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The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing

Ayesha B. Hardaway
Case Western University School of Law, Ayesha.Hardaway@case.edu

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AYESHA BELL HARDAWAY*

ABSTRACT

For more than half a century, documented police brutality has affected communities of color and the American legal system has largely failed to address it. Beginning with Rizzo v. Goode*, Supreme Court decisions have allowed local police departments nearly unlimited discretion in their policies and practices. That decision and others demonstrate that the Supreme Court is misaligned with governmental initiated reforms. The Violent Crime Control and Law Enforcement Act of 1994, which allows the U.S. Attorney General and the U.S. Department of Justice ("DOJ") to investigate law enforcement agencies' practices and seek injunctive relief against agencies found to have engaged in unconstitutional policing, has more adequately addressed the problem. The legislation has resulted in nearly seventy local law enforcement investigations, which in turn have resulted in forty consent decrees.*

While the DOJ has made progress in its attempts to combat police brutality, the Supreme Court is misaligned with its efforts in three significant ways. First, the Court's prevailing Fourth Amendment stop, search, and arrest analysis encourages rule or policy violations and law breaking by police officers. Second, despite the Court's permissive response to officers who disregard departmental policies and local law, many law enforcement agencies have engaged in DOJ-initiated reform processes. Finally, the Court disregards the impact that arbitrary and discriminatory policing has on the ability of police departments to perform their jobs effectively while police experts and departments are focused on building legitimacy with marginalized communities. The dangers posed by this misalignment threaten the progress that DOJ-initiated reforms strive to make.

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INTRODUCTION

Police brutality and other abuses against communities of color have been documented by the federal government for more than half of a century.[1] Historical documentation of local law enforcement attacks on Black communities extend back to the American Reconstruction.[2] The American legal system—both state and federal—has largely failed to address the issue. Attempts by individuals to reform illegal police-department practices have been largely rejected by the U.S. Supreme Court.[3]

The Court usurped federal judiciary attempts to provide injunctive relief to impacted communities with its pronouncement in *Rizzo v. Goode*,[4] finding the lower court's requirement that the Philadelphia Police Department revise its policies to be an impermissible overreach, despite the demonstration of police abuses suffered by Black communities.[5] Specifically, the Court was of the mind that local governments should be granted "the widest latitude"[6] to manage the internal workings of their police departments—without interference from the federal government or from individuals seeking to protect the life and liberty of those targeted by police brutality and misconduct. In its reversal, the Court cited a lack of congressional intent regarding the injunctive reach of § 1983.[7] Some fifteen years after *Rizzo*, news outlets across the globe replayed video footage of Los Angeles Police Department officers brutally beating Rodney King on a Los Angeles highway.[8]

Congress responded by enacting the Violent Crime Control and Law Enforcement Act of 1994.[9] The relevant statute authorizes the U.S. Attorney

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[1] *See generally* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

[2] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 261-62 (1988); Eric Foner, *A Visual Timeline of Reconstruction: 1863-1877*, DIGITAL HIST., http://www.digitalhistory.uh.edu/exhibits/reconstruction/timeline.html [https://perma.cc/6R5H-H3U6] (last visited Apr. 5, 2020); T.W. Gilbreth, *The Freedmen's Bureau Report on the Memphis Race Riots of 1866*, TEACHING AM. HIST., https://teachingamericanhistory.org/library/document/the-freedmens-bureau-report-on-the-memphis-race-riots-of-1866/ [https://perma.cc/9VW9-H8ZJ] (last visited Apr. 5, 2020).

[3] Rizzo v. Goode, 423 U.S. 362, 365-67 (1976) (reversing district court's equitable remedy imposing new citizen complaint mechanism on Philadelphia police).

[4] 423 U.S. 362 (1976).

[5] *Id.* at 379 (concluding that district court order impermissibly interfered in city affairs by "significantly revising the internal procedures of the Philadelphia police department").

[6] *Id.* at 378.

[7] *Id.* at 376.

[8] *See generally, e.g.*, *The Viral Video That Set a City on Fire*, CNN (Apr. 28, 2017), https://www.cnn.com/videos/us/2017/04/28/rodney-king-la-riots-25th-anniversary-viral-tape-orig-nccorig.cnn.

[9] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (recodified at 34 U.S.C. §§ 12101-12643 (2018)); *see also* Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 401 (2018) (discussing Rodney King

General to investigate law enforcement agencies' practices. It also allows the U.S. Department of Justice ("DOJ") to seek injunctive relief against those agencies found to have engaged in a pattern or practice of unconstitutional policing.[10] Scholars have explored some shortcomings of the legislation.[11] Nevertheless, it currently stands as an important tool of the federal government to respond to systemic issues of excessive force and the illegal stops, searches, and arrests that have disproportionately led to the loss of Black lives.[12]

The DOJ has investigated sixty-nine local law enforcement agencies since the passage of the law.[13] As a result of those investigations, forty jurisdictions have entered into settlement agreements—commonly referred to as consent decrees—with the federal government to implement structural reforms designed to rectify their illegal police practices.[14]

incident as impetus for DOJ's oversight power). However, the relevant portion of the Act does not provide a private right of action like the one sought by the plaintiffs in *Rizzo*. 34 U.S.C. § 12601.

[10] 34 U.S.C. § 12601(b) (authorizing Attorney General to file civil action to "obtain appropriate equitable and declaratory relief" to eliminate pattern or practice of law enforcement conduct that deprives persons of constitutional rights).

[11] *See, e.g.*, Cover, *supra* note 9, at 376; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1388 (2000) (proposing amendment to pattern-and-practice litigation that permits DOJ to deputize select private citizens to seek injunctive relief for persistent police abuses); Kami Chavis Simmons, *Stakeholder Participation in the Selection and Recruitment of Police: Democracy in Action*, 32 ST. LOUIS PUB. L. REV. 7, 18-19 (2012).

[12] Joshua Chanin, *On the Implementation of Pattern or Practice Police Reform*, CRIMINOLOGY CRIM. JUST. L. & SOC'Y, Dec. 2014, at 38, 51; Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3-8 (2009) (acknowledging progress § 14141 makes possible and proposing proactive litigation and incentive strategy to promote widespread reform); Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS PUB. L. REV. 57, 74-75 (2012); Joe Domanick, *Police Reform's Best Tool: A Federal Consent Decree*, CRIME REP. (July 15, 2014), https://thecrimereport.org/2014/07/15/2014-07-police-reforms-best-tool-a-federal-consent-decree/ [https://perma.cc/KW2L-DMBZ] (observing that department loyalty prevents large police departments from self-investigating); John Worrall, Opinion, *Data Show Consent Decrees Worth Their Costs*, BALT. SUN (June 12, 2017, 10:50 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0613-consent-decree-20170612-story.html [https://perma.cc/Y2TC-X3LL] (citing research indicating "risk of litigation in consent decree jurisdictions was reduced between 22 and 36 percent").

[13] CIVIL RIGHTS DIV., U.S. DOJ, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3 (2017) [hereinafter DOJ PATTERN AND PRACTICE REPORT], https://www.justice.gov/crt/file/922421/download [https://perma.cc/5XP8-XLFF].

[14] *Id.* at 3, 20-23 (commending consent decrees as "most effective in ensuring accountability, transparency in implementation, and flexibility for accomplishing complex institutional reforms").

The implementation process of consent decrees is complex, costly, and lengthy.[15] It is generally a multiyear endeavor that begins as adversarial but ideally transforms into a collaborative engagement that rectifies the systemic failures that fostered police abuses and misconduct.[16] The creation or revision of departmental policies and concomitant training are key components of DOJ-initiated structural-reform efforts.[17] These policies are reportedly developed based on law enforcement expertise and best practices.[18] They are also tailored to address the specific deficits of each locality.[19] Cities have instituted new departmental policies on numerous substantive areas of policing, including use of force, search and seizure, and bias-free policing.[20] The overall goal is to ensure that persons are protected from unreasonable searches, seizures, and excessive force.[21] Policy mandates ideally direct officers on how to perform their jobs.[22]

The Court's *Rizzo* decision, which rejected injunctive relief as a remedy for failed police policies, is not the only way the Court has obstructed reform efforts. More recent Supreme Court decisions demonstrate that the Court is misaligned with DOJ-initiated reform efforts. This Essay explores three ways that this

[15] *Id.* at 35 (discussing how judge determines length of decrees, which may last two years to decade or more).

[16] *Id.* at 18.

[17] *Id.* at 30.

[18] *Id.* at 20 ("The [Civil Rights] Division pays close attention to consensus opinions in the law enforcement profession regarding best practices for preventing police misconduct.").

[19] *Id.*

[20] The Baltimore Consent Decree describes this as impartial policing. The principles are the same. Consent Decree at 30, United States v. Police Dep't of Balt. City, No. 1:17-cv-00099 (D. Md. Jan. 12, 2017) [hereinafter Baltimore Consent Decree].

[21] *See* DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 3. DOJ investigations discovered a pattern or practice of excessive force in the Baltimore City, Cleveland, and Seattle police departments. *See generally* CIVIL RIGHTS DIV., U.S. DOJ, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016) [hereinafter BALTIMORE FINDINGS LETTER], https://www.justice.gov/opa/file/883366/download [https://perma.cc/6YWX-6TQS]; U.S. DOJ CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE N. DIST. OF OHIO, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1 (2014) [hereinafter CLEVELAND FINDINGS LETTER], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [https://perma.cc/9G7F-5JXQ]; U.S. DOJ CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE W. DIST. OF WASH., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (2011) [hereinafter SEATTLE FINDINGS LETTER], https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/SE9L-5DH3].

[22] BALTIMORE FINDINGS LETTER, *supra* note 21, at 81 (recommending use-of-force training and de-escalation training for officer interactions with persons with mental illness or intellectual disability); CLEVELAND FINDINGS LETTER, *supra* note 21, at 55 (recommending structural reforms to ensure sergeants effectively supervise officers and monitor risky police tactics); SEATTLE FINDINGS LETTER, *supra* note 21, at 34 (reminding that investigatory stops should "be based on real indicators as opposed to vague and nonspecific hunches").

misalignment is evident. First, the Court's prevailing Fourth Amendment stop, search, and arrest analysis encourages rule or policy violations and law breaking by officers. Second, despite the Court's permissive response to officers who disregard departmental policies and local law, law enforcement agencies across the country have engaged in DOJ-initiated reform processes with an aim toward policy implementation and training designed to root out arbitrary and illegal conduct by officers. This work is designed to provide officers with adequate instruction and to increase legitimacy within the communities they police by ensuring that wayward officers are held accountable. Finally, this Essay discusses how the Court disregards the impact that arbitrary and discriminatory policing has on the ability of police departments to effectively do their jobs while police experts and departments are focused on building legitimacy with marginalized communities. The Essay concludes with a brief exploration of the dangers posed by this current misalignment.

The importance of police rulemaking has not been lost on legal scholars and policing experts.[23] Professor Wayne LaFave and others have explored the potential positive impact police rulemaking could have on limiting arbitrary conduct by individual officers.[24] LaFave examined whether courts had prompted departments to engage in rulemaking and if judicial review of any such regulations found that they served their intended purpose. This scholarship provides a comprehensive summary of the Supreme Court's treatment of internal police policies and makes a strong case for how police rulemaking coupled with robust Fourth Amendment analysis would ensure that individuals are not subjected to unchecked and arbitrary searches and seizures.[25] However, the Court's general reluctance to push for or examine law enforcement rulemaking in stop, search, and arrest cases calls into doubt the utility and value of such rules.[26]

[23] However, some scholars have cautioned about the potential dangers of police rulemaking. Professor Eric Miller has convincingly argued that communities without political power will be disproportionately harmed by unchecked departmental policies. *See generally* Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521 (2015). Of particular relevance to this Essay, Miller acknowledges that the danger of police rulemaking exists at least in part because the Court has failed to check arbitrary policing. *Id.* at 535.

[24] *See, e.g.*, Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 451 (1990); Miller, *supra* note 23, at 535; Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 279-82 (2010).

[25] *See generally* LaFave, *supra* note 24.

[26] *See id.* at 503-05. Stops, searches, and arrests by officers for minor traffic offenses are the focus of this Essay. I am currently working on another article that explores whether DOJ-initiated reform litigation has impacted and in some cases expanded use-of-force policies within local law enforcement agencies. That article will evaluate how reform-litigation policymaking differs from existing constitutional jurisprudence that has simply adopted policies drafted by officers (largely to the officers' benefit). In this way, my upcoming article

I. RULELESSNESS AND LAWLESSNESS

The War on Drugs brought with it the Supreme Court's dispensation with the Fourth Amendment balancing test,[27] which evaluates the government's interest in law enforcement against an individual's interest to be free from illegal searches and seizures.[28] Since that time, the Court has essentially created an irrebuttable presumption that the existence of probable cause means the government's interest outweighs the interest of the individual defendant.[29]

The Court has largely disregarded how out-of-policy searches and seizures contribute to an ever-expanding social divide in how police interact with marginalized communities.[30] This lack of regard is further compounded by the fact that the Court is unfazed by the motivations of officers conducting searches and seizures outside of protocol.[31] The vast divide between the unfettered power of police and the demands from communities impacted by that power has led to demands for change.[32] In response to those demands, Congress enacted § 12601,

will expand upon existing scholarship, including a recent article by Professor Osagie K. Obasogie and Zachary Newman that explores how federal courts often rely on or defer to self-serving law enforcement policies rather than critically assess what constitutes reasonable conduct under the Fourth Amendment. *See generally* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281 (2019).

[27] *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1062-66 (2010) (explaining that *Whren* decision resulted from pressure of "war on drugs" and reaffirmed Court's abandonment of balancing test).

[28] *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979) ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

[29] Johnson, *supra* note 27, at 1049 ("None other than Justice John Paul Stevens boldly observed that '[n]o impartial observer could criticize [the] Court for hindering the progress of the war on drugs. On the contrary, [our] decisions . . . will support the conclusion that *this Court has become a loyal foot soldier in the Executive's fight against crime*.'" (first and second alterations in original) (quoting California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting))).

[30] *Id.* at 1069.

[31] *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (concluding that Court's Fourth Amendment jurisprudence "foreclose[s] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

[32] *See, e.g.*, J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1; Robert D. McFadden, *Pleas for Peace and Justice from Pulpits in Dozen Cities*, N.Y. TIMES, May 4, 1992, at B8; *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), https://www.bbc.com /news/world-us-canada-30193354 [https://perma.cc/W6XE-8FB9]; Conor Friedersdorf, *A Tense Denunciation of Tamir Rice's Killing*, THE ATLANTIC (July 20, 2016),

and the DOJ has periodically intervened to reform problematic law enforcement agencies. Local departments found to engage in a pattern or practice of unconstitutional policing have collaborated with police experts and the federal government to develop new policies.[33] The policies are designed to provide parameters on the appropriate way for officers to perform their jobs and—ultimately—to close the ever-expanding divide between communities and police. However, whether the Court will ultimately give any Fourth Amendment teeth to these revised policies is in doubt, given the Court's prior disregard of police orders and procedures.[34]

The Court has applied cursory analysis and variable weight to the appropriateness of law enforcement policies and procedures. In fact, the Court has given great deference to the on-the-ground, discretionary judgment of officers—regardless of whether their actions have complied with departmental policy or procedure. The remainder of this Part discusses stop, search, and arrest cases that highlight how the Supreme Court has: (1) undermined the value of departmental policymaking, (2) rendered state law meaningless, and (3) ignored calls to adopt model standards in an effort to remove officer discretion when deciding whether to effect arrests for misdemeanors.

A. Whren v. United States

Officer rule breaking has received an unequivocal green light from the Supreme Court.[35] The Court's approval of the law enforcement action taken in

https://www.theatlantic.com/politics/archive/2016/07/a-tense-denunciation-of-tamir-rices-killing-at-the-rnc/492110/; Hana Kim, *Dozens of Community Organizations Pressuring City on Police Accountability Measures*, Q13 FOX (June 21, 2019, 5:28 PM), https://q13fox.com/2019/06/21/dozens-of-community-organizations-pressuring-city-on-police-accountability-measures [https://perma.cc/MBD6-FE4A] (discussing renewed push from Seattle community leaders in achieving promised police reforms).

[33] *See generally* DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 20.

[34] The Supreme Court has used the presence of departmental policies to support rulings on Fourth Amendment parameters. In *United States v. Robinson*, the Court cited a D.C. Metropolitan Police General Order that authorized officers to search an individual upon arrest to support its finding that the search and discovery of illegal drugs during the arrest of Mr. Robinson did not violate his Fourth Amendment rights. 414 U.S. 218, 221-24 (1973). This is true despite the fact that a full custodial search for contraband, not just weapons, during a search incident to the arrest expanded the Court's position in *Terry v. Ohio*, 392 U.S. 1, 29 (1968). *See also* Florida v. Royer, 460 U.S. 491, 506 (1983); Gustafson v. Florida, 414 U.S. 260, 265 (1973) (finding that absence of police regulations for full search incident to arrest had no bearing on constitutionality of search).

[35] It is important to note that the Supreme Court has also encouraged officers to disregard state law. For example, according to the Court in *Virginia v. Moore*, 553 U.S. 164, 167 (2008), the law that classified Mr. Moore's operation of a motor vehicle while under suspension deemed it a nonarrestable offense. He should have been issued a citation. Instead, he was arrested contrary to state law. The search incident to arrest uncovered illegal narcotics in his possession. The Supreme Court upheld his arrest and conviction. Moreover, in *Atwater v. City*

Whren v. United States[36] directly speaks to this validation. In that case, Michael Whren and James Brown reportedly attracted the attention of Washington, D.C., officers because they were "youthful occupants" sitting at a stop sign for more than twenty seconds.[37] Whren was the passenger in a newer-model SUV with temporary tags in a "high drug area."[38] Those observations prompted the officers—undercover, in plain clothes, and in an unmarked car—to pursue the SUV and initiate a traffic stop. Undercover officers were prohibited by D.C. Police Department policy from issuing traffic citations.[39] The officers' conduct violated this policy. Despite the fact that it was not the undercover officers' job to conduct traffic enforcement, the Court held that the officers had probable cause to believe that Brown had violated traffic laws.[40]

The most serious charges against Whren and Brown were only discovered after the officers violated department policy by jumping out of their undercover vehicle to stop Brown. It was then that they observed illegal drugs in Whren's hands. The traffic infractions reportedly observed by the undercover officers posed no imminent danger to anyone. Instead, plainclothes individuals approaching a car in a "high drug area" while shouting demands that the occupants pull over can be reasonably viewed as creating a greater risk of danger. The Court's blanket disregard for the prohibition against undercover traffic enforcement reflected a failure to understand the purpose behind the prohibition, thereby circumventing any serious analysis of what was reasonable under the circumstances. The Court prioritized fulfilling its role in the War on Drugs over rigorously evaluating law enforcement conduct with an eye to protecting individuals from erratic conduct not supported by police training or administrative rules.[41] The Court made this clear by dismissing police procedures and rules as "trivialities."[42] If an officer can "deviate[] materially from usual police practices" and still have his conduct deemed reasonable, the Court has given the ultimate judicial green light to rogue, arbitrary policing.[43] Supreme Court approval has moved beyond mere disregard for departmental policy.[44]

of Lago Vista, 532 U.S. 318, 323 (2001), police arrested a motorist for not wearing her seat belt while driving her car, despite the fact that she was not eligible for arrest under state law. The Supreme Court upheld her arrest and conviction.

[36] 517 U.S. 806 (1996).

[37] *Id.* at 808.

[38] *Id.*

[39] *Id.* at 815.

[40] *Id.* at 810.

[41] Johnson, *supra* note 27, at 1076.

[42] *Whren*, 517 U.S. at 815.

[43] *Id.* at 814; *see also* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 299, 302, 309 (discussing how judicial support for officers in field makes strides in War on Drugs via traffic stops).

[44] *See* Sklansky, *supra* note 43, at 317.

In doing so, the Court unfairly diminishes the authority and purpose of police policies. Departments provide policies, manuals, general police orders, and training to officers regarding those orders to provide direction to officers on what to do in the field.[45] That direction includes telling officers how and when to initiate stops and searches under the Fourth Amendment. As discussed in Part II, the Court's willingness to disregard those orders and procedures undermines police efforts to do two things: (1) improve legitimacy within the community and (2) ensure accountability among officers.

B. Virginia v. Moore

The Court has also put its full weight and support behind officers who ignore state law in order to investigate drug crimes. Sworn law enforcement officers in *Virginia v. Moore*[46] demonstrated an unabashed disregard for Virginia law. Detectives stopped David Moore for driving while his operator's license was suspended.[47] A detective testified at trial that they effectuated an arrest, waited for the local kennel to come pick up Moore's dog, and obtained consent from Moore to search his hotel room.[48] They did all of this despite the fact that Virginia state law only authorized law enforcement to issue a citation for driving under suspension. The detective's testimony demonstrated the arbitrary nature of the arrest and subsequent search. Most importantly, it demonstrated a blatant disregard for the law. The detective testified that he chose to place his "prerogative" above the law and that he used the eventual recovery of illegal drugs to justify his conduct.[49]

The Court in *Moore* focused on the need for officers to feel free to make legitimate arrests.[50] That rationale is oxymoronic and defies common sense. The

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[45] *See generally, e.g.*, SARAH LAWRENCE & CHRISTINE COLE, CRIME & JUST. INST., BUILDING CAPACITY: HOW POLICE DEPARTMENTS CAN DRIVE POSITIVE CHANGE WITHOUT FEDERAL INTERVENTION (2019), http://www.crj.org/assets/2019/08/CJI-Consent-Decree-Report-Final.pdf [https://perma.cc/9LAB-U7DD].

[46] 553 U.S. 164 (2008).

[47] Officers were also wrong about the identity of the driver. They reportedly believed he was someone else suspected of driving without a valid license. Moore v. Commonwealth, 609 S.E.2d 74, 76 (Va. Ct. App. 2005), *rev'd en banc*, 622 S.E.2d 253 (Va. Ct. App.), *rev'd*, 636 S.E.2d 395 (Va. 2006), *rev'd*, 553 U.S. 164 (2008).

[48] *Id.*

[49] *Id.*

[50] *Moore*, 553 U.S. at 171 ("In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable."); *id.* at 175 ("If the constitutionality of arrest for minor offenses turned in part on inquiries as to risk of flight and danger of repetition, officers might be deterred from making legitimate arrests." (citing Atwater v. City of Lago Vista, 532 U.S. 318, 351 (2001))); *id.* (stating that in *Atwater*, the Court "found little to justify this cost, because there was no 'epidemic of unnecessary minor-offense arrests,' and hence 'a dearth of horribles demanding redress'" (quoting *Atwater*, 532 U.S. at 353)).

arrest was not supported by law and therefore by its very nature was illegitimate. The decision further demonstrates how out of touch the Court is with such off-the-books police actions. Judicial opinions supporting those actions undermine the legitimacy of American policing.

C. Atwater v. City of Lago Vista

The Court has also ignored calls for clear policies from the American Bar Association, law enforcement experts, prosecutors, and defense bars, which have urged model rules and standards calling for the issuance of citations instead of arrests for misdemeanor offenses.[51] The need for unambiguous policies is illustrated by the Court's decision in *Atwater v. City of Lago Vista*.[52]

Amici curiae briefs in *Atwater* argued that clear policies were necessary to increase officer compliance.[53] Clarity would avoid the need for officers to exercise discretion when deciding whether to arrest for a misdemeanor offense not punishable by jail time. In *Atwater*, Officer Turek decided to arrest Gail Atwater for failing to wear a seatbelt and to secure her children in their seatbelts while she was driving.[54] State law gave Turek this option because the statute made the offense subject to either citation or arrest. Though the Court deemed Turek's conduct "foolish," it declined to find Turek's conduct out of line with Fourth Amendment protections because it had no reason to believe that there was a national "epidemic"[55] of similar conduct. The Court downplayed the need to protect Atwater from the "pointless indignity" of arrest because her lawyer could offer only one other warrantless misdemeanor arrest and an amicus brief mentioned only a "handful" of others.[56] In doing so, they refused to affirmatively protect Americans from those very "pointless indignities."[57] While it is questionable that the Court appreciated the full universe of warrantless misdemeanor cases, it is undoubtable that their decision provides cover for law enforcement to engage in the very conduct the Court admittedly recognized as foolish. The Justices seem to have underestimated the power of their opinions.

As the dissent in *Atwater* so aptly predicted, "[t]he *per se* rule that the Court creates has potentially serious consequences for the everyday lives of

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[51] *See, e.g.*, Brief of the Institute on Criminal Justice at the University of Minnesota Law School & Eleven Leading Experts on Law Enforcement & Corrections Administration & Policy as Amici Curiae in Support of Petitioners at 22, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1341293, at *22 [hereinafter Brief in Support of Petitioners].

[52] 532 U.S. 318 (2001).

[53] Brief in Support of Petitioners at 21-27 (detailing model standard of American Bar Association, American Law Institute's Model Code, and Uniform Rules of Criminal Procedure).

[54] *Atwater*, 532 U.S. at 318.

[55] *Id.* at 353.

[56] *Id.* at 353 & nn.23-24.

[57] *Id.* at 361.

Americans."[58] And it has. Though there are some distinctions, the Court's refusal to engage in a meaningful analysis of individual rights and interests, while at the same time refusing to place reasonable checks on the motives and discretion of law enforcement, can be viewed as emboldening police officers. Plainclothes police officers killed Eric Garner in 2014 for the crime of selling loose cigarettes to avoid state tax law.[59] An officer fatally shot Walter Scott in the back while Scott was running away to avoid arrest for the minor traffic violation of driving on a suspended license.[60] The Court's view that Atwater's handcuffing, arrest, and brief time in jail were minimally intrusive when compared to use of force, strip searches, and the like failed to account for the many in-custody deaths that occur in American jails. The questionable circumstances of Sandra Bland's in-custody death in 2015 and of Eric Garner's killing a year earlier typify precisely what the Court should have realized in *Whren* and *Atwater*—unchecked police authority leads to extrajudicial deaths.

Interestingly enough, the allegiance to officer conduct continues in its steadfastness even when the subject officer's conduct does not comport with departmental policy. In those instances, the Court has disregarded the importance of departmental policies. Instead, the Court has chosen to regard the Fourth Amendment as inflexible and unable to accommodate policies and procedures that "vary from place to place and from time to time."[61] In short, when the policy favors the action of the police officer in question, the Court is willing to factor the policy into its analysis, but when the policy contradicts the reasonableness of the action in question, the Court dismisses the value or importance of the policy.

II. POLICY DEVELOPMENT INTEGRAL TO REMEDYING PATTERN-OR-PRACTICE VIOLATIONS

Comprehensive policies provide the necessary foundation for how police departments operate.[62] Policies that are properly designed and implemented

[58] *Id.* at 371 (O'Connor, J., dissenting).

[59] *See* Goodman & Baker, *supra* note 32, at A1.

[60] Matthew Vann & Erik Ortiz, *Walter Scott Shooting: Michael Slager, Ex-officer, Sentenced to 20 Years in Prison*, NBC NEWS (Dec. 7, 2017, 12:28 PM), https://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-michael-slager-ex-officer-sentenced-20-years-n825006 [https://perma.cc/WP83-PNPK].

[61] Whren v. United States, 517 U.S. 806, 815 (1996).

[62] W. DWAYNE ORRICK, INT'L ASS'N OF CHIEFS OF POLICE, BEST PRACTICES GUIDE FOR DEVELOPING A POLICE DEPARTMENT POLICY-PROCEDURE MANUAL 1 (2018), https://www.theiacp.org/sites/default/files/2018-08/BP-PolicyProcedures.pdf [https://perma.cc/F725-CC44]. Policies and procedures have not always been utilized in a comprehensive and consistent manner in American policing. Scholars identified a dearth of guidance for officers on how to perform their job duties as a cause for the arbitrary and highly discretionary method of law enforcement on American streets. *See* Herman Goldstein, *Police*

serve a few key functions. First, they primarily inform officers on how to perform their job duties in a consistently professional and legal manner.[63] Second, they provide some assurance to the community being serviced by the police department that the services they receive are in line with current standards.[64] Third, comprehensive policies provide a mechanism by which to hold officers accountable for misconduct.[65] Finally, policies instruct officers on the performance of their job duties, but they also set out the disciplinary parameters for misconduct.[66]

The absence of established or effective policies and training has been linked to improper policing.[67] Police leadership, the DOJ, and other stakeholders have engaged in the process of shoring up failing policies and creating new ones where previous policies did not exist.[68] These reform efforts have been prompted by pattern-and-practice investigations initiated by the DOJ[69] to remedy unconstitutional policing.[70] Investigations by the DOJ have ended with sixteen

Policy Formation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123, 1146 (1967).

[63] ORRICK, *supra* note 62, at 1.

[64] *Id.* at 8.

[65] *See* Samuel Walker, Police Accountability: Current Issues and Research Needs 4 (May 2006) (unpublished manuscript), https://www.ncjrs.gov/pdffiles1/nij/grants/218583.pdf [https://perma.cc/8CZ5-8ZC4].

[66] *See* DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 5; *see also* BALTIMORE FINDINGS LETTER, *supra* note 21, at 139; CLEVELAND FINDINGS LETTER, *supra* note 21, at 34; SEATTLE FINDINGS LETTER, *supra* note 21, at 34.

[67] *See* CIVIL RIGHTS DIV., U.S. DOJ, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at xiii (2011) [hereinafter NEW ORLEANS FINDINGS LETTER], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [https://perma.cc/5D4G-HRHG]; Walker, *supra* note 65, at 10 (discussing how establishment of clear policies has been shown to reduce "undesirable outcomes").

[68] DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 10.

[69] *See, e.g.*, NEW ORLEANS FINDINGS LETTER, supra note 67, at xiii (finding that policies failed to give officers adequate direction on how to conduct stops, searches, and arrests); SEATTLE FINDINGS LETTER, *supra* note 21, at 25-26 (pointing to lack of clear policies and practices regarding pedestrian stops, with no clear distinction between casual encounters and investigatory stops); Detroit Police Dep't Witness Detention Findings Letter from Stephen H. Rosenbaum, Chief of Special Litig. Section of DOJ, and Geoffrey G. Collins, U.S. Attorney, to Ruth Carter, Corp. Counsel for City of Detroit § II(B) (June 5, 2002), https://www.justice.gov/crt/detroit-police-dept-witness-detention-findings-letter [https://perma.cc/6XFR-Y2GS] (recommending that arrest policies be revised because they permitted officers to use information gathered subsequent to arrest as basis for establishing probable cause for same arrest); Investigation of the East Haven Police Department Letter from Thomas E. Perez, Assistant Attorney Gen., to Joseph Maturo Jr., Mayor, Town of East Haven 1 (Dec. 19, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven_findletter_12-19-11.pdf [https://perma.cc/ZT28-YZYX].

[70] This is not to say that policy creations and revisions in American police departments occur only when the DOJ is involved. I fully recognize that there are police departments across

police agencies agreeing to reform their policies and/or practices for stops, searches, and arrests.[71]

Those agreements typically come about once the DOJ issues a Findings Letter.[72] Those letters communicate the constitutional violations the federal government has determined it has reasonable cause to believe have been committed by a local law enforcement agency. A number of Findings Letters have flagged the detrimental impact that inadequate and outdated policies on stops, searches, and arrests have on the quality of police services. In New Orleans, for example, the DOJ informed city leaders that the brief and stale information contained in their policy on warrantless searches and seizures lacked details and explanations necessary to provide officers guidance.[73]

The New Orleans Police Department is not alone. The Court's refusal to recognize the impact of its unchecked support for police conduct has arguably created rampant practices of discriminatory and unconstitutional policing in cities like Baltimore. Prior to the current reform efforts, officers in Baltimore executed a zero-tolerance form of law enforcement that disproportionately affected Black communities within that city. The zero-tolerance approach "encourage[d] officers to make large numbers of stops, searches, and arrests for minor, highly discretionary offenses."[74] Individuals were stopped, frisked, and questioned for suspicion of loitering in accordance with a departmental policy that misstated local law.[75] When supported by probable cause, the Supreme Court—stricken by tunnel vision—has validated such destructive practices.[76]

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the country that actively and independently work to ensure that their policies are up to date, to include the input and feedback of their members, and to ensure their members are adequately trained. The points in this Essay only address DOJ-initiated reform efforts.

[71] *See An Interactive Guide to the Civil Rights Division's Police Reforms*, U.S. DOJ, https://www.justice.gov/crt/page/file/922456/download [https://perma.cc/D2VE-EG4R] (last updated Jan. 18, 2017) (click "Unlawful Stops, Searches, & Arrests" and then click "General Policies") (listing Alamance County, Baltimore, Cleveland, Detroit, East Haven, Ferguson, Los Angeles, Los Angeles County, Newark, New Jersey State Police, New Orleans, Pittsburgh, Puerto Rico, Seattle, Steubenville, and Yonkers). This number captures those jurisdictions that have entered into binding settlement agreements later adopted by a federal court as consent decrees. It does not include jurisdictions that may have developed new stop, search, and arrest policies after receiving technical assistance from the DOJ.

[72] DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 17.

[73] NEW ORLEANS FINDINGS LETTER, *supra* note 67, at 28 (showing that policy was only four pages long and had not been revised for approximately eight years).

[74] BALTIMORE FINDINGS LETTER, *supra* note 21, at 40.

[75] *Id.* at 43 ("[The Baltimore Police Department's] newly adopted order . . . includes a section discussing special considerations for a violation of the Baltimore City Code prohibiting loitering, but fails to mention the requirement that officers may not arrest individuals for loitering until they have been told what specific conduct is prohibited, warned that a violation of law is occurring, and still refuse to desist.").

[76] *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 178 (2008) (holding that when officers have probable cause to believe that person has committed crime in their presence they can make

The DOJ has directly linked the absence of police policy guidance within departments—along with other systemic deficiencies—to patterns or practices of unconstitutional stops, searches, and arrests.[77] As a result, the consent decree between the City of Baltimore and the DOJ specifically prohibits officers from relying on *Whren* to engage in pretextual stops.[78]

This places the DOJ-initiated reform efforts directly in conflict with the Supreme Court's decision in *Whren*.[79] This is an exceptional step taken by the DOJ, and it is not without merit. The agreement singles out the problematic effect the *Whren* decision has had on policing and on the lives of those being policed.[80] A plain reading of the relevant section of the Baltimore consent decree suggests that the prohibition against pretextual stops is designed to prevent situations like that which resulted in the death of Freddie Gray.[81] Officers are not allowed to rely on the classification of a community as a "high crime area" or a person's efforts to avoid contact with law enforcement as a justification to initiate an investigatory stop or detention.[82] The Court in *Whren* relied on similar factors when it rejected the notion that pretextual motivations could negate the reasonableness of a stop when the stop is supported by probable cause.[83]

Identifying policy deficiencies and the way those deficiencies have manifested in the form of illegal police practices is only the beginning of the process to reform those practices.[84] Quality, comprehensive policymaking is a

immediate arrest and search individual); Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("Accordingly, we confirm today what our prior cases have intimated: the standard of probable cause 'applie[s] to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.'" (alteration in original) (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))).

[77] BALTIMORE FINDINGS LETTER, *supra* note 21, at 3, 40, 129.

[78] Baltimore Consent Decree, *supra* note 20, at 15-16, para. 43(a).

[79] *Id.* ("BPD will prohibit officers from: Conducting pretext stops under *Whren v. United States*, 517 U.S. 806 (1996), in a manner that violates the Fourteenth Amendment, Title VI, or the Safe Streets Act . . . ."); *see also* Whren v. United States, 517 U.S. 806, 819 (1996).

[80] Baltimore Consent Decree, *supra* note 20, at 16, para. 43(a).

[81] *See id.* at 13, para. 38. To be clear, the death of Freddie Gray highlighted the negative consequences of zero-tolerance and pretextual policing. BALTIMORE FINDINGS LETTER, *supra* note 21, at 19. Community members and organizations worked for several years prior to Gray's death to prompt the police not only to change their policies and practices but also to implement those changes so that individuals were not subjected to stops, searches, and arrests without the requisite legal threshold of reasonable suspicion or probable cause. *Id.* at 18.

[82] Baltimore Consent Decree, *supra* note 20, at 16, para. 43(e).

[83] *Whren*, 517 U.S. at 808 (detailing presence of defendants in "high drug area" and assertions by undercover officers that defendants' car turned "suddenly to its right, without signaling, and sped off at an 'unreasonable' speed" when undercover officers began pursuit).

[84] *See* DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 1. At this point, an adversarial posture exists between the parties. A local jurisdiction may disagree with the findings made by the DOJ and refuse to enter into a settlement agreement. *Id.* at 19. In that instance, the DOJ may elect to sue the jurisdiction under 34 U.S.C. § 12601. A federal judge

multistep process.[85] It requires an understanding of the legal issues and parameters.[86] Input and feedback from officers not in management have also been identified as integral to successful policymaking.[87] But departments with deficient policies should not be presumed competent to do this work alone.[88] Collaboration and input from stakeholders in the reform process is essential to improving the policies as well as the legitimacy of the organization.[89] This requires that additional time and resources are utilized to ensure that this important work benefits from an appropriately robust process.

III. LEGITIMACY

Law enforcement agencies reportedly strive for "lawfulness" and "legitimacy."[90] Despite that goal, American law enforcement agencies have a legitimacy problem within certain segments of the country. The Black Census Project reported that 84% of respondents in the Black community say that "police officers not being held accountable for their crimes is a problem."[91] Additionally, 83% describe excessive use of force as a problem and 73% "agree that holding police officers responsible for the misconduct would improve police-community relations."[92] A recent study of nearly 100 million traffic stops conducted by twenty-one state patrol departments and twenty-nine municipal police departments provides some data on what may be contributing to that lack

then determines whether there is sufficient evidence to support a finding of a pattern or practice of unconstitutional policing. DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 20.

[85] *See* Goldstein, *supra* note 62, at 1128 (outlining numerous steps that police would need to take to adequately take on policymaking role).

[86] *Id.* at 1127.

[87] *Id.* at 1133 (alleging that if individual officers were involved in promulgation of policies, "it would serve in a positive way to inform members of a force what is expected of them"); Walker, *supra* note 12, at 66 (discussing failure of top-down police-reform strategies).

[88] POLICE EXEC. RESEARCH FORUM, ADVICE FROM POLICE CHIEFS AND COMMUNITY LEADERS ON BUILDING TRUST: "ASK FOR HELP, WORK TOGETHER, AND SHOW RESPECT" 15 (2016), https://www.policeforum.org/assets/policecommunitytrust.pdf [https://perma.cc/D63A-FRGT] ("[I]f the community doesn't believe in you, you are at ground zero. . . . [Police and the community need to be] able to work through obstacles and work together on many issues.").

[89] *See generally id.* at 65 (suggesting various ways community members and police can work together to "re-establish community trust and legitimacy through engagement, partnerships, transparency and accountability").

[90] Walker, *supra* note 65, at 1 (defining legitimacy as "perception that police conduct is both lawful and consistent with public expectations").

[91] BLACK FUTURES LAB, MORE BLACK THAN BLUE: POLITICS AND POWER IN THE 2019 BLACK CENSUS 13 (2019), https://blackcensus.org/wp-content/uploads/2019/06/Digital-More-Black-Than-Blue.pdf [https://perma.cc/Q26L-GJRE].

[92] *Id.* at 8.

of confidence.[93] The study examined traffic stops conducted by those agencies and found that officers demonstrated racial bias in the performance of their job duties.[94] Researchers first found that officers demonstrated bias when deciding who to stop.[95] The study also found that officers used a lower threshold for Black and Hispanic drivers when deciding whether to conduct a search.[96] The data gathered and analyzed by this study only confirm what people of color have known for some time: racial bias is a reality in American policing.[97]

The lack of confidence in law enforcement is not limited to communities of color. A 2015 national Gallup poll found that just over half of Americans reported having high confidence in the police—the lowest number in twenty-two years.[98] The data also align with what the DOJ found when investigating some jurisdictions for pattern-and-practice violations.[99] In several jurisdictions across the country, the DOJ found that officers conduct stops, searches, and arrests in a discriminatory manner.[100]

Holding officers accountable for misconduct is a key component to improving legitimacy.[101] Officers who violate policy are expected to be held accountable for failures to comply with policy in a manner that is appropriate with the level of offense and prior misconduct of the offending officer. To that end, the reform efforts also involve the development of disciplinary matrixes to hold officers accountable.[102] DOJ-initiated reform efforts have sought to address the issue.[103] But addressing the problematic issues of American law enforcement should not fall solely on the DOJ. Violations of departmental policies have had little or no impact on the Supreme Court in determining the reasonableness of an officer's

[93] Emma Pierson et al., STANFORD COMPUTATIONAL POL'Y LAB, A LARGE-SCALE ANALYSIS OF RACIAL DISPARITIES IN POLICE STOPS ACROSS THE UNITED STATES 1 (2019) ("[W]e compiled and analyzed a dataset detailing nearly 100 million municipal and state patrol traffic stops conducted in dozens of jurisdictions across the country . . . .").

[94] *Id.*

[95] *Id.* at 3.

[96] *Id.* at 5.

[97] *See* BALTIMORE FINDINGS LETTER, *supra* note 21, at 5.

[98] Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx [https://perma.cc/HDB9-LH93].

[99] *See* DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 41-48.

[100] *Id.*

[101] Walker, *supra* note 65, at 1.

[102] *Id.* at 15-16 (discussing use of early intervention systems in some departments to identify "patterns of problematic conduct," such as "identifying officers with more serious conduct problems," and to correct those problems).

[103] DOJ PATTERN AND PRACTICE REPORT, *supra* note 13, at 30 ("Inadequate systems for holding law enforcement agencies accountable to communities and individual officers accountable for misconduct are at the heart of nearly every finding of a pattern or practice the Division has ever issued. As a result, improving accountability systems occupies a prominent place in the Division's reform agreements.").

conduct.[104] Indeed, the Constitution provides protections that the judicial branch should make its priority to enforce.

The American judicial system has in large measure failed to hold officers criminally liable for the deaths of unarmed Black and Hispanic individuals.[105] The Court's most recent stop, search, and arrest decisions are yet another way in which officers are not held accountable and in which the Court continues to undermine police legitimacy.[106] The consolation offered by the Court that claims of discrimination can be remedied via the Equal Protection Clause is really no consolation at all.[107] And while it may seem judiciously expedient to enforce traffic and drug laws against civilians, the cost shouldered collectively by law enforcement agencies that are viewed as illegitimate and discriminatory has proven to be great.[108]

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[104] *See* Whren v. United States, 517 U.S. 806, 815 (1996).

[105] *See, e.g.*, Katie Benner, *No U.S. Charge Against Officer in Garner Case*, N.Y. TIMES, July 17, 2019, at A1; Mitch Smith, *Officer Cleared in 2016 Killing of Black Driver*, N.Y. TIMES, June 17, 2017, at A1; Timothy Williams & Mitch Smith, *Jurors Decline Charges in Death of Cleveland Boy*, N.Y. TIMES, Dec. 29, 2015, at A1; Tracy Connor et al., *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBC NEWS (Nov. 25, 2014, 2:21 AM), https://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shooting-michael-brown-n255391 [https://perma.cc/4SLQ-WB2N]; Ida Lieszkovszky, *Cleveland Police Officer Michael Brelo Not Guilty*, CLEVELAND.COM (May 23, 2015), https://www.cleveland.com/court-justice/2015/05/brelo_verdict.html; Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016, 8:57 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-miller-pretrial-motions-20160727-story.html; Steve Schmadeke & Jeremy Gorner, *Anger Follows Acquittal in Rare Trial of Chicago Cop*, CHI. TRIB. (Apr. 21, 2015, 7:09 AM), https://www.chicagotribune.com/news/breaking/ct-chicago-police-detective-manslaughter-trial-0421-met-20150420-story.html.

[106] Taslitz, *supra* note 24, at 282.

[107] *Whren*, 517 U.S. at 813; Sklansky, *supra* note 43, at 326-27 (discussing how Equal Protection Clause will not be meaningful vehicle to address discriminatory policing without showing of explicit racial animus on part of identified officers).

[108] *See* Balt. Sun Editorial Bd., Opinion, *Baltimore's Consent Decree Is Hurting Police Officer Morale. It's Also the Solution.*, BALT. SUN (Aug. 20, 2019, 7:45 AM), https://www.baltimoresun.com/opinion/editorial/bs-ed-0820-consent-decree-20190820-gothfjinebbf3kvhobx6ky4g3a-story.html ("The Fraternal Order of Police has been saying the same thing . . . for years, and it stands to reason that cultural change on the order the consent decree requires coupled with the demands of reducing Baltimore's horrific rate of violent crime would put enormous pressure on officers."); Derrick Blakley, *How Much Will New CPD Consent Decree Cost the City?*, CBS CHI. (Mar. 1, 2019, 7:46 PM), https://chicago.cbslocal.com/2019/03/01/cpd-consent-decree-cost/ [https://perma.cc/8CWL-BC44] (comparing cost of Chicago consent decree at $25.7 million, including almost $13 million for personnel, to cost of consent decrees for other cities and noting that Baltimore, Cleveland, and New Orleans spent $10.5 million, $11 million, and $7 million respectively).

The lack of legitimacy also makes it difficult for officers to do their jobs effectively.[109] Unhealthy relationships rife with mistrust between law enforcement officers and the communities they serve inhibit the information and insight that officers can gain from critical resources.[110] Some law enforcement agencies have deplorable solve rates for homicides.[111] Community members who are unable to trust police officers are unlikely to cooperate with investigations.[112]

The Court's refusal to acknowledge and remedy discriminatory police practices under the Fourth Amendment has helped foster a culture of unaccountability.[113] An essential role of the Court is to provide a check on the conduct of law enforcement.[114] This check is what distinguishes a democratic nation from a police state.[115]

CONCLUSION

The Court's deference to decisions made by officers policing American streets has resulted in an obvious disregard for the important impact that comprehensive police policies and procedures can have on law enforcement. The current spotlight on the disproportionate number of Black men and women killed by police has prompted attempts to reform many aspects of policing. Police leaders, experts, and communities impacted by police violence agree that there exists a need to increase police accountability and enhance police legitimacy.[116]

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[109] *See* BALTIMORE FINDINGS LETTER, *supra* note 21, at 4; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003); Walker, *supra* note 65, at 1.

[110] *See* BALTIMORE FINDINGS LETTER, *supra* note 21, at 4 ("[F]rayed community relationships inhibit effective policing by denying officers important sources of information and placing them more frequently in dangerous, adversarial encounters."); Walker, *supra* note 65, at 1 (explaining that police partnerships with community are "essential ingredient" in effective policing).

[111] *See, e.g.*, Martin Kaste, *Open Cases: Why One-Third of Murders in America Go Unresolved*, NPR (Mar. 30, 2015, 5:04 AM), https://www.npr.org/2015/03/30/395069137/open-cases-why-one-third-of-murders-in-america-go-unresolved [https://perma.cc/MV6T-YXK2].

[112] *Id.* ("Since at least the 1980s, police have complained about a growing 'no snitch' culture, especially in minority communities. They say the reluctance of potential witnesses makes it hard to identify suspects.").

[113] Nirej Sekhon, Essay, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1716 (2019).

[114] *Id.* at 1724.

[115] *See id.* at 1753-54 (explaining how Court's excessive deference to police discretion has given police power to suspend rights and act as if there were instilled martial law).

[116] *See* LAWRENCE & COLE, *supra* note 45, at 8.

The Supreme Court's decision in *Whren v. United States* has been described as a show of support for law enforcement in the American "War on Drugs."[117] That decision declared that the actual motivations of an officer do not factor into the constitutional analysis for determining the reasonableness of a traffic stop.[118] In doing so, the Court rejected arguments that would have required courts to consider if the stated basis of the stop was pretextual.[119] The Court refused to entertain whether discriminatory assumptions about the criminality of Black youth should weaken or eliminate the establishment of probable cause.[120] Instead, the Justices—in a unanimous decision—went to great lengths to avoid exploring the question of pretext.[121] In doing so, the Court undermined the legitimacy of law enforcement that it aimed to secure. Specifically, the Court negated the authority and potential importance of police policies and manuals.[122] *Whren* is not an anomaly in this respect.

The Supreme Court has a demonstrated pattern of disregarding policies for certain search-and-seizure cases. This is particularly true during face-to-face officer encounters with people of color.[123] Judicial opinions supporting officer misconduct undermine the efforts of law enforcement in its pursuit of legitimacy and accountability. This is of renewed importance in light of recent reform efforts to implement constitutional policing. What was deemed reasonably prudent and necessary by the Court during the "War on Drugs" era has come at a significant cost, not only to U.S. citizens but also to policing in America. The purported gains the Court made in fortifying officers' on-the-ground crime-fighting authority and strategies have led to the current deficits and unnecessarily deadly encounters in American policing.

Probable cause—for even the most minor offenses—has been used as a bright-line rule to permit the Court to forgo balancing individual interests against those of the government.[124] The Court presumes that governmental interests are

[117] Johnson, *supra* note 27, at 1075 ("In supporting law enforcement efforts once again in the 'war on drugs,' the *Whren* Court made any challenge to a pretextual stop close to impossible under the Fourth Amendment when the stop was based primarily on race."); *see also* Whren v. United States, 517 U.S. 806, 819 (1996).

[118] *Whren*, 517 U.S. at 819.

[119] *See id.* at 814 (categorizing petitioner's proposed test of "reasonableness" as "designed to combat nothing other than the perceived 'danger' of the pretextual stop" making it inconsistent with Court's cases).

[120] *See id.* at 814-15.

[121] *See id.* at 815 ("Petitioners argue that our cases support insistence upon police adherence to standard practices as an objective means of rooting out pretext. They cite no holding to that effect, and dicta in only two cases.").

[122] *See id.* (condoning officer behavior at odds with department policies).

[123] *See* Sklansky, *supra* note 43, at 317 ("The disregard of racial problems in the Court's recent vehicle stop decisions obviously has implications for all of Fourth Amendment law, not just for the rules governing roadside detentions.").

[124] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 321-22 (2001) ("Thus, the probable-cause standard applies to all arrests, without the need to balance the interests and

superior to individual interests when an officer has probable cause to believe that a crime has been committed.[125] This truncated analysis assumes that the government's interest will always rest on the side of making the arrest and enforcing the law, regardless of the arresting officer's motivation or the triviality of the offense. Police leaders and experts committed to improving police legitimacy and avoiding unnecessary use of force on American streets would categorize the governmental interest differently.

This reflexive and habitual support is evidenced by the enormous deference given to the manner in which officers have been legally permitted to conduct traffic stops over the last two decades. Fourth Amendment jurisprudence has resulted in the erosion of individual protections related to stops, searches, and arrests. Officers have been given wide latitude to question a motorist and inconvenience a motorist's life, despite the minor nature of the offense.[126] Officers have been granted the right to question an individual regarding their citizenship status and history of drug use.[127] They have also been granted the right to arrest an individual for an offense that has been deemed a nonarrestable offense under state law.[128]

The Court's reflexive and habitual support is also demonstrated by the conflicting and selective value of importance placed on local policies and procedures designed to govern officer conduct. A review of the Supreme Court cases involving an analysis of departmental policies and procedures indicates that weight is given to the mandates provided by those policies when the subject officers' conduct comports with the policy. This holds true even when the conduct is contrary to existing Fourth Amendment jurisprudence. The outcome further erodes civilian protections while bolstering the support of law enforcement and on-the-ground officer decisions. Supreme Court decisions on stops, searches, and arrests are not aligned with best practices or modern reform efforts.

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circumstances involved in particular situations." (citing Dunaway v. New York, 442 U.S. 200, 208 (1979))).

[125] *See id.* at 322 ("An officer may arrest an individual without violating the Fourth Amendment if there is probable cause to believe that the offender has committed even a very minor criminal offense in the officer's presence.").

[126] Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 133-37 (2017) (citing cases establishing legal right of officers to question motorists and others about details, including where they are coming from and going to, if officers can conduct consensual searches of their belongings, and immigration status of motorists and companions).

[127] *See* Muehler v. Mena, 544 U.S. 93, 101 (2005) (holding that officer "did not need reasonable suspicion to ask [defendant] for her name, date and place of birth, or immigration status"); Terry v. Ohio, 392 U.S. 1, 10 (1968) (holding that officer may stop and question individual if they believe the individual may be involved in criminal activity).

[128] *See* Virginia v. Moore, 553 U.S. 164, 177 (2008) (holding that officer's arrest was valid even though state law required that only citation be given for offense).

This misalignment endangers the ultimate effectiveness of reform efforts. It encourages departments and officers to go through the motions with an understanding that the federal courts will uphold searches and seizures contrary to policy as long as they are supported by probable cause, no matter how specious. The potential for federal courts to undermine the reform efforts of local police departments will come at great financial and organizational costs. The failure of the courts to fully consider the reasonableness of officer conduct will reinforce the illegitimacy of policing and all levels of government. All the while, members of marginalized communities will be left to continue suffering discriminatory and deadly violence at the hands of police.

That suffering is demonstrated in many ways, including pervasive and widespread police abuses—in some instances captured by video—in the form of the killings of Michael Brown, Eric Garner, Tamir Rice, and Walter Scott. That suffering has reignited a national debate about the way police departments handle encounters with Black people. The way that Supreme Court decisions have contributed to that suffering makes it clear that there are legal determinants beyond just a few bad apples that foster injustice and suffering.