation_under_swat_how_americas_police_became_an_occupying_force_partner/.

¹⁰⁵ See ACLU, *supra* note 96, at 37 (noting that police used a battering ram or other breaching device in 65% of all raids); Julia Angwin & Abbie Nehring, *Hotter Than Lava*, PROPUBLICA (Jan. 12, 2015), <https://www.propublica.org/article/flashbangs> (detailing the use of flashbang devices and the resulting damage in paramilitary raids).

¹⁰⁶ ACLU, *supra* note 96, at 9.

¹⁰⁷ *Id.* at 17. There are many other examples. See, e.g., RADLEY BALKO, CATO INSTITUTE, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 1, 2–3 (2006), http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf (noting other examples of the increasing use of paramilitary police units for routine police work).

¹⁰⁸ See BALKO, *supra* note 107, at 5 (critiquing the increasingly pervasive use of SWAT teams); see also Radley Balko, *Former Cops Speak Out About Police Militarization*, THE AGITATOR (last updated Aug. 1, 2013, 2:25 PM), http://www.huffingtonpost.com/2013/08/01/cops-speak-out-on-police-_n_3688999.html (citing law enforcement criticism of SWAT policies).

has nothing to say about this, it seems altogether appropriate for there to be rules—formulated with public input—about when SWAT teams are deployed, what training they should have, and what equipment they should possess.

The same is true of frequent uses of (ostensibly) non-lethal force, like Tasers and pepper spray. Tasers have been used on the mentally infirm, on those in water, and on pregnant women—the last of which is contrary to the manufacturer’s own instructions.¹⁰⁹ Malika Brooks, eight months pregnant, was Tasered for refusing to sign a traffic ticket.¹¹⁰ A 2014 ACLU study found that only a handful of Iowa’s ninety-nine sheriff’s departments had policies in place expressly prohibiting the use of a Taser on pregnant women, the elderly, children, or those already restrained.¹¹¹

Constitutional law cannot fill this policy void. For example, the Supreme Court’s third party doctrine allows policing agencies to obtain vast amounts of data about all of us without judicial recourse.¹¹² It is what the government used to justify NSA bulk surveillance.¹¹³ Even if this is good federal constitutional law—and there are arguments, some gaining credence, that it is not¹¹⁴—policy is desperately needed on when the police can obtain our bank records, social network contacts, and stored photographs. The same may be said of searching computers and cellular phones: In looking for one particular thing, police necessarily come across a vast amount of per-

¹⁰⁹ ACLU OF N. CAL., *supra* note 76, at 13.

¹¹⁰ Hector Castro, *Pregnant Woman ‘Tasered’ by Police Is Convicted*, SEATTLE POST-INTELLIGENCER, May 10, 2005, at B1.

¹¹¹ Veronica Fowler, *ACLU Report Finds Iowa Taser Policies Woefully Inadequate*, ACLU OF IOWA (Oct. 19, 2014), <http://www.aclu-ia.org/2014/10/19/aclu-report-finds-iowa-taser-policies-woefully-inadequate/>.

¹¹² See, e.g., *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.”); see also *Smith v. Maryland*, 442 U.S. 735, 742–44 (1979) (same, as applied to pen registers); Slobogin, *supra* note 22, at 1746–47 (discussing the implications of these decisions for modern surveillance).

¹¹³ See *Klayman v. Obama*, 957 F. Supp. 2d 1, 30–31 (D.D.C. 2013) (noting the government’s reliance on *Smith* to argue that the Fourth Amendment is not implicated in NSA bulk data collection); *ACLU v. Clapper*, 959 F. Supp. 2d 724, 749–52 (S.D.N.Y. 2013) (relying on *Smith* to uphold bulk data collection), *vacated on other grounds*, 785 F.3d 787, 822–23 (2d Cir. 2015) (overruling the district court on statutory grounds and discussing but not reaching the question of whether *Smith* would have controlled the Fourth Amendment analysis).

¹¹⁴ See, e.g., Gerald G. Ashdown, *The Fourth Amendment and the “Legitimate Expectation of Privacy,”* 34 VAND. L. REV. 1289, 1315 (1981) (criticizing the third party doctrine); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 564–66 (1990) (same); see also *United States v. Jones*, 132 S. Ct. 945, 954–57 (2012) (Sotomayor, J., concurring) (suggesting it may be time to reconsider the third party doctrine).

sonal data.¹¹⁵ In *Comprehensive Drug*, an en banc panel of the Ninth Circuit wrote a protocol, effectively a statute, to govern such searches.¹¹⁶ The court later withdrew the opinion,¹¹⁷ and one can see why, given its legislative approach. But such protocols are needed; the void is real.

4. Policy Change

In the all-too-rare instances in which there is transparency and public debate, policing policy often changes. This demonstrates that when police departments are left to their own devices, the policies they adopt often differ substantially from what policies might look like if policing agencies were subject to the ordinary processes of democratic accountability.

The public's response to events in Ferguson, Missouri provides an object lesson. The spectacle of police officers in full riot gear, sitting atop military-grade armored personnel carriers and training weapons at civilians in a small St. Louis suburb prompted voters and councilmembers across the country finally to ask what their own police departments had stashed away in their arsenals. In the months that followed, police departments in a number of cities and towns have promised to give away their mine-resistant ambush protected vehicles (MRAPs).¹¹⁸ The police department for the Los Angeles Unified School District (yes, *school* district) agreed to give away its three grenade launchers.¹¹⁹ In December 2014, the White House announced plans to amend rules governing the "1033 program," under which the Department of Defense has transferred millions of dollars

¹¹⁵ See *Riley v. California*, 134 S. Ct. 2473, 2489–90 (2014) (acknowledging the breadth of data stored on cell phones).

¹¹⁶ *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 998–99, 1004–06 (9th Cir. 2009) (en banc) (providing guidance to the government on future searches and seizures of electronic data), *modified*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam).

¹¹⁷ *Comprehensive Drug*, 621 F.3d 1162 (reaching the same judgment). The specific guidelines appeared only in a concurring opinion. See *id.* at 1180 (Kozinski, J., concurring).

¹¹⁸ See, e.g., Matt Bigler, *San Jose Police Returning Mine-Resistant Armored Truck to Feds Amid Militarization Debate*, CBS S.F. BAY AREA (Aug. 29, 2014, 8:43 AM), <http://sanfrancisco.cbslocal.com/2014/08/29/416281-mrap-san-jose-police-returning-armored-transport-amid-militarization-debate-tank-armored-mine-fedea/> (noting San Jose's decision to give up their military-style weapons); Tony Perry, *San Diego School District to Return Armored Military Vehicle*, L.A. TIMES (Sept. 18, 2014, 9:07 AM), <http://www.latimes.com/local/lanow/la-me-ln-san-diego-military-vehicle-20140918-story.html> (noting the San Diego school district's decision to return its armored military vehicle).

¹¹⁹ Niraj Chokshi, *School Police Across the Country Receive Excess Military Weapons and Gear*, WASH. POST (last updated Sept. 19, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/16/school-police-across-the-country-receive-excess-military-weapons-and-gear/>.

in equipment to state and local policing agencies.¹²⁰ The new rules will require, among other things, local civilian approval of all acquisitions.¹²¹

The use of drones is another example of how policing policy changes when the public is given an opportunity to weigh in. After Seattle residents discovered that their police department had acquired two small drones—without informing the City Council of its plans to do so—fierce disapproval prompted the mayor to order the department to give them away.¹²² After the local sheriff's department refused to accept them for fear of public backlash, the hot-potato drones made their way to the Los Angeles Police Department (LAPD), where the police chief promised to keep the drones grounded (under lock and key in a federal facility) until the department could hold public hearings and craft strict rules to govern their use.¹²³ Since 2013, thirteen states have passed laws regulating drone use.¹²⁴ Most of these states have either required police to obtain a warrant prior to using a drone for surveillance or criminal investigation purposes, or banned their use outright.¹²⁵

Examples abound. After traffic-stop data showed that police officers had been disproportionately targeting minority drivers for consent searches, city councils in both Durham, North Carolina and Austin, Texas adopted policies requiring police to obtain written con-

¹²⁰ The program is named after the corresponding section number of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201 § 1033, 110 Stat. 2639 (1996) (codified at 10 U.S.C. § 2576a (2000)). See also Hanqing Chen, *The Best Reporting on Federal Push to Militarize Local Police*, PROPUBLICA (Aug. 19, 2014, 8:30 AM), <http://www.propublica.org/article/the-best-reporting-on-the-federal-push-to-militarize-local-police> (describing the 1033 program and compiling additional coverage on the program's scope and consequences).

¹²¹ Ben Mathis-Lilly, *White House Will Fund Police Body Cameras, Review "Police Militarization" Process*, SLATE (Dec. 1, 2014, 3:52 PM), http://www.slate.com/blogs/the_slatest/2014/12/01/obama_police_body_cameras_white_house_says_it_will_help_fund_purchases.html.

¹²² Rick Anderson, *Game of Drones: How LAPD Quietly Acquired the Spy Birds Shunned by Seattle*, L.A. WEEKLY (June 19, 2014), <http://www.laweekly.com/news/game-of-drones-how-lapd-quietly-acquired-the-spy-birds-shunned-by-seattle-4794894>.

¹²³ *Id.*

¹²⁴ Bohm, *supra* note 70.

¹²⁵ See, e.g., 2013 N.C. Sess. Laws 360 § 7.16(e)–(f) (regulating the operation of “unmanned aircraft” and disclosure of personal information acquired through their operation); OR. REV. STAT. § 837.360 (2013) (prohibiting the use of evidence acquired by drones for establishing reasonable suspicion or probable cause); TENN. CODE ANN. § 39-13-609(f) (2014) (prohibiting use of non-targeted personal data collected by drones); TEX. GOV'T CODE ANN. § 423.002(a) (West Supp. 2014) (requiring a warrant for use of drones absent exceptional circumstances).

sent to conduct a search absent probable cause.¹²⁶ Similarly, public discontent over “stop-and-frisk” in New York—fueled in large part by evidence produced in litigation showing that police disproportionately targeted racial minorities, and that the vast majority of searches revealed nothing criminal—ultimately led to the election of a new mayor and a substantially altered policy.¹²⁷

Although it may be tempting to point to these examples as evidence that policing agencies *are* in fact accountable to the public—through oversight by city councils, the direct election of sheriffs, or the power of municipal officials to appoint and remove chiefs of police—in fact they illustrate just the opposite. Absent a push from the public, usually motivated by some tragic newsworthy event, municipal officials rarely have a strong incentive to involve themselves in governing the police.¹²⁸ And as we discuss in greater detail in Part II, voters typically are far more focused on the threats posed by crime and neighborhood disorder than on the particular tactics employed by local law enforcement.¹²⁹ As a result, municipal officials primarily concentrate on keeping crime rates down, and are otherwise content to give police free reign.¹³⁰

But as the examples in this section highlight, there often is a sharp disjuncture between the public’s *wholesale* preference for more policing, and the public’s *retail* views about specific practices that police employ. When confronted with specific tactics or policies, the same voters who would normally be in favor of stepped-up policing may nonetheless insist on curbing certain practices or regulating their use. In short, the public’s views about policing—and thus what reform they call for—are shaped by the transparency of policing, and as we have seen there is precious little of it. Under the status quo, only when something goes wrong does the public begin to ask questions about what police are doing and why. But why should things have to go wrong before sound policy is adopted? This is precisely why trans-

¹²⁶ Richard A. Oppel Jr., *Wielding Search Data to Change Police Policy*, N.Y. TIMES, Nov. 21, 2014, at A1.

¹²⁷ See Kenneth Lovett, *NYC Elections 2013: Exit Polls Show Bill de Blasio Swept Virtually Every Demographic over Joe Lhota*, N.Y. DAILY NEWS (Nov. 6, 2013, 1:46 AM), <http://www.nydailynews.com/news/election/exit-polls-show-bill-de-blasio-swept-demographic-article-1.1507854> (noting that, of the 55% of voters who viewed stop-and-frisks as excessive, 87% supported de Blasio).

¹²⁸ See *infra* Part II.C (discussing public choice theory and officials’ incentives in governing the police).

¹²⁹ See *infra* notes 180–81 and accompanying text.

¹³⁰ See, e.g., GOLDSTEIN, *supra* note 18, at 135 (noting that “[m]ayors often take pains to disassociate themselves from decisions upon which controversial police actions are based” and that as a result police often “have greater autonomy than other agencies of government that exercise much less authority”).

parency and direct accountability through public rulemaking are so essential, and their absence so problematic.

II

WHY POLICING IS DIFFERENT (AND WHY IT SHOULD NOT MATTER)

The question is why policing is exceptional. Are there sound reasons that policing has been exempted from the requisites of American democracy? And if not, do the reasons for police exceptionalism help point to means by which the situation can be corrected?

This Part provides three explanations for why policing is not subjected to the fundamental requirements of accountability and transparency. The first reason, a doctrinal one, is unacceptable given the poor job that ex post judicial review does in regulating policing. That problem is addressed in Part III, as a prelude to arguing that regulating policing through public rules is essential. The other two, based on history and public choice, hardly justify police exceptionalism, but do point to problems one can anticipate in trying to change the status quo. A judicial solution to these problems is offered in Part V, entitled “From Here to There.”

A. *Doctrine: Policing and “Legislative” Rules*

A core requirement of law is that agency action must be legislatively authorized.¹³¹ As a corollary, the nondelegation doctrine holds that in granting power to executive agencies, legislatures must provide an “intelligible principle” to guide agency discretion.¹³²

Together, these doctrines ensure that democratically accountable bodies make governance decisions.¹³³ The *ultra vires* doctrine supplies

¹³¹ See, e.g., *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (“[T]he Executive’s administration of the laws . . . cannot reach beyond the limits of the statute that created it.”); SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 26.15 (2d ed. 2014) (“Rules and regulations adopted by local government administrative bodies must be authorized by state constitutions, statutes, local charters, or local legislation, and when not so authorized they are held to be void.”).

¹³² *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹³³ Although the nondelegation doctrine is relatively moribund at the federal level, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (pointing out that the doctrine was only used in one year, 1935, to overturn federal legislation), courts in all fifty states apply their own separation-of-powers principles, and often are far less forgiving of broad delegations of legislative authority. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–200 (1999) (surveying state approaches to nondelegation). And even at the federal level, courts continue to enforce the nondelegation principle through various interpretive canons, thereby ensuring that legislatures take responsibility for key policy decisions. See Sunstein, *supra*, at 331–35 (citing examples, including constitutional

the requirement of legislative authorization, whereas the nondelegation doctrine governs how specific that authorization must be.

As we explained in greater detail in Part I, federal and state APAs serve a similar function in the administrative context, both by encouraging agencies to clarify their policies through binding rules, and by requiring that agencies give the public an opportunity to comment before the rules go into effect.¹³⁴ And even where APAs do not apply, as is typical in local government contexts, a variety of open meeting laws and hearing requirements nonetheless ensure that members of the public have an opportunity to weigh in.¹³⁵

The reason that much policing escapes the strictures of both delegation doctrines and administrative rulemaking requirements turns on the doctrinal distinction between “legislative” and other rules. The nondelegation doctrine is limited to grants of “legislative” power to executive agencies, which are typically defined as rules that have “the purpose and effect of altering the legal rights, duties, and relations of persons.”¹³⁶ Stated differently, legislative action is that which “bind[s] or regulate[s] the primary conduct of the public.”¹³⁷ Similarly, only “substantive” or “legislative” rules must comply with the procedural requirements of an APA.¹³⁸ In deciding whether a rule should have been promulgated through notice and comment, courts typically ask whether the rule “creates rights and obligations”¹³⁹ or “impose[s] new substantive burdens.”¹⁴⁰

When agency rules establish permissible emissions levels for certain pollutants, or relax eligibility requirements for public benefits, it is easy to see why these rules are “substantive” or “legislative” in character. These rules bind the public. And they alter the standards against which agencies and courts will judge individuals’ conduct or eligibility.

avoidance and clear statement rules); *infra* notes 361–68 and accompanying text (discussing clear statement rules).

¹³⁴ See *supra* notes 44–50 and accompanying text (discussing the function APAs serve).

¹³⁵ See *supra* notes 51–60 and accompanying text (describing the various procedural requirements that apply to local government decisionmaking).

¹³⁶ *Chadha*, 462 U.S. at 952.

¹³⁷ *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (discussing why judicial promulgation of the U.S. Sentencing Guidelines does not violate the separation of powers).

¹³⁸ See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979).

¹³⁹ *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (distinguishing between legislative rules and policy statements).

¹⁴⁰ *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (quoting *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997)) (distinguishing substantive and procedural rules).

As a formal matter, however, policing agencies do not create binding law. Instead, they merely decide what methods to use when enforcing the substantive criminal law already on the books. Despite having numerous rules, policing agencies generally are not authorized to promulgate rules that alter the scope of criminal statutes or their applicability to the populace.¹⁴¹

For the most part, police rules are *internal*—they simply instruct police officers how they must go about enforcing the laws already in place.¹⁴² Rules contained in a police manual may be binding on individual officers, but the police are not permitted to make members of the general public do (or abstain from doing) anything not already written into the substantive law. By the same token, although plenty of police rules may implicate individuals' constitutional rights—by establishing protocols for seeking warrants or defining the circumstances when officers are permitted to use deadly force—as a formal matter such rules cannot alter the scope of constitutional rights. Rather, those rights are defined by the Fourth Amendment (or other constitutional provisions), as interpreted by the courts.¹⁴³ As a result, police rules and practices are not thought to implicate the constraints

¹⁴¹ In the rare instances when the contrary is true, for example with regard to the power of the U.S. Attorney General to classify drugs into “schedules” under the Controlled Substances Act, the traditional requirements of notice-and-comment rulemaking do apply. See 21 U.S.C. § 811(a) (2012). Of course, police and prosecutors can effectively alter the substance of this law through discretionary enforcement decisions. See DAVIS, *supra* note 28. Commentators express concern about such discretion on the prosecution side, and urge recourse to more rulemaking. See, e.g., Kahan, *supra* note 31, at 479–81, 518–19 (discussing prosecutorial discretion and proposing the application of the *Chevron* doctrine to federal criminal law).

¹⁴² Although courts have at times extended the APA's requirements to internal agency rules, they have only done so when such rules have had the *effect* of altering the legal rights or obligations of the regulated public. See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946–48 (D.C. Cir. 1987) (finding that FDA's internal use of action levels constituted a “legislative rule”).

¹⁴³ For example, the FBI's version of a police manual, the Domestic Investigations and Operations Guide (DIOG), permits FBI agents to recruit and use informants, obtain records from public databases, and engage in “[p]hysical [s]urveillance . . . not requiring a court order.” FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18 (2011) (listing investigative methods). The Supreme Court has made clear that each of the aforementioned investigative methods falls short of a Fourth Amendment “search” and that a warrant therefore is not required. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 213–15 (1986) (holding that physical surveillance of a suspect's backyard from an airplane is not barred by the Fourth Amendment); *United States v. White*, 401 U.S. 745, 751–52 (1971) (plurality opinion) (finding the use of wired informants permissible under the Fourth Amendment); cf. *Willan v. Columbia Cnty.*, 280 F.3d 1160, 1162 (7th Cir. 2002) (holding that a search of a public database does not implicate constitutional rights). Had the Court held otherwise—requiring, for example, that officers obtain a warrant before plugging a suspect's name into a database—the FBI could not override the warrant requirement by promulgating a binding rule, even if it wanted to.

of the nondelegation doctrine or the APAs, and thus are not thought to require public participation.¹⁴⁴

Police rules and policies about enforcement methods unequivocally have huge consequences for people, and thus should, as a normative matter, be subject to rulemaking requisites such as public notice and room for public participation. But as presently conceived the doctrine does not require this.

B. *History: Autonomy and Discretion*

If the principal barrier to public rulemaking by the police were only doctrinal, one would expect some pressure to change that—for example by broadening the definition of rules subject to rulemaking procedures to include decisions police make about enforcement methods. A bit of history provides some insight into why this has not happened.

1. *The Rise of “Professionalism” and “Autonomy”*

Today we largely take for granted that police must in some way be “accountable” to the people they serve, yet for the first half of the twentieth century, the chief concern of police reformers was that police had become *too* beholden to the public and to the elected officials they voted into office.¹⁴⁵ To the extent that accountability was part of the discussion, it was as a problem to be solved.¹⁴⁶

In 1931, the National Commission on Law Observance and Enforcement (the Wickersham Commission)—asked by President Hoover to undertake a comprehensive inquiry into the administration of criminal justice—painted a grim picture of the nation’s police.¹⁴⁷ Officers were ill-trained, ill-supervised, and badly outmatched—both by the criminal syndicates that had sprung up in the wake of Prohibition and by the ordinary thieves, grifters, and muggers who

¹⁴⁴ See, e.g., *ACLU v. Nat’l Sec. Agency*, 493 F.3d 644, 679 n.37 (6th Cir. 2007) (rejecting a challenge to the NSA’s wiretapping program under the APA because, *inter alia*, NSA wiretapping does not “purport to determine the rights or obligations of others”); *Borg-Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 836 (D.C. Cir. 2001) (holding that an agency’s finding of probable cause and issuance of administrative subpoena was exempt from judicial review because “standing alone, it is lifeless and can fix no obligation nor impose any liability on the plaintiff”).

¹⁴⁵ See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 21–22 (2014) (describing political independence as a principal goal of early police reform movements); Livingston, *supra* note 20, at 565–73 (citing widespread concerns about close ties between police and local politics).

¹⁴⁶ See Livingston, *supra* note 20, at 565–66 (describing the struggle for professional, centralized control of the police).

¹⁴⁷ NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON POLICE* 1–6 (1931) [hereinafter WICKERSHAM].

preyed on the law-abiding public.¹⁴⁸ Corruption was rampant. Even when police attempted in good faith to enforce the law, they often did so with shocking brutality.¹⁴⁹ The Commission's observations echoed those of prior studies, which likewise commented on the "incivility, ignorance, brutality and graft" exhibited by the nation's police.¹⁵⁰

In the opinion of the Wickersham Commission, the "chief evil" responsible for these failings was the public's ill-considered desire to control the police.¹⁵¹ In most cities, chiefs of police were appointed by the mayor or the city council, and typically were subject to removal at will.¹⁵² Rapid turnover and political control fostered incompetence and mismanagement, and in some cities, also bred corruption—particularly where criminal syndicates enjoyed close ties with the political machines.¹⁵³

If the problem was that the police were too close to politics, the answer was the opposite: an autonomous police force in which "professionalism" was the code. The Commission argued that police officers from the chief on down should receive full civil service protection.¹⁵⁴ Departments should be "organized on a scientific basis" with clear division of responsibility and lines of authority.¹⁵⁵

What proponents of autonomous professionalism failed to recognize was that policing, like all other regulatory endeavors, involves a large measure of policy choice. There simply was no basis for thinking that police administrators would have either the desire or know-how to balance all of the competing interests at stake—let alone the democratic pedigree to do so. By the 1930s, the notion that "experts" could be trusted to formulate policy without rules or democratic input to guide them was already on its way out for the rest of the administra-

¹⁴⁸ *Id.* at 1–5.

¹⁴⁹ The Commission devoted an entire volume ("Lawlessness in Law Enforcement") to the problem of police violence, and in particular, the widespread resort to the "third degree" in custodial interrogation. See Samuel Walker, *The Engineer as Progressive: The Wickersham Commission in the Arc of Herbert Hoover's Life and Work*, 96 *MARQ. L. REV.* 1165, 1181–83 (2013) (describing the report and its discussion of the "third degree").

¹⁵⁰ August Vollmer & Albert Schneider, *The School for Police as Planned at Berkeley*, 7 *J. CRIM. L. & CRIMINOLOGY* 877, 877 (1917); see also RAYMOND B. FOSDICK, *CRIME IN AMERICA AND THE POLICE* 3 (1920) ("[W]e have become so accustomed to think of our police work as perhaps the most pronounced failure in all our unhappy municipal history.").

¹⁵¹ WICKERSHAM, *supra* note 147, at 1.

¹⁵² *Id.* at 2–3. Too often, these political appointees were ill-equipped to manage a modern police force; those who were competent rarely held office long enough to make their mark. *Id.*

¹⁵³ See *id.* at 5–6.

¹⁵⁴ See *id.* at 52 ("With security of tenure, with intelligence, with training, with honesty, and with sincerity of purpose, the criminal element can be controlled.").

¹⁵⁵ See *id.* at 20.

tive state.¹⁵⁶ Indeed, the Administrative Procedure Act—adopted in 1946 but debated in one form or another since the late 1930s¹⁵⁷—was premised on the notion that “professionalism” standing alone could neither ensure the wisdom of administrative policy nor guard the public against arbitrary government decisionmaking.¹⁵⁸ The conclusion was that agencies needed rules and procedures to cabin discretion, as well as a process that allowed members of the public the opportunity to weigh in on administrative policies before they went into effect. As the House Committee on the Judiciary noted in a 1946 report, “the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.”¹⁵⁹ Yet, policing evaded all this—partly for the doctrinal reasons we have discussed, but also because while theory as to the rest of executive government was changing, the police were still in the midst of their backlash against popular control.

Policing’s “professionalism” paradigm itself began to crumble in the late 1950s, as a new wave of researchers discovered—somehow, to their amazement—that policing was shot through with discretion. In a 1953 speech before the American Bar Association, Supreme Court Justice Robert Jackson condemned the “breakdown, delay and ineffectiveness of American law enforcement.”¹⁶⁰ Responding to Justice Jackson’s criticism, the American Bar Foundation—the new research arm of the American Bar Association—organized a massive effort to study policing close up.¹⁶¹ What researchers found was that the real “rules” of policing were made “bottom-up” in an ad hoc manner through hundreds of individual decisions made by cops on the beat.¹⁶² In the wake of riots in the 1960s, President Johnson’s Commission on Law Enforcement and the Administration of Justice said much the same.¹⁶³ Although police manuals were filled with detailed rules regarding uniforms, recordkeeping practices, and off-duty conduct,

¹⁵⁶ See Bressman, *supra* note 44, at 471–73 (describing the criticism of the expert model as focused on the lack of procedural safeguards).

¹⁵⁷ See Rabin, *supra* note 41, at 1264–65 (describing the history leading to the adoption of the APA).

¹⁵⁸ See Bressman, *supra* note 44, at 472; Stewart, *supra* note 42, at 1678–81.

¹⁵⁹ H.R. REP. NO. 79-1980, at 9–10 (1946) (quoting H.R. REP. NO. 76-1149, at 2 (1939)).

¹⁶⁰ Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, 9 JUST. Q. 47, 50 (1992).

¹⁶¹ *Id.* at 50–52.

¹⁶² See *id.* at 56–58 (noting that the researchers “were overwhelmed by the pervasiveness of discretionary decision making” and found that routine decisions “were guided by no formal standards and were largely ad hoc accommodations designed to ‘get the job done.’”).

¹⁶³ See *id.* at 64–65; PRESIDENT’S COMM’N, *supra* note 27, at 103–06 (explaining that decisions made on the street each day “are the heart of police work”).

they said precious little about the “hard choices policemen must make every day” not only in deciding which laws to enforce, but how.¹⁶⁴ To take but one timely example, the Johnson Commission expressed serious concern about “field interrogations,”¹⁶⁵ what today we call stop-and-frisk.

2. *The Rulemaking Movement*

Once it became evident that policing involved considerable discretion, the answer was the same one that courts and legislatures had arrived at in dealing with discretion elsewhere in the administrative context: Police departments needed rules, and these rules had to be made with public input. In its 1967 report, President Johnson’s Crime Commission proposed that police departments formulate rules to cover everything from “the issuance of orders to citizens regarding their movements or activities” to the “selection and use of investigative methods.”¹⁶⁶ It further made clear that because these rules involved matters of policy, the public had “a right to be apprised in advance, rather than *ex post facto*, what police policy is.”¹⁶⁷ Writing two years later, administrative law professor Kenneth Culp Davis drew a still closer connection between policing and administrative government, arguing that each of the nation’s then-40,000 policing agencies “is in every sense of the term an administrative agency,” and that like all administrative agencies, policing agencies “should do a large portion of their policy-making through rulemaking procedure along the line of what is required of federal agencies by the Administrative Procedure Act.”¹⁶⁸

The notion that police must operate subject to rules developed through democratic processes quickly won prominent adherents. In 1963, the American Law Institute took up the task of drafting a Model Code of Pre-Arrest Procedure.¹⁶⁹ That same year, the American Bar Association undertook its own effort to draft its own set of model rules and principles to guide the police.¹⁷⁰ Noted academics and judges, particularly Professor Anthony Amsterdam, joined

¹⁶⁴ PRESIDENT’S COMM’N, *supra* note 27, at 103 (noting “the failure of the police to set forth consistent law enforcement policies”).

¹⁶⁵ *Id.* at 94–95.

¹⁶⁶ *Id.* at 104.

¹⁶⁷ *Id.*

¹⁶⁸ DAVIS, *supra* note 61, at 80.

¹⁶⁹ Walker, *supra* note 160, at 65; MODEL CODE OF PRE-ARREST PROCEDURE (1975).

¹⁷⁰ Walker, *supra* note 160, at 65; Symposium, *The American Bar Association Standards Relating to the Administration of Criminal Justice*, 12 AM. CRIM. L. REV. 251 (1974).

Davis in arguing for police rulemaking.¹⁷¹ Lawyers and criminologists at Boston University partnered with the Boston Police Department to draft and implement rules on various investigative procedures;¹⁷² a second group of academics at Arizona State University worked with representatives from police departments across the country on still another model rules project.¹⁷³

C. *Public Choice: Why Legislatures Won't Regulate Police*

Ultimately, though, the rulemaking movement fizzled.¹⁷⁴ Although police departments did eventually write more internal rules, democratically accountable police rulemaking along the lines suggested by Davis and others never took hold.¹⁷⁵ Part of the reason undoubtedly was that as crime rates continued to climb and the country took a more conservative turn after the Johnson years, proposals that legislatures place additional constraints on policing largely fell on deaf ears.¹⁷⁶ Even in a more hospitable climate, however, such measures were unlikely to gain much traction from legislative bodies or the public that elects them—and the reason for this lies in the theory of public choice.¹⁷⁷

¹⁷¹ See Amsterdam, *supra* note 28, at 416–29; Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500, 514 (1971) (arguing for comprehensive police rulemaking); Robert M. Igleburger & Frank A. Schubert, *Policy Making for the Police*, 58 A.B.A. J. 307 (1972) (recommending administrative rulemaking for police procedures with significant public input); McGowan, *supra* note 22; *Contemporary Studies Project: Administrative Control of Police Discretion*, 58 IOWA L. REV. 892 (1973) (citing the benefits of rulemaking but noting some of the challenges to implementation).

¹⁷² SHELDON KRANTZ ET AL., POLICE POLICYMAKING: THE BOSTON EXPERIENCE (1979).

¹⁷³ MODEL RULES: WARRANTLESS SEARCHES OF PERSONS AND PLACES (Project on Law Enforcement and Rulemaking 1974); see also MODEL POLICY MANUAL FOR POLICE AGENCIES (Fred A. Wileman 1976); MODEL RULES FOR LAW ENFORCEMENT OFFICERS: A MANUAL ON POLICE DISCRETION (Tex. Crim. Justice Council 1974).

¹⁷⁴ See David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1272–73 (2002) (noting the limited progress on administrative or legislative rulemaking).

¹⁷⁵ See *id.* at 1272–76 (surveying the limited and specific scope of police rulemaking and general legislative inactivity in this domain); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 363 (1986) (“No police department has undertaken systematic rulemaking in the fashion proposed by Davis and others.”).

¹⁷⁶ Walker, *supra* note 175, at 361–63 (detailing the history of efforts to control police behavior and noting that “[d]espite the broad consensus over the potential effectiveness of administrative rulemaking, progress in that direction has been sporadic at best”).

¹⁷⁷ The core intuition of public choice theory is that laws typically create winners and losers, and that legislators internalize the costs and benefits of legislation only to the extent that they can be translated into potential votes, campaign donations, or volunteers. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL

As public choice theory predicts, and as decades of legislative inaction largely confirm, legislators rarely have an incentive to regulate policing.¹⁷⁸ The most powerful interests in the legislative process around criminal justice—police officers and prosecutors—seldom think they stand to benefit from greater regulation.¹⁷⁹ And often they can count on large segments of the public for support.¹⁸⁰ As Donald Dripps suggests, “a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant.”¹⁸¹

For the most part, the interests on the other side of the policing ledger are either underrepresented in the political process or are too diffuse to generate much political pull. The costs of policing fall disproportionately on communities of color and on the poor—and within these communities, police tend to concentrate their attention on young men.¹⁸² Even when the costs of policing are more evenly distributed—as is the case with drunk-driving checkpoints, bulk-data collection, or CCTV cameras—public choice theory predicts that legislatures will be slow to act. The privacy costs that these programs impose on any one person are often minimal, even if in the aggregate the privacy costs to society might in some circumstances outweigh any potential benefits.

These factors are all the more prominent in the context of policing because of the political salience of crime. For at least the last fifty years, crime and the fear of crime have been the bugaboo of American politics.¹⁸³ As a result, legislators typically have little to

INTRODUCTION 14–24 (1991) (providing an overview of public choice theory). As a result, groups that are better positioned to reward legislative action are more likely to prevail in a political fight. And where interests on both sides are evenly matched, legislative inertia generally favors the status quo. *See id.* at 17.

¹⁷⁸ Dripps, *supra* note 74, at 1081.

¹⁷⁹ *See id.* at 1091–92 (discussing disincentives to regulation for police and prosecutors). Police unions in particular have considerable influence, and as a number of scholars note, have often succeeded in forestalling efforts to regulate policing. *See* Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 756–57 & nn.454–55 (2001); Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 71–72 (2012).

¹⁸⁰ *See* Dripps, *supra* note 74, at 1092 (examining the widespread fear of crime victimization among the general public).

¹⁸¹ *Id.* at 1089.

¹⁸² In 2009, for example, New York City police conducted 5% of all stops in just one of the city’s seventy-six precincts, at a rate of thirty-one searches per one hundred residents; citywide, 87% of those stopped in all precincts were either black or Hispanic. *Stop, Question and Frisk in New York City Neighborhoods*, N.Y. TIMES, July 12, 2010, at A16.

¹⁸³ *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 3–12 (2007) (describing the phenomenon).

gain—and much to lose—from any attempt to regulate the police. There are few labels in American politics more damning than “soft on crime.”¹⁸⁴ For the most part, then, legislatures are content to leave well enough alone.

To the extent legislatures do pass laws regulating police behavior, the reasons why serve only to explain the persistence of general legislative neglect. First, as Dripps notes, legislators will regulate policing in the rare instance when powerful interest groups demand it.¹⁸⁵ For example, the telecommunications industry was instrumental in seeing that Congress enacted the Electronic Communications Privacy Act in 1986.¹⁸⁶ Even here, however, strong law enforcement pushback can be a problem. Despite widespread calls by industry and privacy groups to amend the ECPA to keep up with advancing technology, Congress has not moved because—among other reasons—law enforcement agencies possessing only civil enforcement authority fear the lack of means to obtain emails held by third-party providers.¹⁸⁷

Absent strong interest-group pressure for regulation of policing, legislative action is only likely with police malfeasance so striking the public clamors for change.¹⁸⁸ In Maryland, it took a botched raid of the home of a small-town mayor, and the shooting of his two dogs, to get the legislature to take even the modest step of requiring reporting on the use of SWAT.¹⁸⁹ Similarly, city councils across the country

¹⁸⁴ Barkow, *supra* note 61, at 880; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 807 (2006) (highlighting the need for political candidates to establish “anti-crime *bona fides*”). See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 1 (2001) (tracing the development of “‘law and order’ politics” in the United States and United Kingdom).

¹⁸⁵ See Dripps, *supra* note 74, at 1083–85 (citing examples).

¹⁸⁶ H.R. REP. NO. 99-647, at 29–30 (1986) (listing the organizations and corporations that supported the legislation).

¹⁸⁷ See, e.g., Letter from ACT et al. to Robert W. Goodlatte and John Conyers, Jr., Chairman and Ranking Member of the House Judiciary Committee (Jan. 22, 2015), <http://www.digital4th.org/wp-content/uploads/2015/02/ECPA-support-letter-House-judiciaryjan2015-v2-clean.pdf> (urging support for the ECPA Amendments Act and blaming the delay in consideration of the legislation on civil regulators’ desire for warrantless access to the content of customers’ communications from third-party service providers); Letter from Mary Jo White, Chair, Securities and Exchange Commission, to Patrick J. Leahy, Chairman, Senate Judiciary Committee (Apr. 24, 2013), <https://www.cdt.org/files/file/SEC%20ECPA%20Letter.pdf> (warning that the ECPA Amendments Act of 2013 would “codify [*United States v.*] *Warshak*,” 631 F.3d 266 (6th Cir. 2010), and thereby hamper the SEC by requiring warrants to obtain email records from third-party service providers for investigations).

¹⁸⁸ See Murphy, *supra* note 31, at 498 (noting that when it comes to legislative regulation of privacy, “[t]he most common prompt for legislation is some catalyzing event, whether a Supreme Court case, a newspaper story, or a tragic incident”).

¹⁸⁹ See Aaron C. Davis, *Police Raid Berwyn Heights Mayor’s Home, Kill His 2 Dogs*, WASH. POST, July 31, 2008, at B1 (detailing the circumstances of the raid); John Wagner,

ignored for years the creeping militarization of local police departments, until the startling display of force in Ferguson, Missouri forced them to take note (leading some local departments to give away their military equipment by the armored-truck full).¹⁹⁰ But these moments of salience are rare, which explains why policing largely escapes legislative scrutiny.

III WHY JUDICIAL REVIEW DOES NOT ADDRESS POLICE EXCEPTIONALISM

For the reasons described in Part II, our system largely leaves the regulation of policing to the courts, relying primarily on the Constitution and after-the-fact review. Contrary to the norm governing other areas of the administrative state—to obtain democratic authorization before acting—the default for the police is to act how they see fit until told otherwise. And for the most part, we look to the courts to tell police when they have overstepped their bounds.

The difficulty is that, as this Part makes clear, constitutional judicial review is completely inadequate for this task. Even in the case of traditional, investigative policing, judicial review fails to do its job, the result of which is countless unremedied rights violations. As policing has evolved to become more proactive and regulatory, the limits of judicial review have become yet more apparent. Finally, even if judicial review could meaningfully ensure constitutional compliance, it could never make up for the lack of democratic accountability in policing.

A. *Judicial Remedies Fail*

For the first century-and-a-half of this country's history, the rights of the people were protected by a stringent system of common law tort remedies. Although there were no police forces to speak of, there were sheriffs, constables, and federal marshals—and when these officials engaged in a search or seizure in violation of the Constitution, the target had recourse to law.¹⁹¹

The common law could be shockingly unforgiving when government officials violated people's rights, even when officials made

SWAT Security Bill Is Signed into Law, WASH. POST, May 20, 2009, at B2 (discussing new regulations affecting Maryland SWAT teams which were enacted after the raid).

¹⁹⁰ See *supra* note 118 and accompanying text (discussing the move by certain towns to dispose of their military equipment in the months following the events in Ferguson).

¹⁹¹ See Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414 (1987) (discussing the use of common law trespass suits during the time of the Marshall Court).

honest mistakes or were simply following orders.¹⁹² By the 1960s, however, this common law system had collapsed,¹⁹³ leading the Supreme Court to extend the exclusionary rule to state proceedings¹⁹⁴ and create a federal cause of action for money damages against law enforcement officers for violations of constitutional rights.¹⁹⁵

1. *The Exclusionary Rule Is Ineffective*

Suppression motions in criminal cases, which today provide the primary forum for litigating police conduct,¹⁹⁶ bias judges' decisions regarding the regulation of the police in two important ways. First, courts understandably are disinclined to rule for a defendant who has been caught red-handed with the goods.¹⁹⁷ Second, exclusionary rule cases necessarily present judges with an instance where a particular policing practice succeeded. Judges rarely see all of the false positives that might suggest that a particular tactic is insufficiently productive to justify the intrusion.¹⁹⁸ In ruling against the defendant, the court blesses the police tactic as well.¹⁹⁹

Two examples vividly illustrate the costs of trying to regulate policing through exclusion cases. In *Illinois v. Wardlow*, confronted with a defendant caught possessing drugs, the Supreme Court upheld

¹⁹² For example, in *Little v. Barreme*, the Supreme Court ordered a ship captain to pay over \$8000 in money damages (approximately \$160,000 in today's dollars) for illegally seizing a Dutch vessel called the *Flying Fish* despite the fact that the captain had acted pursuant to a presidential order. 6 U.S. (2 Cranch) 170 (1804). In imposing liability on the hapless ship captain, the Court observed that even such an order "cannot . . . legalize an act which without those instructions would have been a plain trespass." *Id.* at 179. Ultimately, Captain Little was able to persuade Congress to pick up the tab—but indemnification was by no means certain; and in any event, at least *someone* had to pay when rights were violated. Jules Lobel, Comment, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1394 (1989).

¹⁹³ See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 *U. COLO. L. REV.* 1, 41 (1972) (tracing the evolution of government immunity doctrines).

¹⁹⁴ See *Mapp v. Ohio*, 367 U.S. 643, 652–53 (1961) (noting "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies," and extending the exclusionary rule to the states).

¹⁹⁵ *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (interpreting § 1983 to provide a federal remedy for state officer violations of Fourth Amendment rights).

¹⁹⁶ Nancy Leong, *Making Rights*, 92 *B.U. L. REV.* 405, 422–25 (2012) (relying on survey of appellate cases to estimate that over 70% of all Fourth Amendment cases—and 96% of consent search claims, 95% of stop-and-frisk claims—are heard in the context of suppression motions).

¹⁹⁷ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 799 (1994) ("Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated.").

¹⁹⁸ Bar-Gill & Friedman, *supra* note 23, at 1623–24 (noting the problem of ex post bias in suppression rulings).

¹⁹⁹ *Id.* at 1624 ("[J]udges . . . put the law's imprimatur on what the cops have done.").

a stop based on nothing but a suspect's presence in a "high crime area" along with "unprovoked flight" at the sight of the police.²⁰⁰ Police rely on this rule to justify likely millions of stops and frisks of people based on nothing more than a "furtive movement" in a "high crime area."²⁰¹ In stop-and-frisk litigation, hundreds of thousands of such stops have been determined to violate the targets' rights.²⁰² But there has been no recourse for the individual targeted, and undoubtedly there are many others like them.

The situation is similar with "consent" searches. In *Schneckloth v. Bustamonte*, a case involving a defendant caught with stolen checks, the Supreme Court upheld consent-based searches so long as they were "voluntary."²⁰³ Voluntariness was to be determined under an amorphous "totality of the circumstances" test.²⁰⁴ Police now make wide use of consent searches, although the data suggest there is precious little voluntary consent going on. In Los Angeles in 2006, where police sought consent to search over 30,000 automobiles, people agreed to be searched more than 98% of the time.²⁰⁵ In an extensive study in Ohio—where the rate runs at 90 to 95%—motorists told the researcher that they consented because they thought they had no choice.²⁰⁶ (They may have been right, as police still searched many of those who refused consent.)²⁰⁷

2. Damages Actions Are Ineffective

The obvious alternative to the problem of biased adjudication in exclusionary rule cases is for victims of police misconduct to bring civil

²⁰⁰ *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

²⁰¹ *See, e.g., Floyd v. City of New York*, 813 F. Supp. 2d 417, 436 (S.D.N.Y. 2011) (citing an expert report which found that "furtive movement" in a "high crime area" was the reason given for nearly half of all stops).

²⁰² *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658–60 (S.D.N.Y. 2013) (finding a widespread practice of unconstitutional stops and frisks).

²⁰³ 412 U.S. 218, 227 (1973).

²⁰⁴ *Id.* at 224–26; *see also Ohio v. Robinette*, 519 U.S. 33, 35, 39 (1996) (refusing even to require that people be told they can refuse the search or are free to go).

²⁰⁵ L.A. POLICE DEP'T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE AND AUDIT STATISTICS AND THE CITY STATUS REPORT COVERING PERIOD OF JANUARY 1, 2006 – JUNE 30, 2006 (2006), http://assets.lapdonline.org/assets/pdf/consent_decree_rpt_jan_jun_2006.pdf (showing that of 16,228 requests for consensual search, 16,225 were granted); L.A. POLICE DEP'T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE AND AUDIT STATISTICS AND THE CITY STATUS REPORT COVERING PERIOD OF JULY 1, 2006 – DECEMBER 31, 2006 (2007), <http://assets.lapdonline.org/assets/pdf/Website%20Report,%20Jul-Dec%202006.pdf> (showing that of 16,672 requests for consensual search, 16,059 were granted).

²⁰⁶ Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter* 260–78 (Oct. 1999) (unpublished Ph.D. dissertation, Rutgers University) (on file with New York University Law Review).

²⁰⁷ *Id.* at 280–82.

claims for injunctive relief or money damages under § 1983.²⁰⁸ This would mirror the former common law remedy, and many scholars argue this sort of *ex post* relief is preferable to the exclusionary rule.²⁰⁹ In reality, though, suing the government is a costly and time-consuming endeavor, hardly worth it or within the ken of most people.²¹⁰ It's a serious matter to be tossed against a wall and frisked, to have one's Internet or email data collected in bulk, or to be detained by the roadside while the police wait for a K-9 to appear or officers wrangle consent from a driver. Still, when that happens to most people they try to shrug it off and live their lives.

A further problem is that even when there are plaintiffs inclined to bring cases, a host of judicial doctrines limit the efficaciousness of damages actions in regulating police misconduct.²¹¹ Aggregate litigation, which could solve the problem of the individual plaintiff, faces high justiciability barriers. *Clapper v. Amnesty International USA* denied standing to plaintiffs who sought to challenge NSA data collection under the "702" program, on the ground that they could not say for certain the NSA was collecting or would collect their communications.²¹² *City of Los Angeles v. Lyons* held that Lyons lacked standing to challenge the LAPD's use of chokeholds—which had previously killed or injured a number of arrestees—because he could not show with sufficient certainty that he would be subjected to the practice in the future.²¹³ That the NSA had been spying on all of us, and that Lyons had himself already been the victim of a chokehold, only underscores the extent to which justiciability rules bar legitimate constitutional complaints.²¹⁴

²⁰⁸ 42 U.S.C. § 1983 (2012).

²⁰⁹ See, e.g., Amar, *supra* note 197, at 811–16 (suggesting injunctive remedies and money damages as an alternative to exclusion); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981) (arguing that tort remedies should be substituted for the exclusionary rule).

²¹⁰ See Bar-Gill & Friedman, *supra* note 23, at 1632 (citing the difficulty of finding plaintiffs willing to sue for violations of Fourth Amendment rights).

²¹¹ In addition to all the obstacles discussed below, the Supreme Court has said the Fourth Amendment does not deem police searches and seizures in violation of state positive law to be unreasonable. *Virginia v. Moore*, 553 U.S. 164, 176–78 (2008); see also *infra* notes 419–24 and accompanying text (discussing *Moore*).

²¹² 133 S. Ct. 1138, 1148–49 (2013).

²¹³ 461 U.S. 95, 105–09 (1983).

²¹⁴ See Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 153–54, 162–65 (2014) (discussing the *Clapper* decision in the context of revelations from Edward Snowden, and the *Lyons* decision).

Even when individual or aggregate suits are allowed, immunity doctrines preclude relief. They immunize states entirely,²¹⁵ make it extremely difficult to sue municipalities,²¹⁶ and leave officers individually responsible only for “clearly established” violations.²¹⁷ Even when money damages are imposed, most officers are indemnified for virtually anything they do.²¹⁸ And studies show that—as theory predicts—governments are content to pay damages awards without requiring policing agencies to alter behavior, let alone even informing them they lost in court.²¹⁹

Civil plaintiffs also face staggering problems of proof that leave rights violations unremedied. To take one example, police use of racial profiling is widespread, yet under existing equal protection doctrines plaintiffs cannot prevail absent pattern-and-practice evidence specific to each jurisdiction that can only be accumulated at extraordinary cost.²²⁰ It required a laborious social science study in New Jersey and Maryland to prove that state troopers engaged in widespread racial profiling, subjecting minorities to disproportionate numbers of traffic stops and automobile searches.²²¹ Stop-and-frisk litigation in New

²¹⁵ *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987) (holding that the Eleventh Amendment bars a citizen from bringing suit against the state in federal court).

²¹⁶ *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–94 (1978) (holding that cities may be held liable under § 1983 only “when execution of a government’s policy or custom . . . inflicts the injury”).

²¹⁷ *Safford v. Redding*, 557 U.S. 364, 377–78 (2009) (finding officers entitled to qualified immunity absent prior Supreme Court precedent and disagreement among the circuit courts). The one exception is the rare case where a practice is so shocking that courts will find a violation absent a ruling on point.

²¹⁸ Schwartz, *supra* note 97, at 890.

²¹⁹ *See Bar-Gill & Friedman, supra* note 23, at 1633 (noting that money damages are often ineffective in deterring constitutional violations); Daryl J. Levinson, *Making Government Pay*, 67 U. CHI. L. REV. 345, 367–68 (2000) (suggesting governments may be content to pay damages where the benefits of aggressive policing outweigh the monetary costs of compensating plaintiffs); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1028 (2010) (finding that law enforcement agencies rarely keep track of lawsuits against them).

²²⁰ *See Bernard E. Harcourt & Tracey L. Meares, Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (citing numerous studies that have demonstrated evidence of racial profiling in policing).

²²¹ *See State v. Soto*, 734 A.2d 350, 352–53 (N.J. Super. Ct. Law Div. 1996) (describing a racial profiling study conducted on the New Jersey Turnpike); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 721–22 (2002) (finding evidence of racial profiling in Maryland highway drug interdiction stops). Fueled by racial bias rather than cause, these searches also are disproportionately unproductive; in fact, data establishes that minority communities typically use drugs at approximately the same rate as white communities. *See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS* 26 (2014)

York similarly revealed profound racial bias in policing, yet it has taken years and years of litigation to obtain a judgment.²²²

Even when petitioners prevail in judicial proceedings—be it exclusionary rule cases or civil actions—the Supreme Court eschews the development of judicial rules that would serve to deter future violations and thus regulate policing. The Court rejects “rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach,” one that proceeds case by case looking at the totality of the circumstances.²²³ For example, in *Florida v. Harris*, the Supreme Court reversed the Florida Supreme Court’s attempt to establish standards for determining if a canine is sufficiently well-trained that its alert should provide probable cause to search, insisting that litigants must instead fight it out case by case, sniff by sniff.²²⁴ This, despite the fact that studies show drug dogs are notoriously unreliable, in no small part because of trainers cuing them.²²⁵ Thus, thousands of people are subjected to unnecessary searches, unsupported by probable cause. The same is true of consent searches, for which the Court has refused to adopt clear rules requiring police to inform suspects that they have the right to refuse consent,²²⁶ or restricting the circumstances in which consent may be sought,²²⁷ leaving police free to conduct thousands of searches annually.²²⁸

(finding illicit drug use rates of “8.8 percent among Hispanics, 9.5 percent among whites, [and] 10.5 percent among blacks”).

²²² See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660–61 (S.D.N.Y. 2013) (finding that New York police had engaged in racial profiling as part of a stop-and-frisk program).

²²³ *Florida v. Harris*, 133 S. Ct. 1050, 1055–56 (2013).

²²⁴ *Id.* at 1057–58.

²²⁵ A study in Illinois showed dog alerts got it right about 44% of the time—but that the rate fell to 27% when the target was Latino. Dan Hinkel & Joe Mahr, *Drug Dogs Often Wrong*, CHI. TRIB., Jan. 6, 2011, at 1. The result in Illinois was no coincidence; there is evidence that dog handlers cue their dogs or misread them regularly, and such cues are going to occur more often if the handlers have an unconscious (or conscious) racial bias. Other studies suggest that accuracy rates for particular dogs vary based on the quality of training and certification and the protocols employed. Brief of Amici Curiae Fourth Amendment Scholars in Support of Respondent at 22–24, *Florida v. Harris*, 133 S. Ct. 1050 (2013) (No. 11-817) (citing various studies noting differences in training protocols and hit rates).

²²⁶ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973) (“[K]nowledge of a right to refuse is not a prerequisite of a voluntary consent.”).

²²⁷ See *Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (finding that voluntary consent is a question of fact based on all the circumstances present).

²²⁸ A Bureau of Justice Statistics survey found that police conducted nearly 500,000 consent searches in 2008 alone. CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, NCJ 235499, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 10 (2011).

B. *Judicial Review Is Ill-Equipped to Deal with the New Policing*

Over the last few decades, policing itself has changed in fundamental ways that make it all but impossible to govern it solely through *ex post* judicial review. Well into the twentieth century, the goal was to identify and apprehend individuals who had violated the law.²²⁹ In the face of this particular goal, seemingly broad legislative authorizations to policing agencies were not nearly as expansive as they appeared. The tools police employed—conducting physical searches of persons and property, and making arrests when necessary—were relatively familiar and understood. Courts could exercise reasonable control over illegality with back-end judicial review.²³⁰

Beginning in the latter half of the twentieth century and accelerating in recent decades, however, policing at all levels of government has become increasingly proactive and programmatic, rather than reactive and investigative.²³¹ Typical is the increased use of what many call “dragnet” searches, or what Christopher Slobogin calls “panvasive surveillance.”²³² These include administrative searches of bars and nightclubs, junkyards, and even barber shops, often conducted by uniformed officers (sometimes inexplicably accompanied by SWAT teams).²³³ They also include widespread use of drunk driving, immigration, and license-and-registration checkpoints—the last two of which are almost certainly conducted in the hopes of also nabbing drug couriers.²³⁴ States now routinely collect DNA from convicts and arrestees.²³⁵ Schools impose mandatory drug tests on students wishing

²²⁹ See Livingston, *supra* note 20, at 567 (describing policing in the first decades of the twentieth century as focused on “rapid response” and “retrospective investigation”).

²³⁰ When policing went beyond this, however, courts began to have trouble supervising police practices. In *Terry v. Ohio*, in which the Court gave its blessing to “field interrogation,” the Justices recognized that they were “powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.” 392 U.S. 1, 14 (1968).

²³¹ See Livingston, *supra* note 20, at 576 (describing community policing as more proactive than the traditional investigative model); Charles F. Sabel & William H. Simon, *Due Process of Administration: The Problem of Police Accountability*, 33 *YALE J. ON REG.* (forthcoming 2015) (manuscript at 21–23) (on file with New York University Law Review) (noting the transition from reactive to proactive policing).

²³² Slobogin, *supra* note 22, at 1723.

²³³ See sources cited *supra* note 84 (providing examples).

²³⁴ See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (sobriety checkpoint); *Delaware v. Prouse*, 440 U.S. 648, 650 (1979) (license-and-registration checkpoint); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (border patrol checkpoint).

²³⁵ See, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013) (“Twenty-eight States and the Federal Government have adopted laws . . . authorizing the collection of DNA from some or all arrestees.”).

to participate in sports or extracurricular activities.²³⁶ Cities have installed video camera surveillance to patrol high-crime areas and deter criminal activity.²³⁷ Cities, states, and the national government collect, share, and analyze bulk data on millions of Americans.²³⁸ The mission of many law enforcement officials has grown or shifted to include intelligence gathering.²³⁹

The protections against errant policing collapse under a deterrence-based regime, in part because the target is no longer a particular individual suspected of an offense: It is all of us. Under an investigative regime, individualized suspicion was key: Before or after the fact, courts could supervise whether police investigation of the target was justified on that basis.²⁴⁰ In sharp contrast, panvasive dragnets by their very nature intrude upon the privacy and security of large swaths of the law-abiding public. The TSA requires everyone who wants to board a plane to go through security. CCTV cameras capture the day-to-day movements of millions of urban residents. As a *New York Post* columnist explained in defending the police department's stop-and-frisk policy, "[b]y definition, this kind of deterrence requires the kinds of numbers we've been reading about—hundreds of thousands of stops, concentrated in high-crime neighborhoods or ones where there are crime spikes."²⁴¹ Similarly, in defending the NSA's bulk data col-

²³⁶ See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (describing how a school district required students engaged in competitive extracurricular activities to submit to drug testing); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649–50 (1995) (detailing a policy requiring student athletes to consent to drug testing).

²³⁷ See, e.g., Steve Henn, *In More Cities, a Camera on Every Corner, Park and Sidewalk*, NPR (June 20, 2013, 2:57 AM), <http://www.npr.org/blogs/alltechconsidered/2013/06/20/191603369/The-Business-Of-Surveillance-Cameras>.

²³⁸ See, e.g., Slobogin, *supra* note 22, at 1749–50 (describing the scope of data collection by fusion centers).

²³⁹ See, e.g., THE CONSTITUTION PROJECT, *supra* note 102, at 6 (noting that intelligence gathering techniques now extend beyond antiterrorism to “all hazards” and crimes); Berman, *supra* note 30, at 14–15 (noting the FBI's transition to intelligence gathering); Samuel J. Rascoff, *The Law of Homegrown (Counter) Terrorism*, 88 TEX. L. REV. 1715, 1716–18, 1720 (2010) (discussing the role of local law enforcement in counterterrorism operations); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 307–09 (2012) (noting various cooperative programs); Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. TIMES, Apr. 16, 2014, at A1 (describing a now-disbanded NYPD program to surveil Muslim communities).

²⁴⁰ See Barry Friedman & Cynthia Benin Stein, *Redefining What's “Reasonable”*: *The Protections for Policing*, 84 GEO. WASH. L. REV. (forthcoming Feb. 2016) (manuscript at 5–6) (on file with the New York University Law Review) (describing importance of individualized suspicion and judicial review for suspicion-based searches).

²⁴¹ John Podhoretz, *Stop and Frisk's Secret*, N.Y. POST (Aug. 14, 2013, 4:00 AM), <http://nypost.com/2013/08/14/stop-frisks-secret/>.

lection of all Americans, its Director, General Keith B. Alexander, was known to say that “[y]ou need the haystack to find the needle.”²⁴²

Even the techniques of traditional investigative, reactive policing now also are utilized for proactive, general deterrence purposes. Such is the case with “order maintenance” policing, the goal of which is to deter more serious crime by stamping out minor offenses.²⁴³ Aggressive policing of neighborhood “undesirables” and small-time offenders prompted the Supreme Court in the 1960s and 1970s to clamp down on vagrancy and loitering statutes under the vagueness doctrine,²⁴⁴ but despite these Court decisions, the scope of such policing blossomed at the end of the twentieth century.²⁴⁵

No better example of how traditional “investigative” tools in recent years have been put to programmatic deterrent use exists than urban “stop-and-frisk.” Under *Terry v. Ohio* and its progeny, an officer is permitted to conduct a protective “frisk” of a suspect during a stop if there is reason to believe that the suspect may be armed.²⁴⁶ Of the roughly 192,000 stops that the NYPD conducted in 2013, officers recovered a gun in only 0.02% of those encounters,²⁴⁷ and the

²⁴² Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-Mail Address Books Globally*, WASH. POST, Oct. 15, 2013, at A1.

²⁴³ The basic theory of order maintenance policing, typically associated with a 1982 essay by James Q. Wilson and George L. Kelling entitled “Broken Windows,” is that crime follows neighborhood disorder—and that instead of focusing primarily on major violent and property crimes, police should focus on quality of life offenses like loitering, prostitution, public intoxication, and, as the title suggests, “broken windows.” James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 30–32, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

²⁴⁴ The concern then was, as it is now, with arbitrariness—the risk that overly broad statutes delegate far too much discretion to the cop on the beat. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (finding a loitering ordinance unconstitutionally vague); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating a vagrancy ordinance on vagueness grounds); Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1363–69 (2010) (describing the reasoning behind the Court’s opinion in *Papachristou*); Livingston, *supra* note 20, at 585 (discussing how much discretion vagrancy and loitering statutes delegated to police officers before constitutional reforms in the 1960s and 1970s). But while cases like *Papachristou* and *Kolender* limited police power, *Terry v. Ohio* increased their power by authorizing police to conduct brief investigative stops (and frisks) on less than probable cause. *See* 392 U.S. 1, 30–31 (1968); Goluboff, *supra*, at 1386 (noting the relationship between *Papachristou* and *Terry*).

²⁴⁵ *See* Livingston, *supra* note 20, at 583–84 (describing the widespread adoption of order-maintenance policing).

²⁴⁶ 392 U.S. at 27.

²⁴⁷ *New York’s Stop-and-Frisk Policy Ineffective in Recovering Guns, Stopping Murders—Report*, RT (Aug. 21, 2014, 6:12 PM), <http://rt.com/usa/181976-stop-frisk-ineffective-guns/>.

overall weapon recovery rate from frisking in 2011 was below 2%.²⁴⁸ These statistics suggest that when it came to the vast majority of stops, officers had nowhere close to the requisite level of cause. Pressed to justify these numbers, Mayor Bloomberg told reporters in 2012 that civil rights organizations just “don’t get it.”²⁴⁹ Low hit rates, he argued, were evidence that the program was working: “Stops are a deterrent. It’s the same reason we set up DWI stop points.”²⁵⁰

The regulatory nature of the new policing renders traditional constraints on the sweep of criminal law enforcement largely meaningless. Many people subjected to programmatic searches—such as targets of intelligence gathering—are unaware that they are being watched. Even when they are, the limitations on justiciability and damages described above mean most practices never see the inside of a courtroom, or face extraordinary efforts to get there.²⁵¹ Finally, constitutional remedies are ill-suited to this new policing; the judicial system has never been particularly good at compensating the sort of psychological and emotional injuries that targets incur.²⁵²

Technology further complicates the ability of courts to govern modern policing. Panvasive technologies—from bulk data collection to CCTV cameras and drones—fall at the borderline of rights that the Fourth Amendment protects.²⁵³ The same is true of technologies such as Stingray GPS tracking devices²⁵⁴ and electronic license plate

²⁴⁸ Jason Oberholtzer, *Stop-and-Frisk by the Numbers*, FORBES (July 17, 2012, 12:53 PM), <http://www.forbes.com/sites/jasonoberholtzer/2012/07/17/stop-and-frisk-by-the-numbers/>.

²⁴⁹ *Bloomberg: Stop-and-Frisk Works as ‘Deterrent’*, WNYC NEWS (May 10, 2012), <http://www.wnyc.org/story/208256-blog-bloomberg-stop-and-frisks-work-deterrent/>.

²⁵⁰ *Id.* The same can be said for consent searches—conceived of initially as a routine investigative technique and now increasingly deployed in systematic fashion in airports, on interstate buses, and during routine traffic stops. *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 440–42 (1991) (Marshall, J., dissenting) (describing the prevalence of “‘dragnet’ style” bus searches); *United States v. Hooper*, 935 F.2d 484, 500 (2d Cir. 1991) (Pratt, J., dissenting) (citing officer testimony that they stopped 600 people at the Buffalo airport in one year but made only ten arrests); EITH & DUROSE, *supra* note 228, at 10 (estimating that police conducted at least 450,000 consent searches in 2008 alone).

²⁵¹ *See supra* notes 211–19 and accompanying text (describing the barriers facing plaintiffs, including justiciability rules and immunity doctrines).

²⁵² *See Bar-Gill & Friedman, supra* note 23, at 1628–29 (noting the failure of ex post remedial schemes to compensate these types of injuries (citing Levinson, *supra* note 219, at 372–73)).

²⁵³ *See, e.g.*, *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (finding no reasonable expectation of privacy against aerial surveillance); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (same); *ACLU v. Clapper*, 959 F. Supp. 2d 724, 749–52 (S.D.N.Y. 2013) (relying on the third party doctrine to find that bulk data collection does not constitute a Fourth Amendment “search”); Slobogin, *supra* note 22, at 1745–57 (discussing the use of bulk data collection, CCTV, and drones, and noting the lack of regulatory controls).

²⁵⁴ *See Stingray Tracking Devices: Who’s Got Them?*, ACLU, <https://www.aclu.org/maps/stingray-tracking-devices-whos-got-them>.

readers,²⁵⁵ which exponentially increase the reach of policing. If these techniques do not constitute a “search” under existing doctrine, the courts lose any opportunity to regulate them at all.²⁵⁶

Similarly, police today have the means to impose unfathomable harm. From SWAT teams to high-powered assault rifles, battering rams and flash-bang explosives, they employ a range of munitions and auxiliary devices more apt to the battlefield than a suburban street.²⁵⁷ Technology has also expanded the available means of (ostensibly) non-lethal force, like Tasers and pepper spray.²⁵⁸ The constraints that may have worked to keep police in line when officers wielded a handgun or a billy club are no longer sufficient in a world of overwhelming police force.

C. *Judicial Review Cannot Substitute for Democratic Accountability*

Most fundamentally, judicial review is not, and could not possibly be, a substitute for democratic accountability. Yet, democratic review is what is necessary to strike the policy balance that rests at the bottom of policing decisions. As the Supreme Court’s muddled “special needs” doctrine—used to evaluate the constitutionality of searches and seizures outside the context of “ordinary” law enforcement—illustrates, courts are simply incapable of making the sorts of tradeoffs that are necessary to evaluate the reasonableness of a deterrence-based regime.²⁵⁹ Not only does the “special needs” doctrine require courts to balance incommensurables—intrusions to individuals against necessity to government—but each of the factors at issue is itself inherently value-laden. There simply is no objective measure of the intrusiveness of dotting a neighborhood with CCTV cameras, or

²⁵⁵ See *You Are Being Tracked: How License Plate Readers Are Being Used to Track Americans’ Movements*, ACLU, <https://www.aclu.org/technology-and-liberty/you-are-being-tracked-how-license-plate-readers-are-being-used-record>.

²⁵⁶ See Murphy & Swire, *supra* note 31, at 1 (explaining that existing Fourth Amendment doctrine fails to restrain excessive discretion by police utilizing new technologies); Slobogin, *supra* note 22, at 1727–30.

²⁵⁷ See *supra* notes 104–08 and accompanying text (noting the prevalence of SWAT).

²⁵⁸ GEOFFREY P. ALPERT ET AL., U.S. DEP’T OF JUSTICE, POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 1–3 (2011), <https://www.ncjrs.gov/pdffiles1/nij/232215.pdf>.

²⁵⁹ A number of scholars have criticized the malleability of the Court’s special needs doctrine. See, e.g., Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 296–97 (2011) (arguing that the Court’s balancing is “conducted in a way that systematically favors the government”); Slobogin, *supra* note 22, at 1727–32 (describing the difficulty of distinguishing between “ordinary crime control” and “special needs” cases, and questioning the rationale for attempting to do so); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 Touro L. REV. 93, 179–92 (2007) (arguing the special needs balancing test is malleable, and that the Court is not well suited to weigh the costs and benefits of general searches).

requiring members of the public to pass through X-ray scanners at an airport. In a world of SWAT teams, Stingrays, and drones, it is no longer tenable—to the extent that it ever was—to assume that legislatures have provided sufficient guidance to police departments simply by authorizing departments to enforce the substantive criminal law. Yet courts lack the ability to weigh the inevitable tradeoffs.

Michigan Department of State Police v. Sitz serves as an object lesson for all that is wrong in leaving it to courts to regulate the police.²⁶⁰ *Sitz* considered the reasonableness of drunk-driving checkpoints. In concluding that such checkpoints were constitutional, the Court emphasized that the special needs test “was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger.”²⁶¹ The Court went on to note that “[e]xperts in police science might disagree” how best to catch drunk drivers, but that “the choice among such reasonable alternatives” rested with the police, “who have a unique understanding” of the tradeoffs involved.²⁶²

In concluding that its own limitations required deferring to the police, the *Sitz* Court proved itself exactly half right. Courts *do* lack the ability or pedigree to justify their making decisions about policing methods that really ought (in the first instance) be made through democratic processes. But there simply is no basis for thinking that deferring to the police is the answer, as though the police themselves are a proxy for democratic weighing of competing interests. And surely it is not true that those interests can be reconciled by police applying their own special brand of “expertise.” Indeed, as early as 1941, proponents of the APA recognized that an executive agency’s “knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.”²⁶³ The same is true—if anything to a still greater degree—to the policies and practices adopted by police.

Policing agencies today possess unfathomable discretion, the appropriate control for which is democratically sanctioned rules—not judicial judgments or (worse yet) naked deference. The need for administrative discretion justified the growth of the administrative state, but the risk posed by the exercise of that discretion made urgent the adoption of the APAs to control it. When police were seen as

²⁶⁰ Mich. Dep’t of State Police v. Sitz, 496 U.S. 444 (1990).

²⁶¹ *Id.* at 453.

²⁶² *Id.* at 453–54.

²⁶³ ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 102 (1941).

choosing only how to enforce preexisting law against offenders, and when their methods were relatively limited, post hoc constitutional judicial review arguably could suffice. Today, we kid ourselves if we believe both the rule of law and democratic accountability are satisfied when courts govern policing.

IV

SPECIAL PROBLEMS IN REGULATING POLICING

By now the prescription should be clear. Rather than regulating policing through blanket authorizations and post hoc judicial review, something more is required. That something more is clearer legislative authorization on the front end, rules adopted by police departments themselves through a transparent process that allows for public participation, or some other method of obtaining community input into policing policy. This Part offers provisional answers to difficult questions that follow from this general prescription. As we said at the outset, moving policing to a democratic footing is no simple task—but it is essential, and the problems we identify are hardly insurmountable.

A. *Are Rules Governing Policing Possible?*

The idea of requiring democratically accountable rules to govern policing is so alien in the United States that many ask whether such a thing is even possible. The answer is that policing is entirely amenable to written rules. Indeed, policing already has those rules. Many police departments have detailed rules and policies to govern the use of force, custodial interrogation, and use of informants.²⁶⁴ A number of organizations have also developed model rules to govern various aspects of police investigations. In the 1970s, both the American Bar Association²⁶⁵ and the American Law Institute²⁶⁶ published model rules that address everything from border searches to custodial interrogations. The International Association of Chiefs of Police likewise has published model rules and policies on a range of topics, including active shooter incidents, canines, foot pursuits, and drones.²⁶⁷ In the 1970s, a group of lawyers and criminologists at Boston University worked with the Boston Police Department to write and implement

²⁶⁴ See, e.g., sources cited *supra* notes 77–79.

²⁶⁵ STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1974).

²⁶⁶ A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

²⁶⁷ See *Model Policies*, INT'L ASS'N OF CHIEFS OF POLICE, <http://www.theiacp.org/Model-Policies-Alphabetical-Order> (last visited Oct. 22, 2015).

model rules to govern criminal investigations, search warrants, and street-level stops.²⁶⁸

The concern that such rulemaking is impossible is parochial. Many other countries regulate policing primarily through statutes and rules.²⁶⁹ Such laws are common in civil law countries; for example, Germany has an extensive policing code.²⁷⁰ But rules for policing are available in common law jurisdictions as well. Police in the United Kingdom are governed by a comprehensive Police and Criminal Evidence Act,²⁷¹ supplemented by still more detailed Codes of Practice,²⁷² which are adopted by the Home Office and subject to public comment.²⁷³ Both the Codes and the accompanying records of public comments and government responses are easily accessible online. The Codes' stop-and-frisk provisions are extensive, requiring among other things that officers inform suspects of the purpose of the search as well as the specific grounds for reasonable suspicion, and maintain a detailed record of each search conducted, including offender characteristics.²⁷⁴

Undoubtedly, there are some aspects of policing that may be more (or less) suited to being governed by detailed rules. Discretion is inherent in policing, and while it may be possible to cabin that discretion, it will not evaporate entirely. Yet much of modern policing—from the use of checkpoints and administrative inspections, to reliance on new technologies like drones, license plate readers, or Stingray devices—is entirely amenable to such regulation. Even use-of-force policies can often be quite specific. As Sam Walker notes, depart-

²⁶⁸ See KRANTZ ET AL., *supra* note 172, at 1–2 (describing the effort).

²⁶⁹ See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 95–132 (1993) (describing legislative codes governing police in England, France, Germany, Italy, Canada, and Australia).

²⁷⁰ STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. II] Part I p. 1074, 1319, as amended by Art. 3, Act of Apr. 23, 2014, p. 410, http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

²⁷¹ Police and Criminal Evidence Act, 1984, § 67, http://www.legislation.gov.uk/ukpga/1984/60/pdfs/ukpga_19840060_en.pdf; see also BRADLEY, *supra* note 269, at 97 (discussing the passage of the Act and its comprehensive nature).

²⁷² See *Police and Criminal Evidence Act 1984 (PACE) Codes of Practice*, <https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice> (last visited Nov. 4, 2015).

²⁷³ See, e.g., HOME OFFICE, POLICE AND CRIMINAL EVIDENCE ACT 1984 ('PACE') CODES OF PRACTICE CONSULTATIONS: A RESPONSE TO THE HOME OFFICE CONSULTATIONS ON PACE CODES A, B, E & F AND C & H (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252315/A__B__C__E__F__H_PACE_Consultation_Response.pdf.

²⁷⁴ HOME OFFICE, PACE CODE A ¶¶ 3.8–11, 4.1–10 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414195/2015_Code_A_web-19-03-15.pdf.

ments typically prohibit officers from firing warning shots.²⁷⁵ The El Dorado County Sheriff Department prohibits the use of Tasers on “individuals who are passively resisting.”²⁷⁶ And at the very least, the threshold questions of whether officers may engage in certain tactics ought to be decided through a transparent process that allows for public comment.

B. Is Public Rulemaking Likely to Improve Policing?

A related question is whether police rules are likely to be better if they are adopted in a democratically accountable way. Given the strength of police representation at the local levels, one might wonder whether publicly-adopted rules necessarily will be an improvement over the status quo. This is the public choice problem all over again. In particular, police unions have a strong voice at the state and local levels, and often are a potent political force in opposition to reform.²⁷⁷ In Maryland, for example, law enforcement groups vehemently opposed efforts to institute even modest reporting requirements for police use of SWAT.²⁷⁸

Although this may prove a realistic worry, there is reason for optimism. The entire point of public procedures to adopt or approve rules governing policing is to bring rationality and other perspectives to the task. Although, as we explain below, the processes by which rules are adopted may vary from locale to locale, in the end the rules are going to have to be justified in the face of contending arguments. If existing rules are too deferential to the interests of police—and, incidentally, many of the existing rules may be just fine—it is hard to see that they will necessarily get worse. The hope is that with public participation, controversial practices will be moved in a better direction.

In addition, opening rulemaking to local community participation will bring voices into the process that may have had no outlet thus far. It is apparent that those who live in heavily-policed communities have strong views about police practices.²⁷⁹ There are many state and

²⁷⁵ WALKER, *supra* note 20, at 42.

²⁷⁶ ACLU OF N. CAL., *supra* note 76, at 18 (quoting El Dorado Cnty. Sheriff Dep’t, Order Nos. 308.55–.56 (Feb. 2005)).

²⁷⁷ See Walker, *supra* note 179, at 71–72.

²⁷⁸ See Radley Balko, *Militarized Police Overreach: “Oh, God, I Thought They Were Going to Shoot Me Next,”* SALON (July 10, 2013, 7:45 AM), http://www.salon.com/2013/07/10/militarized_police_overreach_oh_god_i_thought_they_were_going_to_shoot_me_next/ (noting that the proposed law was ultimately passed over the objection of “every police organization in the state”).

²⁷⁹ A study in Chicago found, for example, that attendance rates at routine police-community meetings were highest in predominantly African-American communities and in

national organizations—including the ACLU and the NAACP—that are mobilized around police accountability, along with local groups like the Advancement Project, CopWatch NYC, and Communities United for Police Reform.²⁸⁰ Church groups and other local community organizations also take an interest in these issues.²⁸¹ What they lack is a formal mechanism through which to make their voices heard.²⁸²

At the outset we gave a number of examples in which policy changed when police practices were the subject of public attention. There also are examples of police-community interactions that have been lauded on both sides as improving the state of affairs. In Los Angeles, the LAPD partnered with the Advancement Project and the city's housing authority to form the Community Safety Partnership. This innovative program not only fostered closer ties between police and residents of the crime-ridden Watts public housing developments, but also helped to reduce both violent crime *and* arrests by 50% in the program's first three years.²⁸³ As part of a court-supervised settlement, the Cincinnati Police Department likewise has experimented with greater community engagement under a Collaborative Agreement developed through a series of meetings and roundtables with community groups; the department also has adopted a more targeted crime-fighting strategy to focus its resources on known offenders and minimize reliance on stop-and-frisk and similar tac-

lower-income and higher-crime areas. WESLEY G. SKOGAN & LYNN STEINER, CAPS AT TEN: COMMUNITY POLICING IN CHICAGO 9–10 (2004), <http://4abpn833c0nr1zvvp7447f2b.wpengine.netdna-cdn.com/wp-content/uploads/2014/12/Caps10.pdf>.

²⁸⁰ For a representative list of organizations involved in these, see *Other Resources and Links*, NAT'L POLICE ACCOUNTABILITY PROJECT, <http://www.nlg-npap.org/resources/links> (last visited Aug. 10, 2015).

²⁸¹ See, e.g., *Group Pushing for Police Reform to Meet with Community, City Leaders in Coming Weeks*, ABCNEWS4 (June 7, 2015, 3:46 PM), <http://www.abcnews4.com/story/29259836/group-pushing-for-police-reform-to-meet-with-community-city-leaders-in-coming-weeks> (“The North Charleston Civil Coalition for Reform is an alliance between nonprofit organizations, business owners, and church leaders that have banded together to push for police reform.”); *Interfaith Coalition*, POLICE REFORM ORGANIZING PROJECT, <http://www.policereformorganizingproject.org/interfaith-coalition/> (last visited Aug. 10, 2015).

²⁸² See, e.g., SKOGAN & STEINER, *supra* note 279, at 35–36 (noting that although Chicago has established formal District Advisory Committees (DACs), made up of “residents, community organization leaders, business owners, [and] representatives of local institutions,” to work with police to establish priorities, the program has largely proven ineffective in part because the DACs are virtually isolated from planning or assessment).

²⁸³ CONSTANCE RICE & SUSAN K. LEE, ADVANCEMENT PROJECT, RELATIONSHIP-BASED POLICING ACHIEVING SAFETY IN WATTS 4–5 (2015), <http://67.20.108.158/sites/default/files/imce/President%27s%20Task%20Force%20CSP%20Policy%20Brief%20FINAL%202002-27-15.pdf>.

tics.²⁸⁴ Cincinnati's various initiatives have achieved "notable local crime-control successes" and increased minority community satisfaction.²⁸⁵

Indeed, as these examples illustrate, police departments themselves stand to benefit from involving community groups in setting policies and priorities. Numerous studies have shown that individuals are far more likely to comply with the law and to cooperate with law enforcement authorities when they perceive their actions as legitimate—and that one critical component of legitimacy is the perception that police officials are responsive to community demands.²⁸⁶ At listening sessions before the President's Task Force on 21st Century Policing, a number of police officials testified about the benefits of adopting robust civilian oversight and community engagement programs.²⁸⁷

In any event, moving in this direction is an imperative. Transparency and democratic accountability are not optional. They are requisites of American governance. In far too many instances such requisites are absent altogether. This has to change. No doubt effecting this change will be a learning experience with false starts and failures, but it is an odd argument to claim that because democratic governance of the police is difficult or uncertain, policing agencies therefore should be left to do as they will.

²⁸⁴ See Sabel & Simon, *supra* note 231, at 35–39.

²⁸⁵ *Id.* at 23–24.

²⁸⁶ See, e.g., NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 310–11 (2004) (noting the increased legitimacy due to adoption of police polices more responsive to community demands); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. CRIMINOLOGY 335, 344–49 (2011) (noting the importance of legitimacy for securing community cooperation and improving police effectiveness); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008) (making a similar argument).

²⁸⁷ See, e.g., Charlie Beck, Chief of Police, L.A. Police Dep't, Civilian Oversight of the Police in Los Angeles: Collaboration, Activism and Outreach (Jan. 30, 2015), <http://www.cops.usdoj.gov/pdf/taskforce/submissions/Beck-Charlie-Testimony.pdf> ("The true spirit of meaningful civilian oversight of the police relies on *collaboration* among City leaders, dogged and determined *activism* and ongoing community *outreach*."); Chris Magnus, Chief of Police, Richmond (CA) Police Dep't, Building Community Policing in Richmond, CA 4 (Feb. 13, 2015), http://www.cops.usdoj.gov/pdf/taskforce/submissions/Magnus_Chris_Testimony.pdf ("Common threads woven throughout all of these changes have included a commitment to accountability . . . approachability . . . as well as transparency . . ."). See generally K. JACK RILEY ET AL., RAND CORP., POLICE-COMMUNITY RELATIONS IN CINCINNATI 136 (2005), http://www.rand.org/content/dam/rand/pubs/technical_reports/2005/RAND_TR333.pdf (citing various studies showing higher rates of officer satisfaction in police departments with more robust community engagement programs).

C. *When Are Public Rules Required?*

A difficult question is when precisely rules will be required. There are two aspects of this. The first is the question of when a given authorization is specific enough to meet the demands of democratic accountability. Then there is the question of whether rules are required at all, or whether case-by-case regulation (or at least experimentation) is permissible.

The two problems are related. An oft-recited principle of administrative law is that agencies are under no obligation to promulgate binding rules—an agency may decide at its discretion to formulate policy in common law fashion through case-by-case adjudication.²⁸⁸ The principle, first announced by the Supreme Court in *Chenery II*, gives agencies the flexibility to address problems as they arise, and to wait until the agency has acquired “sufficient experience . . . to warrant rigidifying its tentative judgment into a hard and fast rule.”²⁸⁹ Commentators also defend the *Chenery II* rule on administrability grounds. As John Manning suggests, “[t]o enforce a meaningful rulemaking requirement, reviewing courts would not only have to compel the adoption of rules, but would also have to tell the agency how precise such rules must be.”²⁹⁰

Whatever one thinks of the *Chenery II* rule in the administrative context—and the rule certainly has its fair share of critics²⁹¹—it is far from clear that the same principle should apply to policing. When an administrative agency chooses to formulate policy through case-by-case adjudication, both the APA and the Due Process Clause nonetheless ensure that agencies comply with a variety of procedures that

²⁸⁸ SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 203 (1947).

²⁸⁹ *Id.* at 202.

²⁹⁰ John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 896 (2004).

²⁹¹ See, e.g., Bressman, *supra* note 44, at 533–37 (criticizing the Court’s rigid application of the *Chenery II* rule and arguing that courts should do more to encourage agencies to cabin broad statutory delegations by promulgating binding rules).

Importantly, courts in a number of states have also rejected the federal model, holding that either as a matter of due process or state administrative law agencies are required to establish at least minimal standards to guide case-by-case enforcement. See, e.g., *Florida Dep’t of Bus. & Prof’l Regulation v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 377–81, 384 (Fla. 1999) (discussing the requirements placed on agencies’ issuance of declaratory statements and promulgation of rules); *Crema v. N.J. Dep’t of Env’tl. Prot.*, 463 A.2d 910, 916–17 (N.J. 1983) (requiring rulemaking where a principle would affect a large segment of the general public or prescribes a legal standard not expressly provided for in rule or statute); *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 569–71 (N.C. 1980) (noting a strong presumption in favor of rulemaking); *Megdal v. Or. State Bd. of Dental Exam’rs*, 605 P.2d 273, 282–83 (Or. 1980) (requiring the agency to promulgate standards for what constitutes “unprofessional conduct” for dentists).

ensure rationality and guard against arbitrariness.²⁹² When it comes to policing, however, the alternative to rulemaking often is not adjudication governed by administrative procedure, but rather an ad hoc determination by a police officer in the field. There is no requirement of reasoned decisionmaking (except the weak standard of Fourth Amendment reasonableness). And, as we discuss in greater detail in Part V, courts all too readily defer to these snap judgments—or worse still, to ex post rationalizations offered by police officers in court.²⁹³ The risk of arbitrariness in this context is far too great to give policing agencies the same discretion to forego rulemaking that the APA gives to traditional administrative agencies.

The experience of states like Oregon, New Jersey, North Carolina, and Florida—all of which have robust rulemaking requirements for administrative agencies²⁹⁴—suggests that it would not be difficult for courts to decide when an agency ought to have promulgated a rule to address the situation before the court. Oregon, for example, requires agencies to define vague statutory terms like “good cause,” “unreasonable,” or “public convenience and necessity” through binding rules.²⁹⁵ As applied to policing, a similar standard would require police departments to establish standards to decide when there is a sufficient threat to officer safety to warrant the use of SWAT or other means of force. New Jersey courts, meanwhile, require agencies to promulgate rules when dealing with “‘broad policy issues’ that affect the public-at-large or . . . important areas of social concern.”²⁹⁶ Again, a similar standard in the policing context would certainly call for rules governing the use of checkpoints and other panvasive dragnets, as well as bulk data collection, CCTV cameras, fusion centers, and similar surveillance tools.

²⁹² Under *Mead*, agencies risk less deference to their statutory interpretations when they proceed through less formal means. *United States v. Mead Corp.*, 533 U.S. 218, 228–31 (2001) (noting that formality of procedure is a factor that influences a court’s deference, but is not dispositive). *Chenery I* requires the agency to compile a sufficient record to justify its decision. *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 87 (1943). If an agency fails to adopt its policy as a binding rule, it “must be prepared to support the policy” in each and every case before the agency “just as if the policy statement had never been issued.” *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38–39 (1974). In short, there are costs to foregoing rulemaking—and more importantly, protections for individual rights.

²⁹³ See *infra* notes 338–40 and accompanying text.

²⁹⁴ See sources cited *supra* note 291.

²⁹⁵ See *Springfield Educ. Ass’n v. Springfield Sch. Dist.*, 621 P.2d 547, 555 (Or. 1980) (discussing statutory terms which require an agency to complete a value judgment left incomplete by the legislature).

²⁹⁶ *Crema*, 463 A.2d at 917 (quoting *Bally Mfg. Corp. v. N.J. Casino Control Comm’n*, 426 A.2d 1000, 1008 (N.J. 1981) (Handler, J., concurring)).

Finally, as we suggested at the outset, there are two circumstances in which public rulemaking seems particularly essential. Policing at present is authorized by statutes of sweeping generality, typically adopted some time ago, instructing officials simply to enforce the law. Any inference that such laws authorize particular police tactics becomes quite thin in two particular circumstances: (a) when police engage in what the Supreme Court calls “special needs” policing (programmatic, deterrent practices other than traditional law enforcement, typically occurring without any individualized suspicion of criminal wrongdoing); and (b) when they employ technologies that could not have been envisioned at the time of legislative grants.

D. *When Is Secrecy Permissible?*

One of the most frequent objections to greater transparency in policing is that doing so would allow criminals to more skillfully evade police detection.²⁹⁷ The notion is that policing is like a game of cat and mouse—and as the cats get smarter, the mice adapt. The longer police are able to keep their investigative strategies secret, the longer they can maintain the upper hand.

In reality, the need for secrecy is not nearly as acute as it may seem. When it comes to many of the police tactics that currently escape regulation—from protocols for the deployment of SWAT teams to what police must do to obtain consent to search—there simply is no plausible case for keeping department policies secret regarding their use. Again, as we saw in Part I, when policing policy is made public, it often changes.²⁹⁸

Secrecy makes the least sense as an argument for avoiding regulation when it comes to policing based explicitly on deterrence. For deterrence-based techniques like drunk-driving checkpoints or administrative inspections, the entire goal is to use the threat of detection to keep people within the lines of the law. Police need not announce precise checkpoint locations or inform businesses of when inspections will take place—but there simply is no plausible rationale for shielding department policies regarding the use of these tactics from public debate. Big Brother wants you to know he’s watching, so why not tell you?

As for more sensitive areas of policing, the key distinction is between operational details and governing law. Operational details—

²⁹⁷ This argument is especially prevalent in the context of intelligence gathering, *see, e.g.*, Berman, *supra* note 30, at 61, but is also frequently made in the context of ordinary policing.

²⁹⁸ *See supra* Part I.B.4.

pertaining both to specific investigations and to investigative techniques that, if public, would encourage circumvention—are the sorts of things that properly need not be revealed. For example, policing agencies have good reason to resist disclosure of department protocols regarding optimal placement of listening devices or techniques used in undercover operations.²⁹⁹ But department rules governing the *use* of these techniques—which crimes, based on what threshold level of suspicion, and with whose approval—can be made public and publicly debated without undermining law enforcement interests. That is what Title III does.³⁰⁰ As Senator Ron Wyden said in the context of the NSA’s secret interpretation of its authority, “[T]he law should [n]ever be kept secret. Voters have a right and a need to know what the law says and what their government thinks the text of the law means.”³⁰¹

Broad claims that secrecy is a necessity are given the lie by the fact that a number of police departments already make their manuals publicly available. Police departments in Los Angeles, Seattle, Chicago, and the District of Columbia have made their manuals easily accessible to the public,³⁰² as have departments in smaller jurisdictions like Fullerton, California³⁰³ and East Haven, Connecticut.³⁰⁴ Even the FBI’s manual—the Domestic Investigations and Operations Guide (DIOG)—is available online, although redacted in some sensitive places.³⁰⁵ In fact, when the DIOG last came up for revision, the FBI sought input from a number of civil liberties groups about proposed changes.³⁰⁶ Although the process was informal, and frankly inadequate for a federal agency perfectly able to use rulemaking procedures, it shows that public participation is possible.

²⁹⁹ See *Lewis-Bey v. U.S. Dep’t of Justice*, 595 F. Supp. 2d 120, 137–38 (D.D.C. 2009) (protecting details of electronic surveillance techniques, including “timing of their use, and the specific location where they were employed” (internal quotation marks omitted)); *LaRouche v. U.S. Dep’t of Justice*, No. 1:90-cv-02753-RCL, slip op. at 21 (D.D.C. Nov. 17, 2000) (allowing the Department of Justice to withhold details regarding undercover investigative techniques).

³⁰⁰ See 18 U.S.C. § 2516 (2012) (defining categories of offenses for which wiretaps may be obtained).

³⁰¹ 157 CONG. REC. 8180 (May 26, 2011) (statement of Sen. Wyden).

³⁰² See sources cited *supra* note 95.

³⁰³ *Policies and Procedures*, FULLERTON POLICE DEP’T, <http://www.fullertonpd.org/about/policy.asp> (last visited Aug. 14, 2015).

³⁰⁴ *Policies and Procedures Manual*, EAST HAVEN POLICE DEP’T, <http://www.easthavenpolice.com/index.php/about-us/policy-procedure/> (last visited Aug. 14, 2015).

³⁰⁵ *FBI Domestic Investigations and Operations Guide (DIOG)*, FBI, <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/> (last visited Nov. 4, 2015).

³⁰⁶ See Berman, *supra* note 30, at 62 (discussing FBI meetings with stakeholders regarding DIOG).

What goes for policies and regulations goes for data as well: Much of the information that the public needs to make informed decisions about policing policy can safely be disclosed in the aggregate. One of the repeated points of the President's Task Force is that such data must be available, and pilot projects are already under way to make it so.³⁰⁷ A number of states currently require police departments to maintain a record of all traffic stops or citizen-police encounters, including the race of the suspect and whether a search was performed or an arrest made.³⁰⁸ Between 2010 and 2014, Maryland required police to report on the use of SWAT (over the opposition of law enforcement groups who resisted greater oversight).³⁰⁹ In 2008, a New York state court ordered the NYPD to grant civil liberties groups access to its stop-and-frisk database, over the Department's objection that releasing such data would "give away information about specific policing methods, such as location, frequency of stops, and patterns."³¹⁰ The only apparent consequence of the disclosure was greater public scrutiny of—and, eventually, public backlash against—the Department's indiscriminate use of stop-and-frisk.³¹¹

E. How Can the Rulemaking Process Be Scaled?

Of all the difficult questions surrounding the application of public rulemaking to policing, the real challenge is identifying methods of public participation that can be scaled to communities and police forces of various sizes. In the United States, there are nearly 18,000 law enforcement agencies, almost half of which employ fewer than ten full-time officers.³¹² The median local police department in the United States has just eight full-time sworn officers.³¹³ By way of comparison, the NYPD employed more than 36,000 full-time officers in 2008.³¹⁴

It is implausible that each of these jurisdictions is going to be able to adopt federal notice-and-comment rulemaking procedures, and it is

³⁰⁷ See Megan Smith & Roy L. Austin, Jr., *Launching the Police Data Initiative*, THE WHITE HOUSE BLOG (May 18, 2015, 6:00 AM), <https://www.whitehouse.gov/blog/2015/05/18/launching-police-data-initiative> (describing the President's Police Data Initiative).

³⁰⁸ According to a 2005 survey, twenty-nine state police agencies collected traffic stop data, and of these, twenty-two made data available to the public. MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, NCJ 209156, TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE, 2004, at 3 (2005), <http://www.bjs.gov/content/pub/pdf/tsdcp04.pdf>.

³⁰⁹ See ACLU *supra* note 96, at 4, 28–29 (discussing the Maryland law).

³¹⁰ Christine Hauser, *Judge Tells Police Dept. to Release Stop-And-Frisk Data*, N.Y. TIMES, May 31, 2008, at B5.

³¹¹ See *supra* note 127 and accompanying text (noting the change in the stop-and-frisk policy in response to public backlash).

³¹² REAVES, *supra* note 62, at 2.

³¹³ *Id.* at 4.

³¹⁴ *Id.* at 14.

not clear this is even desirable. As we noted earlier, even at the federal level, notice-and-comment rulemaking is often thought to be overly laborious, prompting agencies to forego rulemaking and turn instead to more informal guidelines and policy manuals to formulate policy and cabin administrative discretion.³¹⁵ Ideas about efficient bureaucracy are changing from an emphasis on binding rules toward more flexible processes based on transparency and monitoring.³¹⁶

But notice-and-comment rulemaking is hardly the only model for seeking input from the public on the rules and practices that govern police. The question is one of scaling and experimentation.

Some departments already answer to supervisory police boards. For example, the LAPD operates under the control of a five-member civilian Board of Police Commissioners, responsible for setting police department policy as well as investigating use-of-force incidents and civilian complaints against the Department.³¹⁷ The Commission holds weekly meetings that are open to the public and broadcast on several local news channels.³¹⁸ When the mayor of Los Angeles announced plans to outfit police officers with body cameras, the Commission sought input from a variety of stakeholders—including civil liberties groups, privacy experts, and local residents—before formulating a policy to govern their use.³¹⁹ Similarly, in 2012, the City of Seattle—under a settlement agreement with the Department of Justice—created a Community Police Commission to seek community input on

³¹⁵ See CARNEGIE COMM'N, *RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISIONMAKING* 107 (1993), <http://www.ccastg.org/pdfs/RiskEnvironment0693.pdf> (discussing the impact of the formal rulemaking process); Freeman, *supra* note 46, at 9–10 (same).

³¹⁶ See William H. Simon, *The Organizational Premises of Administrative Law*, 78 *LAW & CONTEMP. PROBS.* 61, 61–62 (2015) (discussing the shift to an emphasis on bureaucratic transparency). On the potential implications of these trends for regulation of policing, see Sabel & Simon, *supra* note 231, at 22–26.

³¹⁷ See CHRISTOPHER STONE ET AL., *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* 54–55, 59 (2009), http://www.hks.harvard.edu/content/download/67474/1242706/version/1/file/Harvard_LAPD_Report.pdf (describing the Commission's functions).

³¹⁸ *The Function and Role of the Board of Police Commissioners*, L.A. POLICE DEP'T, http://www.lapdonline.org/police_commission/content_basic_view/900 (last visited Aug. 15, 2015).

³¹⁹ Kate Mather, *Commission OKs Body Cameras for All LAPD Officers*, L.A. TIMES, Apr. 29, 2015, at A1 (discussing the community feedback solicited by the LAPD prior to the creation of body-camera policies). Likewise, when the LAPD acquired two drones, the Commission announced that the drones would be stored under lock and key until it could hold community hearings and formulate a policy to govern their use. Rick Orlov, *Commission Grounds LAPD's Drones Until Guidelines Formed*, L.A. DAILY NEWS (Sept. 15, 2014), <http://www.dailynews.com/government-and-politics/20140915/commission-grounds-lapds-drones-until-guidelines-formed>.

various police department policies and to make recommendations to the police department and the city council on possible reforms.³²⁰

What has worked in Los Angeles and Seattle may not be feasible in Ferguson or North Charleston, but it is simply not the case that each local department is going to have to draft a set of rules from the ground up. There already are examples of model rules governing many aspects of policing.³²¹ And numerous state and local governments have recently drafted rules that cover drone usage³²² or police cameras.³²³ These rules may serve as a model for other communities. Most likely there will be convergence toward best practices. Tellingly, the American Law Institute has launched a new project to write principles of police investigations.³²⁴

The challenge is going to be figuring out how to elicit community participation in communities of all sizes. But this is a beneficial challenge, not a disheartening one. By virtue of their closeness to the citizenry, local governments are already adept at fielding input from the community, be it through school boards, zoning boards, arts commissions, or neighborhood councils.³²⁵ For example, the village of Park Ridge, Illinois—a suburb of Chicago—has twenty-three separate commissions and task forces, including a Civil Service Commission, Historic Preservation Commission, Liquor License Review Board, and a Library Board of Trustees.³²⁶ As described in greater detail in Part I, open meeting laws in all fifty states already require a variety of local government agencies to subject their processes and policies to

³²⁰ *About Us—Community Police Commission*, SEATTLE.GOV, <http://www.seattle.gov/community-police-commission/about-us> (last visited Aug. 15, 2015).

³²¹ See *supra* notes 265–68 and accompanying text (discussing various model rules governing police investigations).

³²² See, e.g., AVIATION COMM., INT’L ASS’N OF CHIEFS OF POLICE, RECOMMENDED GUIDELINES FOR THE USE OF UNMANNED AIRCRAFT (2012), http://www.theiacp.org/portals/0/pdfs/IACP_UAGuidelines.pdf (proposing model police drone policy); *Current Unmanned Aircraft State Law Landscape*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 8, 2015), <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx> (describing state drone laws).

³²³ See Sonia Roubini, *Police Need to Make Body-Camera Policies Transparent*, ACLU FREE FUTURE BLOG (Dec. 18, 2014, 3:00 PM), <https://www.aclu.org/blog/free-future/police-need-make-body-camera-policies-transparent> (citing various department policies on body cameras).

³²⁴ Both authors of this Article are involved in the ALI project, *Principles of the Law, Police Investigations*; Barry Friedman is the Reporter, and Maria Ponomarenko is a Fellow on the project.

³²⁵ See, e.g., *Boards & Commissions*, CITY OF FARMINGTON HILLS, <http://www.fhgov.com/Government/Boards-Commissions.aspx> (last visited Aug. 15, 2015) (listing the various boards and commissions in the city of Farmington Hills, Michigan).

³²⁶ See *Boards, Commissions, Committees and Task Forces*, CITY OF PARK RIDGE, http://www.parkridge.us/government/committees_commissions_and_boards.aspx (last visited Aug. 15, 2015) (listing Park Ridge’s boards, commissions, committees, and task forces).

public scrutiny.³²⁷ There is no reason to think that these sorts of governance structures could not be adapted to facilitate greater engagement between communities and their police. In short, although this question of local participation should not be minimized, there is ample room for experimentation, and any sort of progress is likely to be better than the status quo.

V

FROM HERE TO THERE

The problem, of course, is how to motivate democratically accountable police rulemaking. As Part II made clear, public choice theory has provided an obstacle to legislatures moving in that direction.³²⁸ In this Part, we argue that although post hoc adjudication works poorly to regulate policing, particularly the new policing, there is a vital role courts can and should play in democratizing policing. Using the tools described below, courts can motivate legislative and administrative rulemaking, including by police officials themselves.

A. *The Role Courts Can Play*

1. *The Difficulty with Judicial Review*

Beginning in the 1930s, but picking up in earnest in the 1950s and 1960s under Chief Justice Earl Warren, the Supreme Court began to regulate the police. Over the course of several decades, the Justices had grown increasingly frustrated by the failure of state legislatures and courts to address even the most flagrant abuses in the criminal justice system, particularly in the Jim Crow South.³²⁹ And so, in a series of landmark decisions, the Court extended the Fourth Amendment's protections to state and local law enforcement,³³⁰ clamped down on coercive interrogation practices,³³¹ guaranteed

³²⁷ See *supra* notes 56–60 and accompanying text (discussing “sunshine” or “open meeting” laws, which require public access to meetings where matters of public interest are voted on or discussed).

³²⁸ See *supra* Part II.C.

³²⁹ See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156–59 (1998) (citing the Court’s concern with institutionalized racism in the development of modern criminal procedure doctrines); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841–44 (1994) (same).

³³⁰ See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding the exclusionary rule applicable to the states).

³³¹ See *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964) (recognizing a Sixth Amendment right to counsel during police interrogations).

criminal defendants a right to counsel,³³² and perhaps most famously, in *Miranda v. Arizona*, required police to inform suspects of their right to remain silent and to have an attorney present during custodial interrogation.³³³

But that brief moment of judicial reform went by the boards in the face of rising crime rates in the 1960s and 1970s. Richard Nixon ran against the Court in 1968, and won.³³⁴ His chief target was the Warren Court's pro-criminal-rights decisions.³³⁵ Soon thereafter, Nixon made four appointments to the Supreme Court,³³⁶ and under Chief Justice Warren Burger the Court began to take a distinctly hands-off approach toward policing.³³⁷

Although there are exceptions, for the most part today the Justices adopt a posture of extreme deference in policing cases, one that is very difficult to explain as a matter of constitutional theory.³³⁸ Commentators regularly note the low level of scrutiny courts apply when examining the reasonableness of searches and seizures, quite unlike that applied to most other constitutional rights.³³⁹ It is one thing for courts to defer to governmental decisions adopted transparently with an opportunity for public input; it is quite another to defer to the often non-transparent decisions of police officials. Even if it makes sense to give "due weight" to an officer's "experience and

³³² See *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (finding that the right to counsel is fundamental to a fair trial and therefore obligatory upon the states under the Fourteenth Amendment).

³³³ *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

³³⁴ See KEVIN J. McMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 3–4, 36 (2011) (noting Nixon's extensive criticism of the Warren Court throughout his presidential campaign).

³³⁵ For example, a Nixon campaign brochure attacked the Warren Court's *Miranda* and *Escobedo* decisions for tying the hands of law enforcement and "shield[ing] hundreds of criminals from punishment." NIXON FOR PRESIDENT COMM., RICHARD NIXON: TOWARD FREEDOM FROM FEAR, para. 52–53, 58–60 (1968), <https://industrydocuments.library.ucsf.edu/documentstore/n/q/b/j//nqbj0029/nqbj0029.pdf>.

³³⁶ McMAHON, *supra* note 334, at 69–70.

³³⁷ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469–70 (1996) (arguing that the Burger and Rehnquist Courts have limited the scope of Warren Court criminal procedure decisions by narrowing available remedies and reducing the consequences to police from violating suspects' rights).

³³⁸ See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 248–49 (1993) (criticizing the Court's deferential posture toward police as inconsistent with the history or theory of the Fourth Amendment).

³³⁹ See, e.g., Amsterdam, *supra* note 28, at 394 (arguing that, in practice, "appellate courts defer to trial courts and trial courts defer to the police"); Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1247–48 (2004) (noting the "high degree of deference" in special needs cases).

expertise”³⁴⁰ on a *fact*-based issue like whether there was probable cause—and the high number of false positives calls this into question—it hardly makes sense to do the same when the question is whether to adopt programmatic policies affecting wide swaths of the population.

Courts defer to policing decisions in part because they lack the data or confidence to second-guess them. Whether the issue is consent searches, the use of drones, or the protocols for searching computers, there is a delicate balance between the intrusion into liberty and the necessity of maintaining a crime-free society. Although they do not always write in the register of judicial humility, the deferential stance of courts seems to be saying—and with good reason—that judges lack the knowledge or skills to resolve this balance in myriad situations.

2. *A New Role for Courts*

What if, though, instead of saying “aye” or “nay” to specific policing tactics, courts could simply prod governmental actors—including the police themselves—to adopt their own rules regulating policing in a democratically accountable way? If they did this, they would sidestep problems of competence, and likely backlash as well. Courts need not judge the police, at least in the first instance. They need only assure that someone is filling the regulatory void. (It remains the case, of course, that judicial review will be available to evaluate constitutional challenges to rules that are put in place.)³⁴¹

Commentators regularly look to courts to be “deliberation-forcing” or “representation-reinforcing,” or to engage in “dialogue” with the political branches—and courts regularly play this role.³⁴² The ordinary rules of administrative judicial review, forsaken in the criminal justice context, are directed at precisely this end. Doctrines like *Chevron* are built on a foundation of deference—but unlike in the

³⁴⁰ *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

³⁴¹ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down a local loitering ordinance and accompanying police regulations on vagueness grounds).

³⁴² Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1601, 1836 (2001); see also, e.g., EINER ELHAUGE, STATUTORY DEFAULT RULES 151–67 (2008) (citing statutory default rules as an example of a judicial technique for prompting legislative action); JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980) (arguing in favor of a “representation reinforcing” approach to judicial review); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 583 (1993) (“[C]ourts interpret the Constitution, but they also facilitate and mold a societywide constitutional dialogue.”); Matthew Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008) (arguing that courts can more effectively vindicate certain constitutional values by raising the costs to legislatures of enacting dubious policies).

realm of policing, deference in administrative law is structured.³⁴³ Deference is the norm only when legislatures make explicit choices or clearly delegate authority, or when agencies make decisions pursuant to notice-and-comment rulemaking.³⁴⁴

Likewise, courts ought to defer to police decisions about enforcement methods only to the extent that those decisions represent considered, fact-based judgments formulated with democratic input. This sort of channeled deference is nothing new. Under governing doctrine, courts defer more to probable cause determinations if officers obtain warrants in advance.³⁴⁵ Similarly, courts are more likely to extend qualified immunity to police officers when their decisions are the product of a deliberative internal process as opposed to an ad hoc determination made by an officer on the beat.³⁴⁶ Judges may find it difficult to second-guess society's policy decisions. But they surely are in the position to know when policing agencies are acting pursuant to democratically accountable law.

B. *Constitutional Fulcrums*

There are a variety of doctrines courts should use to motivate democratic lawmaking with regard to policing. Most are quite familiar and regularly employed in other contexts. Better yet, some are immanent in policing doctrine itself, and need only be tapped. All eliminate the need for courts to uphold or strike down policing decisions on the merits; instead, courts can require that legislative or administrative bodies—including the police themselves—make ex ante rules in a democratically accountable fashion.

³⁴³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (justifying judicial deference to agency statutory interpretation on competency grounds). Some commentators argue it should be even more structured. John Manning argues that rather than worrying over when notice-and-comment rulemaking should be required, the better option is simply to let agencies make this decision, incentivizing rulemaking by not according deference in its absence. Manning, *supra* note 290, at 943–45.

³⁴⁴ *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 230–34 (2001) (refusing to extend judicial deference to an agency interpretation arrived at through informal processes).

³⁴⁵ *See Ornelas*, 517 U.S. at 698–99 (requiring greater judicial scrutiny of probable cause determinations for warrantless searches, and explaining that “police are more likely to use the warrant process if the scrutiny applied to a magistrate’s probable-cause determination to issue a warrant is less than that for warrantless searches”).

³⁴⁶ *Compare Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012) (granting qualified immunity to a police officer who submitted a facially invalid warrant application where the officer’s application had gone through several stages of department approval), *with Malley v. Briggs*, 475 U.S. 335 (1986) (denying qualified immunity where the officer had acted independently in submitting a faulty warrant application).

1. Requiring Authorization

The simplest and most direct way for courts to ensure democratic accountability of policing would be by barring practices that were not authorized either by a legislative body in sufficiently clear terms or through administrative rulemaking. For example, in the *Sims* cases, the Utah courts demanded legislative authorization before police could employ an automobile roadblock. *Sims* was caught with a kilo of cocaine, and yet the evidence was excluded both in criminal proceedings³⁴⁷ and a civil tax case.³⁴⁸ While the Utah Highway Patrol had statutory authority to “regulate traffic on all highways and roads of the state”³⁴⁹ and nothing in the Utah code “specifically prohibit[ed] the roadblock,”³⁵⁰ the Utah Supreme Court “decline[d] to infer authority [to conduct] suspicionless investigatory stops from broad statutory directives.”³⁵¹ Absent proper authorization, the action of the state police was simply *ultra vires*.

The *Sims* cases are emblematic of state courts taking the question of democratic authorization more seriously than do the federal courts. As Jim Rossi explains, states typically apply a more robust version of the nondelegation doctrine, requiring at least a clear statement of legislative policy, and often insisting also on specific statutory standards.³⁵² Even those states with a “weak” approach to delegation typically tolerate broad legislative authorization only when the agency itself has adopted adequate procedural safeguards.³⁵³ This structural body of law provides the basis for ensuring the democratic accountability of policing.

The *Sims* cases also are a good example of a “multiple branch” solution to the problem of executive discretion: not allowing executive officials to act without the concordance of at least one coordinate branch (and better if both). This can come from the judiciary in the form of warrants or from a legislature through statutory authorization. The Utah Court of Appeals explained that “[b]oth warrants and stat-

³⁴⁷ *State v. Sims (Sims I)*, 808 P.2d 141, 149 (Utah Ct. App. 1991).

³⁴⁸ *Sims v. Collection Div. of the Utah State Tax Comm’n (Sims II)*, 841 P.2d 6, 13 (Utah 1992) (holding that the exclusionary rule applies because a civil tax case is “quasi-criminal”).

³⁴⁹ UTAH CODE ANN. § 27-10-4(1)(b) (LexisNexis 1989) (current version at UTAH CODE ANN. § 53-8-105 (LexisNexis 2014)).

³⁵⁰ *Sims I*, 808 P.2d at 145.

³⁵¹ *Sims II*, 841 P.2d at 9.

³⁵² See Rossi, *supra* note 133, at 1189–90 (noting that in states, unlike the federal system, “the nondelegation doctrine is alive and well”).

³⁵³ See *id.* at 1191–92 (giving the example of Washington, a “weak” state that allowed the Director of the Department of Motor Vehicles to set maximum fees under a very vague mandate so long as it abided by procedural rules).

utes originate outside the executive branch, serving to check abuses of that branch's law enforcement power."³⁵⁴ In the absence of either of these checks, leaving authority in the hands of police alone is, according to that court, "constitutionally untenable."³⁵⁵ In a similar case, the Oregon Supreme Court held that for certain kinds of police intrusions, like suspicionless roadblock seizures, "authority . . . cannot be implied" from a general statute authorizing police to enforce the criminal law.³⁵⁶ Instead, "[b]efore they search or seize, executive agencies must have explicit authority from outside the executive branch."³⁵⁷ A number of other states have required either clearer authorization for roadblocks, or judicial supervision of them.³⁵⁸ The net result is a body of law governing police conduct in this area that is lacking in many others.³⁵⁹

2. *Statutory Remand Tools*

Unlike at the state level, the federal nondelegation doctrine is seldom enforced, but the failings of federal law in this regard may be more apparent than real because there are a number of well-established federal doctrines that ultimately accomplish the same thing. These fall under the rubric of "constitutional doubt," which counsels courts to read certain statutes narrowly when constitutional rights are at stake.³⁶⁰ As John Manning explains, "clear statement rules and the canon of avoidance may help to enforce substantive norms that are otherwise hard to enforce through *Marbury*-style judicial review."³⁶¹

³⁵⁴ *Sims I*, 808 P.2d at 149.

³⁵⁵ *Id.*

³⁵⁶ *Nelson v. Lane Cnty.*, 743 P.2d 692, 695 (Or. 1987).

³⁵⁷ *Id.*

³⁵⁸ See *Sims I*, 808 P.2d at 149 (pointing out that Oregon, Idaho, and Oklahoma all interpreted either their state constitutions or the Fourth Amendment to require prior authorization for roadblocks); see also *Commonwealth v. Tarbert*, 535 A.2d 1035, 1045 (Pa. 1987) (holding that the police power had to be exercised within the statutory powers); *Holt v. State*, 887 S.W.2d 16, 19 (Tex. Crim. App. 1994) (holding that a driving checkpoint had to be legislatively authorized).

³⁵⁹ See *Sobriety Checkpoint Laws*, *supra* note 71 (noting that thirty-eight states permit roadblocks and a number of states impose various requirements on their use).

³⁶⁰ See Coenen, *supra* note 342, at 1604–05 & n.122 (listing cases that rely on "constitutional doubt" or constitutional avoidance). For example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, the Supreme Court held that an agency's preferred interpretation of the statute would involve "such a 'sweeping delegation of legislative power' that it might be unconstitutional" and that therefore "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." 448 U.S. 607, 646 (1980) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)).

³⁶¹ John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 422 (2010). A number of scholars have stressed that these interpretive canons often

Examples of clear statement rules abound in federal law.³⁶² In *Kent v. Dulles*, for example, the Court held that a 1952 statute that purported to leave the issuance of passports “to the discretion of the Secretary of State” did not in fact authorize the Secretary to deny a citizen a passport on the ground that he was a communist.³⁶³ The Court explained that when it comes to “an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or deny it.”³⁶⁴ The Court concluded it did not need to reach the question of constitutionality, because when the constitutional rights of citizens “such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.”³⁶⁵

Clear statement rules—which can be used to prompt either the legislative or administrative process³⁶⁶—are particularly important when the Court confronts government action that threatens structural values, like democratic accountability. That was the Court’s point in *Gregory v. Ashcroft*, which declined to find that the Age Discrimination in Employment Act displaced Missouri’s mandatory retirement law for judges absent a clear statement of congressional intent.³⁶⁷ To the extent that certain value judgments are “left primarily to the political process,” the Court said it “must be absolutely certain that Congress intended” to displace them.³⁶⁸

All a “remand” for a clear statement requires is some constitutional interest at stake that has not been taken into account by

replace the nondelegation doctrine in targeted ways when substantial rights are at stake. See, e.g., Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1400–01, 1431–38 (2000) (arguing that the Court applied nondelegation principles in *Iowa Utilities Board* to require an agency to supply standards to cabin its own discretion); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593, 630–31 (1992) (discussing use of clear statement rules as an alternative to the nondelegation doctrine); Sunstein, *supra* note 133, at 330–35 (describing various canons).

³⁶² See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (requiring clear legislative intent before “alter[ing] the usual constitutional balance between the States and the Federal Government” (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989))); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (articulating the presumption against preemption absent a clear statement from Congress).

³⁶³ *Kent v. Dulles*, 357 U.S. 116, 128 (1958).

³⁶⁴ *Id.* at 129.

³⁶⁵ *Id.*

³⁶⁶ See *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 582–83 (1987) (requiring an agency’s clear statement of intent to preempt state law); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90, 114–17 (1976) (refusing to defer to an agency decision to bar aliens from the civil service).

³⁶⁷ 501 U.S. at 470.

³⁶⁸ *Id.* at 464.

Congress or the agency.³⁶⁹ In the area of policing, an apt hook for the exercise of constitutional doubt may be the risk of arbitrariness. For example, the Court's vagueness doctrine, which requires that legislatures draft criminal statutes with some degree of specificity,³⁷⁰ is motivated primarily by the Court's concern with "arbitrary and discriminatory enforcement."³⁷¹ Courts have struck down a variety of loitering ordinances and vagrancy statutes on the ground that such laws "vest[] virtually complete discretion in the hands of the police."³⁷² And although the vagueness doctrine only cabins the potential breadth of substantive criminal statutes, the same sorts of concerns with standardless discretion ought to extend to the sweeping enforcement authority presently granted to police.³⁷³

With regard to other constitutional rights, the Court likewise has been firm in requiring the existence of rules to eliminate official arbitrary conduct. In First Amendment cases, the Court has repeatedly insisted that "law[s] subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must also provide "narrow, objective, and definite standards to guide the licensing authority."³⁷⁴

³⁶⁹ See *Quill v. Vacco*, 80 F.3d 716, 738–43 (2d Cir. 1996) (Calabresi, J., concurring) (introducing the concept of "constitutional remand" and arguing that, in the face of constitutional doubt, courts should require a clear statement of legislative intent), *rev'd on other grounds*, 521 U.S. 793 (1997).

³⁷⁰ Although the vagueness doctrine also applies to civil regulations, the Court has emphasized that such provisions are subject to less exacting scrutiny. *E.g.*, *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.")

³⁷¹ See *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (noting that "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement'" (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1983))).

³⁷² *Id.* at 358; see also *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (citing the risk of arbitrary enforcement in invalidating Chicago's loitering ordinance as unconstitutionally vague); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating a vagrancy law on vagueness grounds); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking down a local ordinance that prohibited three or more people from congregating on a public sidewalk "in a manner annoying" to passersby).

³⁷³ Indeed, as a number of scholars have argued, the sheer multiplicity of traffic laws and other minor offenses—which virtually all of us have violated at one time or another—has rendered all but meaningless the requirements of reasonable suspicion and probable cause as a check on police discretion to effect a stop or arrest. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 7 (1997) ("In a world where . . . routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing. Officers can arrest for a minor offense—everyone violates the traffic rules—in order to search or question a suspect on a major one."); Sklansky, *supra* note 174, at 1276–77 (same).

³⁷⁴ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969); see also *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (noting "that in the area of free expression a licensing statute placing unbridled discretion in the hands of a

Similarly, in the Eighth Amendment context, the Court has insisted that “where discretion is afforded a sentencing body on a matter so grave as [whether to impose the death penalty], that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”³⁷⁵ The rights at stake under the Fourth Amendment, involving bodily and property security, are vital as well. A “paramount purpose of the [F]ourth [A]mendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.”³⁷⁶

Although some scholars express concern about the use of clear statement and avoidance rules,³⁷⁷ this is plainly preferable to an aggressive reading of the Constitution that would bar policing tactics altogether. As Debra Livingston points out, even narrowly drafted public order statutes nonetheless vest considerable discretion in the hands of police.³⁷⁸ Requiring rulemaking can allow for that discretion while at the same time cabining it. Police—working in conjunction with community groups—may be in the best position to adopt rules that guide the exercise of discretion.³⁷⁹ Compelling such rules seems far preferable to banning policing conduct altogether.³⁸⁰

government official or agency . . . may result in censorship”); *Cox v. Louisiana*, 379 U.S. 536, 556–58 (1965) (striking down a licensing ordinance for vesting too much discretion in the hands of police); *Schneider v. New Jersey*, 308 U.S. 147, 163–65 (1939) (same); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195–204 (1988) (discussing similar cases); cf. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 487–90 (2010) (citing additional examples where constitutional law triggers some form of administrative process).

³⁷⁵ *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

³⁷⁶ *Amsterdam*, *supra* note 28, at 417; *see also* *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 621–22 (1989) (“An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents.”); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”).

³⁷⁷ *See* Manning, *supra* note 361, at 402–03. Similarly, John Manning objects to using constitutional doubt techniques when constitutional mandates are “abstract” rather than clause-bound, such as with “federalism.” *Id.* at 404–05.

³⁷⁸ Livingston, *supra* note 20, at 560–61.

³⁷⁹ *See id.* at 658–61 (explaining how the police and the community can come together to create informal, enforceable guidelines for community behavior).

³⁸⁰ *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (criticizing the Court’s aggressive application of the vagueness doctrine in cases where loitering ordinances are adopted with community support).

3. *Safe Harbors*

Often, a carrot is even more effective than a stick.³⁸¹ Courts can refuse deference when there is a constitutional doubt, but by the same token they can accord deference if policing is governed by rules that are the product of sound democratic processes. To the extent legislatures and policing agencies anticipate deference for their efforts, they will be more inclined to adopt statutes or rules.

Such tactics are not novel; they simply are underused. As noted above, with regard to traditional investigative policing, the warrant requirement provides a good example of a safe harbor—the “multiple-branch” solution in operation.³⁸² Yet the numerous exceptions to the warrant requirement tend to swallow the rule.³⁸³ Courts should act to maximize the value of the safe harbor by denying deference to warrantless searches, at least unless the warrant exception at issue is the product of sound democratic authorization.³⁸⁴

The Court passed on one opportunity to prompt rulemaking in *United States v. Robinson* and *Gustafson v. Florida*, a pair of cases addressing the permissible scope of a warrantless search incident to arrest.³⁸⁵ In *Robinson*, a police department rule expressly authorized the search at issue; in *Gustafson*, the local police department had never adopted any sort of policy to that effect. Nonetheless, the Court explicitly refused to distinguish the cases on that basis.³⁸⁶ The Justices missed another such opportunity in a pair of programmatic search cases, where existing doctrine provides an even stronger basis for insisting on democratic authorization or publicly adopted rules. In *Skinner v. Railway Labor Executives' Association*, the Court upheld a drug-testing program for railway workers adopted by regulations sup-

³⁸¹ See, e.g., Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341 (2013) (describing the relative advantages of carrots and sticks in shaping behavior and noting the circumstances where carrots are preferable).

³⁸² See, e.g., *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (deferring to a magistrate judge's finding of probable cause).

³⁸³ Some are indefensible, such as the “vehicle” exception, which particularly in light of modern technology is an exception desperately in search of a rationale. See, e.g., *California v. Carney*, 471 U.S. 386, 394 (1985) (describing the warrantless search of a stationary mobile home as permissible because of the automobile exception).

³⁸⁴ See Bar-Gill & Friedman, *supra* note 23, at 1638 (emphasizing the benefits of warrants); Sklansky, *supra* note 174, at 1245–48 (noting that good faith cases like *Leon* create incentives to obtain warrants).

³⁸⁵ *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

³⁸⁶ *Gustafson*, 414 U.S. at 265.

ported by a strong record,³⁸⁷ but that same day in *National Treasury Employees Union v. Von Raab*, it likewise upheld a drug-testing program for certain customs service employees that was the product of executive fiat based on no record at all.³⁸⁸ Treating these two situations as equivalent does little to encourage the use of democratic processes. As Anthony Amsterdam observed in the context of *Robinson* and *Gustafson*, “[i]f the Court had distinguished the two cases on this ground, it would . . . have made by far the greatest contribution to the jurisprudence of the [F]ourth [A]mendment since James Otis argued against the writs of assistance in 1761 and ‘the child Independence was born.’”³⁸⁹

4. Substantive Law

The most underutilized tool available to courts to force democratic deliberation regarding policing is substantive constitutional law itself. Doctrinal law is awash with demands for democratic deliberation, but in its haste to defer, the Supreme Court typically ignores what its own tests would seem to require.

The Supreme Court’s special needs doctrine, properly deployed, would serve as a prod to legislatures and policing agencies to specify government interests through democratic processes and in credible ways. The doctrine balances “government interests” against the intrusion on individuals. Yet, courts fail to require that government bodies specify these interests *ex ante*. In *Maryland v. King*, for example, the Court approved DNA testing of felony arrestees as a means to “identify” the arrestee for the purposes of processing and bail.³⁹⁰ The difficulty was that the Maryland legislature had made clear that the real purpose of the statute was to solve cold cases—which under the Court’s prior cases would not have survived constitutional scrutiny.³⁹¹ *King* is an example of the Court inappropriately deferring to post hoc rationales provided by counsel, rather than focusing on what motivated a rule in the first place. Similarly, the Supreme Court in *Sitz* applied an extremely deferential standard of review to Michigan’s use of drunk-driving roadblocks, despite the fact that state police officials had introduced such checkpoints without first seeking public input.³⁹²

³⁸⁷ 489 U.S. 602, 607–08 (1989) (noting that the regulations were adopted through notice-and-comment rulemaking).

³⁸⁸ 489 U.S. 656, 660 (1989) (discussing the implementation by the Commissioner of Customs).

³⁸⁹ Amsterdam, *supra* note 28, at 416 (footnote omitted) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

³⁹⁰ 133 S. Ct. 1958, 1970 (2013).

³⁹¹ *Id.* at 1985 (Scalia, J., dissenting).

³⁹² *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447, 453–54 (1990).

Yet, it struck down the drug roadblock in *City of Indianapolis v. Edmond*,³⁹³ even though the program had been adopted through negotiations between elected officials and the affected community.³⁹⁴ If deference were ever warranted, it would be in the latter case, not the former. No programmatic policing tactic or policy should receive deferential review unless it is legislatively authorized or otherwise the subject of democratically accountable rules.

The threshold question for invoking the Fourth Amendment—the question of whether policing conduct constitutes a “search”—similarly provides a basis for requiring ex ante democratic consideration. The Court’s stated test for what constitutes a “search” is whether the police practice invades an “actual (subjective) expectation of privacy” that “society is prepared to recognize as ‘reasonable.’”³⁹⁵ In practice, the Court all too frequently decides what expectations are reasonable or not, without regard to what society says. Police trespass in violation of state common law; the Supreme Court says it is not a search.³⁹⁶ The California Supreme Court—electorally accountable to the citizens of that state—held their citizens had a legitimate expectation that their trash would not be picked through by government agents; the Supreme Court disagreed.³⁹⁷ Courts should not approve policing tactics like these unless and until there is proper democratic deliberation. And, in any event, societal disapproval should be strong evidence that a tactic constitutes a search for Fourth Amendment purposes.

Even the question of when warrants should be required is ripe for forcing democratic deliberation. As we have seen, the judiciary’s patchwork quilt of exceptions to the warrant requirement hampers such deliberation. Some jurisdictions have statutory schemes for warrant exceptions.³⁹⁸ The International Association of Chiefs of Police, in conjunction with the Texas Governors’ Council, long ago drafted a model rule that was far more demanding of warrants and far less solicitous of exceptions than current Supreme Court doctrine.³⁹⁹ The

³⁹³ 531 U.S. 32 (2000).

³⁹⁴ See Rodger Birchfield, *Roadblocks Will Feature Drug Dogs*, INDIANAPOLIS STAR, Sept. 22, 1995, at E1 (describing the community consultation process that went into development of the roadblock program).

³⁹⁵ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

³⁹⁶ See *Oliver v. United States*, 466 U.S. 170, 183–84 (1984).

³⁹⁷ See *California v. Greenwood*, 486 U.S. 35, 43–44 (1988).

³⁹⁸ See, e.g., FLA. STAT. ANN. § 901.15 (West Supp. 2011) (describing the circumstances when officers are permitted to make a warrantless arrest); *id.* § 901.21 (West 2001) (setting out the permissible purposes of a warrantless search incident to arrest).

³⁹⁹ See MODEL RULES FOR PEACE OFFICERS § 6:3.03, at VI-11 (Tex. Advisory Comm’n on Intergovernmental Relations 1980) (prohibiting officers from conducting pretextual arrests for the purpose of conducting a warrantless search); *id.* § 6:7.02, at VI-25 (requiring

Supreme Court should force legislative bodies to face the question of whether warrants are preferred and when they can be excused.

Finally, it bears repeating that democratically authorized rules still are subject to constitutional review. All law must comport with the Constitution, even if adopted through the proper channels. But much of judicial review in the area of policing has been toothless. It would be a major advance if courts would only refuse to accord deference to policing rules that lack a democratic pedigree.

5. *Orchestrating Deliberation*

When courts act to foster deliberation over policing rules, it matters how they go about it. Although any refusal to defer to rules that lack a democratic pedigree would be an improvement, it is possible to refine judicial techniques in ways that are more likely to provoke legislative response.

Title III, the federal law governing wiretapping, is, as many recognize, the product of an extended dialogue between Congress and the Supreme Court.⁴⁰⁰ In *Olmstead v. United States*, the Supreme Court held that wiretapping did not constitute a “search” or “seizure” within the meaning of the Fourth Amendment, and thus was exempt from constitutional control.⁴⁰¹ As the Court later acknowledged in *Berger v. New York*, Congress responded shortly thereafter by “specifically prohibit[ing] the interception without authorization and the divulging or publishing of the contents of telephonic communications.”⁴⁰² It turned out, though, that *Berger* had the same effect of spurring action. In *Berger* the Supreme Court struck down New York’s wiretapping and eavesdropping law but made clear that a more narrowly drawn statute might satisfy the Fourth Amendment’s commands.⁴⁰³ Within two weeks of the *Berger* decision, legislators in Congress introduced a new piece of legislation that eventually became Title III of the Omnibus Crime Control and Safe Streets Act of 1968.⁴⁰⁴ Title III comprehen-

officers to inform suspects that they have the right to refuse to consent to a search); *id.* § 6:8.03, at VI-29 (requiring officers to obtain a warrant to search a vehicle unless there is reason to believe that delay will result in the destruction of evidence). The Supreme Court has refused to impose similar requirements under the guise of the Fourth Amendment. *See, e.g.,* *Whren v. United States*, 517 U.S. 806, 813 (1996) (no prohibition on pretextual searches); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (no need to inform suspects of right to refuse consent); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (no limits on automobile searches, so long as supported by probable cause).

⁴⁰⁰ *See, e.g.,* Rappaport, *supra* note 31, at 226–27 (describing the interplay of Supreme Court precedent and congressional passage of Title III).

⁴⁰¹ *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

⁴⁰² *Berger v. New York*, 388 U.S. 41, 51 (1967).

⁴⁰³ *Id.* at 63–64.

⁴⁰⁴ Rappaport, *supra* note 31, at 226–27.

sively regulates police wiretapping practices throughout the nation, using *Berger* as a roadmap, and even exceeding in some particulars what the *Berger* decision required.⁴⁰⁵

The path from *Olmstead* to Title III contains two very important lessons for a court anxious to trigger democratic deliberation. First, legislative bodies are more likely to act if judges take a somewhat extreme doctrinal position. The reason for this is that legislative bodies often are notoriously gridlocked and an extreme position in either direction can break the legislative logjam.⁴⁰⁶ *Olmstead* left wiretapping entirely unregulated by constitutional standards. *Berger* took a stringent position regarding constitutional requirements for wiretaps. Both extreme positions caused Congress to respond.

Second, all things considered, courts are more likely to evoke legislative action if the extreme doctrinal position taken is in the rights-protective direction. This is because, as we have seen, legislatures would often rather do nothing in this area, and so it takes interest groups to motivate them.⁴⁰⁷ The most focused interest groups around policing issues are policing agencies themselves—which are most likely to spur legislatures to act when courts temporarily deprive them of their preferred investigative tools.⁴⁰⁸

In addition to these lessons, *Berger* suggests that courts ought to consider explicitly inviting legislative action—and even offering a roadmap for what a viable statute might look like.⁴⁰⁹ *Berger* reads as an explicit invitation. So does *United States v. U.S. District Court* (the *Keith* case), which held that domestic security investigations are not immune from the warrant requirement, but left open the door for Congress to develop “protective standards for [domestic security investigations] which differ from those already prescribed for speci-

⁴⁰⁵ S. REP. NO. 90-1097, at 75 (1968) (“Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the above constitutional standards, the subcommittee has used the *Berger* and *Katz* decisions as a guide in drafting title III.”).

⁴⁰⁶ Cf., e.g., John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 849–50 (2006) (suggesting more dramatic Supreme Court action in habeas cases involving military commissions to force debate in Congress); Stuntz, *supra* note 184, at 797–98 (noting that legislatures are more likely to regulate privacy “where the Supreme Court has not already occupied the relevant field”).

⁴⁰⁷ See *supra* notes 178–82 and accompanying text.

⁴⁰⁸ See *supra* notes 185–87 and accompanying text.

⁴⁰⁹ See Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711 (1998) (noting that judges often give advice to legislatures about constitutional methods of achieving a certain end); Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1194–95 (2000) (describing the practice of striking down legislation but providing “constitutional road maps for subsequent enactments”).

fied crimes in Title III.”⁴¹⁰ The *Keith* Justices even made particular suggestions as to what might work. Congress eventually responded with the Foreign Intelligence Surveillance Act, which set out various rules governing domestic security investigations and created a special court to hear warrant applications.⁴¹¹

In contrast to *Berger* and *Keith*, *Miranda v. Arizona* failed to evoke legislative action. *Miranda* famously set out certain “procedural safeguards” to be followed before a suspect was subjected to custodial interrogation.⁴¹² But the *Miranda* Court left open the possibility that states could devise “other fully effective means” to vindicate suspects’ rights.⁴¹³ Despite that invitation to devise alternatives to the controversial *Miranda* rule, virtually nothing happened.⁴¹⁴ Although speculative, the possible reasons why are nonetheless instructive. One theory is that, despite superficial discontent, the rule seemed easy enough to comply with, such that the rule fell within the gridlock interval such that no legislature could motivate itself to change it.⁴¹⁵ But another possibility is that unlike in *Berger* and *Keith*, the Court did not give any guidance as to alternatives, nor did it seem very keen to have them adopted.⁴¹⁶ As commentators make clear, advice-giving requires a certain amount of direction, and then deference on the back end.⁴¹⁷

C. *The Problem of Remedies*

When it comes to regulating policing, by far the thorniest question may have to do with remedies. This is true of policing generally,

⁴¹⁰ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322 (1972).

⁴¹¹ See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (recognizing the relationship between the *Keith* decision and Congress’s subsequent enactment of the Foreign Intelligence Surveillance Act); see also Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855 (2004) (discussing same).

⁴¹² *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁴¹³ *Id.*

⁴¹⁴ The only notable attempt was when Congress enacted 18 U.S.C. § 3501, which basically sought to overrule *Miranda*. The Court overturned that provision in *Dickerson v. United States*. 530 U.S. 428, 444 (2000).

⁴¹⁵ See Rappaport, *supra* note 31, at 258–59 (making the argument); Stuntz, *supra* note 184, at 792–93 (making the related point that *Miranda* reduced the marginal benefit to legislatures of enacting legislation to protect suspects’ rights).

⁴¹⁶ See Rappaport, *supra* note 31, at 262 (arguing that *Miranda*’s “muddy message” is partly to blame for its failure to evoke legislative action).

⁴¹⁷ See Katyal, *supra* note 409, at 1711 (noting the benefits of judicial opinions that “announce narrow holdings, but superimpose broad advice”); Luna, *supra* note 409, at 1127–28 (discussing how the Court can offer a “road map” to help lawmakers replace an unconstitutional statute with one that would pass constitutional muster).

and it is no less true when it comes to courts doing more to encourage rulemaking and democratic authorization of policing methods.

In the typical administrative context, if an agency fails to promulgate a rule, or promulgates it without the proper process, the usual remedy is to vacate the agency action—but that won't work when the agency is a policing agency. If a police officer arrests a suspect and it later turns out that the investigative tactic a police officer used had not been legislatively authorized, the court cannot simply send the suspect home and tell the officer to re-arrest him once the department gets its ducks in a row.⁴¹⁸ The only remedy at present is suppression of any evidence obtained by the police, which courts have proven reluctant to apply.

An example of judicial reluctance to use suppression as a remedy for unauthorized policing is *Virginia v. Moore*. In *Moore*, the Court upheld a search incident to arrest under the Fourth Amendment, despite the fact that the arrest itself violated state law.⁴¹⁹ (State law required police officers to issue a citation instead of making an arrest for that particular offense.)⁴²⁰ Virginia had adopted a more restrictive arrest policy than the Fourth Amendment required, but had decided to enforce its policy through internal disciplinary sanctions and damages suits rather than exclusion.⁴²¹ The Court concluded that nothing in the federal Constitution required Virginia to adopt the federal exclusionary remedy to enforce statutorily created rights.⁴²²

On the merits, the *Moore* Court likely was wrong—there are important arguments in favor of using exclusion as a remedy for failure to promulgate or adhere to a rule governing policing.⁴²³ Absent delegated authority to make an arrest in that circumstance,

⁴¹⁸ This is one principal difference between policing and administrative law. When an administrative agency fails to properly weigh the evidence before it or to comply with one of the APA's procedural requirements, a court can simply remand the case back to the agency for additional proceedings—but that won't work in many policing cases. For example, in *Chenery I* the Supreme Court invalidated an SEC enforcement action because the agency had relied on an erroneous interpretation of the governing statute. *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 88–90 (1943). On remand, the agency issued essentially the same order—this time justified on permissible grounds—which the Court upheld in *Chenery II*. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 208–09 (1947).

⁴¹⁹ *Virginia v. Moore*, 553 U.S. 164, 176–78 (2008).

⁴²⁰ *Id.* at 167.

⁴²¹ *Id.* at 180 (Ginsburg, J., concurring in the judgment).

⁴²² *Id.* at 177–78; see also, e.g., *Whren v. United States*, 517 U.S. 806, 813–19 (1996) (holding that a police stop conducted in violation of department rule may still be reasonable under the Fourth Amendment); *Cooper v. California*, 386 U.S. 58, 61–62 (1967) (holding that police action violating state law may nonetheless be constitutional).

⁴²³ Note, to begin with, that *Moore* was about a federal court enforcing a state rule; nothing in that decision applies to state courts and state or local rules, or federal courts and federal rules. Indeed, federal courts use their supervisory power in instances like this to

Virginia officers lacked the power to do so; it is unclear on what basis the Justices concluded that the officers had acted “reasonably” when the Virginia legislature to which they are accountable had thought otherwise.⁴²⁴ But even if the *Moore* Court was right to defer to the Virginia legislature’s remedial scheme, the Justices’ arguments simply do not apply to the many unauthorized policing practices for which there simply is no indication that legislators had given *any* thought to whether the practice is appropriate or how abuses ought to be deterred.

Nonetheless, there necessarily is going to have to be some sort of good faith exception that allows jurisdictions time to adopt rules they may not have known they needed until court proceedings began. Administrative law offers a guide. A number of state courts have adopted strong presumptions in favor of rulemaking, and have set aside agency orders in cases where the authorizing statute or agency rule was not sufficiently specific to guide the agency’s decision.⁴²⁵ Yet in enforcing rulemaking requirements, states also have allowed agencies some leeway to respond to unforeseen situations on a case-by-case basis—at least for a time. Florida courts, for example, have made clear that where an agency is faced with a situation it could not have anticipated, it may issue an order in the case before it, so long as it also initiates rulemaking to address similar cases in the future.⁴²⁶ In an exclusion case, if the need for a rule had previously not been apparent, suppression is not warranted, and some delay must be allowed to formulate the rule.

exclude evidence. *See, e.g.*, *United States v. Di Re*, 332 U.S. 581, 587–95 (1948) (excluding evidence in federal court obtained in violation of state arrest law).

⁴²⁴ As David Sklansky points out, the exclusionary rule provides an excellent vehicle to enforce rulemaking requirements, given the constant stream of cases in which to ascertain if governments are meeting and adhering to rulemaking requirements. Sklansky, *supra* note 174, at 1291–92.

⁴²⁵ *See, e.g.*, Fla. Stat. Ann. § 120.54(1)(a) (West) (noting that “[r]ulemaking is not a matter of agency discretion”); *Crema v. N.J. Dep’t of Env’tl. Prot.*, 463 A.2d 910, 919–20 (N.J. 1983) (finding that an agency’s “reliance on adjudication . . . amount[ed] to an abuse of discretion or a violation” of the agency’s authorizing legislation); *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 269 S.E.2d 547, 569–71 (N.C. 1980) (setting aside an agency order as improper and in violation of a “policy favoring rulemaking rather than ad hoc adjudication”); *Sun Ray Drive-in Dairy, Inc. v. Or. Liquor Control Comm’n*, 517 P.2d 289, 292–93 (Or. App. 1973) (holding that rulemaking is needed where there are broad grants of authority).

⁴²⁶ *See Fla. Dep’t of Bus. & Prof’l Regulation v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 385 (Fla. 1999) (permitting an agency to “issue a declaratory statement dealing with a petitioner’s ‘particular set of circumstances,’ while at the same time indicating that ‘a similar fact pattern may exist’ in other circumstances and announcing its intention to ‘initiate rulemaking to establish an agency statement of general applicability.’”).

Finally, it bears pointing out that there is a difference between instances in which no rule has been promulgated, and where the police fail to follow an extant rule. In the latter case, some sort of harmless error rule or good faith exception may be appropriate. In reviewing agency action under the APA, courts apply an “administrative law . . . harmless error rule,” which requires petitioners to demonstrate that they have been prejudiced by the agency’s mistake.⁴²⁷ Courts have likewise mitigated the sting of the APA’s notice-and-comment rulemaking requirements by occasionally permitting an agency to temporarily continue enforcing a faulty rule where immediate vacatur would cause substantial disruption.⁴²⁸ In foreign systems, the exclusionary rule is available only for egregious violations.⁴²⁹ Time will tell what teeth are required to make adherence to written rules work. Besides, as many commentators have pointed out, once police adopt the rules themselves, publicly, the quasi-military nature of policing organizations may lead to hierarchical enforcement.⁴³⁰

The more important point with regard to remedies may be that the Supreme Court should ease up on its justiciability doctrine to allow more civil litigation over rulemaking, taking some pressure off the exclusionary rule. Many of the Court’s “special needs” cases already are brought in actions seeking damages or injunctive relief.⁴³¹ The same is true of excessive force claims.⁴³² These are cases where

⁴²⁷ See *Nat’l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659–60 (2007) (“In administrative law, as in federal civil and criminal litigation, there is a harmless error rule.” (quoting *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004))).

⁴²⁸ See, e.g., *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (ordering the EPA to undertake notice and comment but leaving the existing rule in place because vacating the rule “may affect the EPA’s ability to respond adequately to serious safety hazards”); cf. *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1265 (D.C. Cir. 2007) (Rogers, J., concurring in part and dissenting in part) (“[T]he court has traditionally not vacated the [defective] rule if doing so would have serious adverse implications for public health and the environment.”).

⁴²⁹ Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 440 & n.349 (discussing exclusionary rule practices outside the United States).

⁴³⁰ See Amsterdam, *supra* note 28, at 428 (“Only the police administration itself can make its troops toe the line; and police administrators are understandably quicker to enforce their own edicts than somebody else’s.”); Rappaport, *supra* note 31, at 236–45 (discussing the various benefits of second-order regulation of law enforcement in the context of compliance and enforcement). *But see* KRANTZ ET AL., *supra* note 172, at 3 (noting that the principal reason rulemaking failed in Boston was that senior officers lacked sufficient mechanisms of enforcement).

⁴³¹ See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 36 (2000) (seeking injunctive relief and damages); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (seeking injunctive relief); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 444 (1990) (seeking injunctive relief).

⁴³² See Leong, *supra* note 196, at 445, 447 (noting that excessive force claims are typically brought by civil plaintiffs).

someone has suffered a tangible injury. While the Court can be excused for its reluctance to rule up or down on substantive practices absent a tangible injury, in the rulemaking context preenforcement injunctive actions should be welcomed. Jurisdictions may in all good faith try writing rules and there is no point in playing cat-and-mouse with them, invalidating some in subsequent suppression motions. Better to have some test litigation on the front end, as courts, legislatures, and police departments find their way. In the administrative law context, standing thresholds are lowered: Under *Data Processing*, people “aggrieved by agency action” can sue,⁴³³ and as we have seen, this can include not only regulated parties, but parties with an interest in litigation. The advantage of civil actions is that in these cases, courts can effectively “remand” the matter back to the police department by enjoining the use of a particular investigative practice until the department obtains prior authorization or promulgates governing rules.

* * *

As we have argued throughout this paper, democratic deliberation around policing is an imperative. Yet, that does not mean it will happen absent a strong nudge from the courts. Courts, which have done a poor job patrolling policing *ex post*, could do much to promote deliberation by using the familiar tools described here.

CONCLUSION

At present, not only do courts do a poor job of protecting rule of law values when it comes to policing, but the requisite of democratic accountability is altogether unmet. As a result, the methods of policing are not subjected to a minimum requirement of rationality, let alone cost-benefit analysis, and there is little democratic sanction for what the police do. Under the guise of either administrative or constitutional law, a number of state courts have imposed authorization and rulemaking requirements on policing agencies, providing a roadmap for how this can be done. Rather than attempting to regulate policing substantively, something they have proven ill equipped to do, courts should follow this roadmap and force democratic deliberation over police tactics. While there are undoubtedly difficult questions for courts (and others) to answer, this difficulty alone is an insufficient reason to cling to the status quo. Even small steps in the direction of democratic accountability would go a long way toward a saner system of regulating the police.

⁴³³ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (internal quotation marks omitted).