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The Problem of Policing

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THE PROBLEM OF POLICING

Rachel A. Harmon*

The legal problem of policing is how to regulate police authority to permit officers to enforce law while also protecting individual liberty and minimizing the social costs the police impose. Courts and commentators have largely treated the problem of policing as limited to preventing violations of constitutional rights and its solution as the judicial definition and enforcement of those rights. But constitutional law and courts alone are necessarily inadequate to regulate the police. Constitutional law does not protect important interests below the constitutional threshold or effectively address the distributional impacts of law enforcement activities. Nor can the judiciary adequately assess law enforcement practices or predict police conduct. The problem of policing is fundamentally a problem of regulation—a fact largely invisible in contemporary scholarship. While scholars have criticized the conventional paradigm, contemporary scholarship continues to operate within its limits.

In this Article, I advocate a new agenda for scholars considering the police, one that asks not how the Constitution constrains the police but how law and public policy can best regulate the police. First, scholars should evaluate policing practices to determine what harms they produce, which practices are too harmful, and which are harm efficient. These inquiries are essential to ensuring that the benefits of policing are worth the costs it imposes. Second, scholars should explore the full “law of the police”—the web of interacting federal, state, and local laws that govern the police and police departments. Presently, for example, courts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior, yet civil service law, collective bargaining law, and federal and state employment discrimination law simultaneously discourage the same reforms, a phenomenon ignored by the academy. Third, scholars should analyze the capacities and incentives of nonjudicial local, state, and federal institutions to contribute to a regulatory regime capable of intelligently choosing and efficiently promoting the best ends of policing. This agenda offers a path for moving beyond constitutional criminal procedure toward a legal regime that promotes policing that is both effective and protective of individual freedom.

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INTRODUCTION

Police officers are granted immense authority by the state to impose harm. They walk into houses and take property. They stop and detain individuals on the street. They arrest. And they kill. They do all these things in order to reduce fear, promote civil order, and pursue criminal justice. The legal problem presented by policing is how to regulate police officers and departments to protect individual liberty and minimize the social costs the police impose while promoting these ends.

The problem of regulating the police is complex. It requires influencing a vast number of officers operating in diverse institutional, demographic, and political conditions. It demands the involvement of local, state, and federal actors using legislative, judicial, and administrative tools. And it depends on empirical assessments, theoretical interpretations, and normative judgments that are widely contested. While courts and commentators have written extensively on the law governing the police, they have in recent decades mostly neglected the problem of regulating them. They have largely treated the legal problem of policing as limited to preventing the violation of constitutional rights and its solution as the judicial definition and enforce-

ment of those rights. The problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure.

This conventional paradigm is necessarily inadequate to regulate the police. Despite doctrinal rhetoric to the contrary, constitutional law cannot alone balance individual and societal interests when they conflict. Instead, constitutional rights establish only deferential minimum standards for law enforcement, without addressing the aggregate or distributional costs and benefits of law enforcement or its effects on societal quality of life. Even within constitutional law, the judiciary alone cannot undertake the problem of policing. As the Supreme Court's constitutional criminal procedure doctrine suggests, empirical and causal analysis is central to both defining and protecting constitutional rights, yet courts have limited institutional capacity to engage in that analysis. In short, the public policy problems presented by the use of police power necessarily extend beyond constitutional law and courts. Protecting rights and balancing competing individual and social interests require a broader set of regulatory tools and institutions.

Of course, legal scholars have often been critical of aspects of the conventional paradigm, especially of its reliance on courts to protect individuals and communities from abuses of police power. Despite those criticisms, the paradigm continues to influence scholarly efforts to understand the problem and regulate the police effectively. Even scholars who have criticized the traditional approach continue to view the problem of policing principally through the lens of constitutional law. They therefore limit their analysis to constitutional methodologies and the subject matter of constitutional law. And while some recent work highlights nonconstitutional rules governing police conduct or utilizes the methodologies of social science to understand police conduct, it usually does so in service of either conclusions about constitutional doctrines or nonlegal analysis. In short, contemporary scholarship remains firmly grounded in the conventional paradigm. Scholars have yet to consider the full range of nonconstitutional legal questions at the core of the problem of policing.

The ongoing influence of the conventional paradigm has obscured some of the conceptual preconditions for effectively regulating the police. First, the paradigm limits the regulation of the police to the problem of identifying and enforcing constitutional rights. Yet the problem of regulating the police extends beyond constitutional law to ensuring that the benefits of policing are worth the harms it imposes, including harms not prohibited by the Constitution. The law should promote policing that effectively controls crime, fear, and disorder without imposing unjustifiable and avoidable costs on individuals and communities. Addressing the problem of policing therefore requires determining what harms policing produces, what kinds of policing are too harmful, and what kinds are harm efficient. Legal scholars and social scientists have yet to embrace this inquiry.

Second, courts have difficulty assessing the incentives affecting police officers, a task central to determining how to encourage police officers to conform their conduct to law. Scholars have studied many determinants and

correlates of police conduct, but the conventional paradigm has encouraged the belief that constitutional criminal procedure is the primary legal influence on police officers and departments. In fact, nonconstitutional law plays a much greater role in influencing police officers than has previously been appreciated. While scholars have begun to consider nonconstitutional law governing the police, their efforts have been narrow. Scholars have not yet adequately considered the full web of federal, state, and local laws that govern the police outside of the context of criminal investigations. This neglect stymies existing efforts to regulate the police. Presently, for example, courts tailor their interpretation of § 1983 and the exclusionary rule to encourage changes in police behavior, yet civil service law, collective bargaining law, and federal and state employment discrimination law simultaneously discourage the same reforms.

Finally, courts lack the institutional capacity to undertake complex empirical analysis of policing or to constrain the police beyond identifying and enforcing constitutional rights. Because regulating the police requires such capacity, it is clear that courts cannot adequately regulate the police by themselves. Thus, regulating the police requires allocating responsibility among institutional actors to ensure a regime capable of intelligently choosing and efficiently promoting the best ends of policing. Yet the focus of scholarship remains on the courts, with little attention to the comparative roles, capacities, and incentives of nonjudicial institutions that can influence police conduct.

These neglected areas of inquiry—harm efficiency, the real law of the police, and comparative institutional analysis—suggest a new scholarly agenda that asks not how the Constitution regulates the police but how law and public policy can best regulate them. In this Article, I explore the development and limitations of the conventional paradigm and elaborate on this new agenda.

In Part I, I argue that courts alone cannot effectively interpret or enforce constitutional rights and that constitutional rights are inadequate to ensure that police practices are worth their individual and social costs. As a result, I maintain that the problem of policing requires moving beyond the conventional paradigm to recognize the significance of other institutions and sources of law in regulating the police. In Part II, I contend that criminal procedure scholarship remains limited by the conventional paradigm. Consequentially, contemporary scholarship does not fully address the weaknesses of that paradigm or provide adequate grounding for effective legal regulation of the police. In Part III, I identify the essential elements of a research agenda for future scholarship aimed at regulating the police. I maintain, first, that scholars should evaluate policing practices to determine whether they are harm efficient as well as whether they are constitutional and effective; second, that they should identify and explore the full effects of existing extraconstitutional legal regulation of the police; and third, that they should thoroughly compare local, state, and federal institutions to determine how to allocate responsibility for assessing and implementing

effective, efficient, and coherent regulation of the police beyond constitutional criminal procedure.

I. THE CONVENTIONAL PARADIGM

A. *The Warren Court Origins of the Conventional Paradigm*

The Warren Court imposed new, concrete constitutional standards on the police and charged courts with enforcing those standards through the exclusionary rule and civil liability. In so doing, the Court established as law the now conventional paradigm for addressing the problem of policing: courts use the Constitution as the primary means of regulating the police.

The conventional paradigm originated in the Warren Court's well-known jurisprudence. In *Monroe v. Pape*,¹ *Mapp v. Ohio*,² *Katz v. United States*,³ and *Miranda v. Arizona*,⁴ the Court enlarged the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment right against self-incrimination; implemented the exclusionary remedy for those enlarged rights; and broadened § 1983 liability. By expanding constitutional rights, the Court brought constitutional law to bear directly on police officers and departments. By augmenting constitutional remedies, the Court facilitated court challenges to police conduct. And by justifying its sweeping action on the ground that local and state governments had failed to prevent police misconduct, the Court established the primacy of constitutional adjudication for regulating the police. There has been tremendous debate about the import and consequences of these changes to the law of criminal procedure. But whatever else the Court can be said to have done, it allocated wholesale the responsibility for solving the problem of policing to courts and promoted the regulation of the police primarily by constitutional adjudication.

The Warren Court expanded the remedies for police misconduct before it expanded the rights. In 1961, in *Monroe*, the Court interpreted § 1983 to permit civil liability for police officers who violated federal rights even if those officials also violated state law.⁵ Even more importantly, later the same year in *Mapp*, the Court required state courts to exclude evidence obtained by searches and seizures that violated the Fourth Amendment.⁶ These decisions gave victims the incentive and means to challenge police conduct, the courts the opportunity to refine constitutional doctrine, and the police new reasons to comply with constitutional norms. In this way *Mapp*, and to a lesser degree *Monroe*, made the Amendment newly consequential.

1. 365 U.S. 167 (1961).

2. 367 U.S. 643 (1961).

3. 389 U.S. 347 (1967).

4. 384 U.S. 436 (1966).

5. *Monroe*, 365 U.S. at 192.

6. *Mapp*, 367 U.S. at 655.

Six years after *Mapp* and *Monroe* broadened Fourth Amendment remedies, *Katz* reshaped the right. *Katz* eliminated technical requirements that previously limited the scope of the Fourth Amendment⁷ and articulated a new standard for applying the Fourth Amendment to a police activity—namely, whether the government intruded on a privacy expectation on which the suspect “justifiably relied.”⁸ The Court later reframed this test in terms of whether the government interfered with a defendant’s “reasonable expectation of privacy.”⁹ This new approach brought a broader array of police practices within its ambit, and, by raising far more questions than it answered, *Katz*’s imprecise formulation spurred years of litigation.

In *Miranda*, the Court for the first time applied the Fifth Amendment privilege against self-incrimination to police interrogations and imposed prophylactic rules and an exclusionary remedy to protect suspects during those interrogations.¹⁰ Like *Katz*, *Miranda* subjected additional police activity to judicial review, and, like *Mapp*, the case incentivized litigation and police compliance. Thus, *Miranda* achieved for police interrogations what *Katz* and *Mapp* together achieved for searches and seizures.

If the holdings in *Monroe*, *Mapp*, *Katz*, and *Miranda* enabled courts to regulate police conduct, their reasoning established courts, especially federal courts, as the primary institution for performing this task. *Monroe* reasoned that § 1983 is premised on distrust of both state legislatures, which might provide discriminatory laws or inadequate remedies, and state courts, which might neglect to enforce rights even when the law demands it.¹¹ *Mapp* was premised on state legislative and judicial dereliction in protecting against Fourth Amendment violations.¹² *Katz* contended that law enforcement self-regulation is necessarily inadequate to protect constitutional rights.¹³ And *Miranda* began by describing a problem of policing—abuse

7. *Katz*, 389 U.S. at 353.

8. *Id.*

9. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 177 (1984) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

10. *See* *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

11. *Monroe v. Pape*, 365 U.S. 167, 173–74, 183–87 (1961).

12. *See* *Mapp v. Ohio*, 367 U.S. 643, 651–52 (1961) (noting that remedies other than the exclusionary rule for Fourth Amendment violations “have been worthless and futile”). The Court in *Mapp* further stated as follows:

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.

Id. at 660.

13. The Court stated as follows:

It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. . . . Searches conducted without warrants have been held unlawful notwithstanding facts

during interrogation—long left unsolved by police departmental regulation, states, and federal courts.¹⁴ These cases thus justified the expansion of constitutional rights and remedies as a means to address the failure of states, prosecutors, law enforcement agencies, and even the federal government to provide an adequate check on the police. They not only empowered the courts to use the Constitution to supervise police activities but also presupposed a world in which only courts are likely to do so. With this logic, *Monroe*, *Mapp*, *Katz*, and *Miranda* created a paradigm for how the police should be regulated. In that now-conventional paradigm, courts impose and enforce conduct limits on the police, and those conduct limits constitute the primary means of regulating the police.

While the Supreme Court's doctrines have changed over time, its enterprise has not. Since 1968, the Court has considerably loosened the constraints on the investigation and detection of crime imposed by the Fourth and Fifth Amendments, substantially narrowed the scope of the exclusionary rule, and, after expanding § 1983 liability significantly in the 1970s, contracted liability under § 1983.¹⁵ Even so, the paradigm arising from the Warren Court doctrines remains largely intact. Courts continue to apply the Fourth Amendment and the *Miranda* doctrine to require evidentiary exclusion and to permit civil liability to remedy civil rights violations by the police. Although the Court has occasionally raised doubts about its earlier rationale that judicial intervention is essential to compensate for the absence of alternative means of effective regulation,¹⁶ courts continue to

unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. Over and again, this Court has emphasized that the mandate of the Fourth Amendment requires adherence to the judicial process

Katz, 389 U.S. at 356–57 (alterations omitted) (citations omitted) (internal quotation marks omitted).

14. See *Miranda*, 384 U.S. at 447 (“[Abuses in custodial interrogations] are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future.”).

15. See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (ruling that a suspect who receives *Miranda* warnings waives his right to remain silent by making a voluntary statement to the police absent evidence that he did not understand his rights, despite language in *Miranda* to the contrary); *Herring v. United States*, 555 U.S. 135 (2009) (ruling that the exclusionary rule does not apply to constitutional violations resulting from police negligence rather than deliberate or reckless disregard for constitutional requirements or systemic error); *Virginia v. Moore*, 533 U.S. 164 (2008) (holding that the Fourth Amendment is not violated by a search incident to an arrest that violates state law); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (concluding that qualified immunity protects police officers from § 1983 suits where no prior cases “squarely govern[ing]” the conduct clearly establish in a “particularized sense” that the conduct is unconstitutional).

16. See *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (“We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago.”); *id.* at 599 (“[T]he extant deterrents against [knock-and-announce violations] are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided.”).

delimit and protect constitutional rights through criminal cases and civil suits as if the primary means to regulate the police must and does reside in the judiciary.

B. *The Limits of the Conventional Paradigm*

As this description suggests, the conventional paradigm for regulating the police depends on constitutional rights and remedies defined and enforced by courts. Although scholars have criticized aspects of the paradigm, it continues to shape the academic understanding of the problem of policing today.¹⁷ As a result, scholars have not adequately clarified the role that the courts and Constitution can, and cannot, play in defining and addressing the problem of policing. First, the judiciary cannot alone effectively define or prevent police misconduct. Even if the problem of policing were limited to constitutional rights, both defining and enforcing rights require empirical and causal analysis for which the judiciary is ill suited. Second, the problem of policing is not limited to constitutional rights. Consequently, courts and the Constitution play an important role in regulating the police, but the judiciary and the Constitution can never successfully address the problem of policing without assistance.

1. Courts Cannot Alone Interpret or Protect Constitutional Rights

The conventional paradigm holds that courts *ought to* and *can* address the problem of policing. Courts acting alone, however, will inevitably fall short of solving this problem, even on the narrow view that the problem of policing is to ensure respect for constitutional rights. Effective regulation of the police must include limits on police conduct and provide effective incentives for officers not to exceed those limits. Courts specify those limits when they interpret the Constitution to restrict police behavior, and they deter violations when they apply the exclusionary rule and § 1983. Truly effective limits and deterrents, however, require complex analysis of policing and the effects of constitutional doctrines on law enforcement behavior. Yet courts suffer from structural, and therefore systematic, limitations that prevent them from effectively undertaking this analysis. While the limited capacity of courts is well known, it is especially debilitating for the criminal procedure enterprise.

a. *Constitutional Criminal Procedure Requires Consequentialist Analysis by Courts*

Fourth Amendment doctrine requires courts not simply to discern the historical, moral, and political demands of the constitutional text, but also to make empirical judgments about the police and their interactions with citizens, as well as to draw causal conclusions about the repercussions of

17. See *infra* Part II.

possible constitutional rules. According to the Supreme Court, courts interpreting the Fourth Amendment must appraise the nature of the intrusion on the individual, the strength of the government's interest in the intrusion, and the consequences for law enforcement of various possible rules, and then balance these interests against each other.¹⁸ Assessing these considerations requires courts to draw factual conclusions about matters beyond the circumstances of the particular case,¹⁹ including, for example, what kinds of information a search method can reveal²⁰ and whether the same law enforcement ends could be achieved by alternative means.²¹

Courts must make these empirical and causal judgments not only when interpreting the substance of Fourth Amendment rights but also in determining their shape. The Court has sometimes articulated a permissive rule or rejected one,²² or established a bright-line rule or refused one,²³ because of the predicted effects of the alternative formulations. In *Atwater v. City of Lago Vista*, for example, the Court acknowledged that if it "were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail," but it nevertheless ruled against her in order to protect the government's "essential interest in readily administrable rules."²⁴ In both the content of rights and in their design, consequences are deeply embedded in the heart of the Fourth Amendment.

To be sure, not all Fourth Amendment analysis depends on consequences. When courts determine what values the Fourth Amendment protects, when those values are strongest, or when the interests of individuals can be

18. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 444–45 (1990); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). Recently, the Court has suggested that balancing should occur only if history provides no conclusively applicable "traditional standards of reasonableness." See *Moore*, 553 U.S. at 171; *Atwater v. City of Lago Vista*, 532 U.S. 318, 345–46 (2001); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999). But since history is rarely conclusive or uncontested, this trend has not avoided balancing the interests at issue.

19. See Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 736–37 (1998).

20. See *Caballes*, 543 U.S. at 409; *id.* at 411–13 (Souter, J., dissenting); *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001); *Smith v. Maryland*, 442 U.S. 735, 741 (1979).

21. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Brown v. Texas*, 443 U.S. 47, 50–51 (1979).

22. Compare *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (rejecting a permissive rule regarding the scope of a vehicular search incident to lawful arrest), with *Terry v. Ohio*, 392 U.S. 1, 26–30 (1968) (formulating a permissive rule regarding when a police officer may conduct a "stop and frisk").

23. Compare *United States v. Robinson*, 414 U.S. 218, 235 (1973) (establishing a rule permitting full searches of an arrestee's person incident to arrest regardless of the crime that triggers the arrest and without requiring reason to believe that the arrestee is armed or that evidence of the crime would be found), with *Illinois v. Gates*, 462 U.S. 213, 237 (1983) (favoring a totality-of-the-circumstances test for determining whether a tip establishes probable cause in part because the alternative two-pronged test would diminish the value of anonymous tips and therefore "seriously impeded[e] the task of law enforcement").

24. 532 U.S. 318, 346–47 (2001).

outweighed, they do so in light of the historical traditions and moral principles that underlie the Fourth Amendment right. Moral considerations are evident, for example, in the Supreme Court's conclusion that "[i]t is not better that all felony suspects die than that they escape."²⁵ Historical concerns motivated the Court when it declined to require arrest warrants for felons lawfully arrested in public because "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause."²⁶

However, in Fourth Amendment jurisprudence, even the Court's most principled decisionmaking is inevitably mixed with judgments about consequences.²⁷ For example, the Court made its moral judgment about killing fleeing felons in part because it concluded that its rule permitting deadly force against only dangerous fleeing felons would not unduly hamper law enforcement.²⁸ In cases in which the Court takes account of history, it also engages in analysis beyond it, because history is often equivocal, disputable, and not by itself sufficiently persuasive for many justices.²⁹ Inevitably, Fourth Amendment cases involve a *mélange* of judgments about individuals, law enforcement, and the future consequences of Fourth Amendment decisions.

25. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). *See also* *Kyllo*, 533 U.S. at 37–38 (finding thermal imagers to constitute a search and reasoning that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. . . . In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."); *United States v. Karo*, 468 U.S. 705, 716 (1984) ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."); *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . ."); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (requiring more stringent analysis of searches that intrude into an individual's body than other searches of the person because of the serious "human dignity and privacy" interests at stake).

26. *United States v. Watson*, 423 U.S. 411, 423 (1976). *See also, e.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("In evaluating the scope of [the Fourth Amendment] right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (looking to common law meaning of arrest to determine whether Hodari had been seized within meaning of Fourth Amendment).

27. *See* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 415 (1993) ("Rights matter, but rights are not all that matter. Even to those for whom rights loom large in personal and public decision making, consequentialist considerations of policy and prudence still occupy a significant proportion of the total decision-making picture.")

28. *See Garner*, 471 U.S. at 19–20.

29. *See, e.g., Arwater*, 532 U.S. at 336–46 (considering historical evidence regarding a rule limiting custodial arrests and then continuing on to balance competing Fourth Amendment interests); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (considering historical evidence regarding standards governing the search of a car passenger's belongings during a traffic stop and then continuing on to balance competing Fourth Amendment interests to reach a conclusion).

Miranda doctrine, like Fourth Amendment doctrine, mixes reasoning about fundamental constitutional values with reasoning about consequences. The *Miranda* decision itself is filled with conclusions about moral principles embedded in the privilege against compelled self-incrimination. Thus, for example, the *Miranda* Court found psychological intimidation by the police “equally destructive of human dignity” as physical intimidation.³⁰ At the same time, however, *Miranda* was self-consciously premised on the finding that abusive interrogation techniques were “sufficiently widespread to be the object of concern.”³¹ The Court also justified requiring warnings in part based on the predicted effects of its ruling, concluding that the Federal Bureau of Investigation practice of giving warnings could “readily be emulated by state and local enforcement agencies.”³² While the relationship between the underlying right and the procedural safeguards in *Miranda* doctrine has always been complicated, contested, and unstable, courts frequently depend on conclusions about law enforcement and the anticipated consequences of proposed rules in evaluating whether *Miranda* has been violated.³³ Delineating the scope of *Miranda*, like determining the limits of the Fourth Amendment, requires courts to assess institutional facts and analyze consequences.

In addition to defining constitutional rights, courts seek to prevent constitutional violations by police officers through the exclusionary rule and their interpretation of 42 U.S.C. § 1983.³⁴ Whereas the rights-*defining* enterprise is partially comprised of consequentialist judgments, this rights-*protecting* enterprise is based entirely on the likely effects of enforcement doctrines on police behavior. The purpose of the exclusionary rule is “to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”³⁵ The

30. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

31. *Id.* at 447.

32. *Id.* at 485–86.

33. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (requiring an unambiguous invocation of the right to silence under *Miranda* in part because “if an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused’s unclear intent and face the consequence of suppression if they guess wrong” (internal quotation marks omitted)); *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000) (reasoning that *Miranda* should not be overruled in part because “*Miranda* has become embedded in routine police practice” and the proposed alternative “is more difficult than *Miranda* for law enforcement officers to conform to”); *Michigan v. Tucker*, 417 U.S. 433, 447–48 (1974) (refusing to exclude evidence obtained in violation of *Miranda* in large part because it would not deter future police conduct).

34. *See Herring v. United States*, 555 U.S. 135, 135 (2009); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980). Section 1983 is an old and brief statute, and the Supreme Court exercises unusual control over its contours in the guise of statutory interpretation. It uses that power to vindicate § 1983’s purposes, including to deter illegal conduct by the police. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (outlining qualified immunity doctrine).

35. *Elkins v. United States*, 364 U.S. 206, 217 (1960), *quoted in Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

implicit theory is that excluding evidence deprives the government of criminal convictions and either that police officers care enough about losing cases to comply with the law or that those who supervise the police care enough to pressure officers to do so. The logic of § 1983 deterrence is like that of the exclusionary rule: threatening liability for money damages leads officers to comply with the law, and it leads supervisors, chiefs, and cities to influence them to do so.

This rights-protecting enterprise requires three levels of empirical and causal analysis by courts. First, § 1983 and the exclusionary rule are likely to incentivize lawful police behavior effectively only if courts make correct assumptions about what police officers value and how their professional and personal motives translate into conduct.³⁶ Second, courts' ability to tailor these tools to prevent constitutional violations depends on their ability to forecast how particular legal decisions translate into incentives for officers. And third, courts must analyze police behavior and institutions to take into account competing constitutional values. For example, since the Supreme Court has applied both the exclusionary rule and § 1983 selectively to minimize their impact on law enforcement,³⁷ the Court must predict the consequences of rulings on efforts to prevent crime as well as on potential constitutional violations.

b. Institutional Limitations Prevent Courts from Effective Consequentialist Analysis

Although courts can define and vindicate constitutional rights only if they are capable of the institutional assessments and predictive analysis required by the Court's own jurisprudence, they are notoriously ill suited to these tasks.

For one thing, courts act with grossly inadequate data. In *Berkemer v. McCarty*, for example, the Court decided that police officers are required to give *Miranda* warnings before questioning individuals arrested for minor offenses during a traffic stop, but not before questioning individuals detained in routine traffic stops without arrest.³⁸ The reasoning rests heavily on empirical assertions and predictions that lack support. For example, the Court concluded with respect to arrestees that “[t]he exception to *Miranda* proposed by petitioner would substantially undermine” clarity—a “crucial advantage” of the *Miranda* rule³⁹—because “the police *often* are unaware

36. They have been doubted. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 367–68 (2000).

37. *E.g.*, *Hudson v. Michigan*, 547 U.S. 586 (2006) (refusing to apply the exclusionary rule to knock-and-announce violations in part because of the significant costs to law enforcement); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (reversing a refusal to grant qualified immunity and emphasizing that police officers should be protected from litigation unless a prior case “squarely governs” the facts at issue).

38. 468 U.S. 420 (1984).

39. *Berkemer*, 468 U.S. at 430 (citing *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

when they arrest a person whether he has committed a misdemeanor or a felony.”⁴⁰ It also rejected the claim that “law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights,” noting that “[t]he occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare.”⁴¹ In determining that *Miranda* does not apply to traffic stops, the Court contended that “[t]he vast majority of roadside detentions last only a few minutes,”⁴² that “the typical traffic stop is public,”⁴³ and that a rule requiring warning “would substantially impede the enforcement of the Nation’s traffic laws . . . while doing little to protect citizens’ Fifth Amendment rights.”⁴⁴ Without doubting the correctness of either result in *Berkemer*, one might reasonably wonder, “Says who?”⁴⁵

Recently, scholars have encouraged courts to draw more heavily on social science research to bolster their empirical conclusions as a way to avoid unsupported assumptions.⁴⁶ But the problem cannot be so easily cured. Courts deciding constitutional criminal procedure matters have no effective mechanism to obtain empirical evidence and incorporate it into their normative judgments. Most Fourth Amendment questions are contested in state criminal cases in which neither party is likely to have adequate resources or incentives to effectively litigate significant empirical questions,⁴⁷

40. *Id.* (emphasis added).

41. *Id.* at 434.

42. *Id.* at 437.

43. *Id.* at 438.

44. *Id.* at 420.

45. The Supreme Court often acknowledges that it relies on intuition to predict the effects of its decisions on the police. *See* *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (“In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences from suspicious behavior, and this Court cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”); *Delaware v. Prouse*, 440 U.S. 648, 658–60 (1979) (“Although the record discloses no statistics concerning the extent of the problem of lack of highway safety, in Delaware or in the Nation as a whole, we are aware of the danger to life and property posed by vehicular traffic, and of the difficulties that even a cautious and an experienced driver may encounter.” (footnote omitted)).

46. *See, e.g.,* Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 4 ILL. L. REV. 851, 873 (2002) (arguing that empirical evidence is relevant to the Court’s normative choices in criminal procedure doctrine); Meares & Harcourt, *supra* note 19, at 735 (“call[ing] for a new generation of criminal procedure jurisprudence, one that places empirical and social scientific evidence at the very heart of constitutional adjudication,” and noting that other scholars have also called for such use); Symposium, *What Criminal Law and Procedure Can Learn from Criminology*, 7 OHIO ST. J. CRIM. L. 1 (2009) (exploring lessons from social science research for constitutional criminal procedure).

47. *See, e.g.,* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 331 (discussing institutional pressures on defense attorneys that discourage them from litigating defendants’ cases aggressively);

and even a civil plaintiff hoping for compensation after a violent arrest cannot cost-effectively litigate many matters. Courts also often know so little about the institutional structures, occupational norms, market pressures, political influences, and nonconstitutional laws that shape police conduct that they cannot ask the right questions in making judgments about the police. Even when courts are able to engage in effective empirical analysis, they have little opportunity or ability to adjust a doctrine as the facts and social science underlying the doctrine evolve.⁴⁸ As a result, courts have a systematic and profound disability in ensuring that doctrine accurately reflects the expected effects of criminal procedure rulings on the behavior of police.

One can see the depth of the problem in the Supreme Court's recent efforts to apply the exclusionary rule selectively. The Court often has refused to exclude evidence for Fourth Amendment and *Miranda* violations where it concludes the benefits are limited, such as where it perceives the kind of violation at issue to be difficult to deter.⁴⁹ The Court's assessments are based on selected research submitted by parties, and critics have disputed its conclusions about how much the rule deters and in which circumstances the rule deters best.⁵⁰ But the problem is not just with the outcome of any par-

Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1006–07 (1965). Nor can judges independently investigate these matters, given the volume of suppression motions.

48. Orin Kerr notes some of these disadvantages in arguing that courts should defer to Congress in regulating high-tech, new search technologies. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004) [hereinafter Kerr, *New Technologies*]. He points out that courts cannot easily understand new technologies or alter their rulings based on technological evolution, especially when that evolution is swift. *Id.* at 868–69. But Kerr assumes that in other Fourth Amendment contexts courts are expert fact finders acting well within their institutional core area of competence, *id.* at 863–64, and in this he is wrong.

49. See *Herring v. United States*, 555 U.S. 135, 144–48 (2009) (refusing to apply the exclusionary rule to negligent policy mistakes because doing so is not justified by its deterrent effect); *United States v. Leon*, 468 U.S. 897, 919–21 (1984) (refusing to apply the exclusionary rule when officers conducted an unconstitutional search in good faith reliance on a warrant because doing so is not justified by its deterrent effect); see also *Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998) (refusing to exclude evidence obtained in violation of the Fourth Amendment from a parole revocation hearing because doing so is unnecessary to deter and would provide only minimal additional deterrence); *Michigan v. Tucker*, 417 U.S. 433, 447–48 (1974) (refusing to exclude evidence obtained in violation of *Miranda* in large part because it would not deter future police conduct).

50. See *Leon*, 468 U.S. at 942 (Brennan, J., dissenting) (“[T]he Court’s decisions over the past decade have made plain that the entire enterprise of attempting to assess the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly or accurately. Although the Court’s language in those cases suggests that some specific empirical basis may support its analyses, the reality is that the Court’s opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data.”); Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009) (contending that the Court in *Herring* “asserts as a foregone conclusion, without an iota of supporting analysis or evidence, the proposition that application of the exclusionary rule in the instance of a negligent violation of the Fourth Amendment has a reduced ‘deterrent effect’”).

ticular case. The project as a whole is suspect. The exclusionary rule is instrumental. By its own lights, the Court should adopt whatever doctrine prevents the most violations at the lowest cost. Yet the Court has no reliable means of determining whether selective enforcement of the rule is likely to achieve that result more cost-effectively than applying the exclusionary rule consistently to all constitutional violations. The Court has never adequately justified its selective approach, yet its doctrine requires such a justification.⁵¹

Though legal scholars criticize the Supreme Court's efforts to regulate the police, they also tend to underestimate the extent of the problem. They note that courts struggle to formulate effective rules for the police⁵² and have difficulty preventing constitutional violations.⁵³ They highlight the obstacles to effective court judgments about new technologies,⁵⁴ and they criticize courts' empirical assessments in particular cases.⁵⁵ But contemporary criminal procedure scholars largely continue to view delineating constitutional rights against the police as well within the core institutional competence of courts.⁵⁶

The mismatch between judicial competence and the requirements of constitutional analysis distorts the contours of the law in two important ways. First, courts sometimes draw inaccurate empirical conclusions and

51. The same is true for § 1983 doctrine. The Court has limited § 1983 costs using qualified immunity doctrine, for example. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). But no one—least of all courts—knows how many § 1983 suits for police misconduct are filed or settled each year; what municipalities regularly spend on § 1983 claims; or what effect these suits have on police practices, much less when § 1983 best deters or how qualified immunity, insurance, and indemnification affect how much it does so. *See Marc L. Miller & Ronald F. Wright, Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 760 (2004) (attempting to determine how many tort suits are filed against police officers and noting that “the most important and revealing features of litigation against the police [are] hidden in the dark: who pays, and who is held accountable for the payments? Are payouts a significant portion of the police budget, or do settlements come out of the general revenues for the city? And even if settlements are a significant expenditure, are there mechanisms to translate judgments into changes in policy or personnel?”).

52. *See, e.g.,* CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 3–5, 62–94 (1993); Kerr, *New Technologies*, *supra* note 48, at 863–67 (2004).

53. *See, e.g.,* David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 160 (2009).

54. *See, e.g.,* Kerr, *New Technologies*, *supra* note 48, at 864–67.

55. *See, e.g.,* Meares & Harcourt, *supra* note 19, at 750–93.

56. *See, e.g.,* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 309 (2011) (prescribing changes to Fourth Amendment administrative search doctrine); Kerr, *New Technologies*, *supra* note 48, at 860–64 (arguing that in traditional cases—as opposed to cases involving new technologies—judges have the institutional capacity to create rules governing police behavior). I have been no exception. *See Rachel A. Harmon, When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1120 (2008) [hereinafter Harmon, *Police Violence*] (arguing “that concepts that structure justification defenses can and should be imported, subject to appropriate modifications into the Fourth Amendment doctrine regulating police violence”).

make flawed normative arguments about both rights and remedies.⁵⁷ Second, courts sometimes set deferential standards or disallow remedies not because they find facts that justify those determinations but because they recognize their inability to draw more rigorous conclusions about the context and consequences of their rulings.⁵⁸ Either way, as a result of institutional deficiencies, constitutional rights are not enforced to their “full conceptual boundaries.”⁵⁹ There may be an ineliminable role for courts in making normative decisions about the moral principles and historical traditions underlying constitutional rights, given that we ultimately depend on courts to make such judgments. But the enterprise of regulating the police by defining and protecting rights requires inputs from institutions other than courts.

2. Constitutional Rights Cannot Alone Protect Individuals Adequately from Police Intrusion

Courts lack the institutional capacity to regulate the police without substantial assistance from institutions designed to amass context-specific expertise and undertake complex, ongoing empirical analysis. But even if courts could overcome these barriers, a major objective of police regulation would still remain beyond their reach. If courts regulate the police, then the legal problem of policing is limited to constitutional violations. Constitutional rights are, however, structurally ill suited to balance societal interests in law enforcement and individual freedom.

Some policing is inevitably harmful, no matter how friendly, community oriented, or well done. Communities embrace policing precisely because they have an interest in harming some people for the greater good—by arresting those who have committed crimes, by shooting those who run away, by searching individuals’ cars on the street, or by questioning suspects once they are in custody.

Ideal regulation of the police would provide a normative framework for properly balancing individual and societal interests. It would specify the conditions under which the police *should*, rather than *may*, harm individual interests for the greater good. It would ensure that the quality of our lived

57. At least, they are often criticized for doing so. See, e.g., Sherry F. Colb, *What Is a Search?: Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 187 (2002) (criticizing the Court’s normative judgments about what constitutes knowing exposure); Meares & Harcourt, *supra* note 19, at 750–93 (criticizing the Court for failing to incorporate empirical research in criminal procedure cases); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 753 (2005) (describing the Court’s third party doctrine as “one of the most serious threats to privacy in the digital age”).

58. See, e.g., Barry Friedman, *Trumping Rights*, 27 GA. L. REV. 435, 459 (1993) (criticizing the Court for discounting evidence and deferring to other government decisionmakers); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978) (distinguishing between institutional and analytical reasons for limiting a “judicial construct of a constitutional concept”).

59. Sager, *supra* note 58, at 1213.

experience is not impoverished but rather enhanced by law enforcement activities. Ideal regulation would take into account considerations such as how harmful any police action is to individuals and communities, as well as how it compares to other means of producing law and order in terms of cost, harm, effectiveness, and officer safety.

While constitutional rights accommodate both individual and societal interests, they cannot approach the ideal balance between these interests. The well-known process by which constitutional rights are articulated and enforced instead dictates that rights can provide only a limited analysis of police conduct. First, rights establish only minimum standards for law enforcement. Because individuals assert rights against the police rather than the other way around, constitutional criminal procedure rights are always framed as a ceiling on government action (or a floor on individual rights) rather than as a thick account of how to balance competing interests when the police enforce the law and individuals are harmed. Constitutional criminal procedure rights are therefore commands about what the police cannot do, not standards for what they should do.

Second, because rights are categorical once they are defined, that “ceiling” must be lower and more generous to law enforcement than a true measure of the interests at stake. Constitutional criminal procedure rights set unbreakable rules for police officers in advance. In the process of defining rights, courts must thus accommodate the government’s interests *ex ante*. As a result, the rights themselves are defined to permit law enforcement flexibility in pursuing societal aims. This means, for example, that an unreasonable seizure may be lawful because it falls within a set of seizures that are useful to law enforcement and often reasonable.⁶⁰

Third, because rights are held and enforced by individuals, usually with respect to specific actions, they do a poor job of measuring aggregate costs and benefits of law enforcement activity or its effects on the quality of life in society. In fact, when we use rights alone to regulate the police, we may perversely invite excessive but constitutionally permissible harms to legitimate, constitutionally recognized interests. As William Stuntz has pointed out, constitutional rights effectively tax some police practices and subsidize others.⁶¹ By requiring warrants for house searches, Fourth Amendment law makes house searches more expensive for the police than *Terry* stops and frisks, which require only reasonable suspicion.⁶² Likewise, *Terry* stops are more expensive for the police than consent searches, which require no suspicion at all.⁶³ The Fourth Amendment therefore encourages the police to substitute street encounters for house searches without regard to the total costs of either practice.⁶⁴ If the vast number of lesser intrusions encouraged

60. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001).

61. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1822 (1998) [hereinafter *Stuntz, Race, Class, and Drugs*].

62. *Id.* at 1822–23.

63. *Id.*

64. *Id.*

by constitutional rules create aggregate harm that exceeds the harm caused by the total number of greater intrusions those rules protect against, some kinds of constitutional regulation may make policing less protective of constitutional interests overall.

Because of these characteristics, police can harm constitutional interests substantially and undesirably, even when they fully comply with the Constitution. The Constitution provides a rough measure of whether a particular harm to a constitutional interest is sufficiently justified and not exceedingly intrusive. But adequately protecting individual and communal interests requires regulatory efforts beyond the contemporary paradigm in the form of nonconstitutional regulation that ensures adequate justification for harm to important interests left unvindicated by constitutional law.

Consider the constitutional doctrines governing arrests, *Terry* frisks, and asset forfeiture. These doctrines illustrate how constitutional rights test whether the police have sufficient reason to harm a particular individual, but do not test whether the policing activity imposes too much harm on constitutional interests. The doctrine that governs home searches demonstrates that even when constitutional doctrines regulate the manner in which invasions of constitutional interests are carried out, they do not adequately protect against harms to those interests. Arrests and home searches require substantial constitutional justification, *Terry* frisks somewhat less, and asset forfeiture almost none at all. But all raise the same basic issue: even perfectly constitutional activity can impose serious harms that deserve attention beyond constitutional law.

Every arrest harms an individual, and perhaps a community, no matter how lawful. It may be hard to sympathize with the liberty interests of a violent criminal under arrest, but of the estimated 14 million people arrested for nontraffic-related offenses in the United States in 2008, only 4 percent were arrested for violent crimes, fewer than those who were arrested for either disorderly conduct or liquor law violations.⁶⁵ In New York City alone, from 1997 to 2006, more than 353,000 people were arrested for possessing small amounts of marijuana, a single minor misdemeanor.⁶⁶ Most of those people

65. *Crime in the United States, 2008*, FED. BUREAU OF INVESTIGATION (Sept. 2009), http://www2.fbi.gov/ucr/cius2008/data/table_29.html. In Washington, D.C., for example, more than one in five adult arrests were for disorderly conduct in the year 2000. CITIZEN COMPLAINT REVIEW BD., *DISORDERLY CONDUCT ARRESTS MADE BY METROPOLITAN POLICE DEPARTMENT OFFICERS 2* (2003), available at http://newsroom.dc.gov/file.aspx/release/7250/disorderly_conduct_policy_recommendation.pdf. By 2009, this number was one in nine arrests. METRO. POLICE DEP'T, *ANNUAL REPORT 2009*, at 28 (2010), available at http://mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/lib/mpdc/publications/ar_2009_lowres.pdf.

66. HARRY G. LEVINE & DEBORAH PETERSON SMALL, *N.Y. CIV. LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997-2007*, at 4 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf. These arrests raise concerns about equality as well as liberty, since they disproportionately affect the African American community. See *id.*; Jeremy Travis, President, John Jay Coll. of Criminal Justice, *Race, Crime and Justice: A Fresh Look at Old Questions* 5 (Mar. 19, 2008), available at http://www.jjay.cuny.edu/extra/speeches/racecrime_justice.pdf.

were handcuffed, taken to the police station, booked, and jailed overnight,⁶⁷ experiences that typically cause serious distress.⁶⁸ While the Constitution requires probable cause of criminal activity for each arrest, probable cause ensures only that there is a reason to arrest the individual, not that the arrest is a necessary or effective means of enforcing the law or preventing disorder. Once the probable cause standard is met, the Constitution has little to say about whether an arrest is desirable or worth its costs, even though those questions are crucial to deciding what the police should do.

The same can be said about *Terry* stops and frisks. In constitutional terms, a stop under *Terry* is a minor “seizure,” because it is brief, and a weapons pat down under *Terry* is a minor “search,” because it reveals only limited information about what is under a person’s outer garments.⁶⁹ Anyone who has experienced a *Terry* stop, however, knows that the harm to dignity can be substantial. And anyone who has been frisked knows that the invasion affects bodily integrity far more than privacy. Being frisked means being groped by a police officer. The *Terry* Court understood this latter point well.⁷⁰ Yet the constitutional rule established by the Court requires only “reasonable suspicion” for such a stop or a search—perhaps for good reason, given that such searches are intended to protect officers while they investigate crime.⁷¹ Nevertheless, the constitutional standard permits a vast number of these searches. In 2009, the New York Police Department alone conducted more than 575,000 stops and frisks, and it has conducted nearly three million since 2004.⁷² Though the New York Police Department is the country’s largest, there are more than 18,000 other law enforcement agencies in the United States. Together, the number of stops and frisks they conduct is likely mind-boggling, and these intrusions substantially undermine the quality of life in some American cities. Yet, so long as each search and seizure satisfies the Constitution, a police department may use *Terry*

67. LEVINE & SMALL, *supra* note 66, at 35.

68. William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 797–801 (1993); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132–34 (2008) (describing the process costs of arrests and demonstrating that they often dwarf plea prices).

69. *Terry v. Ohio*, 392 U.S. 1, 16–19 (1968); *see also* *Adams v. Williams*, 407 U.S. 143, 145–46 (1972) (characterizing an investigatory stop permitted by *Terry* as “an intermediate response” between arrest and ignoring the situation and describing a frisk for weapons authorized by *Terry* as a “limited search”).

70. The Court described *Terry* frisks as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment,” *Terry*, 392 U.S. at 17, and as a “severe, though brief, intrusion upon cherished personal security . . . [and] an annoying, frightening, and perhaps humiliating experience,” *id.* at 24–25.

71. The reasonable suspicion required for a stop is suspicion with respect to criminal activity. The suspicion required for the frisk is suspicion that the individual who has been stopped is armed and dangerous. *See Adams*, 407 U.S. at 146.

72. Al Baker & Colin Moynihan, *Paterson Signs Bill Limiting Stop-and-Frisk Data*, N.Y. TIMES CITY ROOM (July 16, 2010, 11:56 AM), <http://cityroom.blogs.nytimes.com/2010/07/16/paterson-signs-bill-limiting-street-stop-data>.

aggressively and strategically with constitutional—and usually legal—impunity.

Asset forfeitures are also a common tool of the police and are largely beyond constitutional regulation. Under civil asset forfeiture law, police may take property from individuals if the property is connected to a crime.⁷³ Asset forfeiture is self-evidently intrusive: its premise is that seizing property from individuals can deter them from criminal activity.⁷⁴ And yet federal law encourages it by creating substantial financial incentives for police departments to forfeit property.⁷⁵ Because these forfeitures are civil rather than criminal, the Constitution provides limited protection for those subject to them. As with arrests and *Terry* frisks, the harms that asset forfeiture threatens to individual constitutional interests cannot be fully addressed by constitutional rights.⁷⁶

Constitutional doctrines test not only whether police can act but also the manner in which they act. Thus, when a police officer executes a warrant to search a house, he must do so reasonably. However, just as the Constitution only roughly measures whether an activity is acceptable, it only roughly constrains the manner in which it is conducted. As a result, police engage in many legal but disturbingly intrusive searches: they enter homes at night in full SWAT gear, bang down doors with battering rams, detain partially dressed family members, shoot pet dogs when they approach, and damage interiors during the subsequent search.⁷⁷ Reasonable regulation of the police

73. See, e.g., *Bennis v. Michigan*, 516 U.S. 442 (1995).

74. Though most of those individuals it affects are never charged with a crime. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 77 (1998).

75. See, e.g., 18 U.S.C. § 981(e) (2006) (providing for “equitable transfer . . . of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property”); 21 U.S.C. § 881(e)(3) (2006) (directing the attorney general to transfer back to local law enforcement agency proceeds commensurate with the effort in producing forfeiture in order to “further cooperation between the . . . local agency and Federal law enforcement authorities”); ASSET FORFEITURE AND MONEY LAUNDERING SECTION, U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2009), available at <http://www.justice.gov/usao/ri/projects/esguidelines.pdf> (describing equitable sharing component of federal asset forfeiture program).

76. Our criminal justice system gives police enormous discretion with the expectation they will often “exercise discretion *not* to search and arrest.” William J. Stuntz, *Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 445 (1997). But asset forfeiture law gives police departments a direct financial stake in intruding upon individual property interests. See John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 183 (2001). As a result, it may considerably overincentivize many searches and arrests, disrupting the balance inherent in our system. Nevertheless, there has been little national effort to assess the full costs and benefits of forfeiture programs. Eric P. Baumer, *Evaluating the Balance Sheet of Asset Forfeiture Laws: Toward Evidence-Based Policy Assessments*, 7 CRIMINOLOGY & PUB. POL’Y 245, 245 (2008).

77. E.g., Pscyhostyle, *Columbia, MO SWAT Raid*, YOUTUBE (May 3, 2010), <http://www.youtube.com/watch?v=RbwSwvUaRqc> (showing police execution of search

would ask not merely whether the officers at the scene had good enough reason to do each of those things but also whether searches could have been conducted just as effectively and safely but less harmfully, as well as whether in a specific case or in the aggregate that level of intrusion is worth the societal gain. But the Constitution does not demand this inquiry.

Scholars often contend that where a constitutional doctrine does not adequately protect constitutional interests, the doctrine should be changed.⁷⁸ While some constitutional doctrines are unquestionably too narrow, the problem of lawful violations of constitutional interests cannot be solved through constitutional reinterpretation. Constitutional rights are structurally incapable of encouraging law enforcement to impose only necessary, fair, and efficient harms on legitimate individual interests. They are also unable to require that the means and goals for law enforcement do not undermine the lived experience of individuals and communities. When law enforcement and individual interests collide, constitutional rights alone cannot delineate the appropriate balance between the two.

II. THE CONVENTIONAL PARADIGM IN SCHOLARSHIP

The conventional paradigm molds the work of scholars as well as courts. Although scholars have long been critical of the Warren Court's jurisprudence governing the police, legal scholars considering the problem of policing nevertheless overwhelmingly take constitutional law to be their method and the scope of constitutional regulation to be their subject. Some recent scholarship challenges aspects of the conventional paradigm by considering nonconstitutional law governing the police and by using the social sciences to better understand how police conduct is shaped. But neither the traditional scholarship nor the contemporary alternatives fully address the weaknesses of the conventional paradigm and provide adequate grounding for effective legal regulation of the police.

warrant); Matt Pearce, *Update: SWAT Raid Prompts Columbia Police Review of Policies*, MISSOURIAN, May 9, 2010, <http://www.columbiaindian.com/stories/2010/05/06/update-swat-raid-prompts-police-review-policies>; Matt Pearce, *Columbia Police's Internal Investigation Finds No Wrongdoing by SWAT Officers*, MISSOURIAN, May 20, 2010, <http://www.columbiaindian.com/stories/2010/05/20/police-internal-investigation-finds-no-wrongdoing-swat-officers>; see also RADLEY BALKO, *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* (2006) (discussing paramilitary drug raids and cataloging examples of intrusive warrant executions).

78. See, e.g., CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 206 (2007) (arguing that Fourth Amendment jurisprudence should no longer focus on "the traditional probable cause/individualized suspicion model"); Primus, *supra* note 56, at 261 (arguing that current administrative search doctrine should be changed because it "imposes few limits on government conduct and paves the way for indiscriminate searches and seizures"); Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 COLUM. L. REV. 1751, 1771-85 (1994) (arguing for a move beyond physical privacy interests to the idea of government-citizen trust).

A. *The Conventional Paradigm's Influence
on Contemporary Scholarship*

Scholars have long challenged the normative conclusion of the Warren Court—that courts and the Constitution *should* serve as the primary legal mechanism for regulating the police.⁷⁹ But scholars also largely accept the descriptive claim that courts and the Constitution *do* serve that role.⁸⁰ As a result, legal scholars studying the police overwhelmingly adopt the methods and subjects of the paradigm. Since the Warren Court, academics have largely confined their analysis of the problem of policing in law to constitutional analysis of police conduct that falls within the plausible scope of the Fourth and Fifth Amendments.⁸¹

The paradigm has two primary effects on thinking about the problem of policing. First, scholars largely confine their approach to the acceptable methodologies of constitutional reasoning and adhere to the norms of a specialized kind of constitutional law. A straightforward approach to regulating the police would attempt to “determine the objectives, examine the alternative methods of obtaining these objectives, and choose the best method for doing so.”⁸² But since the Warren Court, scholars who study the law governing the police have been constitutional criminal procedure scholars. Rather than seeking to identify the best means and ends for regulating the police given the costs and benefits of law enforcement, they evaluate appropriate limits on police conduct by looking to the text and structure of the Constitution, the history of the Fourth and Fifth Amendments, and prior judicial precedents.⁸³ They might consider the problem that policing poses, or public

79. See, e.g., BRADLEY, *supra* note 52, at 3–4; Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 930–31 (1965).

80. See, e.g., RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 333–34 (2d ed. 2005); Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 129 (2005).

81. Some scholars have noticed this problem. See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 789–92 (2003) (“For four decades, criminal procedure scholars have focused on federal constitutional rulings by the Supreme Court.”); Elizabeth Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 160 (2009) [hereinafter Joh, *Breaking the Law*] (“[P]olice practices left mostly untouched by federal constitutional law lie beyond the focus of the legal academy as well.”); see also DAVID SKLANSKY, *DEMOCRACY AND THE POLICE* 5 (2008) (“Because thinking about criminal procedure has tended to focus on the questions taken up by courts, the unfortunate result has been not just that *judges* have largely failed to consider the systemic requirements for democratic policing, but that most of the rest of us have, too.”).

82. STEPHEN BREYER, *REGULATION AND ITS REFORM* 5 (1982).

83. For just a few relatively recent examples in the Fourth Amendment context, see, for example, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 36–37 (2011) (arguing that the text of the Fourth Amendment supports a notion of Fourteenth Amendment and that from the 1920s to the 1960s the Court had “interpreted the Fourth, Fifth, and Sixth Amendments in a manner consistent with the promise of equal citizenship contained in the Fourteenth Amendment”); Colb, *supra* note 57, at 123 (suggesting a return to the foundations of the knowing exposure

policy arguments for particular rules, and the costs and benefits of those rules, but only to the extent that those arguments constitute acceptable discourse within constitutional scholarship.⁸⁴

Second, scholars take their subject to be Supreme Court cases involving the Constitution rather than the problem of policing.⁸⁵ Hundreds of articles and books favor or oppose the Warren Court's decisions, arguing that those decisions were or were not revolutionary, and that the revolution failed, succeeded, or has been reversed over time.⁸⁶ Scholars describe and denounce or defend warrant requirement exceptions or the Court's approach to custody, interrogation, and waiver.⁸⁷ They argue that a police activity falls within or outside the scope of the Fourth Amendment.⁸⁸ Professors fight for broader

doctrine in order to determine what is appropriately a search under the Fourth Amendment); and Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 610 (2007) (rejecting the assumption that the Fourth Amendment requires probable cause, individualized suspicion, or even the exclusionary remedy and instead suggesting that the reasonableness requirement could be met by the proportionality and exigency principles).

84. For some recent examples in the *Miranda* context, see, for example, Russell Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1890 (2005) (concluding that the policy objectives of *Miranda* "seem virtually to demand that compulsory interrogation receive Fourth Amendment scrutiny"); Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 784 (2006) (proposing revised *Miranda* warnings, a requirement that police reiterate the warnings throughout lengthy investigations, and videotaping of interrogations to "more effectively achieve the intended policy goals of the right to counsel warnings"); and Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 316 (2004) (providing constitutional rationales for mandatory taping of interrogations in order to realize *Miranda's* goal of regulating interrogation).

85. See Bibas, *supra* note 81, at 789–92. Though Bibas believes that the paradigm is breaking down, he is too sanguine about constitutional criminal procedure scholarship and casebooks today. Although the literature incorporates more reference to "the real world," it continues to allow the Supreme Court to set the agenda, at least with respect to the police. Thus, the then-new casebooks that he describes as revamping criminal procedure are organized by almost precisely the same principles as their predecessors—that is, by the intellectual architecture of Supreme Court constitutional criminal procedure. See RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* (1st ed. 2001); MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* (1st ed. 1998) [hereinafter MILLER & WRIGHT, *CRIMINAL PROCEDURES* (1st ed.)]; *infra* text accompanying notes 105–106.

86. See, e.g., BRADLEY, *supra* note 52; Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, the *Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (Vincent Blasi ed., 1983); Symposium, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 OHIO ST. J. CRIM. L. 1 (2005).

87. For some recent examples, see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009) [hereinafter Kerr, *Third-Party Doctrine*] (defending the third-party doctrine); and Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004) (criticizing the Court's warrantless vehicle search doctrine).

88. See, e.g., Colb, *supra* note 57, at 184–87 (criticizing Supreme Court reasoning in cases like *United States v. White* that allows it to "classify the government's use of pretend friends and tracking devices as failing to implicate the Fourth Amendment" and contending

or narrower readings of the Constitution by revising the Founding history or minimizing its significance.⁸⁹ Articles assess the impact of the Court's jurisprudence on law enforcement, the guilty, the innocent, racial minorities, and the war on drugs, and often point out the Court's inattention to the same.⁹⁰ And an extensive literature debates whether the exclusionary rule is good, good enough, or bad, whether it deters constitutional violations by the police, and whether it is better or worse than plausible alternatives, which often means some form of monetary damages.⁹¹

By contrast, scholars do not write much about police conduct that does not end up at issue in criminal cases, such as the misuse of force.⁹² They do

that “on the logic of *Kyllo*, rummaging through Greenwood’s garbage should therefore be considered a search”); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 163–64 (criticizing *United States v. Drayton* and *Florida v. Bostick*, arguing that “it does not follow that there was no seizure and no unconsented search for Fourth Amendment purposes” in each case).

89. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 763 (1994) (consulting Fourth Amendment history as a basis for advocating contemporary interpretation of the Amendment, that it requires only that all searches be reasonable); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 555–56 (1999) (arguing that contemporary interpretations of the Fourth Amendment are inconsistent with the historical meaning of the Amendment for the Framers, but arguing that return to the original meaning “would subvert the larger purpose for which the Framers adopted the text”); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581, 605–06 (2008) (contending that “many scholars have misinterpreted Fourth Amendment history” and suggesting that adherence to the original understanding might improve upon the “chaotic and inconsistent state of current Fourth Amendment jurisprudence”).

90. See, e.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964–74 (2002) (considering and expanding on existing literature on relationship between Fourth Amendment jurisprudence and race); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1459–66 (1996) (considering and adding to literature on significance of guilt and innocence in Fourth Amendment jurisprudence).

91. A recent symposium on the Fourth Amendment, for example, considered three questions: “(1) How important is (should) history (be) to the resolution of Fourth Amendment questions, and how good (or bad) a job does the Supreme Court do in construing history?; (2) What value(s) is (are) the Fourth Amendment intended to serve?; and (3) Is the exclusionary rule a good (the best) way of enforcing these values?” Arnold H. Loewy, *The Fourth Amendment: History, Purpose, and Remedies*, 43 TEX. TECH L. REV. 1, 1 (2010). For just a few creative proposals out of the vast literature on the exclusionary rule, see Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111 (2003) (proposing a pairing of punishing police illegalities and reducing defendants’ sentences if they are victims of those illegalities); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001) (proposing enforcing exclusion only when police departments refuse to pay damages set by the court as a penalty for illegality); and Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (proposing an administrative damages scheme for Fourth Amendment violations).

92. See Harmon, *Police Violence*, *supra* note 56, at 1122 (“Criminal procedure scholars have largely focused on a set of police activities—searches, seizures of property, interrogations, and techniques of community policing—other than the use of force.”); Joh, *Breaking the Law*, *supra* note 81, at 159, 198 (noting that scholars have paid inadequate “attention to areas where the Court has paid very little attention: undercover policing, police

not address the majority of police contacts with the public, which are initiated by a call for service from the public, involve no serious crime or pressing emergency, and fall outside the scope of the Constitution.⁹³ Few articles compare institutions in their capacity or incentives to address the problem of policing, or consider all possible mechanisms that might be used to do so. And scholars rarely write about the rest of the “law of the police”—the body of federal, state, local, and even international law that applies to police officers and departments and influences what they do.⁹⁴ Thus, there are few articles on how employment discrimination law, state law enforcement officer bills of rights, labor law, and civil service laws affect police behavior. And there are no articles on the implications of laws and regulations establishing hiring criteria, physical fitness requirements, or residency requirements for police departments, even though all of these laws and regulations can be intricately related to police misconduct. Instead, legal scholars write about constitutional law, and according to legal scholars, the Constitution continues to be the primary means for regulating the police.⁹⁵

The scholarship is not and has never been naïve or uncritical. It has, for example, long noted limitations of using courts to regulate the police,⁹⁶ and it has always recognized the importance of internal departmental

discretion, and police corruption, to name a few”). Of course, some scholars—especially more junior ones—defy this trend. *See, e.g.*, ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009) (considering law enforcement practice of offering deals to criminal offenders in exchange for information); Joh, *Breaking the Law*, *supra* note 81 (considering undercover policing); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004) [hereinafter Joh, *Private Policing*] (considering private policing).

93. *See* NAT’L RESEARCH COUNCIL, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* 58 (Wesley G. Skogan & Kathleen Frydl eds., 2003). Although most police contacts with citizens are initiated by calls for service, more face-to-face encounters are traffic-related, either the product of a stop by an officer or an officer responding to the scene of an accident. *See* MATTHEW R. DUROSE ET AL., *BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005*, at 3 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf> (indicating that, in 2005, 56.3 percent of face-to-face contacts were traffic-related and 29.9 percent involved either an individual reporting a problem to the police or receiving assistance from them).

94. *See infra* text following note 128 & Section III.B.

95. There are exceptions to this conventional scholarship. Elizabeth Joh, for example, self-consciously goes beyond constitutional methodology and constitutional subject matter in considering the police, and thus constitutes a counterexample to some of the limitations I describe in contemporary scholarship. *See, e.g.*, Joh, *Breaking the Law*, *supra* note 81, at 158 (discussing authorized criminality by undercover police officers and considering legal regulation beyond constitutional law); Joh, *Private Policing*, *supra* note 92, at 51 (discussing private police and the nonconstitutional law that regulates them).

96. *See* Friendly, *supra* note 79, at 930–32 (arguing that the complexity of criminal procedure calls for legislative compromise and lamenting the settling of issues for all time by the Court); Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge’s Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 991–95, 1000–02, 1003–04 (1965) (discussing limitations of judicial governance of law enforcement decisions).

rulemaking in shaping what police officers do.⁹⁷ But the subjects and methods of scholars continue to follow the Warren Court vision. The Warren Court announced what was self-evidently true—that self-regulation of police was inadequate and that neither federal or state legislatures nor local governments had systematically addressed the problem of policing. It then filled that gap with the tools it had. And policing in this country is better as a result. But the Warren Court framework obscures as well as empowers. Like courts, scholars since the Warren Court era consider the problem of preventing constitutional violations, not the problem of regulating the police.

B. *New Trends in Scholarship and the Conventional Paradigm*

Although the vast majority of scholarship on legal regulation of the police since the Warren Court has been constrained by the subjects and methods of constitutional law, scholars recently have exceeded both limitations of the conventional paradigm.⁹⁸ Specifically, some scholars describe nonconstitutional law that regulates the police more thoroughly, and others use social science rather than constitutional law to describe determinants of police conduct. This scholarship teaches new lessons about the laws that constrain police conduct and the nonlegal factors that shape it, and thereby partially defies the limits of Warren Court thinking. Despite its significant contributions, however, new scholarship on policing remains circumscribed by the conventional paradigm.

1. New Extraconstitutional “Con Law” Scholarship

As noted above, most conventional criminal procedure scholars accept the descriptive premise of the conventional paradigm—that the Supreme Court’s application of the federal Constitution to local policing is the primary regulator of the police.⁹⁹ In recent years, however, some scholarship has challenged this component of the conventional paradigm, alleging that meaningful regulation of the police outside of the Fourth and Fifth Amendments already exists. Although this scholarship advances understanding of the law governing police conduct, it also operates within the conventional framework for legal analysis of the police.

For example, in two recent articles, Orin Kerr catalogues some means outside the Fourth Amendment for regulating criminal investigation. In one,

97. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 80–84, 222–224 (1969) (advocating that police discretion should be governed by detailed administrative rules); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 417–19 (1974) (same).

98. See Bibas, *supra* note 81, at 789–92 (noting that while scholars continue to focus primarily on constitutional doctrine, “a shift is afoot,” with new scholars writing about politics, race, and other nontraditional topics).

99. See *supra* note 83.

he suggests that entrapment law, the *Massiah* doctrine,¹⁰⁰ the First Amendment, and internal police department regulations supplement the Fourth Amendment in limiting undercover police activity.¹⁰¹ In the other, he describes federal statutes that supplement Fourth Amendment regulation of new search technologies.¹⁰² While Kerr's work draws attention to frequently neglected statutes and judicial doctrines that constrain police conduct, Kerr ultimately uses these nonconstitutional alternatives to defend his interpretation of the Fourth Amendment: He describes and lauds statutory regulation of privacy in order to argue for legislative implementation of ideal Fourth Amendment doctrine.¹⁰³ And he argues in favor of the third-party doctrine to undermine one component of the paradigm—the claim that constitutional law provides the primary regulation of the police—in order to deflect critics who might claim that constitutional law should regulate the police because other means of regulating the police are inadequate.¹⁰⁴ In both cases, his work is illustrative of recent scholarship in criminal procedure: it continues to contribute to the “con law” enterprise even as it describes nonconstitutional law governing the police.

Even when scholars do not expressly make claims about constitutional law, their forays into nonconstitutional law governing the police often remain constrained by the conceptual structure of Fourth and Fifth Amendment doctrine. For example, Marc Miller and Ron Wright have been rightly lauded for their casebook, *Criminal Procedures*.¹⁰⁵ This book advances understanding of the regulation of the police considerably by presenting cases, statutes, and administrative regulations from local and state actors that illustrate local variations in laws governing the police. It also adds some subjects rarely considered in the criminal procedure canon, such as internal administrative remedies, community policing, and juvenile curfews.

The Miller and Wright book, however, expands rather than transcends the conventional paradigm. While it recognizes sources of law governing the police beyond courts interpreting the Fourth and Fifth Amendments, it

100. In *Massiah v. United States*, 377 U.S. 201 (1964), the Supreme Court prohibited the use of incriminating statements against a defendant at trial because they were obtained in the absence of his attorney after the Sixth Amendment right to counsel attached. The *Massiah* doctrine prohibits the police from deliberately obtaining information from a defendant after formal charges are brought in the absence of counsel or a knowing, voluntary, and intelligent waiver of the right to counsel. See *Brewer v. Williams*, 430 U.S. 387, 397–406 (1977).

101. Kerr, *Third-Party Doctrine*, *supra* note 87, at 590–94.

102. See Kerr, *New Technologies*, *supra* note 48, at 840–57.

103. *Id.* at 838.

104. See Kerr, *Third-Party Doctrine*, *supra* note 87.

105. MILLER & WRIGHT, *CRIMINAL PROCEDURES* (1st ed.), *supra* note 85; accord Bibas, *supra* note 81, at 794 (describing Miller and Wright's book as representing a “huge” and “welcome” shift in emphasis); Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 *BUFF. L. REV.* 909, 909 (2001) (“Marc Miller and Ronald Wright have produced perhaps the most original criminal procedure book in many years, because it departs more than any other casebook from the conventional model of building all material around United States Supreme Court cases.”).

primarily describes rules that regulate police conduct during criminal investigations—the subject of the Fourth and Fifth Amendments—rather than the full range of laws shaping police conduct, such as those that determine how police officers are hired and managed. And it is organized very much like other casebooks—into chapters analyzing searches, seizures, and interrogations in accordance with the Supreme Court’s Fourth and Fifth Amendment doctrines.¹⁰⁶ Thus, the Miller and Wright book inherits the analytic architecture of constitutional law even as it defies the almost exclusive focus on constitutional doctrine that scholars studying the law governing the police have otherwise embraced.¹⁰⁷

2. New Legal “Non Law” Scholarship

A second and more dramatic trend in contemporary legal scholarship has been to leverage nonlegal tools to provide a richer account of policing than traditional criminal procedure scholarship allows. Thus, scholars such as William Stuntz, David Sklansky, Tracey Meares, and Bernard Harcourt use public choice theory, political science, and sociology to describe the political economy, professional culture, real-world behavior, institutional conditions, and demography of policing.¹⁰⁸ This scholarship challenges the conventional paradigm by using nonconstitutional methodologies to de-

106. Even where Miller and Wright most depart from traditional doctrine, in their first chapter addressing “Daily Interaction Between Citizens and Police,” MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* (2d ed. 2005), at 3–31 [hereinafter MILLER & WRIGHT, *CRIMINAL PROCEDURES* (2d ed.)], the materials are largely organized around Supreme Court doctrines, including community care-taking and vagueness. Another innovative casebook, CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: REGULATION OF THE POLICE INVESTIGATION, LEGAL HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS* (2007), also pushes the bounds of the traditional paradigm by conceiving of the police expressly as a distinctive subject of legal regulation. However, this book too is organized by Supreme Court doctrine.

107. See *supra* note 85. Of course, since *Criminal Procedures* is a casebook, one might argue that the authors have pedagogical rather than scholarly reasons to tie themselves to the conventional paradigm. Nevertheless, the book has been fairly treated by other scholars as an innovation in scholarship as well as teaching. See, e.g., Weisberg, *supra* note 105, at 909.

108. See, e.g., BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING AND PUNISHING IN AN ACTUARIAL AGE* 21–24 (2007) (referencing economic models of profiling, probability, and actuarial science); SKLANSKY, *supra* note 81, at 3–9 (describing project of drawing insights from political science literature on democratic theory for contemporary policing); Meares & Harcourt, *supra* note 19, at 749, 786, 773 (referencing sociological theory, demographic surveys, and police professionalization); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–43 (2001) [hereinafter Stuntz, *Pathological Politics*] (focusing on political economy and institutional dynamics of policing). Other notable legal scholars contributing to a nonlegal understanding of the police are Jeffrey Fagan and Tom Tyler. See Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited*, in RACE, ETHNICITY, AND POLICING (Stephen K. Rice & Michael D. White eds., 2009) (assessing the economic and demographic impact of “broken windows” policing strategies); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002). Fagan and Tyler, like Harcourt, have academic training in other disciplines as well as law.

scribe determinants of police conduct outside of constitutional law, and it provides a fuller account of the costs and benefits of policing. In these ways, this new literature challenges both components of the conventional paradigm in scholarship: that constitutional law provides the method for studying the legal regulation of the police and that it delineates the subjects of that study. Despite its strengths, however, this criminal procedure scholarship can mostly be considered either “con law” or “non law.” Scholars use an enriched analysis of the police either to draw conclusions about constitutional doctrine—reentering the conventional paradigm—or without reference to legal doctrine at all.

For example, influential criminal procedure scholar William Stuntz drew on public choice theory to analyze the interaction between constitutional criminal procedure, substantive criminal law, and police conduct. He noted, for instance, that police enforce laws against cocaine powder and crack differently because public, downscale drug markets are easier to pursue under contemporary constitutional doctrine than upscale markets that occur behind closed doors.¹⁰⁹ More often than not, however, Stuntz used his insights into policing to draw conclusions about constitutional criminal procedure rather than legal regulation of the police more generally, arguing that constitutional doctrine causes a problem for policing, that it could be adjusted to fix a problem, or both.¹¹⁰ Other scholars do the same.¹¹¹

As part of a broader, much-celebrated turn toward interdisciplinarity, empiricism, and criminology, other policing scholars reexamine many of the costs and benefits of police conduct.¹¹² Thus, for example, Bernard Harcourt

109. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 794 (2006) [hereinafter Stuntz, *Political Constitution*]; Stuntz, *Race, Class, and Drugs*, *supra* note 61, at 1799.

110. See, e.g., William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002) [hereinafter Stuntz, *Local Policing*] (arguing for changes to the Fourth Amendment and *Miranda* doctrine in order to improve crime control while improving protections of liberty and privacy in the face of concerns about terrorism); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001) (arguing that defects in Fourth Amendment law caused problems in the O.J. Simpson and Bill Clinton cases and that improvements to Fourth Amendment law could mitigate such problems); Stuntz, *Pathological Politics*, *supra* note 108 (arguing that constitutional doctrine causes pathological tendencies in policing, prosecution, and punishment); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001) (arguing that the *Miranda* doctrine has been an ineffectual way to regulate police conduct).

111. See, e.g., Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1159 (1998) (discussing relationship between community policing and current criminal procedure doctrine); Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 110 (2005) (critiquing the Court for failing to emphasize fundamental fairness in crafting constitutional criminal procedure); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580 (2008) (suggesting that in spite of vast changes in policing over the past four decades the exclusionary rule still plays a significant role in governing police under our system of criminal procedure).

112. While scholars have called before for incorporating insights from criminology into criminal procedure, see, e.g., Robert Weisberg, *Criminal Law, Criminology, and the Small*

challenges the empirical and theoretical premises of broken windows policing, arguing that this policing approach does not prevent crime.¹¹³ And Tom Tyler, Jeffrey Fagan, and others examine the costs of common street-policing techniques to public perceptions of police legitimacy and, by extension, to crime control.¹¹⁴ But this work bypasses legal analysis entirely in favor of empirical or institutional conclusions—even when it purports to contribute to legal scholarship.¹¹⁵ Thus, these scholars primarily add to the social sciences from which they draw, exiting entirely from the *legal* enterprise of understanding and solving the problem of policing. As these examples suggest, new trends in legal scholarship concerning the police push the limits of the conventional paradigm, but they do not yet transcend them. The result is that contemporary legal scholarship on policing does not adequately recognize or foster the project of governing police conduct through law.¹¹⁶

III. BEYOND THE CONVENTIONAL PARADIGM: A NEW SCHOLARLY AGENDA FOR THE PROBLEM OF POLICING

The police are already shaped by law. To be effective, however, legal regulation of the police must be grounded upon a broader conceptual foundation that the conventional paradigm has obscured. Effective governance of the police requires a normative framework for assessing whether constitutionally permissible policing practices properly balance efficacy against individual and social harms. It requires assessing means for influencing police conduct. And it requires allocating responsibility to institutional actors to ensure a regime capable of choosing and promoting the best ends. As a result of the conventional paradigm, the scholarly agenda has not been tailored to identify the best ends, mechanisms, or institutions for regulating the police. Rather, three prerequisites for regulating the police outside the conventional paradigm have been neglected.

World of Legal Scholars, 63 U. COLO. L. REV. 521, 529 (1992), this new literature takes policing rather than criminal procedure as its subject.

113. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 8–11, 57–180 (2001).

114. See, e.g., TYLER & HUO, *supra* note 108, at xiv–xv (arguing that “the way in which members of the public are treated by legal authorities—process-based policing . . . can enhance their willingness to cooperate with and defer to those legal authorities” and that by reinforcing legitimacy, police officers can increase long-term legal compliance); Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 139 (2008) (explaining that erosion of legitimacy harms cooperation and legitimizes the rejection of “legal and social norms”).

115. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (1999); David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006).

116. As I have noted, there are counterexamples of legal scholars on policing who defy many of these limitations. See *supra* notes 92, 95.

First, since the problem of policing extends beyond constitutional law to developing goals for effective and harm-efficient policing, regulating the police requires understanding the full costs and benefits of policing and its techniques. But the conventional paradigm distorts the agenda of legal scholars and social scientists. For example, as a result of the conventional paradigm, academics interested in criminal procedure often devote themselves to assessing the costs and effectiveness of *Miranda* warnings¹¹⁷ and the exclusionary rule.¹¹⁸ Even if the exclusionary rule and *Miranda* are components of a multifaceted regulatory regime, questions about them recede in importance if these tools are not the primary means of influencing police conduct and the Constitution is not the main standard by which policing is measured. By contrast, scholars insufficiently study the comparative costs and benefits of policing techniques, and therefore have not provided an adequate basis for establishing affirmative goals for harm-efficient policing.

Second, determining how to influence police misconduct requires understanding the determinants of police conduct, including existing opportunities to influence that conduct and their limitations. While scholars have studied many determinants and correlates of police conduct, they have not adequately considered the full set of federal, state, and local laws that create and influence the police. Instead, focusing on constitutional criminal procedure obscures the complex set of laws that shapes what police officers and departments do. This neglect has stymied efforts to regulate the police effectively. Presently, for example, courts tailor § 1983 and the exclusionary rule to encourage reform in police behavior, but federal and state employment and labor law simultaneously discourage the same reforms. As noted in Section II.B, some new scholarship describes state and federal conduct rules outside constitutional law and examines the interaction between substantive criminal law and constitutional criminal procedure. But there remains a vast, unexplored realm of law that governs policing, and understanding that law is essential to promoting effective police reform.

117. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1059–60 (1998) (using regression analysis to conclude that clearance rates have declined as a result of *Miranda*); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 652–665 (1996) (tentatively concluding that *Miranda* results in lower conviction rates but noting that police have adapted to its requirements).

118. See generally Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611 (1983) (reviewing a National Institute for Justice study and others and concluding that the effect of the exclusionary rule on disposition of felony arrests was exaggerated); Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004) (reporting results of direct observation of police behavior to determine compliance with Fourth Amendment); Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases": The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034 (1991) (studying incidence of "lost" exclusionary rule cases when police acquire a search warrant).

Third, if courts are limited in their capacity to govern the police, then addressing the problem of policing requires allocating institutional responsibility for regulating the police more broadly. That in turn requires comparing the incentives and capacities of the main institutional actors: police departments, local governments, state courts, state legislatures, federal and state administrative agencies, and Congress. While some new criminal procedure scholarship has contributed to this task, the project of regulating the police effectively requires more analysis to determine the best mechanisms and institutions for reform. This Part makes some initial observations about what these projects might entail.

A. Harm-Efficient Policing

Regulation of the police should provide a normative framework for balancing individual and societal interests. As Part I argued, constitutional law does not ensure that police actions are necessary or justified. Police officers may impose constitutionally permissible harms on individuals and communities that are nonetheless ineffectual in reducing crime, fear, or disorder. Regulation of the police should promote harm-efficient policing—that is, policing that imposes harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms.

Presently, though our intuitions about policing practices are tied closely to whether those practices are worth the costs they impose, debates about them focus on whether the practices are constitutional or whether they are effective, not whether they are harm efficient. As Part I noted, for example, *Terry* stop and frisks can impose substantial individual and aggregate costs. Those costs are most visible in New York, where the New York Police Department has engaged in almost three million stops over the past five years. Some critics of the program contend that it should cease because it is unconstitutional. They argue that many of the stops are insufficiently justified by individual suspicion and therefore violate the Fourth Amendment. They also contend that the program amounts to racial profiling in violation of the Fourteenth Amendment.¹¹⁹ Other critics argue that New York's program is ineffectual as a means of crime control. For example, some scholars have argued that *Terry* stops undermine police legitimacy, which in turn undermines public compliance with law and cooperation with law enforcement.¹²⁰ Procedural justice theorists therefore oppose aggressive *Terry* stops and frisks as “counterproductive” in fighting crime and producing order.¹²¹ Ad-

119. See, e.g., Complaint at 2, *Floyd v. City of New York*, No. 08 Civ 1034, 2011 WL 3856515 (S.D.N.Y. Aug. 31, 2011), available at http://ccrjustice.org/files/Floyd_Complaint_08.01.31.pdf.

120. See, e.g., Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 350 (2011).

121. See, e.g., *id.*

vocates of the program, by contrast, contend that it is both effective and constitutional.¹²²

This debate often erroneously presumes that constitutional and effective police tactics are justifiable. Even if, as some critics claim, many stops are unjustified, by the critics' own measure, hundreds of thousands of stops performed by the New York Police Department each year are likely based on sufficient individual suspicion.¹²³ Many of those are against white New Yorkers, and some solve or prevent serious crimes.¹²⁴ One can imagine a well-designed stop-and-frisk program that could be both constitutional and effective in preventing crime and disorder. But such a program might still be undesirable. If the harm costs of such a program are high, and the benefits are limited, then stop and frisks could be harm inefficient and therefore unjustified.

Harm efficiency is presently a matter largely left to the local political process, and police departments and local and state governments already take it into account in governing policing, at least to some degree. Departments adopt, for example, internal regulations forbidding consent searches without reasonable suspicion of criminal activity, even though constitutional law demands no individualized suspicion before requesting consent to search.¹²⁵ But whichever institutions shape this form of regulation and whatever mechanisms are used to promote it, in order for regulatory actors to promote harm-efficient means of policing, scholars need to lay the groundwork. This requires establishing theoretical accounts of what the relevant harms are and how the harms should be measured, and empirical work measuring and comparing harms and policing efficacy. This work has not yet been done.¹²⁶

Scholars research the effectiveness of policing techniques.¹²⁷ And some scholars assess empirically the harms policing techniques impose, especially

122. See, e.g., Ray Rivera & Al Baker, *Police Cite Help From Stop-and-Frisk Data in 170 Cases*, N.Y. TIMES, July 16, 2010, at A15 (describing the New York police commissioner's contention that data collected through stop and searches provided a "breakthrough for detectives" in solving crimes).

123. See, e.g., Report of Jeffrey Fagan at 4, *Floyd v. City of New York*, No. 08 Civ 1034, 2011 WL 3856515 (S.D.N.Y. Aug. 31, 2011), available at http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf.

124. See *id.* at 22, 56.

125. Compare Charlottesville Police Department, Biased Based Policing General Order, 06-02 (2005) (on file with author), with *Schneckloth v. Bustamonte*, 412 U.S. 218, 232 (1973) (noting that a search request may be the logical result of police investigatory procedures and not requiring individualized suspicion to initiate one).

126. Though some scholars have pointed out the aggregate costs of particular aggressive policing policies, see, e.g., Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV., 1253, 1285-87 (2000), better analysis requires more fully fleshed theoretical work on how to evaluate such policies.

127. See NAT'L RESEARCH COUNCIL, *supra* note 93, at 228-29; David Weisburd & John E. Eck, *What Can Police Do To Reduce Crime, Disorder, and Fear?*, 593 ANNALS AM. ACAD. POL. & Soc. Sci. 42, 50-51 (2004).

with respect to racial impact and legitimacy.¹²⁸ But there is no substantial empirical or theoretical literature that presently can be used to compare policing techniques with respect to both effectiveness and harm. Instead, harm efficiency is a side note in scholarly arguments about policing strategies, if it is present at all.

Critics of zero tolerance and broken windows policing, for example, often contest their effectiveness rather than object to their costs, though the most powerful objection to them is that they are harm inefficient.¹²⁹ In response to concerns about these strategies, scholars have advocated potentially more harm-efficient alternatives, such as problem-oriented policing, hot spots policing, and pulling levers policing.¹³⁰ But they have advocated these strategies primarily on the ground that they are effective at crime control. Accordingly, research on these philosophies has been focused more on their effects on crime and disorder rather than their individual and communal harms or whether they are less intrusive than feasible alternatives. Even when scholars make secondary claims about harm efficiency in promoting a policing strategy, those claims are supported by anecdotes rather than evidence.¹³¹ Until scholars lay the conceptual and empirical groundwork for understanding harm efficiency, institutional actors will be stymied in their efforts to regulate the police toward this end.

128. But this literature is often devoted to assessing the effects of these harms on crime control. See, e.g., 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, 262 (2008) (considering public evaluations of police decisionmaking and arguing that study results show that “legitimacy shapes willingness to cooperate with the police in fighting crime”).

129. See, e.g., HARCOURT, *supra* note 113, at 7, 57–121 (contending that “there is no good evidence to support the broken windows theory”).

130. See Anthony A. Braga & David Weisburd, *Problem-Oriented Policing: The Disconnect Between Principles and Practice*, in POLICE INNOVATION 117 (Anthony A. Braga & David Weisburd eds., 2006); David Kennedy, *Old Wine in New Bottles: Policing and the Lessons of Pulling Levers*, in POLICE INNOVATION, *supra*, at 155; Dennis P. Rosenbaum, *The Limits of Hot Spots Policing*, in POLICE INNOVATION, *supra*, at 245.

131. Research on the High Point Drug Market Intervention Strategy developed by David Kennedy and Sue-Lin Wong provides an example. While the “High Point Strategy” is primarily justified as a means of reducing violent crime and closing public drug market areas, its supporters also note that “[i]t does not produce the community harms that our traditional street-sweeping, unfocused efforts of the past have.” See DAVID M. KENNEDY & SUE-LIN WONG, JOHN JAY COLL. OF CRIMINAL JUSTICE, THE HIGH POINT DRUG MARKET INTERVENTION STRATEGY, at v (2009), available at <http://www.cops.usdoj.gov/files/RIC/publications/e08097226-HighPoint.pdf> (quoting a police department chief commenting on the impact that the High Point Strategy has had in the local community). While the strategy’s effectiveness and ability to mobilize communities have been subject to considerable evaluation, its claims about being less harmful to individuals and communities than alternatives have been less well examined, in part because the theoretical grounds for evaluating harm efficiency are not in place.

B. *The Neglected Law of the Police*

Constitutional criminal law is not the primary law that regulates the police in the United States. Instead, there is a substantial body of law that creates, empowers, influences, and constrains the police and those that supervise them. This law—the law of the police—is far more extensive than the law that courts or scholars have taken into account, and understanding it is a prerequisite for effectively regulating the police.

1. The Example of Employment Law and Civil Rights Litigation

Ignorance of the law of the police already undermines efforts to protect civil rights. Consider the interaction between the judiciary's efforts to encourage changes in police departments and state and federal employment and labor law. The courts often attempt to prevent constitutional violations by excluding evidence and imposing damages, but their efforts cannot achieve their aim effectively because collective bargaining, civil service laws, and employment laws discourage reform.

Both § 1983 and the exclusionary rule rely on departments to shape officer conduct. Section 1983 may have little direct effect on police officers who often have qualified immunity, are indemnified, or are judgment proof, but it may weigh more heavily on departments in cities that pay judgments. The exclusionary rule cannot work if officers do not care about securing convictions, and only departments can make them care, whether through formal or informal incentives. Thus, courts can succeed at preventing constitutional violations only if their doctrines encourage police departments to take cost-effective measures to prevent constitutional violations by officers.

Experts largely agree about the reforms departments should undertake to prevent misconduct. The best departments hire psychologically stable and physically capable officers. They require substantial initial and ongoing training. They provide clear, specific policies and practices, and tailor training and equipment accordingly. They maintain effective mechanisms for reporting, investigating, and responding to legal and policy violations by officers, including retraining, counseling, disciplining, or firing officers when necessary. And they usually have an early-warning system that identifies potentially misconduct-prone officers so that the department can intervene proactively.¹³² To promote civil rights, the exclusionary rule and § 1983 should encourage these or similar practices.

132. See JEFFREY J. NOBLE & GEOFFREY P. ALPERT, *MANAGING ACCOUNTABILITY SYSTEMS FOR POLICE CONDUCT* 286–88 (2009); SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 100–01 (2005); Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 *GEO. MASON U. C.R. L.J.* 479, 508–10 (2009) (describing the mechanisms of early warning systems required by consent decrees and memoranda of agreement negotiated under Section 14141 interventions).

The Supreme Court and lower federal courts have expressly tailored § 1983 liability to incentivize almost precisely these best practices. Departments and supervisors may be held liable for inadequate hiring procedures¹³³ and for failing to train subordinates adequately.¹³⁴ They can be liable for acquiescing in unconstitutional conduct by failing to adequately investigate complaints or discipline officers.¹³⁵ Thus, courts have found § 1983 liability where doing so would incentivize departmental reforms likely to reduce misconduct. While the exclusionary rule is less finely tailored, its costs accrue to departments, and it should have the same effect: it should encourage departments to adopt reforms likely to reduce constitutional violations.

The incentives for reform are, however, only one side of the equation. The costs of reform also dictate what departments do, and other legal incentives can impose costs on a department's choices. In the limiting case, for example, it would be pointless for federal law to incentivize reforms that violate state law. But even if the desired reforms are legally permissible, federal law cannot achieve much reform by imposing liability if state and local laws impose significant costs on the most effective reforms, creating countervailing economic and political incentives not to adopt them. This is the case now.

In a majority of states, for example, civil service laws heavily regulate recruiting, promoting, transferring, demoting, and terminating public employees, including police officers.¹³⁶ These rules impose significant restrictions on how departments hire.¹³⁷ More importantly, these laws empower employees to challenge any internal managerial action that affects them on both substantive and procedural grounds in a formal adversarial process. These challenges ensure frequent and costly legal battles when police departments demote, transfer, or fire any officer.¹³⁸ Whatever the

133. See *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403–05 (1997).

134. See, e.g., *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of Okla. City v. Tuttle*, 471 U.S. 808 (1985); *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1239–41 (10th Cir. 1999); *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991); *Brandon v. Allen*, 645 F. Supp. 2d 1261, 1265–70 (W.D. Tenn. 1986).

135. See *Vineyard v. County of Murray*, 990 F.2d 1207, 1212–13 (11th Cir. 1993) (affirming finding of liability for inadequate policies of supervision, discipline, and training that amounted to deliberate indifference toward unconstitutional conduct); *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) (affirming liability for police chief in light of system in which reports of physical and sexual assault by officers were discouraged or even covered up); *Gentile v. County of Suffolk*, 926 F.2d 142, 145–47 (2d Cir. 1991) (affirming liability for a pattern or practice of refusing to investigate incidents of misconduct or to discipline officers).

136. I am using the term “civil service law” broadly to include other state and local laws that provide adjudicative mechanisms to appeal the hiring, demotion, reassignment, or firing of police officers on either substantive or procedural grounds.

137. See WILL AITCHISON, *THE RIGHTS OF LAW ENFORCEMENT OFFICERS* 96–97 (6th ed. 2009).

138. See, e.g., David Armstrong, *Conduct Unbecoming: Second Chance for Bad Cops; Chiefs Say Civil Service Thwarts Discipline*, BOS. GLOBE, May 21, 2000, at A1 (describing

benefits of these laws in insulating the police from political influence, civil service laws impose significant additional costs on police departments trying to manage, discipline, or fire officers who commit misconduct. They therefore disincentivize precisely the same conduct that § 1983 and the exclusionary rule should encourage. Given this counterincentive, § 1983 and the exclusionary rule may not prevent constitutional violations effectively—or perhaps at all.¹³⁹

Worse, civil service laws are likely to be an especially efficient disincentive. A supervisor facing an officer who sometimes uses too much force faces two basic options: he can address the problem by transferring, retraining, demoting, or firing him, or he can leave him be. If the supervisor does nothing, the officer may someday engage in misconduct, which may cause cognizable injury to a victim. That victim may find a lawyer willing to sue, and the city may face some costs as a result, which may translate into some costs for the department. But if the supervisor transfers, demotes, or fires the officer, or even if he demands retraining, the same supervisor faces the practical certainty that the officer will appeal within the civil service system. The officer's counsel will be experienced in civil service appeals and funded by the police union. That appeal will also often be heard *de novo* by a group of political appointees that is sympathetic—if not beholden—to officers' interests.¹⁴⁰ And that appeal will impose significant immediate costs on the city and department, in addition to potentially undermining the chief's authority. Thus, even if § 1983 imposes significant costs on departments, those

the difficulty of firing police officers accused of misconduct). Although Massachusetts may be an extreme case, it is hardly unique in making efforts to discipline officers costly. Mandatory arbitration for discipline appeals provided for by collective bargaining can have similar effects and is perhaps even more favorable to officers. See AITCHISON, *supra* note 137, at 98; Jane Prendergast & Kevin Aldridge, *Ex-Cop May Be Rehired: Evidence Ruled Insufficient in Owensby Death*, CIN. ENQUIRER, May 6, 2004, at 1C; Jane Prendergast & Robert Anglen, *10 Fired Officers Returned to Force: City Lost All Cases Taken to Arbitration*, CIN. ENQUIRER, Jan. 18, 2001, at 1A; see also AITCHISON, *supra* note 137, at 107–86 (describing dozens of civil service or arbitration appeals of internal discipline in which the appeal resulted in less discipline than was imposed by the department).

139. Unfortunately, data about police misconduct and its remedies are presently too limited to say how well constitutional remedies deter. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 28–34 (2009) [hereinafter Harmon, *Proactive Policing*] (noting that data on police misconduct is limited and describing how the absence of mandatory data collection limits the effectiveness of efforts to enforce 42 U.S.C. § 14141). Moreover, there are many obstacles to deterring police misconduct with constitutional remedies other than the costs imposed by other legal doctrines. See, e.g., Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1028 (2010) (contending that law enforcement agencies lack basic information about lawsuits against their cities and officers); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 475 (2004) (arguing that chiefs of police may tolerate police brutality because the political gains of aggressive policing outweigh the financial costs of liability); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (contending that government actors do not internalize financial costs against cities in the same manner as private actors).

140. See, e.g., Armstrong, *supra* note 138.

indeterminate costs will be imposed sometime in the distant future, while the costs of civil service appeals will be certain, swift, and substantial.¹⁴¹

This interaction between § 1983 and civil service laws may do more than hinder efforts to address officer conduct in specific instances; it also may have pernicious systemic effects on efforts to prevent police misconduct. Experts have trumpeted the importance of strong internal disciplinary mechanisms in preventing misconduct.¹⁴² However, when a department knows that an officer has violated the Constitution but takes no personnel action in order to avoid a civil service appeal, it increases the risk that the department will later be subject to § 1983 liability for failure to discipline, train, or terminate officers. Even if a department would sooner face that liability risk than the civil service appeal, it would surely prefer to avoid both. Because discovering misconduct triggers the dilemma, the department can reduce its expected costs by weakening its internal misconduct investigations. If it does not know of the misconduct, it cannot easily be held liable for failure to discipline, train, or terminate officers.¹⁴³ Though going too far could risk liability for deliberate indifference to constitutional violations,¹⁴⁴ the department probably could significantly reduce the number of findings of misconduct—and therefore the number of times it faces this problem—without stepping over that line. The interaction between civil service law and § 1983 may therefore perversely undermine the very accountability that courts seek to strengthen.¹⁴⁵

141. Civil service rules may discourage police officers as well as supervisors from action. See John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 267–68 (2000) (explaining how officers face vastly greater risk of liability for wrongful acts than for failing to act and noting that civil service protections, which generally prevent workers from being fired for merely doing a bad job, further discourage action).

142. See NOBLE & ALPERT, *supra* note 132, at 207–08.

143. A city that is not directly liable for failing to prevent misconduct may still face costs if the officer is held liable for the misconduct and the city has indemnified the officer. See, e.g., *Wilson v. City of Chicago*, 120 F.3d 681 (1997) (finding the City of Chicago responsible for paying damages awarded against a police officer pursuant to a state indemnification statute even though the claims directly against the city had been dismissed). Where indemnification is mandated by statute or is widespread and is also broadly construed, one would not expect departments to have a strong incentive to diminish internal accountability to avoid external liability.

144. See *City of Canton v. Harris*, 489 U.S. 378, 385–92 (1989) (holding that failure to adequately train police officers can create § 1983 liability if it “amounts to deliberate indifference to the rights of persons with whom the police come into contact”).

145. The tax imposed by civil service laws can have other effects as well. To avoid the costs of a civil service appeal, departments will often negotiate with an officer to resign rather than be fired. See Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 559, 560 n.116 (2001) [hereinafter Goldman & Puro, *Revocation*]. Once he resigns, however, he is free to apply to any of hundreds of other law enforcement agencies in the same state, so long as he is not decertified. Most states have restrictive decertification mechanisms that do not permit decertification for many kinds of misconduct. See ROGER L. GOLDMAN, NAT’L ASS’N FOR CIVILIAN OVERSIGHT OF LAW ENFORCEMENT, *THE CASE FOR PEACE OFFICER DECERTIFICATION* (2011) (on file with author) (describing the limits on state revocation of certification). Of course, we might not fear this as much if the second department could learn

Collective bargaining rights deter department-wide changes intended to prevent constitutional violations even more dramatically. Imagine a department that wants to strengthen the effectiveness of its disciplinary process or change its promotion standards to avoid rewarding overly aggressive policing. In the thirty-six states that require collective bargaining, police departments are required to bargain with police unions before imposing any new rule that could affect any term or condition of employment.¹⁴⁶ This bargaining must continue in good faith until the parties reach an agreement or an impasse. An agreement will presumably require compromise with the union, which typically will oppose policies that increase internal accountability for police officers. Courts will not step in to resolve an impasse unless the negotiations have been at length and the department has negotiated in good faith. If the department fails to bargain before implementing a new rule, the union may bring an unfair labor practice charge against the department, which can be costly to defend. Collective bargaining therefore functions like an immediate tax on those internal departmental reforms.¹⁴⁷

While civil service and collective bargaining laws provide particularly clear cases in which the Court's efforts may be undermined by the law of the police, many other laws may also interfere with policing reform. For example, federal employment discrimination law constrains hiring, promoting, transferring, and firing officers.¹⁴⁸ State law enforcement officer

the circumstances of the resignation from the first, but in many cases, the first department will avoid conveying any information for fear of a defamation suit or a suit for depriving the employee of his Fourteenth Amendment due process rights. See Goldman & Puro, *Revocation*, *supra*, at 548–49; see also Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 566–69 (1972). Thus, nonconstitutional law may promote an unfortunate result: officers with a history of misconduct who move from department to department.

146. See John M. Collins, *Thirteen Ways To Lose a Labor Case*, POLICE CHIEF (Nov. 2009), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1940&issue_id=112009. Some states and local governments allow, but do not require, collective bargaining, and in many of those jurisdictions, contracts with public employees require such bargaining. In 2007, Congress considered H.R. 980, which would have required all states and local governments to collectively bargain with public safety employees, including police officers. Forty-one percent of local police departments, employing seventy-one percent of all officers, authorized collective bargaining for sworn personnel. Collective bargaining is apparently effective. The average starting salary for entry level officers was \$8,900 higher in departments that authorized collective bargaining than in those that did not. MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2003, at 12 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd03.pdf>.

147. For both civil service and collective bargaining, the timing is aggravated by the fact that police chiefs have a limited expected tenure, and that tenure is dependent in part on the costs they incur for the department and city while on the job. As a result, they will more heavily discount future costs and more heavily count immediate costs than other actors. See Harmon, *Proactive Policing*, *supra* note 139, at 47 (noting that police chiefs heavily discount future costs and benefits “because they may be out of office when those costs and benefits are felt, whereas the near-term costs and benefits will often dictate their political futures”).

148. See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101–07, 104 Stat. 327, 330–36 (codified as amended at 42 U.S.C. §§ 12111–17 (2006)); Civil Rights Act, 42 U.S.C. § 2000 (2006); Martin J. Mayer, *ADA and the Hiring Process*, POLICE CHIEF (Sept. 2009), <http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display>

bills of rights interfere with departmental efforts to investigate misconduct.¹⁴⁹ Fourteenth Amendment doctrines give officers a means to challenge termination or demotion for failing to satisfy due process or equal protection standards.¹⁵⁰ Ironically, even Fourth Amendment law may undermine reform, at least to some extent, because it limits the circumstances in which police departments can search patrol cars and station houses to investigate employees for misconduct.¹⁵¹

Moreover, the legal context in which departments operate is not static. The Age Discrimination in Employment Act of 1967 (“ADEA”) was passed to protect older workers from discrimination in employment. The statute initially applied only to private employers but was amended to protect local government employees, including police officers, in 1974.¹⁵² Following litigation over how to apply the ADEA to police departments,¹⁵³ Congress inserted a public safety exemption into the ADEA in 1986, making its provisions once again inapplicable to local police departments.¹⁵⁴ That exemption expired in 1993, and police departments were again subject to

&issue_id=92009&category_ID=3; Karen J. Kruger, *When Does an Employment Disciplinary Action Violate the Fourteenth Amendment’s Protection of the Liberty Interest?*, POLICE CHIEF (Mar. 2008), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1107&issue_id=22007.

149. See Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 200–01 (2005). They often limit the timing, location, circumstances, and content of disciplinary interviews. *Id.* at 217. Many other state laws affect the hiring and management of police officers. New York, for example, has Civil Service Law, Public Officers Law, Military Law, Town and Village Law, state human rights and general employment laws, and the Public Employees Fair Employment Act (The Taylor Law), all of which affect the hiring and management of the police. New York City has additional rules, including the Municipal Civil Service Rules. See N.Y. STATE, DEP’T OF CIVIL SERV., SUMMARY OF NEW YORK STATE CIVIL SERVICE LAW ii, 1 (2008), available at <http://www.cs.ny.gov/pio/publications/summofofsl.pdf>.

150. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 535–48 (1985); *Washington v. Davis*, 426 U.S. 229 (1976); see also Kruger, *supra* note 148.

151. See *O’Connor v. Ortega*, 480 U.S. 709, 718 (1987) (holding that “whether [a public] employee has a reasonable expectation of privacy must be addressed on a case-by-case basis”); see also Kim Wilson, *When Does an Employer’s Search of Employee Work Areas Violate Privacy Rights?*, POLICE CHIEF (Aug. 2009), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1568&issue_id=82008. This, of course, the Supreme Court has realized, see *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), though not in conjunction with the incentives created by § 1983 and the exclusionary rule.

152. Martin Schiff, *The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?*, 67 ST. JOHN’S L. REV. 13, 14 (1993).

153. See, e.g., *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980) (remanding for consideration of whether the ADEA exemption applied to the forced retirement of a police chief at fifty-five); *EEOC v. City of Minneapolis*, 537 F. Supp. 750 (D. Minn. 1982) (holding that the ADEA exemption did not apply to the forced retirement of a police chief at sixty-five).

154. See Schiff, *supra* note 152, at 14–15.

suits under the ADEA.¹⁵⁵ In 1996, Congress acted again, partially exempting public safety employers from the ADEA.¹⁵⁶

As these examples suggest, departments enter a legal minefield whenever they take employee action or make new policies.¹⁵⁷ This is not to say that we should eliminate any of these laws. They all have complicated effects: civil service rules were, perhaps ironically, created in part to reduce misconduct by reducing corruption and partisanship in policing.¹⁵⁸ Collective bargaining results in higher salaries for police officers, which may attract more qualified candidates and therefore reduce misconduct.¹⁵⁹ Moreover, these laws may be justified because they protect officers' rights and reduce discrimination, even if they also inhibit reform. Still, these laws interact in significant ways with § 1983's and the exclusionary rule's intended incentives to reform. Yet courts have not much considered them, or even recognized their potential relevance, in shaping § 1983 and the exclusionary rule.¹⁶⁰

Legal scholars have likewise failed to consider the effects of legal regimes that tax departmental efforts to prevent constitutional violations, such as civil service law, collective bargaining, and employment discrimination law. Instead, scholars have inferred that § 1983 cannot work because cities pay significant damages pursuant to § 1983 yet continue to engage in police misconduct, and they have speculated about why. No scholar, however, has analyzed the other side of the equation—the full costs and legal obstacles to reform that could counter any incentives federal law creates.

Consistent with the conventional paradigm, courts and scholars contemplate constitutional law and its remedies rather than the broader problem of policing. As a result, courts and scholars have neglected the effects and interactions of the full range of laws that influence the police. As the example of employment and labor law suggests, this neglect already undermines legal efforts to prevent misconduct. The problem of policing requires comprehensive consideration of the real law of the police.

155. *Kopec v. City of Elmhurst*, 193 F.3d 894, 897 (7th Cir. 1999).

156. Age Discrimination in Employment Act of 1967, Pub. L. No. 104-208, § 119(1), 100 Stat. 3009, 3009–23 to –24 (codified as amended at 29 U.S.C. § 623(j)(1) (2006)).

157. Julie Risher, *Supervisory Law Basics for New Chiefs and Other Supervisors*, POLICE CHIEF (Aug. 2006), http://www.policiechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=976&issue_id=82006.

158. See, e.g., Craig D. Uchida, *The Development of the American Police: An Historical Overview*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 17, 26–27 (Roger G. Dunham & Geoffrey P. Alpert eds., 6th ed. 2010).

159. See HICKMAN & REAVES, *supra* note 146, at 12.

160. Quite to the contrary, the Supreme Court has sometimes assumed the effectiveness of internal accountability mechanisms. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (describing internal departmental discipline as an effective alternative to the exclusionary rule for deterring civil rights violations).

2. Categorizing the Law of the Police

The vast web of law regulating the police can be divided into five categories. The first two encompass much of the law that is commonly thought to regulate the police: the law that authorizes or restricts the conduct in which they may engage, and laws that remedy, punish, or disincentivize violations of the first category. However, the law within these categories is not limited to constitutional criminal procedure doctrines or remedies, and the law of the police is not limited to these categories. In addition, there is law that governs police qualifications and training, law that regulates the management and organization of police officers, and law that governs the availability of information about police activities.

a. Conduct Rules

Laws that expressly regulate police conduct come from diverse sources ranging from the Vienna Conventions on Consular and Diplomatic Relations, which limit police power to engage in searches, seizures of property, and arrests, to a San Francisco ordinance that prohibits police officers from questioning people about immigration status.¹⁶¹ Federal law, for example, contains more than a dozen statutes that regulate police searches, electronic surveillance, and access to private information.¹⁶² These include the obvious—such as Title III,¹⁶³ which governs wiretaps, and the Electronic Communications Privacy Act,¹⁶⁴ which imposes requirements for law enforcement access to e-mails—and the obscure, such as the Health Insurance Portability and Accountability Act, which restricts law enforcement access to and use of medical records.¹⁶⁵ And federal law concerning the police is

161. Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967); Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964); S.F., CAL., ADMINISTRATIVE CODE ch. 12H (2007).

162. These include the Wiretap Act, the Stored Communications Act, the Drivers Privacy Protection Act, the Electronic Communications Privacy Act, the Pen Register Act, the USA-PATRIOT Act, the Fair Credit Reporting Act, the Right to Financial Privacy Act, the Family Education Right to Privacy Act, the Cable Communication Policy Act, the Video Privacy Protection Act, the Health Insurance Portability and Accountability Act, and the Privacy Protection Act, among others. See Solove, *supra* note 57, at 763–78 (discussing federal statutes regulating police investigation using new technologies).

163. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212–23 (codified at 18 U.S.C. §§ 2510–20 (2006)).

164. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 201[a], 100 Stat. 1848, 1861 (codified at 18 U.S.C. § 2703(c)(1) (2006)).

165. The Health Insurance Portability and Accountability Act, for instance, restricts law enforcement access to medical marijuana prescriptions permitted under local or state law. See 42 U.S.C. §§ 1320d to 1320d-6 (2006); Deedee Correll, *Privacy Act Hinders Police Investigations: Federal Law Stops Cops from Getting Patient Details Quickly*, COLO. SPRINGS GAZETTE, May 11, 2003, at A1; Kim Wilson, *HIPPA and Law Enforcement Access to Medical and Mental Health-Care Records*, POLICE CHIEF (Aug. 2009),

not limited to statutes regulating searches and seizures. For instance, the Illegal Immigration Reform and Immigrant Responsibility Act provides for local police enforcement of federal immigration law,¹⁶⁶ and the Law Enforcement Officers Safety Act allows qualified active and retired law enforcement officers to carry a concealed firearm anywhere in the United States, even if forbidden by state law.¹⁶⁷

Federal law concerning the police is not limited to statutes. Federal constitutional doctrines outside of the Fourth Amendment and *Miranda* also affect the police: the First Amendment limits the conditions under which police officers may make arrests for breach of the peace, disorderly conduct, and resisting arrest.¹⁶⁸ And the *Brady* doctrine requires police officers to maintain and disclose to prosecutors any material evidence that might be favorable to a defendant.¹⁶⁹ As these examples suggest, federal regulation of police conduct outside of the Fourth Amendment and *Miranda* doctrine is considerable.

State constitutions, statutes, and regulations regulate police conduct even more extensively. Local police officers are created by state law, which both grants power to police officers and restricts its exercise. Thus, state statutes permit police officers to engage in community caretaking and criminal law enforcement, require police to aid citizens in limited circumstances, mandate that officers arrest suspects in domestic violence cases, and forbid the police from asking questions unrelated to the subject of a traffic stop, for example.¹⁷⁰ State constitutional law frequently mirrors federal law, regulating searches, seizures, and interrogations, but it is often interpreted more expansively to control police behavior that is beyond federal constitutional protection.¹⁷¹ Local ordinances further restrict police conduct, limiting the

http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1854&issue_id=82009.

166. See 8 U.S.C. § 1357(g) (2006) (added as § 287(g) of the Immigration and Nationality Act by § 133 of the Illegal Immigration Reform and Immigrant Responsibility Act) (authorizing the federal government to enter into agreements with state and local law enforcement agencies to permit those agencies to enforce federal immigration law).

167. 18 U.S.C. §§ 926B–C (2006). There are two narrow exceptions. The statute does not override state laws that permit private landowners or state or local governments from restricting concealed firearms on private or government property. *Id.*

168. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 463 (1987); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990); *Jones v. State*, 798 So. 2d 1241, 1248 (Miss. 2001); *State v. Janisczak*, 579 A.2d 736 (Me. 1990); see also WRIGHT & MILLER, *CRIMINAL PROCEDURES* (1st ed.), *supra* note 85, at 15.

169. See *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Blanco*, 392 F.3d 382, 388 (9th Cir. 2004).

170. See, e.g., ALASKA STAT. § 18.65.530(a) (2010); COLO. REV. STAT. § 18-6-803.6(1) (2001); KAN. STAT. ANN. § 22-2307(b)(1) (1996); N.Y. CRIM. PROC. LAW § 140.10(4)(a) (McKinney 2009).

171. Or not. See Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 232–37 (2008) [hereinafter Miller & Wright, *Leaky Floors*].

use of race in police actions, for example.¹⁷² Finally, departmental administrative rules provide the most important guidance to police officers about what they may and may not do.¹⁷³

The number and variety of laws expressly controlling police behavior beyond constitutional criminal procedure are substantial, but there are also laws that indirectly restrain police conduct. Substantive criminal law provides an important example. Local police sometimes spend resources proactively investigating suspicious individuals, seeking to stop acts of violence before they occur. What regulates arrests in those cases is not the quantity or quality of the evidence the police have, which the Fourth Amendment regulates, but the laws that create inchoate crimes and in doing so permit police to intervene before the full harm is done—that is, state laws governing attempt, conspiracy, and solicitation. Where the police seek to prevent harm rather than uncover its perpetrator, the question governing police action is often not whether the police have probable cause but whether the suspect has yet committed a crime.

b. Remedies

The second category, laws that provide remedies for violations of rules governing police conduct, includes most obviously statutes that authorize federal and state criminal prosecution, state civil suits for damages,¹⁷⁴ state evidentiary exclusion, and suits by the Department of Justice (“DOJ”) under 42 U.S.C. § 14141 for equitable relief, as well as the federal exclusionary rule and § 1983. There are also other less well-studied sources of law governing remedies for police conduct that is unconstitutional, illegal, or merely against administrative regulations. These include remedies provided by state law, such as state suits for equitable relief¹⁷⁵ and state revocation of police officer certification, which prevents officers from reentering law enforcement in the same state.¹⁷⁶ They also include internal administrative

172. See, e.g., N.Y.C., N.Y. ADMINISTRATIVE CODE § 14-151 (2010).

173. To say that there are many legal rules regulating police conduct is not to argue that existing law covers the field. Some matters—such as what suspect identification procedures are used or whether interrogations must be recorded—are now at least arguably inadequately regulated. But this is not because there are no legal rules governing these activities. It is instead a question of which institutions make the rules, and whether those institutions make the right ones.

174. State and federal civil and criminal suits are also subject to defenses, such as self defense, the public authority defense, and entrapment, all of which can set limits on police conduct. These defenses may therefore fall into the first category of laws.

175. See, e.g., *People v. Town of Wallkill*, No. 01-Civ-0364, 2001 U.S. Dist. LEXIS 13364 (S.D.N.Y. Mar. 16, 2001); Walker & Macdonald, *supra* note 132, at 482 n.15 (citing *People v. City of Riverside*, No. 355410 (Cal. Super. Ct. Mar. 5, 2001), available at <http://www.riversideca.gov/rpd/AGTF/stipjdg.pdf>).

176. This approach to reform is not entirely neglected. Roger Goldman and Steven Puro have long advocated the use of decertification (also called revocation) to discourage police misconduct. See Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 47 (1987).

rules within police departments that establish procedures for taking, investigating, and resolving complaints and impose punishments for misconduct, often through an internal affairs unit.¹⁷⁷ These internal processes provide the most commonly used remedy for misconduct and, in many jurisdictions, interact with other remedies, such as where local ordinances, charter amendments, and public referenda also provide for external review of administrative remedies by an auditor or civilian oversight agency.¹⁷⁸

While scholars have often compared at least some direct remedies for misconduct, law also provides what might be considered indirect remedies that remain ignored. *Giglio v. United States*, for example, requires prosecutors to disclose to defendants any impeachment material bearing on the credibility of prosecution witnesses.¹⁷⁹ Police officers are often witnesses for the prosecution, and many testify regularly in the course of their work. If an officer accumulates accusations of dishonesty or bias that would have to be disclosed, prosecutors will sometimes pressure his police chief to reassign him¹⁸⁰ rather than have him work cases in which he could become a key trial witness or could affect the prosecutor's bargaining power during plea negotiations. Mindful of the essential relationship between prosecutors and the police, chiefs often comply and move the officer to a less appealing administrative assignment.¹⁸¹ *Giglio* only regulates some kinds of police conduct, it only works if the officer has already been caught for prior misconduct, and it depends on the incentives of prosecutors. But it nevertheless suggests a yet unconsidered mechanism for incentivizing police conduct beyond the search and seizure context, at least with respect to repeat offenders, a significant problem in policing.¹⁸²

177. State laws often control police complaint, investigation, or disciplinary proceedings. *See, e.g.*, N.J. STAT. ANN. § 40A:14-181 (West 2011).

178. *See* Samuel Walker, *Alternative Models of Citizen Oversight*, in *CITIZEN OVERSIGHT OF LAW ENFORCEMENT* 1, 11–13 (Justina Cintrón Perino ed., 2006) (describing alternative models of citizen oversight and noting ways they interact with internal disciplinary mechanisms).

179. 405 U.S. 150, 153–54 (1972).

180. Of course, as I have already suggested, employment, labor, and civil service laws may make it expensive to transfer such an officer. *See supra* text accompanying notes 136–139.

181. Some big departments effectively designate “liars’ squads” for such officers, an unattractive administrative assignment for officers whom prosecutors do not want to use. Lisa A. Judge, *Disclosing Officer Untruthfulness to the Defense: Is a Liars Squad Coming to Your Town?*, POLICE CHIEF (Nov. 2005), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=744&issue_id=112005.

182. *See* INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 37–39 (1991), available at http://www.parc.info/client_files/Special%20Reports/1%20-%20Christopher%20Commission.pdf; Hans Toch, *The Violence-Prone Police Officer*, in *POLICE VIOLENCE* 94 (William A. Geller & Hans Toch eds., 1996).

c. Qualification and Training Requirements

Some of the most important rules and laws governing the police are state and local laws in the third category, those that set standards for hiring, training, and certifying police officers. These rules fundamentally determine the kind of policing we have, and yet they have received almost no analysis. For example, every state has a peace officer standards and training commission (“POST”) that establishes minimum qualifications and training requirements for police officers as well as a process for licensing them.¹⁸³ These commissions dictate who can become a police officer. They control how old and how educated police officers must be and what kind of criminal record they can have, factors that may affect whether officers are likely to engage in misconduct. They regulate the hiring process for officers, including, for example, whether officers must pass psychological or medical screening, and they are the primary determinant of what kind and how much training police officers receive.¹⁸⁴ These commissions are the reason that an average officer receives 60 hours of firearms training, 36 hours of emergency vehicle operations, 44 hours of self defense training, and 12 hours in using nonlethal weapons, but only 8 hours of ethics and integrity training and 8 hours of mediation or conflict management training before he is licensed—a situation that probably influences which techniques officers use when confronted with conflict.¹⁸⁵ POSTs are administrative agencies, yet little has been written about how they should be organized to avoid undue influence by the police officers and departments they regulate, what their powers can usefully be, or how their regulations interact with other means of promoting lawful and harm-efficient policing.

Local ordinances supplement state law governing police qualifications. These also receive little attention from scholars, and yet can have notable effects. For example, a residency requirement may narrow the pool of potential officers sufficiently that no other laws can raise police minimum standards for officer hiring without threatening to deprive localities of enough qualified officers to achieve their law enforcement goals.¹⁸⁶ Thus,

183. See Richard C. Lumb, *Standards of Professionalization: Do the American Police Measure Up?*, 17 POLICE STUD. 1, 3–4 (1994) (describing the history and activities of POSTs).

184. See *id.* at 8–10; see also MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2002, at 10 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/slleta02.pdf>. For an overview of Peace Officer Standards and Training Commissions, see *IADLEST Model Minimum Standards*, INT’L ASS’N OF DIRS. OF LAW ENFORCEMENT STANDARDS AND TRAINING, <http://www.iadlest.org/Projects/ModelStandards.aspx> (last visited Oct. 9, 2011) (noting that an overwhelming majority of police academies develop the content of basic training pursuant to state commissions and that more than half of academies used state tests). In some jurisdictions, the standards are recommended rather than mandatory.

185. See HICKMAN, *supra* note 184, at 9.

186. See, e.g., David W. Murphy & John L. Worrall, *Residency Requirements and Public Perceptions of the Police in Large Municipalities*, 22 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 327, 331 (1999) (noting that many departments oppose residency

while state POSTs often introduce education requirements or other professional standards as a means to induce reform,¹⁸⁷ doing so may be counterproductive if local ordinances also impose qualification requirements.

Other sources of police qualifications exist, too. The Lautenberg Amendment to the Gun Control Act of 1968, for example, changed federal gun laws to prohibit individuals convicted of misdemeanor domestic violence crimes from possessing a firearm.¹⁸⁸ The Gun Control Act also applies the prohibition to those subject to a restraining order or dishonorably discharged from the military. As a result of this law, individuals in these categories cannot serve as sworn police officers in most jurisdictions, even if state law would otherwise allow them to serve. As this example suggests, laws can impose indirect—and even possibly unintended—employment requirements on the police. Since these federal requirements also affect the size of the pool of potential officers as well as who becomes an officer, they constitute one more piece of the web of laws that governs American policing, and yet these laws and others like them have been largely overlooked by scholars interested in shaping police conduct to protect civil rights.

d. Laws Governing Police Management and Organization

The fourth category involves law regarding the organization of police departments and management of police officers. As this Article has already suggested, federal and state employment and labor law has enormous influence over the police and efforts to regulate their conduct, including through civil service law, collective bargaining law, employment discrimination law, law enforcement officer bills of rights, and Fourth and Fourteenth Amendment doctrines. But many other laws also govern how police departments work and manage officers. State laws and regulations do everything from authorizing the existence of police departments to setting qualifications for the police chief. Federal law, such as the Fair Labor Standards Act, has influence over when the police work, including how shifts are structured to address overtime thresholds, a major financial and administrative issue for police departments. And the Fifth Amendment privilege against self-incrimination has distinctive application to government employees that frequently restricts the use of statements compelled in administrative investigations of police officers against them in criminal prosecutions.¹⁸⁹

requirements because they reduce the quality of officers that a department can attract); Kevin Johnson, *Police, Firefighters Challenge Residency Rules*, USA TODAY, Oct. 2, 2006, at 5A.

187. Police officers with a college education use significantly less force than other officers. See Jason Rydberg & William Terrill, *The Effect of Higher Education on Police Behavior*, 13 POLICE Q. 1, 19 (2010).

188. Pub. L. 104-208, § 658, 110 Stat. 3009, 3009-371 to 3009-372 (codified at 18 U.S.C. §§ 921-22, 925 (2006)).

189. See, e.g., *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding that statements made by police officers and other government employees upon threat of termination cannot be used in subsequent criminal proceedings consistent with the Fifth Amendment's privilege

City charters and local ordinances dictate who hires and fires the police chief, and thus often who ultimately controls policy in the police department. And all of these laws interact.¹⁹⁰

e. Laws Governing Access to Information about the Police

Finally, a variety of state and federal laws govern public access to information about the police. Open records laws permit the public to access some information about police departments and their management, and some states expressly require departments to collect and disclose data about policing.¹⁹¹ But many states restrict public access to data about police misconduct, either through generally applicable statutory exemptions, such as exemptions for personnel records or for criminal investigations, or through specific exceptions for law enforcement.¹⁹² As a result, internal disciplinary records and citizen complaints against an officer can be unavailable to the public, affecting significantly the degree to which the political process can be used to hold the police accountable for their actions. In this context and in others, state laws are often interpreted to inhibit access to information about the police. Some states, for example, have applied laws governing recorded communications to prohibit videotaping or audiotaping citizen interactions with the police.¹⁹³ The full legal landscape concerning information about policing, and the questions of law enforcement transparency and privacy which it raises, remain largely unexplored.¹⁹⁴

against self-incrimination). Police departments and officers can use *Garrity* as a shield as well as a sword. If departments or officers release compelled statements by defendant officers, they can significantly hinder state and federal prosecutions.

190. See, e.g., *Taylor v. Crane*, 595 P.2d 129, 133 (Cal. 1979) (addressing the interaction between a charter that gave the city manager sole power to discipline employees and a police union's assertion that any dispute could be submitted to an arbitrator under the collective bargaining agreement). Other laws affect the management of the police officers more indirectly. Some—such as the Uniformed Services Employment and Reemployment Rights Act of 1994, which grants individuals who leave civilian jobs for military service reemployment rights—are laws of general application that disproportionately impact police departments. Pub. L. 103-353, 108 Stat. 3149 (codified at 38 U.S.C. §§ 4301–33 (2006), 5 U.S.C. § 8432b (2006)).

191. See, e.g., *Kirwan v. Diamondback*, 721 A.2d 196, 199 (Md. 1998); *Federated Publ'ns, Inc. v. Boise City*, 915 P.2d 21 (Idaho 1996).

192. See, e.g., CAL. PENAL CODE § 832.7 (West 2011) (expressly excepting law enforcement personnel records from freedom of information disclosure); *State v. Garrison*, 711 N.W.2d 732 (Iowa Ct. App. 2006) (unpublished table decision) (exempting disclosure of police disciplinary proceedings under personnel file exemption). See generally Jenny R. Macht, *Should Police Misconduct Files Be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should Be Open to Public Scrutiny*, 45 CRIM. L. BULL. 5 (2009).

193. See, e.g., *Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001) (holding that state wiretapping statute was intended to prohibit secretly recording the speech of anyone, including police).

194. For an exception considering one piece of this landscape, see Macht, *supra* note 192.

C. Comparative Institutional Analysis and the Problem of Policing

Legal scholars can also advance the regulatory enterprise by engaging in comparative institutional analysis. As the law of the police suggests, police departments, local governments, states, and the federal government influence police conduct. Although scholars have frequently compared the *mechanisms* for preventing police misconduct,¹⁹⁵ effective reform also requires identifying the optimal allocation of regulatory responsibility among institutions.

Courts and scholars have long engaged in a limited form of institutional analysis with respect to policing, and that analysis continues. The Warren Court, after all, increased court involvement in protecting civil rights precisely because it concluded that alternative institutional actors had failed to provide an adequate check of the police. More recently, judges and scholars advocate new faith in the institutions criticized by the Warren Court, suggesting, for example, that police departments and local governments¹⁹⁶ or states¹⁹⁷ or Congress¹⁹⁸ can now effectively regulate the police. Others maintain that even if these institutions are more favorable to civil rights than they once were, the social and political forces that undermined the reform agenda before the Warren Court would still undermine nonjudicial reform efforts today. They conclude that, despite their substantial shortcomings, courts remain the only realistic institutional option for protecting civil rights.¹⁹⁹

This debate still operates largely within the conventional paradigm. It often lacks comparative focus, instead emphasizing the deficiencies of only one institution. It fails to consider the full range of actors or the full array of legal mechanisms available. And more importantly, it does not start with a problem and ask what capabilities institutions would need to participate in solving it. Instead, it criticizes what legal institutions do and argues that

195. See, e.g., Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in POLICE VIOLENCE, *supra* note 182, at 247, 251; Dripps, *supra* note 91, at 18 (listing proposed alternatives to the exclusionary rule but noting that none has ever been adopted by a state legislature); Slobogin, *supra* note 91, at 394–400 (arguing that a modified administrative damages regime would be a more effective deterrent mechanism than the exclusionary rule or internal sanctions).

196. See, e.g., Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 375–76 (1993); Eric Rakowski, *Conceptual Interdependence and Comparative Competence*, 27 GA. L. REV. 391, 403–04 (1993).

197. See, e.g., Goldman & Puro, *Revocation*, *supra* note 145, at 545–50, 577–79 (advocating for more active state regulation of policing through decertification); Walker & Macdonald, *supra* note 132, at 481–82 (proposing a model state statute analogous to § 14141 in order to “significant[ly] increase . . . police reform efforts directed at patterns or practices of police abuse of rights”).

198. See, e.g., BRADLEY, *supra* note 52, at 144–45 (advocating congressional commission to create a code of criminal procedure); Myriam Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417–19 (2000) (proposing an amendment to 42 U.S.C. § 14141 to allow private citizens a voice in regulating police).

199. See, e.g., Dripps, *supra* note 80, at 147–50; David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1243 (2002).

someone else could do the same task better.²⁰⁰ More thorough comparative analysis is well within the province of legal scholars.²⁰¹ It would be valuable here.

For example, Part I contended that courts cannot engage in the analysis required to delineate and protect constitutional rights, much less provide a normative framework for assessing what policing should be rather than what it is constitutionally permitted to be. Courts cannot, for example, determine the consequences of the real-world tradeoffs between effective policing and individual freedoms that policing puts at stake. But a brief look at the obvious alternatives to courts suggests that the empirical and causal analysis required likely demands new—and unfortunately improbable—institutional capacity.

Police departments have access to department-specific data on aspects of law enforcement effectiveness and harms, and they have enormous influence over the conduct of police officers. They are therefore well positioned to assess how to balance individual and societal interests in law enforcement and to reach that balance once it is identified. But departments with limited resources and limited expertise in the social sciences would likely have difficulty engaging in broader causal analysis about how effective and harmful alternative law enforcement practices are. Even if they could, departments often lack the capacity to engage in effective rights protection.²⁰² Civil rights violations are the product of complex institutional arrangements that determine what police are permitted or incentivized to do.²⁰³ While police departments have some unique knowledge, for example, about which officers are prone to violating rights or which policies lead to complaints, they often have little expertise in identifying and implementing appropriate reforms. Even the largest and most motivated departments struggle to

200. William Stuntz came closest to avoiding this problem. For example, he helpfully explored some of the local political-economic influences on police officers and departments, and how they compare to federal law enforcement. See William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 671–73 (2002) (observing that local police behavior is constrained by local political accountability and by budgetary limitations, which leave police with little time to harass citizens for harassment's own sake). But even Stuntz focused much more on the political economy of crime control than the political economy of policing, and he never meaningfully included state actors in his analysis. See, e.g., Stuntz, *Pathological Politics*, *supra* note 108, at 510.

201. See, e.g., NEIL KOMESAR, IMPERFECT ALTERNATIVES 3–50 (1997) (calling for comparative institutional analysis in law); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Critique*, 35 WAKE FOREST L. REV. 509, 511 (2000) (using institutional choice frameworks to analyze sprawl and smart growth policy); Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 24 (2006) (applying comparative institutional analysis to examine the same-sex marriage movement); Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1248 (2000) (using comparative institutional analysis to argue that gun violence should be reduced through the tort system).

202. See Harmon, *Proactive Policing*, *supra* note 139, at 37.

203. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 459 (2004).

determine whether problem-oriented policing or broken windows policing results in more intrusions on constitutional rights; which use of force policies are likely to be effective at reducing harm to suspects and officers; or how to implement a cost-effective early intervention system.²⁰⁴ For the almost 15,000 local law enforcement agencies in the United States that employ fewer than 100 officers, such challenges are near impossible.²⁰⁵

Police departments also lack sufficient incentive to ensure that constitutional rights—much less all civil rights interests—are adequately vindicated. Police chiefs have good reasons to promote civil rights: increasingly, chiefs recognize that harmful policing can undermine community relations, and that bad community relations can make law enforcement less effective and police officers less safe.²⁰⁶ Additionally, of course, the exclusionary rule and § 1983 impose some costs on departments, though scholars have long debated how significant those costs are. However, chiefs are usually better rewarded for maintaining order and reducing crime than protecting civil rights.²⁰⁷ Protecting rights can drain resources from law and order ends, at least in the short run.²⁰⁸ If a police department refrains from using Tasers against nonviolent suspects, it may make fewer arrests; if it requires officers to log every *Terry* stop, it substitutes time filling out forms for time fighting crime. Faced with these tradeoffs, chiefs may favor a policing practice that is likely to be too harmful. Moreover, even if a police chief tries to promote constitutional rights, he may face many of the substantial legal obstacles this Article has described, including civil service laws, collective bargaining, employment law, or a law enforcement officer bill of rights, all of which tax efforts to protect civil rights.

Local governments create and control police departments, but to the degree that police departments lack adequate incentives to protect civil rights, local governments may cause the problem and cannot be expected to solve it. As others have pointed out, the harms of policing are unevenly distributed.²⁰⁹ Most citizens rarely experience them, except perhaps in the form of a

204. See Harmon, *Proactive Policing*, *supra* note 139, at 37 (noting that police departments often do not have the expertise to develop adequate reforms to prevent misconduct).

205. See BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 4–5 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cs1lea04.pdf>.

206. See, e.g., INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT (2006), available at <http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf> (noting that law enforcement chiefs have recognized the value of organization commitments to civil rights).

207. See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 781–82 (2004) [hereinafter Miller & Wright, *Secret Police*] (noting that police departments do not bear the political or financial costs of monetary judgments in police tort cases).

208. See Harmon, *Proactive Policing*, *supra* note 139, at 8. The short run matters disproportionately to political actors. See *id.* at 46–47.

209. See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 74 (1998) (“When a police department authorizes searches, it generates diffuse benefits and concentrated harms.”); Stuntz, *Local Policing*, *supra* note 110, at

traffic stop. Instead, in many cities, a much smaller group of citizens pay much more than their fair share for policing. Research suggests, for example, that African Americans and Latinos are much more often stopped, searched, arrested, and hurt by the police than are others.²¹⁰ Public choice theory contends that small groups with strong interests can sometimes have disproportionate influence in government, but those who suffer the extra burdens of policing frequently lack the cohesiveness and organization necessary for that kind of advocacy success. The result is that a small part of the population pays disproportionately for harms caused by policing and may have too little power to negotiate for an efficient or fair distribution of the costs.²¹¹ This effectively creates an externality that leads communities to buy more harmful policing than is socially valuable or fair.

Police departments and local governments could do more to protect civil rights than they do now. They could raise hiring standards, improve training, develop better policies, supervise and discipline officers more effectively, and so on. But many localities will need additional resources and incentives to protect rights effectively, much less embrace constitutional interests more broadly. That might mean education and technical assistance for departments about best practices or conditional grants intended to make reforms more cost-effective. It may also mean more aggressive mandates and enforcement mechanisms. Whatever the methods, officers are incentivized by police departments, police departments are shaped by local governments, and none of the three can be counted on to produce consistently harm-efficient policing under current conditions. Instead, regulating the police requires nonlocal policy or law.

Although states are critical in shaping police conduct, they are not presently good regulators of the police. Most state legislation and regulation is now aimed at law enforcement effectiveness rather than civil rights. This explains why basic training focuses so heavily on how to use force and so much less so on how to avoid it. While some legislation seems designed to reduce the harms officers impose, such as laws restricting arrests for misdemeanors, these laws seem as likely to reflect other contingencies—a restrictive rule that predates a less restrictive Supreme Court decision, for example—than a will to promote civil rights comprehensively. State law also provides numerous mechanisms for remedying

2145–46 (noting the tradeoff between more police power and the harms that come with it, and the harms of crime); Stuntz, *Race, Class, and Drugs*, *supra* note 61, at 1822 (describing high costs to police of intervening in upscale drug markets and relatively low costs of street encounters).

210. See, e.g., Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 1155 (2007); Patricia Warren et al., *Driving While Black: Bias Processes and Racial Disparity in Police Stops*, 44 CRIMINOLOGY 709, 731 (2006), reprinted in RACE, ETHNICITY, AND POLICING, *supra* note 108, at 264; Michael D. White & Jessica Saunders, *Race, Bias, and Police Use of the TASER: Exploring the Available Evidence*, in RACE, ETHNICITY, AND POLICING, *supra* note 108, at 382.

211. See, e.g., Stuntz, *Political Constitution*, *supra* note 109, at 786–814 (describing increasing harshness of substantive criminal law and the fact that the groups with the most interest in that law are often small and less sympathetic).

misconduct, and though they have been little analyzed, they seem uniformly weak. Not all states have decertification laws, and many that do rarely decertify officers or do so only following a criminal conviction.²¹² State criminal prosecutions of police officers appear rare.²¹³ State exclusionary rules and civil actions are sometimes weaker than their federal analogs but face the same disadvantages with respect to reducing misconduct.²¹⁴ Even state courts are likely to be insufficiently protective: as Ronald Wright and Marc Miller have pointed out, state judicial decisions are often grudging even with respect to federal constitutional rights that should set a floor on state civil rights protection.²¹⁵

One might argue that states would be more aggressive in regulating civil rights if federal courts were less so. But state actors face disincentives for protecting civil rights that would persist even if constitutional law were not so dominant. State executives, legislators, and judges are all likely influenced by police unions and officer associations. These powerful groups have a strong interest in state law, which governs collective bargaining, creates civil service regimes, dictates funding for law enforcement, affects police officer safety, and determines the extent of officer discretion.²¹⁶ They also have considerable resources. By contrast, civil rights groups have little apparent organization at the state level. As a result, unions can be effective in opposing regulation, such as decertification laws,²¹⁷ or in capturing state

212. Roger L. Goldman, *The Case for Peace Officer Decertification*, Address at the Annual Conference of the National Association for Civilian Oversight of Law Enforcement (Sept. 14, 2011) (on file with author) (stating that six states—California, Hawaii, Massachusetts, New Jersey, New York, and Rhode Island—have no mechanism for decertification and that sixteen more permit decertification only following a criminal conviction); *see also* Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 122 (2003) (describing the existing state of decertification laws and practices of states in decertifying officers).

213. Cheh, *supra* note 195, at 251.

214. *See, e.g.*, Miller & Wright, *Secret Police*, *supra* note 207, at 768 (noting statutory caps on state civil suits); Sklansky, *supra* note 111, at 580–81 (discussing California's exclusionary rule). *See generally* Cheh, *supra* note 195, at 260–61 (describing, but not characterizing, state civil liability for uses of force).

215. *See* Miller & Wright, *Leaky Floors*, *supra* note 171, at 230.

216. The Public Safety Employer-Employee Cooperation Act of 2009 would change this, mandating collective bargaining arrangements with public safety employees, regardless of state and local laws. *See* H.R. 413, 111th Cong. (2009).

217. *See, e.g.*, Goldman & Puro, *Revocation*, *supra* note 145, at 564 (describing California union opposition to expanding the powers of the state police officer standards and training agency to increase revocation); *id.* at 566–67 (describing Florida union opposition to increasing state control over police discipline); Steven Puro et al., *Police Decertification: Changing Patterns Among the States, 1985–1995*, 20 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 481 (1997) [hereinafter Puro et al., *Police Decertification*]; Dan Walters, *Police Panel Deadlocked on Oversight*, FRESNO BEE, Nov. 7, 2000, at A13 (illustrating union efforts to resist expansion of state revocation).

administrative bodies that supervise police departments.²¹⁸ State actors clearly sometimes have sufficient incentives to promote civil rights. Over time, for example, states have adopted laws permitting or expanding decertification for misconduct.²¹⁹ And some states do much more to regulate the police than others.²²⁰ Overall, however, states have a relatively weak history of civil rights regulation.

States could do more. The POSTs have broader knowledge about regulating the police than do many local governments. Even under existing political conditions, state actors might find reform more appealing if scholars persuaded them that civil rights reform is consistent with cost-effective crime control. They might adopt reform if it were made cheaper, for example, by a conditional grant to states that required recording suspect interrogations. And under the right conditions, state governments might have the political will to regulate more effectively: a salient event could raise popular concern and political interest in preventing constitutional violations. But as things stand, states are not very effective at preventing constitutional violations or promoting civil rights more broadly, and existing political incentives, which push legislators to reduce expenditures and increase crime control, suggest it would be unwise to depend on states to do much more without external pressure to do so.

Thus, while local and state actors already promote civil rights to some degree, they likely cannot be expected to take adequate account of individual constitutional rights and constitutional interests that extend beyond them. They cannot and do not have sufficient reason to reach the appropriate tradeoffs between effective policing and individual freedoms. This suggests that addressing the problem of policing requires an institution—other than state or local governments—capable of engaging in the causal and normative analysis that protecting civil rights requires, producing and disseminating information about how to reduce harms to constitutional interests while engaging in effective law enforcement, and incentivizing local and state action toward these ends. As a result, the federal government plays an ineliminable role in addressing the problem posed by the police.

Congress can engage in better analysis about the tradeoffs between individual constitutional interests and law enforcement effectiveness, can facilitate and incentivize reform, and is less prone to the local political forces that can make protecting civil rights unappealing for other institutions. Congress has long regulated some kinds of searches and has limited new means of obtaining

218. See, e.g., Armstrong, *supra* note 138 (alleging that the Massachusetts Civil Service Commission is captured by the interests of government union employees).

219. Goldman & Puro, *Revocation*, *supra* note 145, at 547, 574 (noting that most states have adopted revocation statutes, including six states between 1987 and 1996 and four more since 1996); Puro et al., *Police Decertification*, *supra* note 217.

220. For example, Minnesota and Alaska require videotaping by judicial opinion. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985). Other states have passed statutes. See, e.g., ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(k) (2009); NEB. REV. STAT. § 29-4503 (2008); N.M. STAT. § 29-1-16 (2006).

and using private information deferentially regulated by the Court.²²¹ Already, it funds the DOJ's civil rights efforts, including criminal prosecution of local law enforcement, funding for nonprofits that promote civil rights in law enforcement, and technical assistance to police departments. And it is responsive to change: after court decisions restricted federal civil suits for injunctive relief against police departments,²²² Congress passed 42 U.S.C. § 14141 authorizing the DOJ to bring suits for equitable remedies against police departments that engage in a pattern or practice of unconstitutional misconduct.²²³ But congressional attention to civil rights is piecemeal and irregular, and its efforts to promote civil rights are sometimes frustratingly unclear.²²⁴

In other contexts, Congress has delegated the regulation of complex social problems to administrative agencies, but substantial obstacles exist to federal administrative regulation of the police. Even limited federal intervention into policing—which has always been a local concern—has been politically controversial.²²⁵ And relevant special interest groups, such as police unions, operate at the federal level as well as the state. Congress has not yet required even mandatory data reporting for local police departments, though this could easily be carried out by existing DOJ components and the need for such data to regulate the police is obvious.²²⁶ While it is not inconceivable that Congress would authorize the DOJ to condition some federal law enforcement funding on police department reforms or provide funds to enable additional technical assistance to departments to promote civil rights, more comprehensive regulation of the police, including the administrative

221. See, e.g., Right to Financial Privacy Act of 1978, Pub. L. 95-630, 92 Stat. 3697 (codified at 12 U.S.C. §§ 3401–22 (2000)); Fair Credit Reporting Act, Pub. L. 90-231, 84 Stat. 1128 (1968) (codified at 15 U.S.C. §§ 1681–1681x (2000)); Pen/Trap Statute (Pen Register Act), Pub. L. 99-508, 100 Stat. 1868 (1986) (codified at 18 U.S.C. §§ 3121–27 (2000)); Communications (Dill-Rayburn) Act of 1934, ch. 652, § 631, 48 Stat. 1064 (codified at 47 U.S.C. § 551 (2000)); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, 110 Stat. 1936 (codified in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.); see also Solove, *supra* note 57, at 763–67.

222. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983) (barring injunctive relief for plaintiff harmed by the use of a chokehold by the Los Angeles Police Department (“LAPD”) because plaintiff did not face a realistic threat of being put in another chokehold by the LAPD); *Rizzo v. Goode*, 423 U.S. 362, 371–73 (1976) (striking down injunctive relief because the plaintiffs lacked a personal stake in the court-ordered change to police disciplinary procedures); *O’Shea v. Littleton*, 414 U.S. 488, 493–99 (1974); *United States v. City of Philadelphia*, 644 F.2d 187, 199 (3d Cir. 1980) (holding that the federal government does not have implied statutory authority to enjoin local officials who are violating citizens’ constitutional rights).

223. See Harmon, *Proactive Policing*, *supra* note 139, at 12.

224. See Solove, *supra* note 57, at 748.

225. For example, while President George W. Bush was running for office, he stated, “I do not believe the Justice Department should routinely seek to conduct oversight investigations, issue reports or undertake other activity that is designed to function as a review of police operations in states, cities and towns.” Eric Lichtblau, *Bush Sees U.S. as Meddling in Local Police Affairs*, L.A. TIMES, Jun. 1, 2000, at A5.

226. See Harmon, *Proactive Policing*, *supra* note 139, at 29–34.

analysis of the consequences of alternative law practices for individual and societal interests, is unlikely and may not justify its costs.

Clearly, local, state, and federal institutions must all play a role in regulating the police. Police officers and departments do not have sufficient knowledge or incentives to minimize the harms policing risks. As a result, preventing constitutional violations requires some additional means of informing and influencing them. But existing means for protecting civil rights, both federal and state, have serious problems, not least of which are the unnoticed conflicting requirements of the real law of the police. More effective remedies will be difficult to attain because no government institution has both the ability and the motive to incentivize police officers and police departments effectively.

As a result, one challenge for legal scholarship is to refine the analysis of institutions in order to overcome obstacles to using existing governmental institutions or utilizing alternatives for ensuring that police practices are carried out to minimize harm. As challenging as the goal may be, it has been made more difficult by the continued dominance of the Warren Court paradigm. This conventional paradigm encourages scholars to focus on constitutional rights rather than the problem of policing and the comparative advantages of various governmental institutions in contributing to its regulatory solution.

What the police do is and always will be regulated. But knowing what ends regulation should serve depends on understanding which police practices are harm efficient, predicting how regulation will affect police conduct requires understanding how law and other forces determine that conduct, and deciding who should regulate the police requires understanding the comparative incentives and capacities of available institutional actors. Until scholars embrace these projects, the regulation of police will inevitably remain wanting.

CONCLUSION

The police have always represented both hope and harm. They contribute to social order but also threaten it. While legal scholars interested in the police study the judicial definition and enforcement of constitutional law, the conventional paradigm inaccurately describes how the police are now shaped by law and presents an inadequate normative vision for balancing legitimate individual interests, such as liberty, privacy, autonomy, bodily integrity, property, and equality, and the compelling societal interests in security and order. Though courts can judge the moral and historical imperatives that underlie constitutional rights, they cannot assess conditions on the ground or predict the consequences of legal rulings on civil rights and law enforcement. The project of defining and protecting constitutional rights inevitably requires input from other institutional actors.

Nor can constitutional rights set the agenda for policing reform. Constitutional rights, by their nature, take law enforcement interests into account *ex ante* and therefore are inevitably drafted to provide generous minimum

standards for law enforcement conduct. And they cannot incorporate consideration of the aggregate costs and benefits of law enforcement activities at all. The problem of policing instead requires an account of when law enforcement should harm individual interests for societal ends, given the risks to human dignity and the costs and benefits of law enforcement activity. Such an account necessarily goes beyond constitutional rights.

Since the Warren Court, scholars have, like courts, often mistaken constitutional law to be the sole or principal source for legal regulation of the police. For decades, legal scholarship considering the police has taken as its subject, and assumed as its method, the interpretation of constitutional rights and remedies. The consequence has been tremendous attention to improving doctrine and remarkable inattention to the problem policing presents. Recent scholarship takes a different approach and orients itself toward the problem of policing. But the project of studying the law and regulation of the police, rather than the constitutional law of the police, has only just begun.

Understanding the complex problem of policing a free society requires building on these recent efforts. It requires analyzing the law of the police—the web of law that shapes what police do and that must inform any effort to influence their conduct. And it requires more comprehensive institutional analysis to determine how to allocate the complex task of articulating and implementing a form of policing that is both effective and harm efficient. Even when confined to constitutional criminal procedure, the project for scholars was far from easy. Broadening the enterprise makes it more daunting still. But it also offers new promise of moving beyond the debates of the past half century toward better governance of a complex and crucial social and legal phenomenon.

