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## Article

# The Incidental Regulation of Policing

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### INTRODUCTION

In his groundbreaking 1968 study, James Q. Wilson described how a law enforcement agency's "style" is influenced by the local political environment.<sup>1</sup> In a passing parenthetical, Wilson noted that police practices "may be affected in unintended ways by various political actions, but that is another matter."<sup>2</sup> The study of legal decisions that affect policing even though they are made without policing in mind has largely remained "another matter" ever since. Scholars have focused their attention on laws that are centrally concerned with policing<sup>3</sup> or have looked beyond law altogether to the many sublegal

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1. JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 1–4 (1968).

2. *Id.* at 231.

3. There has been, of course, significant academic attention to laws and doctrines that are intended to have some specific effect on police practices. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (addressing problems with Fourth Amendment doctrine); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983) (discussing the theoretical justification for the exclusionary rule); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001) (seeking to change the doctrine governing consensual encounters).

factors that can affect an officer's decision to take a particular action by, for example, making an arrest or using force.<sup>4</sup> A

Legal scholars have also identified legal doctrines that, while primarily concerned with policing or criminal justice, have unintended and sometimes perverse consequences. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 196–281 (2011) (describing how the constitutionalization of criminal procedure has precluded judicial review of substantive criminal law and raised the costs of legislative action); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1313 (1994) (arguing that the combination of constitutional criminal procedure and evidence law “create functional—if unintended—incentives for law enforcers” to commit perjury); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (pointing out how the current approach to qualified immunity has incidentally stymied the development of constitutional law and “degrade[d] existing rights to a least-common-denominator understanding of their meaning”); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000) (explaining that the remedial structure for constitutional torts may increase the incidents of violations when the perceived benefits make the monetary costs politically salable); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006) (describing the perverse impact constitutional protections can have on the political protections of defendants). No shortage of scholars have observed that the sheer number of substantive criminal offenses has broadened the reach of the criminal justice system by giving police officers broad discretion to selectively stop, search, and arrest and prosecutors the power to cherry-pick from a buffet of criminal charges, creating a heightened potential for arbitrary and discriminatory enforcement. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 21, 30–31 (2008); HARVEY A. SILVERGATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* xxxii–xxxvii (2009); David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 557–59 (1997) (discussing specifically law enforcement authority to stop people for traffic offenses); Alex Kozinski & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43, 45–49 (Timothy Lynch ed., 2009); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

4. Race, gender, and education are perhaps the most frequently discussed sublegal attributes. E.g., James J. Fyfe, *Who Shoots? A Look at Office Race and Police Shooting*, 9 J. POLICE SCI. & ADMIN. 367, 369–81 (1981) (race); Cara E. Rabe-Hemp, *Female Officers and the Ethic of Care: Does Officer Gender Impact Police Behaviors?*, 36 J. CRIM. JUST. 426 (2008) (gender); Victor E. Kappeler et al., *Police Officer Higher Education, Citizen Complaints and Departmental Rule Violations*, 11 AM. J. POLICE 37 (1992) (officer education). Scholars have, however, also identified other factors. See, e.g., TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (describing the effect of community perceptions of police legitimacy); E. ALLAN LIND & TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (discussing citizens’ concerns with legal authorities); David N. Allen, *Police Supervision on the Street: An Analysis of Supervisor/Officer Interaction During the Shift*, 10 J. CRIM. JUST. 91, 95–96 (1982) (discussing the role of front-line supervision); James A. Conser, *A Literary Review of the Police Subculture: Its Characteristics, Impact and Policy Implications*, 2 POLICE STUD.: INT’L REV. POLICE DEV. at 46, 51 (Winter 1980) (focusing on the police subculture); Robin Shepard Engel, *The Effects of Su-*

small but growing cadre of scholars have begun scrutinizing a wider array of legal doctrines, recognizing that the “the law of the police” is broader than conventional accounts acknowledge.<sup>5</sup> Thus far, however, these efforts have not distinguished between laws that are directed at changing police behavior—state certification requirements, for example, which demand that would-be officers satisfy certain criteria<sup>6</sup>—and laws that have an incidental, and often unanticipated, impact on policing.

In this Article, I explore the incidental regulation of policing in its own right. The law enforcement industry operates not in a vacuum, but against a legal backdrop that includes laws that encompass police agencies as constituents of a broader regulatory ambit, such as rules and regulations aimed at local government entities and employers. Even when these laws are explicitly intended to reach police, they are not necessarily intended to affect *policing*—i.e., how officers act—in specific ways. These laws are “policing-neutral,” but they can have a profound, if unappreciated, effect on police practices. By influencing policing style, determining enforcement strategy, and shaping officer tactics, these laws play a role in the external provision of police services, shaping how officers interact with civilians. But they also shape the internal environment in which officers operate, affecting the dynamic that exists between line officers and supervisors as well as interdepartmental relationships. When scholars and reformers discuss policing behaviors, they often emphasize the symptom without engaging with the underlying legal causes. Police practices, or so I shall argue, are meaningfully responsive to an array of laws that do not, on their face, have anything to do with policing. Understanding the incidental regulation of policing, then, is a necessary prerequisite to understanding and reforming police practices.

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*pervisory Styles on Patrol Officer Behavior*, 3 POLICE Q. 262 (2000) (discussing the role of front-line supervision); Robin Shepard Engel, *Patrol Officer Supervision in the Community Policing Era*, 30 J. CRIM. JUST. 51, 53–54 (2002) (focusing on supervisory philosophies); Stephen Mastrofski, *Policing the Beat: The Impact of Organizational Scale on Patrol Officer Behavior in Urban Residential Neighborhoods*, 9 J. CRIM. JUST. 343, 351–55 (1981) (identifying organizational dynamics); Douglas A. Smith & Jody R. Klein, *Police Control of Interpersonal Disputes*, 31 SOC. PROBS. 468, 477–79 (1984) (same); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (2004).

5. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 785 (2012).

6. *Cf. id.* at 798 n.145.

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This Article explores the incidental regulation of policing in three parts. In Part I, I define the concept of incidental regulation and describe the potential problems that it raises in the policing context. Unlike the laws that are aimed exclusively or primarily at police, laws that have only an incidental regulatory effect may not benefit from a deliberative approach to determining whether the impact on police practices is normatively desirable. Instead, the impact on policing is a side effect, and can be entirely unintended. There are reasons to be especially chary of unintended consequences in the context of law enforcement. Police officers carry—and use—handcuffs, batons, and guns, and policing commonly intrudes on sensitive liberty and privacy interests. Further, officers play a unique role in modern society both explicitly, fulfilling a public safety function, and implicitly, as uniformed representatives of the existent social and legal hierarchy. These values are significant enough that deliberately modifying the scope of police authority or how it is exercised typically gives rise to extended debate. Accidental modifications, then, should be even more objectionable.

The conventional academic conception of police regulation, however, is ill-suited to address the incidental effects of laws of general applicability. Current academic work is dominated by two complementary perspectives. The first views law as a direct regulatory mechanism, and so scholars direct their attention primarily at the constitutional doctrines that create conduct rules for law enforcement officers, design decision rules that direct courts in their evaluation of officer actions, and fashion the scope and contours of remedies available for constitutional violations. The second largely eschews law, looking instead to the non-legal aspects of policing such as the effect of policing philosophies on officer behavior, the way that officers' arrest decisions are shaped by organizational structure, and the importance of street-level supervision. These conversations are important, and they have advanced our understanding of the police, but they are incomplete. Rachel Harmon and a few others have sought to correct this deficiency by exploring “the body of federal, state, local, and even international law that applies to police officers and departments and influences what they do.”<sup>7</sup> In the final section of Part I, I engage with the developing

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7. *Id.* For example, legal scholars have identified concerns with police practices that do not implicate the Constitution, such as the use of informants, undercover work, and private policing. In this vein, academic work focuses on

approach by contending that the incidental regulation of policing is a discrete phenomenon worthy of separate study.

Part II offers three examples of the incidental regulation of policing, drawing on both state and federal law. Local government law, which controls geopolitical boundaries and the relationship between municipalities and counties, can establish a competitive dynamic between neighboring police agencies that can result in an expansion of high-visibility police services or cooperation that lends itself to a regional focus on crime prevention, detection, and investigation. The nature of territorial jurisdiction, which limits the geographic area that a particular agency is responsible for, can also encourage the adoption of specific policing tactics, including intentionally displacing crime and disorder into neighboring jurisdictions. State labor law that requires or permits collective bargaining also changes the police role by emphasizing a legalistic approach to patrol, characterized by aggressive criminal enforcement and a high number of arrests. It can also be a source of friction within police agencies, which can negatively affect officer morale and performance. And federal race discrimination law, which constrains how employers assign job duties, also has the incidental effect of inhibiting efforts to improve the public's perception of police legitimacy, particularly in minority communities. When the police are viewed as illegitimate, violent crime increases and civilian cooperation with the police decreases; both phenomena prompt a negative response from the police themselves, changing the way that officers interact with community members.

In Part III, I propose a three-part approach to addressing the potential problems of incidental regulation: laws that exert an incidental regulatory effect on policing must be identified, those effects must be evaluated, and appropriate corrective measures must be taken. Each step presents its own challenges. Forecasting the effects of law on the police is plausible in some cases, as increased scrutiny of proposed legislation could

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the subconstitutional law, or the lack of law, governing police. *See, e.g.*, ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009) (informants); Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 *AM. CRIM. L. REV.* 1145, 1161–73 (2009) (informants); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 *STAN. L. REV.* 155, 159 (2009) (undercover operations); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 *J. CRIM. L. & CRIMINOLOGY* 49, 90–93 (2004) (privately contracted police).

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enable lawmakers to forecast, to some extent, a law's likely impact on police practices, but procedural changes that would drive such scrutiny are challenging and predictions can be notoriously unreliable. A more robust post-enactment review may be appropriate in many cases, and a growing body of research could suggest correlates that are particularly likely to affect policing, as well as certain effects that are likely to be particularly strong or weak. Once a law's incidental effects are recognized, we can engage in normative evaluation by making an informed decision about whether the law should encourage a particular police behavior. If it should, we may simply accept the result or perhaps even take steps to reinforce it. If, on the other hand, the law pushes officers to act in an undesirable way, two separate corrective measures may be appropriate: police-specific carve-outs could exempt police from generally applicable laws, either in part or in whole; and independent offsets could seek to compensate for the effects of incidental regulation through law or policy without upsetting the existent legal background. The concept of carve-outs and offsets are familiar ones, both with regard to policing and in other areas of law, but their use as mechanisms to mitigate the effects of incidental regulation has yet to be fully explored.

#### I. THE PROBLEM OF INCIDENTAL REGULATION

In this Part, I explore the concept of incidental regulation of policing, identifying the problems that can arise when policing-neutral laws impact police practices, which both implicate core social values and affect the functional and expressive role that police play in modern society.<sup>8</sup> I then describe how focus-

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8. This is not to say that laws of general applicability are unproblematic in other areas of law or in society more generally. The first person to take a systematic approach to incidental regulation was not a legal scholar, after all, but a sociologist. See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894-98 (1936). In this Part, I contend that the unique aspects of policing, factors that establish what we might call "police exceptionalism" provide particularly pressing reasons to be wary about the incidental regulation of policing, but one need not go so far. If you agree with the proposition that police practices and tactics are important—a proposition that seems relatively uncontroversial in light of the academic and popular attention given to the subject—then identifying the incidental regulation of policing, which can dramatically affect those practices and tactics, is worthy of study. One can accept this intermediate conclusion without necessarily agreeing with my broader premise that the incidental regulation of policing is more concerning than incidental regulation in some number of other areas.

ing on incidental regulation complements conventional legal scholarship.

Before diving too deeply into my argument, I first want to clarify what I mean by “incidental regulation” and “policing-neutral” laws, and perhaps the easiest way to do that is to explain what they are *not*. Police agencies and individual officers are subject to a number of legal rules and restrictions that exist exclusively or primarily to regulate police conduct. From the “mess” of rules that make up the Fourth Amendment doctrines that govern searches and seizures<sup>9</sup> to state laws establishing officer certification requirements,<sup>10</sup> judicial and legislative law-makers direct a significant amount of effort at shaping police behavior. Each of the resulting laws has, and is intended to have, a specific impact on policing.<sup>11</sup> But police agencies and officers are also subject to laws that have a broader regulatory scope than the law enforcement industry, laws that are not intended to have any particular effect on policing practices. Some of these laws, such as state labor laws that govern public sector collective bargaining, are certainly intended to encompass police—law enforcement as an industry—but they are often not intended to affect *policing*—how officers act as they perform their unique functions. These laws are policing-neutral, and their effect on policing is incidental to their primary purposes.<sup>12</sup> When I refer to the incidental regulatory effects of policing-neutral law, then, I mean the unintended but often profound ways that certain laws, which happen to include police within a

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9. Roger Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 *IND. L.J.* 329, 329 (1973).

10. *See, e.g.*, FLA. STAT. § 943.13 (2013).

11. Of course, it is always possible that a law will undermine the effect that it was intended to have or simply fail to have the intended effect. *See* Levinson, *infra* note 3, at 350–54 (contending that, in some cases, monetary damages for constitutional torts may actually increase the number of violations); Seth W. Stoughton, Note, *Modern Police Practices: Arizona v. Gant’s Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 *VA. L. REV.* 1727, 1729–30 (2011) (arguing that *Gant* would do little to narrow the scope or frequency of vehicle searches incident to arrest).

12. This is not to suggest that law-makers are entirely unaware that policing-neutral laws will have any effect on police practices. At times, law-makers may support or argue against a policing-neutral proposal because of the perceived effects on policing, which may be pointed out by police lobbyists or unions. *See, e.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 *COLUM. L. REV.* 1384, 1400 (2000). Nevertheless, these effects often go unpredicted, and even when predicted they are incidental to the primary purpose of the law under consideration.

broader regulatory ambit, change officer behaviors in ways that are unintended and often entirely unexpected.

The concept of unintended consequences goes well beyond policing, of course. All industries, public and private, are subject to regulations that go beyond that particular industry; teachers and garbage collectors perhaps no less than police officers. Real world costs and efficiency concerns lead law- and policy-makers to engage in wholesale regulation by category, and legal scholars largely acknowledge “the law of unintended consequences” as the result of unavoidably imperfect information about the intersection of complex systems and regulatory mechanisms.<sup>13</sup> To some extent, the concepts in this Article may be applied with equal strength in industries other than policing. This paper, then, identifies a specific incidence of a more general phenomenon. Nevertheless, I contend that the incidental regulation of policing can be particularly problematic.

Police play a unique and important role in modern society. They are, in Hobbesian terms, necessary to fulfill the government’s role as peacekeeper, enabling social cooperation by keeping us from killing each other. In purely practical terms, police perform a range of critical functions by advancing public safety, controlling disorder, detecting and investigating criminal violations, apprehending offenders, et cetera. Many, perhaps most, of these functions inevitably threaten individual liberty interests that hold a privileged position in our social and legal tradition. As one of the three unalienable rights upon which our fledging country was built,<sup>14</sup> the concept of liberty remains a core value enshrined in the Bill of Rights and central to the concept of justice that criminal procedure doctrines seek to protect. Much ink has been spilled over whether the law demarcates correctly the boundaries of government power,<sup>15</sup> but

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13. See, e.g., Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 HOUS. L. REV. 665, 684–88 (2010) (expounding on the role of unintended consequences in policymaking); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 816–18 (2001) (discussing the hidden costs of increasing director independence in corporate structures); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U.L. REV. 335, 342–46 (2000) (discussing unintended consequences in the context of campaign finance reform); Susan Ness, *The Law of Unintended Consequences*, 58 FED. COMM. L.J. 531, 532–35 (2006) (discussing the unexpected effects of the 1996 Telecommunications Act).

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. The various challenges that have been leveled against criminal procedure doctrines are literally too numerous to even attempt to provide a repre-



few people would contest the assertion that police officers have the ability, and at times the obligation, to invade privacy, seize property, restrict movement, and inflict injury.<sup>16</sup> It is for exactly this reason that police, unlike any other local government service, carry handcuffs, batons, and firearms. Policing is uniquely and inevitably invasive; the detection and investigation of many crimes—some more than others—often demands a certain amount of intrusion into private spaces, relationships, and acts. Police can also intrude into people’s lives in a more direct and confrontational way; coercion is an essential element of policing.<sup>17</sup> Officers are distinctively uniformed, decorated with a badge, and visibly armed, all of which serve as a reminder of their capacity and authority for violence. The law allows officers to make explicit what is otherwise implicit, to inform civilians that non-compliance may be met with force or arrest.<sup>18</sup> The dynamic of police/civilian encounters reveals itself in the way that we talk about it; policing is something that is done *to* someone more often than it is done *for* or even *with* someone. Where civilians are “consumers” or “customers” of many public services—libraries, garbage collection, utilities, education, health care, and so on—it would be odd, in many circumstances, to identify someone as a “consumer” of police services. This sense of coercion and inherent threat to liberty interests are functional elements of policing exceptionalism.<sup>19</sup>

Police also play a unique expressive role, profoundly affecting citizens’ conception of law and order. Community attitudes about enfranchisement and the legitimacy of both law and gov-

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sentative sample. They include originalist critiques of broad Fourth Amendment principles to narrow, scientific disputes with specific doctrines. *See, e.g.*, Amar, *supra* note 3, at 801–04 (contending that the elaborate skein of Fourth Amendment rules should be replaced with a reasonableness standard); Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in OXFORD HANDBOOK ON LINGUISTICS AND LAW 326 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (challenging the judicial understanding of consent in the police context). Relatedly, there is a near-boundless body of work that seeks to improve the remedial structure for constitutional violations. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) (discussing the criticisms and possible changes to the exclusionary rule).

16. *E.g.*, Harmon, *supra* note 5, at 762.

17. *See* Steinbock, *supra* note 3, at 554 n.217.

18. *Cf. id.* at 513–14 (describing investigatory stops).

19. *Cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006) (discussing “criminal law exceptionalism” in the separation of powers context).

ernment depend heavily on perceptions that are shaped by the interactions that civilians have with police officers, particularly uniformed patrol officers. To the community, uniformed officers are the enforcers of the existing social order. Patrol officers are highly visible, local representatives of “the system,” enforcers of the existing order, and ambassadors not just for their respective agencies, but for government, law, and justice more generally.<sup>20</sup> Martin Luther King, Jr., criticized the Birmingham Police Department, for example, not just because of individual malicious acts, but also because he saw them as responsible for “preserv[ing] the evil system of segregation.”<sup>21</sup> And federal grants promote “community policing” by taking officers out of patrol vehicles and putting them out on foot, where they can be more effective ambassadors by being more accessible to a community.<sup>22</sup>

This expressive aspect of policing can have broad real-world consequences. Tom Tyler, who has written extensively about police legitimacy, has concluded that community members who view the police as legitimate are more likely to obey the law, assist with police activities, and support policies that empower the police.<sup>23</sup> The inverse is also true; the perception that police are illegitimate undermines “the moral right of the law to dictate appropriate behavior,”<sup>24</sup> not just the moral right of the police to enforce the law’s dictates. Communities that have a very low assessment of police legitimacy, and therefore distrust the police, are less likely to notify the police of low-level problems or cooperate with the prevention, detection, and investigation of crime; “typical residents in low-income urban neighborhoods are extremely reluctant to cooperate with police

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20. Alison McKenney Brown, *Police as Symbols of Government and Justice*, in POLICE MISCONDUCT 15, 15 (Michael J. Palmiotto ed., 2001).

21. David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791, 849 (1993).

22. See, e.g., Peter Hermann, *City Putting Police Back on Foot Patrol*, BALTIMORE SUN, Jan. 7, 2010, [http://articles.baltimoresun.com/2010-01-07/news/bal-md.hermann07jan07\\_1\\_foot-patrol-police-force-frederick-h-bealefeld-iii](http://articles.baltimoresun.com/2010-01-07/news/bal-md.hermann07jan07_1_foot-patrol-police-force-frederick-h-bealefeld-iii).

23. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 514 (2003).

24. Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING 203, 205 (2010).

in producing crime reduction strategies.”<sup>25</sup> Officers, in turn, are more likely to use force and to make an arrest when a suspect is uncooperative or antagonistic<sup>26</sup> and when the officer perceives the community—not just the individual suspect—as hostile.<sup>27</sup> Further, police illegitimacy can itself be criminogenic; there are indications that negative perceptions of the police increases violent crime in disadvantaged areas.<sup>28</sup> Given higher crime and lower cooperation, law enforcement agencies may respond to a lack of community cooperation by unilaterally initiating aggressive “zero tolerance” crackdowns or by under-policing.<sup>29</sup> And some research suggests that officers are also more likely to engage in misconduct in disadvantaged communities.<sup>30</sup> The perception that one’s community is besieged by the police further decreases police legitimacy, as can the perception that the police are ignoring problems in minority neighborhoods.<sup>31</sup> These actions tend to exacerbate perceptions of police

25. ERIC J. FRITSCH ET AL., POLICE PATROL ALLOCATION AND DEPLOYMENT 103 (2009); cf. Ronald Weitzer, *White, Black, or Blue Cops? Race and Citizen Assessments of Police Officers*, 28 J. CRIM. JUST. 313, 321–22 (2000).

26. Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in POLICE VIOLENCE 23, 24 (William A. Geller & Hans Toch eds., 1996).

27. *Id.* at 26.

28. See Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 CRIMINOLOGY 469, 492 (2005); see also VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS xv (2011) (concluding that the negative relationship that young Black and Latino men have with police leads “many of them to fulfill the destiny expected of them” by engaging in “crime and violence”).

29. See MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS 45–46, 103–04 (2009).

30. Robert J. Kane, *The Social Ecology of Police Misconduct*, 40 CRIMINOLOGY 867, 887 (2002).

31. Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 457–58 (2006) (describing focus group interviews in which Black participants expressed “a concern with abuse at the hands of police, general underpolicing, and then a sense of excessive or heavy-handed response to a situation allowed to fester until[] it was out of control”); Harlan Hahn, *Ghetto Assessments of Police Protection and Authority*, 6 LAW & SOC’Y REV. 183, 183 (1971) (“While many black citizens have complained about harsh or brutal police behavior, they also have expressed intense criticism of a lack of police protection.”); KLEIMAN, *supra* note 29; RIOS, *supra* note 28, at xiii (describing the author’s experience as a college student and former gang member in Oakland, CA, writing that “[i]t seemed that police were there selectively, to arrest my family and friends for petty acts but not to arrest the main drug dealers and victimizers who continued to prey on my community”).

illegitimacy, further undermining crime control efforts<sup>32</sup> and setting up a feedback loop between a negative community assessment of police, high crime and the police response.

In many ways, society already recognizes the functional and expressive values of policing. When legislative, judicial, or administrative policy-makers address policing, they do so by creating or modifying rules aimed primarily at police, rules directed at changing officer behavior or bolstering police legitimacy. Under the typical approach, rules are generated through a deliberative process that safeguards, to some extent, the delicate balance between societal and individual interests.<sup>33</sup> In each case, the rule under consideration is intended to impact policing in some way, so the policy-making process inherently includes an opportunity to evaluate the relative merits and drawbacks of the various options under consideration. When the Supreme Court determined that the Fourth Amendment permits officers to make warrantless felony arrests, for example, it rejected requiring a warrant or exigent circumstances because such a requirement would “hamper effective law enforcement.”<sup>34</sup> And when a Police Officer Standards and Training Commission, created by state law and responsible for establishing the minimum training requirements for officer certification,<sup>35</sup> decides how much time would-be officers need to spend learning about various subjects in the police academy, it does so after considering how that training is likely to impact officer behavior.<sup>36</sup> In both cases, and in many others, the rules

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32. Cf. 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, 233–35 (2008) (arguing effective crime control requires community cooperation, which may be obtained by favorable perceptions about the institutional legitimacy of police).

33. See Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1322 (1998) (contending that, with regard to substantive criminal law, the Supreme Court typically reinforces legislative process, but that the Court’s process concerns are reduced in the “absence of deliberative legislative choice”).

34. *United States v. Watson*, 423 U.S. 411, 431 (1976). Whether the Court is the best judge of what constitutes “effective law enforcement” and whether it can correctly predict the effects of a particular rule are separate questions. For more on the former, see Harmon, *supra* note 5, at 768–80 (contending that constitutional rights are insufficient protection from police intrusion and that courts are unable to independently protect constitutional rights). For more on the latter, see Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014).

35. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 7 (2009).

36. See Harmon, *supra* note 5, at 806.

that affect the police are drafted with the end effect on policing in mind.

Thus, the lines that delimit police authority are carefully drawn, with police given more power than ordinary civilians, but less than they might want. When officers act, they do so under a mantle of public authority that excuses them from many of the civil and criminal laws that are intended to protect liberty interests. Where a private citizen would be generally subject to civil and criminal sanctions for false imprisonment, kidnapping, or battery, the police officer is not only allowed to, but expected to infringe on the rights of others by detaining, arresting, and using force.<sup>37</sup> Yet an officer's exercise of these powers is circumscribed by a tangled skein of rules that grant or restrict authority only after being hammered into shape through the pressures of legislation or litigation.

This is not necessarily the case with incidental regulation. For laws that simply include law enforcement as part of a broader regulatory ambit, the effect on policing is a side effect, and often an unintended one.<sup>38</sup> This observation should lead us to be suspicious of laws that have an incidental effect on how officers go about policing. When an increase or decrease in the frequency of arrests, the severity of force, or the measure of police legitimacy is merely a side effect of some apparently unrelated legal decision, it both devalues the interest infringed and deprives the police of the democratic legitimacy that would otherwise come from deliberate approval.

Despite its importance, incidental regulation has largely flown under the radar of conventional scholarship. Scholars who touch on policing issues typically do so through a constitu-

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37. In the right circumstances, of course, a private citizen can exercise some aspect of police powers; citizen's arrest remains part of the common law, individuals can use force in self-defense, and businesses can take steps, including detaining and searching, to protect their property. Nevertheless, it is true that police officers can exercise police powers with more latitude than can civilians. A police officer, for example, is protected from liability for false arrest if he had probable cause to believe that the subject of the arrest committed a crime, where a civilian is protected only if a crime has actually been committed. *Compare, e.g.*, CAL. PEN. CODE § 836(a)(3) (2014) (giving police officers authority to arrest when they have "probable cause to believe that the person to be arrested has committed a felony"), *with* CAL. PEN. CODE § 837(3) (2014) (giving private persons authority to arrest "[w]hen a felony has been in fact committed, and [the private person] has reasonable cause for believing the person arrested to have committed it").

38. *See infra* Part II.

tional lens,<sup>39</sup> “largely accept[ing] the descriptive claim that courts and the Constitution” are “the primary legal mechanism for regulating the police,”<sup>40</sup> viewing it as “the source most likely to supply applicable rules.”<sup>41</sup> Practical considerations, it must be said, also may push us toward finding constitutional answers to questions of police reform. Since the Warren Court’s aggressive development of procedural criminal law,<sup>42</sup> the Constitution stands out as a potential one-stop shop for police reform, dramatically reducing the transaction costs of regulating the more-than-800,000 sworn officers who work at the almost-18,000 law enforcement agencies across the United States.<sup>43</sup>

As a few scholars have identified, however, approaching police regulation through the lens of constitutional law means focusing on some aspects of policing—those regulated by the courts, and particularly by the Supreme Court—at the expense of others.<sup>44</sup> For example, scholars write about consensual encounters, searches, stops, arrests, and interrogations, but they do not often consider how police officers are selected, trained, and equipped; how they go about prioritizing and responding to calls for service; or how specialized squads shape the police role.<sup>45</sup> Constitutional criminal procedure is the bread and butter of legal scholars, but the meat and potatoes of policing do not implicate constitutional rights.<sup>46</sup> Focusing on constitutional regulation thus fails to capture the full extent of police activities.<sup>47</sup> It also limits the discussion about the possible mecha-

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39. Joh, *Breaking the Law to Enforce It*, *supra* note 7, at 159 (“Legal commentary focuses primarily on constitutional criminal procedure.”).

40. Harmon, *supra* 5, at 782.

41. George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 216 (1975) (“One of the sad but indisputable characteristics of the development of legal limitations on law enforcement activity is that it compels looking initially to federal constitutional law, the source most likely to supply applicable rules.”).

42. See, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 249 (1968) (“[T]here can be little doubt that the [criminal law] developments of the [Warren Court] have unalterably changed the course of the administration of criminal justice in America.”).

43. See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1–2 (2011) [hereinafter REAVES, CENSUS], available at <http://bjs.gov/content/pub/pdf/cslea08.pdf>.

44. Harmon, *supra* note 5, at 784–85.

45. A growing number of scholars are looking beyond constitutional questions, but this approach has not yet been widely adopted.

46. Cf. DONALD BLACK, THE MANNERS AND CUSTOMS OF THE POLICE 86 (1980) (describing arrest as a relatively infrequent facet of policing).

47. This is particularly true when police respond to constitutional pres-

nisms that could be leveraged to change police behavior, a particularly thorny aspect of constitutional criminal procedure. The exclusionary rule, for example, allows for the suppression of unconstitutionally obtained evidence, but is limited both by its deterrence rationale<sup>48</sup> and by the fact that it only comes into play during criminal prosecutions.<sup>49</sup> Civil liability, theoretically available when a police officer infringes on an individual's federal statutory or constitutional rights,<sup>50</sup> is curtailed by an expansive qualified immunity doctrine that insulates officers unless their actions violate "clearly established" law.<sup>51</sup> Constitutional torts may be redressed with compensatory damages upon a showing of actual harm, and punitive damages are available if the deprivation was "wanton and malicious," but the Court has rejected the concept of presumed harms for constitutional violations.<sup>52</sup> An individual who suffers only dignitary harm—being stopped, searched, or surveilled by police, for example, but nothing more—may have difficulty proving actual harm,<sup>53</sup> leaving open only the possibility of nominal damages. And even when substantial damages are a real possibility, individual officers are likely to be indemnified by their agency or local government,<sup>54</sup> which may be happy to pay when the monetary costs of a constitutional violation are outweighed by the political benefits.<sup>55</sup> With regard to the scope of both analysis

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asures by shifting to less regulated practices. Gary T. Marx, *The Interweaving of Public and Private Police in Undercover Work*, in *PRIVATE POLICING* 172, 184–86 (Clifford D. Shearing & Phillip C. Stenning eds., 1987) (describing how restrictions on police action encourage officers to leverage private partners—"detectives and informants"—who are "less accountable and not as subject to such limitations").

48. Suppression is only warranted in cases where it would deter future malfeasance. *Davis v. United States*, 131 S. Ct. 2419, 2426–27 (2011).

49. See *Stoughton*, *supra* note 34, at 881–82 (providing reasons that officers make arrests other than to formally invoke the criminal justice process).

50. 42 U.S.C. § 1983 (2006); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

51. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 *FLA. L. REV.* 851, 852 (2010).

52. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carrey v. Piphus*, 435 U.S. 247, 262–64 (1978).

53. See, e.g., Levinson, *supra* note 3 ("[I]t is virtually impossible to imagine an alternative damages measure that could nonarbitrarily convert these types of intangible harms into dollars.")

54. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 *VAND. L. REV.* 583, 584 (1998).

55. See Levinson, *supra* note 3 ("[A] state government that inflicts cruel and unusual punishment on prisoners, or violates their free exercise rights, may benefit the entire non-prison population by reducing their taxes while

and reform efforts, constitutional scholarship provides an incomplete picture of policing.

Other scholars, particularly those in sociology and criminology, focus on the non-legal factors that guide the exercise of officer discretion. In what may have been the first study of the incidental regulation of policing, James Q. Wilson described how the local political environment—political partisanship, the size of constituencies, and the professionalism of the head executive—affects officers' approaches to the patrol function by pushing them to prioritize peacekeeping, aggressive crime-fighting, or responsiveness to community expectations.<sup>56</sup> Later studies have sought to identify the factors that influence officers' behaviors, particularly their decisions to arrest or use force. Researchers have identified, *inter alia*, the police subculture;<sup>57</sup> community perceptions of police legitimacy;<sup>58</sup> front-line supervision;<sup>59</sup> policing philosophies;<sup>60</sup> organizational dynamics;<sup>61</sup> and officer characteristics such as race,<sup>62</sup> gender,<sup>63</sup> and education,<sup>64</sup> just to name a few.

This approach captures more of policing than a strictly constitutional focus, but it, too, fosters a fragmentary understanding of police. Focusing on non-legal factors can, in short, put the cart before the horse by exploring the way that social factors affect police behavior without recognizing the role of law in creating those social factors. Further, recommendations for reform at the sublegal level overlook the extent to which those factors are shaped by background legal considerations, including laws not traditionally or primarily associated with the police. If, for example, officers with higher education use less

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imposing only costs on the prisoners.”).

56. WILSON, *supra* note 1. Later studies provided some support to his thesis, finding that officers in jurisdictions with a professional city manager were more likely to adopt a legalistic approach to police patrol. Robert H. Langworthy, *Wilson's Theory of Police Behavior: A Replication of the Constraint Theory*, 2 JUST. Q. 89 (1985).

57. *E.g.*, Conser, *supra* note 4.

58. Tom R. Tyler is the leading expert on police legitimacy. See TYLER, SOCIAL PSYCHOLOGY, *supra* note 4; TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 4; Tyler, *Enhancing Police Legitimacy*, *supra* note 4.

59. *E.g.*, Allen, *supra* note 4; Engel, *Effects of Supervisory Styles*, *supra* note 4.

60. Engel, *Patrol Officer Supervision*, *supra* note 4.

61. Mastrofski, *supra* note 4; Smith & Klein, *supra* note 4.

62. *E.g.*, Fyfe, *supra* note 4.

63. *E.g.*, Rabe-Hemp, *supra* note 4.

64. Kappeler et al., *supra* note 4.



force, as some studies suggest,<sup>65</sup> police reformers interested in reducing police violence should advocate for a more educated police department. But a state's collective bargaining rules may play a significant role in determining what forms of advocacy are likely to be effective. A police union—which represents current officers, but not future officers—might favor providing tuition assistance or paid leave so that current officers can pursue higher education, rather than changing hiring criteria for new officers or providing incentive pay for more educated officers, for example.

A small but growing number of legal scholars have begun to look beyond the constraints of the constitutional frame to what Harmon has described as “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.”<sup>66</sup> Harmon provides a useful taxonomy of the law of the police, categorizing five ways that law affects police: as conduct rules, remedies, qualification and training requirements, laws governing police management and organization, and laws governing access to information about the police.<sup>67</sup> Those categories are comprehensive, subsuming constitutional and statutory law at the federal, state, and local level and including both police-specific laws and incidental regulation that can “interfere with policing reform” and “tax efforts to protect civil rights.”<sup>68</sup>

This taxonomy is a valuable addition to legal scholarship, but it would benefit from expansion. The fact that the incidental regulation of policing avoids the deliberative process that safeguards societal interest-balancing makes policing-neutral laws a particular concern. These laws create the status

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65. James P. McElvain & Augustine J. Kposowa, *Police Officer Characteristics and the Likelihood of Using Deadly Force*, 35 CRIM. JUST. & BEHAV. 505, 514 (2008) (finding that college-educated officers were less likely to use deadly force); Eugene A. Paoline III & William Terrill, *Police Education, Experience, and the Use of Force*, 34 CRIM. JUST. & BEHAV. 179, 179 (2007) (finding that officers with any amount of college education used less verbal coercion, while officers with a 4-year degree used less physical force). *But see* Lawrence W. Sherman & Mark Blumberg, *Higher Education and Police Use of Deadly Force*, 9 J. CRIM. JUST. 317, 317 (1981) (finding that education level may not actually make a significant difference among officers who used deadly force).

66. Harmon, *supra* note 5, at 785. For example, legal scholars have identified concerns with police practices that do not implicate the Constitution, such as the use of informants, undercover work, and private policing. In this vein, academic work focuses on the subconstitutional law, or the lack of law, governing police. *See* sources cited *supra* note 7.

67. Harmon, *supra* note 5, at 802–08.

68. *Id.* at 799, 811.

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quo, defining the police role in society and shaping the practices that implicate policing's unique functional and expressive role in society.

## II. POLICING-NEUTRAL LAWS & INCIDENTAL EFFECTS

In the preceding Part, I identified the conceptual problem with incidental regulation and explained that it has largely evaded academic scrutiny. In this Part, I provide concrete examples of policing-neutral laws of general applicability that have an incidental regulatory effect on policing. Police departments, after all, are not just providers of law enforcement services. They are also employers, government agencies, and, for the most part, entities organized at the city or county level. As such, they are subject to laws that happen to include police agencies as constituents of a broader regulatory ambit. In the following pages, I demonstrate how these generally applicable laws incidentally affect the way that officers provide policing services. My goal is not to provide an exhaustive list of examples, but rather to provide useful illustrations of how laws that we do not associate closely with law enforcement may nevertheless impact the structure and form of policing.

### A. TERRITORIAL JURISDICTION & LOCAL GOVERNMENT LAW

Every fall, tens of thousands of alumni and fans of Florida Agricultural & Mechanical University gather in Tallahassee for a week-long homecoming celebration. In addition to the football game, public service events, and private parties, one of the most popular parts of homecoming involves seeing and being seen. Many attendees arrive with spectacularly decorated vehicles that boast stunning paint jobs, powerful stereo systems, and multiple television screens—I saw hundreds, if not thousands, of vehicles at the five separate FAMU homecomings that I worked as a police officer, and my firm favorite was a bright pink late-1960s Chevrolet Chevelle, complete with chrome accents, twenty-five inch spinning rims, and a hood that had been playfully adorned with a very debonair picture of the Pink Panther (the cartoon character, not Inspector Clouseau). These aren't just cars, they're works of art, and the owners spend the evenings displaying them by driving up and down West Tennessee Street, a major thoroughfare on the west side of town. Other attendees pull into roadside parking lots to laugh, drink, and enjoy the show. The crowds can be enormous, and traffic in that section of the city typically slows to a crawl. To manage

the event, the city police department and county sheriffs' office typically call in all off-duty officers, cancelling regular days off. The surge in manpower is used primarily to control the heavy pedestrian and vehicle traffic. As evening rolls around and businesses start to close for the night, officers clear the area by going from parking lot to parking lot, systematically sweeping people into cars and cars onto the street. At the same time, east-bound traffic into the city is restricted as much as possible, and side streets are closed off so that out-bound traffic cannot turn off of West Tennessee Street. The effect is to push vehicle traffic west until it is beyond the city limits. Not to be outdone, the sheriffs' office takes over and continues to funnel traffic away from the city, preventing cars from looping back as soon as they get beyond the city limits and forcing traffic into a neighboring county.<sup>69</sup>

The Tallahassee Police Department and Leon County Sheriffs' Office, which take the lead in FAMU homecoming operations,<sup>70</sup> are in many ways emblematic of modern policing. Law enforcement in the United States is dominated by the more than twelve thousand police departments operated by municipal governments<sup>71</sup> and three thousand sheriffs' offices organized at the county level.<sup>72</sup> These agencies employ almost 700,000 sworn officers—about eighty percent of all officers in the country<sup>73</sup>—and the majority of those are the uniformed pa-

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69. See Karl Eppers, *Law Enforcement Beefs Up Security for Homecoming*, THE FAMUAN, Oct. 2, 2011, <http://www.thefamuanonline.com/news/law-enforcement-beefs-up-security-for-homecoming-1.2643404#UxOHPNiYaP9>.

This description will be familiar to most residents of Tallahassee, but it is difficult to find an authoritative written account of either the event or the police response. The depiction that I have provided is based in large part on my own experience working as a police officer during five separate FAMU homecomings.

70. Also involved are the FAMU Police Department, the Florida State University Police Department, the Florida Highway Patrol, and the Florida Division of Alcoholic Beverages and Tobacco. *Id.*

71. REAVES, CENSUS, *supra* note 43, at 2. A small percentage of police departments are “operated by a county, tribal, or consolidated city-county government.” *Id.* at 4.

72. *Id.* at 5. The term “sheriffs’ office” refers to an agency that is independent of county government. *See id.* (“Some sheriffs’ offices that have been involved in consolidations of county and municipal governmental functions are classified as local police in the CSLLEA.”). Many state constitutions create sheriffs’ offices. *See, e.g.*, GA. CONST. art. IX, § 1, ¶ III. A county sheriffs’ department, in contrast, is literally a *department* of, and thus subordinate to, county government.

73. REAVES, CENSUS, *supra* note 43, at 2. The remainder is made up of the 120,000 agents who work for the seventy-three federal law enforcement agen-

trol officers who are primarily responsible for responding to calls for service.<sup>74</sup> With a few exceptions, policing is an intensely local enterprise. State laws generally recognize the local nature of policing by restricting officers' extra-territorial authority. In Michigan, for example, city or county officers can act outside of their home jurisdictions only when working with the state police or with an officer from the foreign jurisdiction.<sup>75</sup> In Georgia, city and county officers can take extra-territorial enforcement action only to the extent provided for in a contract or agreement between local government entities.<sup>76</sup> Other states give local officers limited statewide jurisdiction, allowing them to make arrests for felonies<sup>77</sup> or other offenses committed in their presence.<sup>78</sup>

Regardless of the idiosyncrasies of state law, which may give officers a greater or lesser degree of extraterritorial authority, local police agencies are geopolitically centered. The Chief or Sheriff is politically accountable to the voting citizens of a single jurisdictional entity, either directly, in the case of elected officials, or indirectly, in the case of appointed officials.<sup>79</sup> It follows that local police departments and sheriffs' of-

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cies, the 60,000 officers who work for state law enforcement agencies, the 57,000 officers who work for the 1700 agencies with special jurisdiction and the 4000 officers employed by a handful of constable and marshals' agencies. *Id.* at 1–2; BRIAN A. REAVES, U.S. DEPT OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2008 at 1 (2012), available at <http://bjs.gov/content/pub/pdf/fleo08.pdf>. The agencies with special jurisdiction include both those that provide general police services to a special-purpose district or other geographic entity, such as a college campus or public transit system, and those that target only specific behaviors, such as beverage control or gaming enforcement. REAVES, CENSUS, *supra* note 43, at 8.

74. BRIAN A. REAVES, U.S. DEPT OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007 at 6 (2010) (patrol officers make up between sixty and ninety percent of sworn employees in any given police department), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf>; see also FRITSCH ET AL., *supra* note 21, at 7 (“[P]atrol . . . consumes the bulk of officer personnel resources.”). Other officers are in investigative, administrative, or specialized positions. See *id.* at 3–5; see also Stoughton, *supra* note 34, at 878–79.

75. MICH. COMP. LAWS § 764.2a (2002).

76. GA. CONST. art. IX, § 2, ¶ III(b)(1); GA. CODE ANN. § 40-13-30 (2011).

77. See, e.g., PA. CONS. STAT. § 8953(6) (2007).

78. See, e.g., GA. CODE ANN. § 17-4-23(a) (2013) (traffic offenses); CA. PENAL CODE § 830.1(3) (2013) (any crime when “there is immediate danger to person or property, or of the escape of the perpetrator”).

79. The assumption that local governments are concerned with their own citizens is a familiar one. See Alan Williams, *The Optimal Provision of Public Goods in a System of Local Government*, 74 J. POL. ECON. 18, 19 (1966).

fices focus their efforts on their home jurisdictions.<sup>80</sup> How, then, can local government law affect police? Policing is, to a significant extent, the exercise of control over space,<sup>81</sup> but it is the territorial nature of local jurisdiction that determines *who* exercises control over *which* space. This, in turn, provides officers with a strategy or tactic: displacement. If a police officer can push a problem into a neighboring jurisdiction, it becomes someone else's problem.

Displacement is a viable strategy because we organize our units of local government according to what Richard T. Ford called "territorial jurisdiction": "the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions."<sup>82</sup> Police accountability, like police jurisdiction, stops at the city limits, further "foster[ing] metropolitan fragmentation."<sup>83</sup> Displacing crime or disorder to a neighboring jurisdiction can be an effective strategy for local police. Think back to the example of FAMU homecoming that opened this subsection; the displacement strategy is easily identifiable. Both the Tallahassee Police Department and the Leon County Sheriff's Office push the heavy traffic out of their own jurisdictions to minimize both disruption and cost to the residents to whom they are answerable. Displacement is not always so dramatic or visible; individual police officers may "deal with" problems caused by homeless people by informally ejecting them from a jurisdiction (or certain parts of one). Only last year, the ACLU accused the Detroit Police Department of displacing homeless people from the popular Greektown area of the city by, *inter alia*, dropping them off

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80. This, of course, is a general statement that has any number of specific, if limited, exceptions. The New York Police Department's infiltration into and surveillance of Muslim communities in New Jersey is a recent and particularly controversial example of extraterritorial action. Arguably, this was not *police* action; Andrew Schaffer, a deputy commissioner at the NYPD, defended the spying program in part by explaining that the officers involved were "*not acting as police officers* in other jurisdictions." Matt Apuzzo & Adam Goldman, *NYPD Spying: How a 911 Caller Outed NYPD Surveillance of Muslims in New Jersey*, HUFFINGTON POST (July 25, 2012, 12:52 PM), available at [http://www.huffingtonpost.com/2012/07/25/nypd-spying-new-brunswick-muslim-surveillance-new-jersey\\_n\\_1701340.html](http://www.huffingtonpost.com/2012/07/25/nypd-spying-new-brunswick-muslim-surveillance-new-jersey_n_1701340.html) (emphasis added).

81. STEVE HERBERT, *POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT* 9–11, 21–23 (1997).

82. Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 843 (1999).

83. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 167 (1999).

outside the city limits,<sup>84</sup> and media reports indicate that police in other cities have done the same thing.<sup>85</sup> Escorting a disorderly homeless person to a sparsely populated area of the area, to the city limits, or even into a neighboring jurisdiction can be an attractive option for officers. Displacement can be an enticing short-term problem-solving technique; it takes little time, requires no paperwork, and does not present much physical danger. The appeal is particularly strong when compared against making an arrest, which is often the only other short-term response that officers have at their immediate disposal. Making an arrest, though, involves an increased element of risk and requires spending time physically making the arrest, searching the arrestee, writing up the arrest paperwork, driving the arrestee to a booking facility (which requires more paperwork), impounding any evidence or personal property that the booking facility will not hold (which requires yet more paperwork), and getting a supervisor to sign off on all the paperwork. There is also the possibility of back-end costs, such as having to appear for a deposition or court proceeding and the threat of being sued. Compared to the time, effort, risk, and expense required by an arrest, displacement can be a bargain. Displacement can also be a more versatile tool; because it does not require probable cause, it can be used to deal with non-criminal problems and disorder even in situations when arrest would not be appropriate.

So far, I have focused on how local government law can affect a particular jurisdiction by encouraging officers to displace problems into neighboring jurisdictions. But local government law, which governs the boundaries that separate both geographical territories and government services, can influence

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84. Letter from Sarah L. Mehta, Staff Attorney, American Civil Liberties Union, to Barbara L. McQuade, U.S. Attorney (Apr. 18, 2013), available at <http://www.aclumich.org/sites/default/files/DOJ%20Complaint%20re%20Police%20Abuse%20of%20Homeless.pdf>.

85. In 1994, the ACLU filed a lawsuit against the City of Cleveland, alleging that the police department engaged in similar activity. Jean Taddie, *Lawsuit Claims Homeless Dumped by Police*, NORTHEAST OHIO COALITION FOR THE HOMELESS (June 19, 2012, 10:28 AM), available at <http://www.neoch.org/issue-10-articles/2012/6/19/lawsuit-claims-homeless-dumped-by-police.html>. There have been more recent accusations of police removing homeless people from their jurisdiction. See, e.g., Kathleen McGrory, *Other Miami-Dade Cities Deny 'Dumping' Homeless People in Downtown Miami*, MIAMI HERALD, July 1, 2013, <http://www.miamiherald.com/2013/06/30/3479202/other-miami-dade-cities-deny-dumping.html>; Rebecca Ferrar, *Knox Sheriff Ends Homeless Transfers from Other Counties*, KNOXVILLE NEWS, July 14, 2010, <http://www.knoxnews.com/news/2010/jul/14/homeless-transfers-end/>.

how police agencies will act in other ways. The permeability of jurisdictional lines and the possibility of consolidation and municipal annexation can shift a department's priorities and change interagency relationships. Imagine Circle City, located in the northwest corner of Square County. Both Square County and Circle City have their own police agency. If state law set up Circle City as an "independent city," as it likely would in Virginia, the city limits would be a hard barrier to county authority; the Square County Sheriffs' Office simply would not, and could not, have jurisdiction within Circle City, and vice versa.<sup>86</sup> In other states, such as Georgia, the City and County police officers could act in the opposite jurisdiction only to the extent provided for in a contract or agreement between Circle City and Square County.<sup>87</sup> In yet other states, including Florida, Square County deputies might not even think about the Circle City limits; their authority would extend to every part of the county regardless of whether it happened also to be in the city.<sup>88</sup> And in one state, Alabama, the Circle City police jurisdiction would actually extend beyond the city limits and into the county: a mile-and-a-half if there were less than 6000 residents in Circle City and three miles if there were more.<sup>89</sup>

At first blush, the picture is fairly simple. Either the agencies largely ignore each other or they play off of each other in some fairly limited fashion. Perhaps the Square County Sheriff's Office keeps its attention outside the city limits, or maybe the Circle City Police Department relies on the county to answer calls for service within the city so that it can put more effort into providing specialized services like a traffic enforcement unit or a vice crimes squad. Let us now make the picture both more complicated and more realistic. How would the departments react if state law allowed for the consolidation of city and county services? If the county's tax base was substantially lower than the city's, we might expect the sheriffs' office to strongly favor and pursue consolidation while the city police department actively opposed it. If the city was in a budget crunch, it may look into eliminating the police department and relying on the county to provide police services.<sup>90</sup> In either case,

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86. See VA. CODE ANN. § 5.1-23 (2012).

87. GA. CONST. art. IX, § 2, ¶ III(b)(1); GA. CODE ANN. § 40-13-30 (2013).

88. See FLA. STAT. § 943 (2012).

89. ALA. CODE § 11-40-10 (2003).

90. See U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN PO-

the Circle City Police Department is put in the uncomfortable position of justifying its continued existence.<sup>91</sup> And the agencies may respond in much the same way to the possibility of city expansion through annexation, though the roles may change. If Circle City's expansion would cut into Square County's operations, the sheriff's office may be put on the defensive and seek to justify its continued service to constituents.

Police agencies compete for legislator or popular approval by seeking to offer better, faster, or more services.<sup>92</sup> They seek to increase visibility—always a priority—by putting more officers into patrol cars or reconfiguring the “beats” to decrease the number of roadway miles, houses, or businesses per patrol officer.<sup>93</sup> They expand the range of services that they offer, either by loosening restrictions on the types of calls that patrol officers will respond to<sup>94</sup> or by creating special units such as a dedicated community policing or crime prevention squad. They play

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LICE AGENCIES 28–30 (2011), available at [http://www.cops.usdoj.gov/files/RIC/Publications/e101113406\\_Economic%20Impact.pdf](http://www.cops.usdoj.gov/files/RIC/Publications/e101113406_Economic%20Impact.pdf) (providing examples of cities that have consolidated or eliminated police departments to mitigate budget deficits); see also Jesse McKinley, *In a Beachside Tourist Town, a Wrenching Decision to Outsource*, N.Y. TIMES, Apr. 3, 2011, [http://www.nytimes.com/2011/04/04/us/04halfmoonbay.html?\\_r=0](http://www.nytimes.com/2011/04/04/us/04halfmoonbay.html?_r=0) (reporting on the decision of the California city of Half Moon Bay to eliminate its police department due to budget issues).

91. See, e.g., Caley Cook, *Proposal to Merge Elko Law Enforcement Services Draws Police Union Criticism*, ELKO DAILY FREE PRESS, May 28, 2013, [http://elkodaily.com/news/proposal-to-merge-elko-law-enforcement-services-draws-police-union/article\\_7f501aea-c7fc-11e2-a4f2-0019bb2963f4.html](http://elkodaily.com/news/proposal-to-merge-elko-law-enforcement-services-draws-police-union/article_7f501aea-c7fc-11e2-a4f2-0019bb2963f4.html) (reporting on police unions attempts to convince city council to preserve independent city police force).

92. For a recent example, consider the arguments made by the chief of the Bergen County, New Jersey, Police Department, which has had to defend itself from consolidation proposals. Chief Brian Higgins argued that the county police increases patrol presence, engages in more community policing than other agencies, and provides services that other local police agencies do not, such as having a K-9 unit, bomb squad, and SWAT team. S.P. Sullivan, *What Do County Police Do? Bergen Force, Under Fire, Explains Its Role at Forum*, NJ.COM (Apr. 10, 2013, 5:00 AM), available at [http://www.nj.com/bergen/index.ssf/2013/04/what\\_do\\_county\\_police\\_do\\_bergen\\_force\\_under\\_fire\\_explains\\_its\\_role\\_at\\_forum.html](http://www.nj.com/bergen/index.ssf/2013/04/what_do_county_police_do_bergen_force_under_fire_explains_its_role_at_forum.html).

93. ERIC J. FRITSCH ET AL., POLICE PATROL ALLOCATION AND DEPLOYMENT 49 (2009).

94. The Chicago Police Department, for example, will not dispatch an officer to citizen complaints about crime when “the offender is no longer at the scene and no one is in immediate danger.” Hal Dardick & Jeremy Gorner, *More 911 Calls Won't Get In-Person Response*, CHI. TRIB., Feb. 3, 2013, [http://articles.chicagotribune.com/2013-02-03/news/chi-more-911-calls-wont-get-inperson-response-starting-sunday-20130202\\_1\\_Police-officer-crime-scene-officers](http://articles.chicagotribune.com/2013-02-03/news/chi-more-911-calls-wont-get-inperson-response-starting-sunday-20130202_1_Police-officer-crime-scene-officers). As a hypothetical, consider how long that policy would last if the CPD found itself in serious competition with the Cook County Sheriff's Office.



up their specialized knowledge of the community; one major selling point for any police agency, after all, is its ability to provide locally personalized service. Wilson noted that communities in Nassau County, New York, “often resist proposals to use [the county police] patrol services on the grounds that the local force keeps a sharper watch on things.”<sup>95</sup> Other academic work on police consolidation suggests that communities value the perception of being connected to, and perhaps therefore exercising greater formal or informal control over, their local police department.<sup>96</sup> Interagency competition can make agencies more responsive to local concerns, advancing the sense of personal connection that communities value.<sup>97</sup>

Competition between police agencies is largely beneficial, but there are potential drawbacks. To the extent that agencies become more responsive to local concerns, there is some question about which concerns the agencies will respond to. Greater police responsiveness to the concerns of politically enfranchised citizens raises substantially the costs that policing imposes on lower socio-economic class members of the geographic community. Competition can also prove expensive. If new money isn’t forthcoming from City Hall, an agency may increase some services, such as the high-visibility patrol or traffic units, only by cutting costs in another, preferably less visible, area. When resources come out of training or internal affairs, it can change how and when officers may search, arrest, and use force. When resources come out of investigations or joint-agency task forces, the end result may be more enforcement in one area—the low-level misdemeanors that beat cops are more likely to run into—

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95. WILSON, *supra* note 1, at 212.

96. CASE STUDIES OF CITY-COUNTY CONSOLIDATION: RESHAPING THE LOCAL GOVERNMENT LANDSCAPE 298–99 (Suzanne M. Leland & Kurt Thurmaier, eds. 2004); Elinor Ostrom et al., *Do We Really Want to Consolidate Urban Police Forces? A Reappraisal of Some Old Assertions*, 33 PUB. ADMIN. REV. 423, 428 (1973) (providing examples of communities with extensive formal and informal control over the local police force).

97. CONSOLIDATING POLICE SERVICES, AN INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE APPROACH 1 (2003), available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=207077> (“Opponents [of consolidation] also assume that the personal nature of policing in their community will be lost, that response times may not be lowered, and that costs to the smaller community may increase.”); see Edward J. Tully, *Regionalization or Consolidation of Law Enforcement Services in the United States*, NAT’L EXEC. INST. ASSOCS. (Jan. 2002), <http://www.neiassociates.org/-consolidation-law-enforcement/> (suggesting that law enforcement organizations “give consideration to placing the consolidation of small, rural law enforcement agencies into regional police forces”).

and less in another area, such as domestic violence, vehicle theft, or fugitive apprehension. Here, the effects of territorial jurisdiction and interagency competition may be mutually reinforcing. For local law enforcement agencies, engaging in extra-territorial action as part of a joint-jurisdiction task force is almost by definition non-essential. In the mid-2000s, for example, the San Diego Police Department responded to a budget-induced manpower shortage by dramatically scaling back its participation in multi-agency activities, removing all of its officers from a Fugitive Task Force and an Auto Theft Task Force, and cutting down on the number of officers on other task forces.<sup>98</sup> Competition can also reduce agency cooperation, making them less likely to both share information about their own activities and about potentially regional problems. For a dramatic example, consider Lakeport, California, where a series of interagency disputes led the local sheriff's office to cut off the city police department and several other agencies' access to a county-maintained law enforcement records system, severely hampering police and prosecutor operations.<sup>99</sup>

The regulatory effects described in this section are not intended to be all-inclusive; other aspects of local government law undoubtedly influence police in different ways.<sup>100</sup> The point, though, remains constant: local government law, which sets up jurisdictions and allows or forbids consolidation and annexa-

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98. Will Carless, *To Shore Up the Force, SDPD Bails Out of Task Forces*, VOICE OF SAN DIEGO (Apr. 9, 2007), <http://voiceofsandiego.org/2007/04/09/to-shore-up-the-force-sdpd-bails-out-of-task-forces-2/>.

99. Elizabeth Larson, *Lakeport Police, Sheriff in Dispute Over Access to Law Enforcement Records System*, LAKE COUNTY NEWS (Apr. 25, 2013, 3:18 PM), [http://www.lakeconews.com/index.php?option=com\\_content&id=30923:lakeport-police-sheriff-in-dispute-over-access-to-law-enforcement-records-system&Itemid=197](http://www.lakeconews.com/index.php?option=com_content&id=30923:lakeport-police-sheriff-in-dispute-over-access-to-law-enforcement-records-system&Itemid=197).

100. Consider briefly the choice of Home Rule, which permits local governments the flexibility to adopt local ordinances so long as they are consistent with state and federal law, or Dillon's Rule, which gives local governments only the powers expressly granted by state law. In a Home Rule state, police can engage with local political figures to advocate for legal changes that would require state legislation in a Dillon's Rule state. *See, e.g.*, Lori Hall, *City Eases Up on Noise Ordinance*, WESTLINN TIDINGS (Apr. 11 2013, 10:00 AM), <http://www.pamplinmedia.com/wlt/95-news/135789-city-eases-up-on-noise-ordinance> (describing a local police department's successful lobbying to change the time at which a city noise ordinance went into effect every evening); Katie Lopez, *Police Try Passing Synthetic Drug Ordinance for Second Time*, VALLEYCENTRAL.COM (Jan. 23, 2013, 6:46 PM), [http://www.valleycentral.com/news/story.aspx?id=851514#.UxDxgmhc\\_zK](http://www.valleycentral.com/news/story.aspx?id=851514#.UxDxgmhc_zK) (describing a local police chief's attempts to use local law to ban synthetic drugs).

tion, incidentally regulates police agency priorities, interagency interactions, and enforcement practices.

#### B. STATE LABOR LAW & COLLECTIVE BARGAINING

In the late 1990s, the New York Police Department instituted a merit pay program that would have rewarded officers who had outstanding service records with a modest annual bonus. In the aftermath of the brutal beating and rape of Abner Louima, then-Mayor Rudy Giuliani's Task Force on Police/Community Relations<sup>101</sup> recommended incentive pay as a way of "improving police morale and, ultimately, improving police-community relations."<sup>102</sup> The NYPD didn't establish a straight-forward program that would simply reward top-performing officers with increased pay, though.<sup>103</sup> Instead, officers would be transferred, at least on paper, to a special unit. Officers in that unit would continue performing their normal duties, but would receive a bonus in the form of "special assignment differential" pay.<sup>104</sup> Why? The city's collective bargaining agreement set a lock-step, seniority-based pay schedule; pay depended on the length of employment, not officer performance.<sup>105</sup> Officer assignments, however, were largely in the hands of management. Even structured as carefully as it was, the merit pay program had to be scrapped after a challenge by the Patrolmen's Benevolent Association, the union that represents rank-and-file officers.<sup>106</sup> The acting union president objected to merit pay being "given out unilaterally by the Police Department," declaring that "it should be negotiated by the union as to how it is distributed."<sup>107</sup> If the Task Force on Po-

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101. U.S. COMMISSION ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, 3 (Aug. 2000), *available at* <http://www.usccr.gov/pubs/nypolice/ch3.htm>.

102. DEFLECTING BLAME: THE DISSENTING REPORT OF MAYOR RUDOLPH W. GIULIANI'S TASK FORCE ON POLICE/COMMUNITY RELATIONS 43 (1998), *available at* <http://nycivilrights.org/wp-content/themes/civilrights/pdf/Report5.pdf>.

103. *Id.*

104. *Id.*

105. *Id.*

106. Kit R. Roane, *Merit Pay for Police Officers Is Overruled by Labor Board*, N.Y. TIMES, Mar. 3, 1999, <http://www.nytimes.com/1999/03/03/nyregion/merit-pay-for-police-officers-is-overruled-by-labor-board.html>.

107. *Id.* The current collective bargaining agreement permits "performance compensation," but requires the city to "notify and discuss with each affected union of its intent to pay such additional compensation and the individuals to be compensated." CITY OF NEW YORK, PATROLMEN'S BENEVOLENT ASSOCIATION 2002-2004 AGREEMENT 7 (2006) [hereinafter PATROLMEN'S BENEVOLENT

lice/Community Relations was correct about the positive effects of merit pay, the chance to improve moral and public relations was stymied not by a law aimed at shaping police behavior, but by the laws governing public sector unionization.

Police unions, like other public unions, are relative newcomers to the labor movement.<sup>108</sup> They were initially viewed with distrust by traditional unions, which viewed them as “controlled by forces inimical to the labor movement.”<sup>109</sup> Their early progress was retarded by the disastrous Boston Police Department strike of 1919, in which over a thousand officers—about two-thirds of Boston’s police force at the time—made a bid for higher pay and better hours by walking off the job or refusing to report for duty.<sup>110</sup> Several days of rioting followed, resulting in three fatalities and a modest amount of property damage. Public opinion swung sharply against the striking officers, whom President Wilson denounced as having committed “a crime against civilization.”<sup>111</sup> In the aftermath of the strike, national unions were cautious about representing officers, and the public, already generally skeptical of unions, was especially reluctant to support a unionized police force.<sup>112</sup> Even today, most police organizations do not call themselves “unions”; instead, they use less politically charged labels like “associations,” such as the Police Benevolent Association and the Patrolmen’s Benevolent Association, or “orders,” such as the Fraternal Order of Police.<sup>113</sup>

Times have changed, and today police unions enjoy broad legal and social support. Congress has left it to the states to determine whether public-sector employees can engage in collective bargaining, and most have decided that they not only can,

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ASS’N 2002–2004 AGREEMENT] (extended by later memoranda of understanding).

108. See Richard B. Freeman, *Unionism Comes to the Public Sector*, 24 J. ECON. LIT. 41, 43 (1986) (comparing the number of public sector unions).

109. WILL AITCHISON, *THE RIGHTS OF LAW ENFORCEMENT OFFICERS* 8 (6th ed. 2009) (internal quotation marks omitted).

110. *Today in Labor History: 1919 Boston Police Strike*, PEOPLE’S WORLD (Sept. 9, 2013), <http://www.peoplesworld.org/today-in-labor-history-1919-boston-police-strike/>.

111. ROBERT K. MURRAY, *RED SCARE: A STUDY OF NATIONAL HYSTERIA, 1919–1920*, at 122–34 (1955) (internal quotation marks omitted).

112. *Id.*

113. See generally Laura Huey & Danielle Hryniewicz, “We Never Refer to Ourselves as a Lobby Group Because ‘Lobby Group’ Has a Different Connotation”: *Voluntary Police Associations and the Framing of Their Interest Group Work*, 54 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 287 (2012).

but should.<sup>114</sup> According to a recent study by Harvard economist Richard B. Freeman, thirty-four states require government employers to engage in collective bargaining with public-sector employees, and another nine states permit, but do not require, public-sector collective bargaining.<sup>115</sup> A few of the states that have banned collective bargaining for most public employees (Texas) or dramatically restricted it (Wisconsin and Indiana) have exceptions that permit—and in the case of Texas, explicitly encourage—collective bargaining for police officers.<sup>116</sup> Only a few states—Arizona, Georgia, North Carolina, Mississippi, South Carolina, and Virginia—prohibit police unions from collective bargaining.<sup>117</sup> Indeed, the Bureau of Justice Statistics’ reports that most police officers work for agencies that engage in collective bargaining.<sup>118</sup> These collective bargaining laws are policing-neutral; even when they are intended to specifically reach police agencies, the laws that require or permit unionization are silent as to how police practices will or should be changed.<sup>119</sup>

Large law enforcement agencies typically bargain with multiple unions.<sup>120</sup> In some jurisdictions, officers can select

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114. The National Labor Relations Act, which gives private sector employees the right to collective bargaining, explicitly omits “the United States [and] any State or political subdivision thereof” from the definition of “employer.” 29 U.S.C. § 152(2) (2012). Several federal laws that would give public safety employees—police officers, fire-fighters, and emergency medical personnel—the right to collective bargaining have been proposed, but none has been enacted. See The Public Safety Employer-Employee Cooperation Act, S. 3194, 111th Cong. (2009).

115. Richard B. Freeman & Eunice S. Han, *Public Sector Unionism Without Collective Bargaining*, 54 J. OF INDUS. REL. 386 (2012).

116. TEX. GOV’T CODE ANN. § 617.002 (2013); TEX. LOC. GOV’T CODE ANN. § 174.002(b) (2013); WISC. ACT 10 (2011); IND. ACTS 1001 (2013).

117. Even in states that do not provide for collective bargaining, police unions exist have some influence on wages and working conditions. Cf. Freeman & Han, *supra* note 115.

118. BRIAN A. REAVES, U.S. DEPT’ OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (2010), available at <http://bjs.gov/content/pub/pdf/lpd07.pdf> (reporting that 38% of local police departments, which employ 66% of all officers, engage in collective bargaining with police unions).

119. The collective bargaining agreements that a government enters into with a police union are, of course, much less likely to be policing-neutral. These contracts exist because of a policing-neutral legal framework, but, as we will see, they themselves are often closely concerned with police practices.

120. THE COMMITTEE OF SEVENTY, PHILADELPHIA POLICE DEPARTMENT GOVERNANCE STUDY 17 (1998), available at [http://www.seventy.org/Downloads/Policy\\_&\\_Reform/Governance\\_Studies/1998\\_Police\\_Governance\\_Study.pdf](http://www.seventy.org/Downloads/Policy_&_Reform/Governance_Studies/1998_Police_Governance_Study.pdf).

from among several unions, each of which negotiates with the city on its members' behalf. The city of Dallas, Texas, for example, negotiates both with a chapter of the Fraternal Order of Police and the Dallas Police Association. In other jurisdictions, local governments negotiate separately with various unions, each of which represents a different category of officer. The city of New York, for example, negotiates separately and has collective bargaining agreements with five unions: the Captains Endowment Association, the Lieutenants Benevolent Association, the Sergeants Benevolent Association, the Detectives Endowment Association, and the Patrolmen's Benevolent Association.<sup>121</sup> When a single locality includes multiple law enforcement agencies, the situation can get even more complicated. The city of Los Angeles has separate collective bargaining agreements with eight different unions: the Police Command Officer's Association, the Police Protective League, the General Services Police Officer's Association, the Port Police Association, the Port Police Command Offices Association, the Airport Police Command Officers' Association, the Airport Peace Officers' Association, and the Airport Police Supervisors' Association.<sup>122</sup> Although this may seem like an extreme example, it is an accurate representation of the status quo in large cities. The Philadelphia Police Department, though not unique, is highly unusual precisely because all of its officers are represented by a single union and covered by a single collective bargaining agreement.<sup>123</sup>

And what do these negotiated agreements look like? They typically govern a broad range of topics in excruciating detail. The Chicago Police Department contract with non-supervisory police officers—just one of four agreements with police employees<sup>124</sup>—is 150 pages long.<sup>125</sup> Boston Police Department line of

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121. *Collective Bargaining Agreements*, New York City, Office of Labor Relations, available at [http://www.nyc.gov/html/olr/html/collective\\_bargaining/policy\\_contracts.shtml](http://www.nyc.gov/html/olr/html/collective_bargaining/policy_contracts.shtml) (last visited Apr. 21, 2013).

122. CITY OF LOS ANGELES, DIRECTORY OF EMPLOYEE ORGANIZATIONS AND REPRESENTATIVES AUTHORIZED TO REPRESENT CITY EMPLOYEES (Apr. 2013), available at <http://cityclerk.lacity.org/cps/PDF/DirectoryOfEmployeeOrgan.pdf>.

123. THE COMM. OF SEVENTY, PHILADELPHIA POLICE DEPARTMENT GOVERNANCE STUDY 17 (1998), available at [http://www.seventy.org/Downloads/Policy\\_&\\_Reform/Governance\\_Studies/1998\\_Police\\_Governance\\_Study.pdf](http://www.seventy.org/Downloads/Policy_&_Reform/Governance_Studies/1998_Police_Governance_Study.pdf).

124. Chicago also has collective bargaining agreements with a sergeants' union, a lieutenants' union, and a captains' union. *Collective Bargaining Agreements*, CITY OF CHICAGO, [https://www.cityofchicago.org/city/en/depts/dol/supp\\_info/city\\_of\\_chicago\\_collectivebargainingagreements.html](https://www.cityofchicago.org/city/en/depts/dol/supp_info/city_of_chicago_collectivebargainingagreements.html) (last visit-

ficers work under an agreement that, with amendments, totals sixty-three pages,<sup>126</sup> while the line officers of the New York Police Department have a relatively modest twenty-eight page contract.<sup>127</sup> These contracts can also be incredibly specific. One of the amendments to a Boston Police Department collective bargaining agreement, for example, describes the procedures that must be followed for annual drug testing of employees: it requires the collection of three hair samples, two of which are sent to a testing lab while the third remains securely stored by the department, and mandates that a sample will only test positive for cocaine if the initial test returns indicate a “[m]inimum of 5ng/10mg of cocaine; and . . . norcocaine (1ng); or Benzyleconine [sic] at a ratio of 5% or greater.”<sup>128</sup>

One of the most powerful aspects of police collective bargaining agreements involves the power to file a grievance to challenge management decisions. The NYPD’s twenty-eight page agreement includes a “Grievance and Arbitration Procedure” section that spreads over five pages and sets out a detailed four-step process,<sup>129</sup> while the grievance procedure section of Chicago’s 150-page agreement takes up nine pages of

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ed Apr. 21, 2013).

125. CITY OF CHICAGO, AGREEMENT BETWEEN THE CITY OF CHICAGO DEPARTMENT OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7 (2007), *available at* [https://www.cityofchicago.org/content/dam/city/depts/dol/Collective%20Bargaining%20Agreement2/FOP2007\\_2012FINAL.pdf](https://www.cityofchicago.org/content/dam/city/depts/dol/Collective%20Bargaining%20Agreement2/FOP2007_2012FINAL.pdf) [hereinafter CHICAGO DEPT. POLICE AGREEMENT].

126. CITY OF BOSTON, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF BOSTON AND BOSTON POLICE PATROLMEN’S ASS’N, INC. (2002), *available at* <http://www.cityofboston.gov/labor/agreements.asp> (follow “BPPA 2002–2006 CBA” hyperlink) [hereinafter BOSTON COLLECTIVE BARGAINING AGREEMENT]; CITY OF BOSTON, MEMORANDUM OF AGREEMENT, CITY OF BOSTON AND BOSTON POLICE PATROLMEN’S ASS’N, INC., 2006–2007 (2007), *available at* <http://www.cityofboston.gov/labor/agreements.asp> (follow “BPPA 2006–2007 MOA” hyperlink) [hereinafter BOSTON COLLECTIVE BARGAINING AGREEMENT AMENDMENT 1]; CITY OF BOSTON, MEMORANDUM OF AGREEMENT, CITY OF BOSTON AND BOSTON POLICE PATROLMEN’S ASS’N, INC., 2007–2010 (2007), *available at* <http://www.cityofboston.gov/labor/agreements.asp> (follow “BPPA 2007–2010 MOA” hyperlink) [hereinafter BOSTON COLLECTIVE BARGAINING AGREEMENT AMENDMENT 2].

127. CITY OF NEW YORK, PATROLMEN’S BENEVOLENT ASS’N 2002–2004 AGREEMENT (2006), *available at* [http://www.nyc.gov/html/olr/html/collective\\_bargaining/police\\_contracts.shtml](http://www.nyc.gov/html/olr/html/collective_bargaining/police_contracts.shtml) (follow “Police Officers, CBU 79, 2002–2004” hyperlink).

128. BOSTON COLLECTIVE BARGAINING AGREEMENT AMENDMENT 2, *supra* note 126, at 3. The agreement probably refers to Benzoylcegonine, a metabolite of cocaine.

129. PATROLMEN’S BENEVOLENT ASS’N 2002–2004 AGREEMENT, *supra* note 107, at 21–25.

long, single-spaced paragraphs.<sup>130</sup> Both police unions and individual officers can contest agency actions.<sup>131</sup> Grievances typically first flow up the chain of command; if a front-line supervisor (e.g., a sergeant) disciplines an officer, the officer can appeal the decision to the next-higher commanding officer (e.g., a lieutenant).<sup>132</sup> After the chain of command is exhausted, most collective bargaining agreements require continued disputes to be brought before a neutral arbitrator (or panel of arbitrators).<sup>133</sup> Most state laws make police arbitration binding,<sup>134</sup> and judicial review of arbitration decisions is extremely limited. The Supreme Court has held that “[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements”<sup>135</sup> and that courts may not overturn an arbitrator’s decision even when there is “serious error.”<sup>136</sup> Thus, “an arbitrator can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator’s opinion.”<sup>137</sup>

How, then, does collective bargaining impact policing? There are at least three answers. First, unionization gives the rank-and-file a set of mechanisms—negotiations, grievances, and lawsuits—through which they can define the police role by prioritizing order maintenance, service provision, or law enforcement.<sup>138</sup> The choice of role has a range of effects, implicating “police-community relations, internal police operations, police morale, and the quality and quantity of law enforcement.”<sup>139</sup> As it turns out, collective bargaining has a “significant positive relationship [to] . . . an emphasis on the

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130. CHICAGO DEPT. POLICE AGREEMENT, *supra* note 125, at 11–19.

131. *Id.* at 12.

132. *See, e.g., id.*

133. *See, e.g., id.* at 12–13.

134. AITCHISON, *supra* note 109, at 9 (explaining that binding arbitration offsets the disadvantage that comes from being denied the power to strike).

135. *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

136. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

137. AITCHISON, *supra* note 109, at 98.

138. At the risk of simplifying Wilson’s taxonomy, which built on prior sociological work by Egon Bittner and others, “order maintenance” refers to a policing strategy where officers recognize, but do not prioritize, criminal enforcement as one possible peace-keeping mechanism. WILSON, *supra* note 1, at 16–17, 30–31. Officers who prioritize “service provision” prefer informal actions over formal actions such as arrest. *Id.* at 200. This is in contrast to the “legalistic” policing style, which favors arrests and other formal actions over informal police responses to crime and disorder. *Id.* at 175–76.

139. John M. Magenau & Raymond G. Hunt, *Police Unions and the Police Role*, 49 HUM. REL. 1315, 1317 (1996).



law enforcement role.”<sup>140</sup> Officers in unionized agencies are more likely to act legalistically, treating substantive criminal law as an expression of community norms and engaging in aggressive criminal enforcement.<sup>141</sup> In practical terms, officers who take a legalistic approach to law enforcement favor “official” actions: “maintaining surveillance, cultivating informants, and apprehending and arresting suspects.”<sup>142</sup> Officers in a legalistic department tend to make a high number of discretionary arrests and to encourage the civilians with whom they interact to invoke the formal criminal justice process rather than take advantage of informal, or formal but non-criminal, alternatives.<sup>143</sup> The causal mechanism that leads from unionization to a more legalistic approach to policing—or, to put it differently, exactly how police unions influence patrol policy—is not entirely clear. Magenau and Hunt hypothesize that unionization “increase[s] the political power of the rank and file” to essentially self-select the police role,<sup>144</sup> but they do not examine in any depth why rank-and-file officers would collectively prefer a legalistic style. Perhaps because this style preserves officer authority by using the relatively stable referent of “the law” to guide discretion rather than more fickle guidelines such as community norms or citizen concerns.<sup>145</sup> To the extent that legalism is associated with police professionalism, another possible answer may be found in the research suggesting that public sector unions promote employee professionalism.<sup>146</sup>

Second, the grievance procedures that are often a central part of collective bargaining agreements both discourage and frustrate attempts to discipline individual officers.<sup>147</sup> An officer’s ability to contest adverse employment actions makes supervisors less likely to impose disciplinary sanctions because while a supervisor faces a possible headache for not disciplining a misbehaving subordinate, they face a *certain* headache if they

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140. *Id.* at 1325.

141. See WILSON, *supra* note 1, at 172.

142. Magenau & Hunt, *supra* note 139, 1323 (internal quotation marks omitted).

143. See WILSON, *supra* note 1, at 176.

144. Magenau & Hunt, *supra* note 139, at 1317.

145. See *id.* at 1318 (noting unionization allows officers to steer the police role towards law enforcement rather than service delivery).

146. See Freeman, *supra* note 108 (describing professional management as a “nonwage” benefit in the public sector as well as the private).

147. See, e.g., PATROLMEN’S BENEVOLENT ASS’N 2002–2004 AGREEMENT, *supra* note 107, at 21–25 (describing extensive grievance procedures).

do. As Harmon has pointed out in the civil service context, an officer who is left alone after having violated a policy or procedure *may* commit a future infraction, which *may* injure someone, who *may* file a complaint or *may* find a lawyer to file a lawsuit, all of which *may* have an effect on the supervisor, but an officer who is reprimanded, transferred, suspended, or terminated is both enabled and highly motivated to challenge the disciplinary action.<sup>148</sup> This may be even more relevant to collective bargaining than in the civil service context.<sup>149</sup>

Even when discipline is imposed, the grievance procedures in collective bargaining agreements can frustrate or undermine the disciplinary measures. An empirical study that focused on discipline imposed by the Chicago Police Department in the early 1990s found that arbitrators, who had the final say in officer discipline according to a collective bargaining agreement, “routinely cut in half” the severity of disciplinary measures imposed by management.<sup>150</sup> A more recent investigative report by a newspaper in Florida, a state that lacks a strong civil service regime, found that thousands of officers from agencies across the state retained their jobs even after being arrested or implicated in crimes due to “a disciplinary system that has been reshaped in [officers’] favor by the state’s politically influential police unions.”<sup>151</sup> Grievance procedures can undermine supervisory efforts to discipline officers even in light of a clear violation of law or policy. Consider two examples: An arbitrator in Pennsylvania reinstated an officer who had been fired for stealing crack cocaine from a secure evidence storage area, concluding that the officer “had been sufficiently punished by the 10 months he ha[d] been off work without pay.”<sup>152</sup> An arbitrator in Ohio reinstated an officer who had been fired by a new police chief for “punching, kicking, and biting a fellow officer during a party” because termination was a more severe punishment

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148. Harmon, *supra* note 5, at 797.

149. See AITCHISON, *supra* note 109, at 98 (“Law enforcement officers have had more favorable results appealing discipline through grievance arbitration procedures contained in collective bargaining agreements than those subject to civil service laws or internal departmental policies.”).

150. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIM. 215, 216 (1998).

151. Anthony Cormier & Matthew Doig, *Special Report: How Florida’s Problem Officers Remain on the Job*, SARASOTA HERALD-TRIBUNE, Dec. 4, 2011, <http://www.heraldtribune.com/article/20111204/article/111209980>.

152. Michael A. Fuoco, *Officer Fired over Cocaine Reinstated by Arbitrator*, PITTSBURG POST-GAZETTE, June 25, 1991, at 6.

than had been imposed for similar behavior by previous administrations.<sup>153</sup>

Police agencies respond to the increased difficulty of disciplining officers in part by adopting extensive sets of rules, regulations, policies, and procedures, which are laid out in expansive tomes to provide officers with administrative due process by explicitly proscribing and prescribing any number of on-duty and off-duty behaviors.<sup>154</sup> Law enforcement agencies are “permanently flooded with petty military and bureaucratic regulations,”<sup>155</sup> which are “typically codif[ie]d . . . in shockingly great and verbose detail.”<sup>156</sup> The NYPD’s Department Manual, which “serves as a guide for ALL members of the service” consists of an Administrative Guide, a Patrol Guide, and an Organization Guide that together total more than 1,600 pages,<sup>157</sup> while the much smaller Madison Police Department in Wisconsin—an agency that is not even on the list of the top fifty largest police departments in the country—has a policy manual of just under 400 pages.<sup>158</sup> The rule books are all-encompassing to the point of being self-defeating; the rules “are so numerous and patently unenforceable that no one will (or could) obey them all.”<sup>159</sup> As a result, policy and procedure failures are commonplace. As Peter Moskos wrote of the Baltimore Police Department, “[S]ome violations of the book of general orders are so ingrained as to be standard operating procedure.”<sup>160</sup> The frequency of violations preserves the power of police administrators to discipline officers; they can always be written up for *something*. But approaching police discipline opportunistically leaves line officers

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153. *Arbitrator Reinstates Fired Police Officer*, THE BLADE, Feb. 14, 2006, <http://www.toledoblade.com/Police-Fire/2006/02/14/Arbitrator-reinstates-fired-police-officer.html>.

154. DAVID DIXON, *LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES* 4 (1997). Maintaining the integrity of officer discipline is not the only reason that departments adopt extensive written policies—others include the desire to limit officer discretion, the attempt to avoid civil liability, and agency accreditation requirements—but it remains an important one. *Id.*

155. *Id.* (quoting EGON BITTNER, *ASPECTS OF POLICE WORK* 223 (1990)).

156. PETER MOSKOS, *COP IN THE HOOD* 25 (2008).

157. N. Y. POLICE DEP’T, *PATROL GUIDE* (2005) (emphasis in original).

158. TOWN OF MADISON POLICE DEP’T, *POLICY MANUAL* (2005).

159. DIXON, *supra* note 154, at 4–5 (quoting John Van Maanen, *Working the Street: A Developmental View of Police Behavior*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 83–130 (Herbert Jacob, ed. 1974)).

160. MOSKOS, *supra* note 156, at 25.

with the perception of arbitrary enforcement—paralleling the concerns that over-criminalization expands officer discretion.<sup>161</sup>

The threat of arbitrary discipline brings into focus the third effect of collective bargaining agreements: the creation or aggravation of intradepartmental tensions. Police insularity and the “us versus them” mentality that pervades law enforcement is a widely remarked on phenomenon, but it is more nuanced than contemporary accounts typically credit.<sup>162</sup> In addition to the well-documented tension between law enforcement officers and the public, there is tension between sworn employees and civilian employees, line officers and command staff, and patrol officers and investigators.<sup>163</sup> Friction exists in part because the mission goals of the constituent groups are not always well-aligned. For example, an officer who wants to stay at the scene of a burglary and write up the report while the details are fresh in his mind will be frustrated by an insistent dispatcher who wants him to be available to respond to the next incident on the list of pending calls, while a dispatcher who lives by the credo of rapid response policing will be frustrated by an officer “milking” a call (staying on-scene longer than necessary just to catch a break). Similarly, line officers may resent what they view as unnecessarily onerous department procedures adopted by police managers who are overly concerned with legal liability and out of touch with life on the street, while police managers are exasperated by officers who will not voluntarily adopt new practices, refuse to support new programs, and lose track of bigger picture concerns like community perceptions of legitimacy. These tensions affect officer behavior. For example, Moskos describes how a management-imposed initiative to increase arrests actually decreased the number of arrests even by officers who were known for making many arrests.<sup>164</sup>

Collective bargaining also exacerbates these tensions by eliminating a potential source of solidarity when multiple collective bargaining units negotiate with a city or county gov-

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161. See generally Erik Luna, *The Overcriminalization Phenomena*, 54 AM. U. L. REV. 703 (2005).

162. See, e.g., HARRY W. MORE & LARRY S. MILLER, *EFFECTIVE POLICE SUPERVISION* 179 (7th ed. 2014) (“Insularity erects protective barriers between the police and the public and creates an ‘us versus them’ mentality.”).

163. See generally Theodore N. Ferdinand, *Police Attitudes and Police Organizations*, 3 POLICE STUD.: INT’L REV. POLICE DEV. 46 (1980) (investigating the effect of roles, ranks, and other factors in interdepartmental relations).

164. *Id.* at 152–54.

ernment, which is particularly common in large agencies. Recall that Los Angeles negotiates with eight different police unions, New York with five, and Chicago with four.<sup>165</sup> This creates two sources of conflict between officers of different unions. The first exists because a city or county government has finite resources that must be spread among the different groups. Thus, the various unions' negotiations may be seen as a zero-sum game in which benefits to one group of police employees accrue only at the expense of others, undermining internal cohesion.<sup>166</sup> Two unions that are both demanding a significant pay increase may dispute which group has the better claim.

The second source of conflict exists because the position taken by one collective bargaining unit can undermine the demands of another. Take a recent case from Chicago, in which the Fraternal Order of Police (FOP), which represents line officers, demanded a twelve-percent raise over two years.<sup>167</sup> The Police Sergeant's Association, on the other hand, requested a more modest two-percent annual raise—a move that took the FOP president “aback” and that could have “undercut the FOP's bargaining position.”<sup>168</sup> The FOP president responded by publicly advocating for the members of the Sergeants' Association “to reject the proposed contract” that the sergeants' union had endorsed<sup>169</sup> and by instructing line officers, via a newsletter, to “please politely lobby your sergeant to vote” to reject the contract.<sup>170</sup> If the sergeant's union had accepted the two-percent

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165. See *supra* notes 120–24 and accompanying text.

166. This view has also been at the heart of the often-contentious relationship between many police and firefighters' unions. For a recent example of this debate, see Dillon Collier, *San Antonio Police, Fire Unions Fight over Possible Benefit Reductions*, KENS 5 (Dec. 16, 2013), <http://www.kens5.com/news/San-antonio-police-and-fire-unions-digging-in-for-fight-over-possible-benefit-reductions-236125451.html>.

167. Fran Spielman, *City, Police Sergeants Union Strike Deal on Raises, Pensions*, CHI. SUN-TIMES, Feb. 11, 2013, <http://www.suntimes.com/news/metro/18157927-418/city-police-sergeants-union-strike-deal-on-raises-pensions.html>.

168. *Id.*

169. Hal Dardick, *Chicago Police Sergeants Reject Emanuel Contract Offer*, CHI. TRIB., Mar. 11, 2013, [http://articles.chicagotribune.com/2013-03-11/news/chi-chicago-police-sergeants-reject-emanuel-contract-offer-20130311\\_1-sergeants-union-chicago-police-sergeants-pension-payments](http://articles.chicagotribune.com/2013-03-11/news/chi-chicago-police-sergeants-reject-emanuel-contract-offer-20130311_1-sergeants-union-chicago-police-sergeants-pension-payments).

170. Michael Shields, *President's Report*, F.O.P. NEWS (F.O.P. Chi. Lodge No. 7), Mar. 2013, at 1, available at <http://chicagofop.org/newsletter/2013/032013news.pdf> (emphasis in original).

raise, the concession would have given the city a bargaining advantage vis-à-vis the officers' union.<sup>171</sup>

The conflict between management and the rank-and-file, which is aggravated by aspects of collective bargaining, contributes to low morale, which has a deleterious effect on officer performance.<sup>172</sup> It, along with the authority of line officers to challenge departmental actions, also makes top-down administrative reforms difficult to implement because of the reduction in "buy-in" from front-line supervisors and the rank-and-file.<sup>173</sup> Officers have contested changes to how they will be evaluated,<sup>174</sup> how their actions are monitored,<sup>175</sup> how patrol shifts are staffed,<sup>176</sup> and even how they must dress.<sup>177</sup>

State labor law requires or permits collective bargaining, and that, like local government law, can have unanticipated side-effects on police practices. When collective bargaining gives line officers more authority to define the police role, offic-

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171. To use another example, the union representing police detectives in New York "grudgingly" agreed to eliminate a contract provision that required the police department to wait forty-eight hours before interviewing officers accused of misconduct, but only because the sergeants' union had already made the same concession. Amy Waldman, *Detectives' Union Agrees to Drop Disputed Rule*, N. Y. TIMES, July 17, 1998, <http://www.nytimes.com/1998/07/17/nyregion/detectives-union-agrees-to-drop-disputed-rule.html>.

172. See MOSKOS, *supra* note 156, at 145–55.

173. See Wesley G. Skogan, *Why Reforms Fail*, 18 POL. & SOC. 23, 25–27 (2008) (describing resistance on the part of rank-and-file officers).

174. In 2012, the union representing officers at the Raleigh Police Department was involved in a public dispute with the Police Chief over officer performance evaluations. Thomasi McDonald, *Raleigh Police Union: New Evaluation Process Is 'Thinly Veiled' Quota System*, NEWS & OBSERVER (July 13, 2012), <http://www.newsobserver.com/2012/07/13/2197551/raleigh-police-union-new-evaluation.html>.

175. A police union in Columbus, Ohio has come out strongly against the city's use of real-time GPS tracking of police vehicles, arguing that the city has an obligation to negotiate with the union about how the devices can be monitored and used for disciplinary purposes. Lucas Sullivan, *Fire, Police File Grievance Over GPS Tracking of Vehicles*, COLUMBUS DISPATCH, Apr. 24, 2013, <http://www.dispatch.com/content/stories/local/2013/04/24/fire-police-make-gps-gripes-official.html>.

176. For example, a police union at the Denver Police Department has recently spoken against a staffing arrangement that it says will slow officer response times and make backup less available. Sadie Gurman, *Denver Police Union: Chief's Staffing Plan Is Dangerous*, DENVER POST, May 21, 2013, [http://www.denverpost.com/breakingnews/ci\\_23293931/denver-police-union-chiefs-staffing-plan-is-dangerous](http://www.denverpost.com/breakingnews/ci_23293931/denver-police-union-chiefs-staffing-plan-is-dangerous).

177. See, e.g., Cecilia Chan, *Phoenix Police Union Sues City over Uniform Change*, ARIZONA REPUBLIC, June 5, 2013, <http://www.azcentral.com/community/phoenix/articles/20130605phoenix-police-union-sues-city-over-uniform-change.html>.

ers embrace a legalistic patrol style that results in higher arrests and more aggressive criminal enforcement. The power-shifting effect of collective bargaining is, to a great extent, apparently inconsistent with the hierarchical “chain of command” structure that police agencies adopt. The resulting friction adversely affects officer performance.

### C. FEDERAL RACE DISCRIMINATION LAW

In a study of college students, participants watched a grainy video that depicted two police officers making an arrest.<sup>178</sup> The viewers could tell that the suspect was black, and they could identify the officers by race, but the quality of the recording was too poor to provide other details.<sup>179</sup> Each participant saw the suspect offer a low level of resistance and watched the officers respond with a moderate amount of force.<sup>180</sup> They were then asked “to estimate the degree of violence and illegality (i.e., brutality) employed by police in the arrest they had viewed.”<sup>181</sup> Though the participants did not know it, the arrest was staged; one set of participants saw a video of two black officers, another saw two white officers, and a third saw one black officer and one white officer.<sup>182</sup> Although the officers’ actions were identical in the three videos, participants reported “significantly greater violence and illegality” when the arresting officers were both white than when one or both of the arresting officers were black.<sup>183</sup>

This study demonstrates that the perception of police legitimacy depends in part on *who* does the policing, and race is a particularly relevant characteristic. As a 1967 presidential commission report put it, “The occupying-army aspects of predominantly white . . . police patrol in predominantly Negro neighborhoods have been many times remarked; the actual extent of the alienation thereby enforced and symbolized is only now being generally conceded.”<sup>184</sup> On the other hand, having

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178. Jack Levin & Alexander Thomas, *Experimentally Manipulating Race: Perceptions of Police Brutality in an Arrest: A Research Note*, 14 *JUST. Q.* 577, 581 (1997).

179. *Id.*

180. *Id.*

181. *Id.*

182. In each video, the “officers” were the same two campus security guards wearing light- or dark-colored panty hose over their heads. Distance and poor-quality recording turned the mask into the officer’s “race.” *Id.* at 579.

183. *Id.* at 582.

184. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE,

only minority officers policing minority neighborhoods “smacks of segregation and seems to ratify existing racial barriers.”<sup>185</sup>

The representation of minorities in policing is better now than it historically has been; minorities now make up about a quarter of all state and local officers, roughly matching the total percentage of minorities in the national population.<sup>186</sup> But the national picture is deceptive. There is variation with respect to different minority groups, for example,<sup>187</sup> and most local law enforcement agencies are not racially representative of the population they serve.<sup>188</sup> Large urban police departments are more likely to have a patrol force made up of a disproportionately high number of minority officers,<sup>189</sup> while agencies that serve less than 100,000 civilians have relatively few minority officers.<sup>190</sup> Yet existing research suggests that a large percentage of the public, particularly minority communities, would generally favor a racially representative local police force.<sup>191</sup> A study by Ronald Weitzer, a sociologist at George Washington University who specializes in police/minority rela-

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THE CHALLENGE OF CRIME IN A FREE SOCIETY 62–63 (1967), available at <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

185. Weitzer, *supra* note 25, at 320.

186. REAVES, CENSUS, *supra* note 43, at 14; LINDSAY HIXSON ET AL., U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010 3 (2011).

187. Blacks make up less than 12% of state and local officers and over 13% of the national population; about 10.3% of officers are Latino, compared to 16.7% of the broader population; Asians make up 2% of officers, but 5% of the population; and about 0.7% of officers are American Indians, who make up 1.2% of the population. REAVES, CENSUS, *supra* note 43, at 14.

188. *Id.*

189. See, e.g., Ronald Weitzer, *Can Police Be Reformed?*, 4 CONTEXTS, 2005, at 22 (listing five other cities—“Atlanta, Detroit, El Paso, Miami, [and] Washington”—that have a disproportionately minority patrol force); Tamer El-Ghobashy, *Minorities Gain in NYPD Ranks*, WALL ST. J., Jan. 7, 2011, <http://online.wsj.com/article/SB10001424052748704415104576066302323002420.html> (reporting on the New York City Police Department); J. David Goodman, *More Diversity in New York City’s Police Dept., but Blacks Lag*, N. Y. TIMES, Dec. 26, 2013, <http://www.nytimes.com/2013/12/27/nyregion/more-diversity-in-new-york-citys-police-but-blacks-lag.html> (reporting on the percentage of minority police recruits).

190. REAVES, *supra* note 74, at 14.

191. Weitzer, *supra* note 25, at 313–14. The lack of proportional racial representation is a theme that runs through criminal justice scholarship, and has been explored in the context of juries and trial court judges, among others. See, e.g., Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1037–50 (2003); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 102–04, 143–45 (1997).



tions, suggests that even more people may prefer racially diverse police squads; that is, there is a preference that the groups of officers who patrol various neighborhoods should include members of different races.<sup>192</sup> The benefits seem to be threefold; Weitzer describes a “moderating effect,” in that officers of different races serve to check and balance each other; an “edifying effect,” in that officers of different races can facilitate better personal perceptions; and “symbolic benefits” that reduce the perception of White “occupation” by expressing a more positive social message.<sup>193</sup> Thus, regardless of whether minority officers do things differently than white officers,<sup>194</sup> racial factors play a role in the perception of police legitimacy.

Changing the racial make-up of a police department, however beneficial it may be, is a difficult proposition. Affirmative action programs are legal, if not uncontroversial, but they are not particularly effective at increasing minority representation on a police force.<sup>195</sup> More direct action is legally suspect. In *Regents of the University of California v. Bakke*, the Court held that Equal Protection demands strict scrutiny of race-conscious government actions, which must be “precisely tailored to serve a compelling governmental interest.”<sup>196</sup> Applying *Bakke*, courts have generally permitted law enforcement agencies to take “race into account to advance the operational needs of the po-

192. Weitzer, *supra* note 25, at 320.

193. *Id.*

194. See, e.g., Robert A. Brown & James Frank, *Race and Officer Decision Making: Examining Differences in Arrest Outcomes Between Black and White Officers*, 23 JUST. Q. 96, 96 (2006) (finding that officer race influences the decision to arrest); Rod K. Brunson & Jacinta M. Gau, *Officer Race Versus Macro-Level Context: A Test of Competing Hypotheses About Black Citizens' Experiences with and Perceptions of Black Police Officers*, CRIM. & DELINQUENCY (print version forthcoming), available at <http://cad.sagepub.com/content/early/2011/02/17/0011128711398027> (exploring the influence of officer race in forming police perceptions); Scott H. Decker & Russell L. Smith, *Police Minority Recruitment: A Note on Its Effectiveness in Improving Black Evaluations of the Police*, 8 J. CRIM. JUST. 387, 389 (1980) (investigating the effect of minority recruitment); Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison Between Black and White Police Officers*, 50 CRIM. & DELINQUENCY 516 (2004) (examining differences in behavior between Black and White officers in interpersonal conflict resolution).

195. Jihong Zhao & Nicholas Lovrich, *Determinants of Minority Employment in American Municipal Police Agencies: The Representation of African American Officers*, 26 J. CRIM. JUST. 267, 274–75 (1998). The size of the Black population in a given locality is much more strongly correlated with minority representation than the existence of an affirmative action program. *Id.* at 275.

196. 438 U.S. 265, 299 (1978).

lice department by achieving diversity.”<sup>197</sup> But race-based hiring or promotional quotas are difficult to justify; even when an agency seeks to “remedy[] past and present discrimination by a state actor,” a court will

determin[e] whether race-conscious remedies are appropriate [by] look[ing] to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.<sup>198</sup>

Courts have been reluctant to approve of a racial quota, typically doing so only when it is included as a provision of a consent decree.<sup>199</sup>

In addition to the legal challenges to creating a racially representative police force or command structure, police agencies are unlikely to be able to purposefully avoid single-race squads of patrol officers. Title VII of the Civil Rights Act of 1964 prohibits employers from using race or color to make decisions about the “terms, conditions, or privileges of employment.”<sup>200</sup> The EEOC Compliance Manual is more detailed, explaining that “[w]ork assignments must be distributed in a nondiscriminatory manner. This means that race cannot be a factor in determining the amount of work a person receives, or in determining who gets the more, or less, desirable assignments.”<sup>201</sup>

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197. *Talbert v. City of Richmond*, 648 F.2d 925, 928 (4th Cir. 1981); *see also* *Petit v. City of Chi.*, 352 F.3d 1111, 1111 (7th Cir. 2003) (noting the police department’s operational need for diversity satisfied the “compelling interest” requirement).

198. *United States v. Paradise*, 480 U.S. 149, 167, 171 (1987).

199. *See id.* at 151 (approving a condition of a consent decree that required the Alabama Department of Public Safety to allocate fifty percent of corporal promotions to black state troopers); *Aiken v. City of Memphis*, 37 F.3d 1155, 1158 (1994) (approving a condition of a consent decree that required the Memphis Police Department to allocate at least twenty percent of all promotions to black officers, while remanding the case on other grounds); *Rutherford v. City of Cleveland*, 179 F. App’x 366, 368 (6th Cir. 2006) (approving a condition in a consent decree that required the Cleveland Police Department to hire three minority officers for every four non-minority officers hired).

200. 42 U.S.C. § 2002e-2(a)(1) (2006).

201. EEOC COMPLIANCE MANUAL § 15-VII(B)(1) (2006), *available at* <http://www.eeoc.gov/policy/docs/race-color.pdf>.

### III. RESOLVING THE PROBLEMS WITH INCIDENTAL REGULATION

In the preceding Part, I used state labor law, local government law, and federal race discrimination law to demonstrate how policing-neutral laws can incidentally affect officer conduct. In this Part, I offer a three-part response to the potential problems of incidental regulation: identification, evaluation, and response. Identification may be prospective predictions, forecasting the effects of a policing-neutral law on police practices prior to enactment, or retrospective analysis that determines the incidental effects of existing law. Once the incidental effects are identified, it is possible to make an informed decision about whether to accept them. If the incidental effects are undesirable, either a separate offset or a police-specific carve-out may be appropriate.

#### A. IDENTIFYING INCIDENTAL EFFECTS

The best way to avoid the potential pitfalls of incidental regulation may be to avoid it altogether by predicting, to the extent possible, the effects of any given law on the police. The acquisition of information can be costly; as Matthew Stephenson has observed, there is a systemic “underinvestment in information” that arises from the agency dynamic of public decision-making.<sup>202</sup> Before one can talk sensibly about how law- and policy-makers might obtain more information about the incidental regulatory effects of proposed laws, one must address the threshold question of when—that is, in what contexts—they should make the attempt.<sup>203</sup> There is an easy answer—

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202. See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1427–31 (2011).

203. Academically, of course, it would be ideal if policymakers considered carefully the effects of every law on police, but this is obviously unrealistic. Federal lawmakers propose thousands of bills every year, some action is taken on about a thousand, and several hundred are enacted as law. Josh Tauberer, *Kill Bill: How Many Bills Are There? How Many Are Enacted?*, GOVTRACK.US (Aug. 4, 2011), <http://www.govtrack.us/blog/2011/08/04/kill-bill-how-many-bills-are-there-how-many-are-enacted/>. State statistics are not as clear, but if they lag behind, it might not be by much; in 2011, the Governor of California, in a state which already has a cap on the number of bills each legislator can propose, asked state lawmakers to propose fewer bills. See Michael J. Mishak, *State Lawmakers Are Being Urged to Scale Back the Number of Laws They Propose*, L.A. TIMES, Mar. 6, 2011, <http://articles.latimes.com/2011/mar/06/local/la-me-legislature-20110226>. Though many of those bills seem unlikely to affect officer behavior or police legitimacy—to use an example from California, a statutory restriction on what can be called “extra virgin olive oil” appears

they should do so when the error costs of failing to identify incidental effects are likely to outweigh the costs of identification—but that is hardly a practical limiting principle. Preliminarily, we might start by identifying vectors through which policing-neutral laws seem most likely to influence police practices. The examples in this Article provide a starting point, as we have seen how laws that impact political accountability, the balance of power between line officers and management, and public perceptions of police legitimacy can affect police practices. There are clearly other vectors through which policing-neutral, non-criminal laws impact policing,<sup>204</sup> and, once a body of research develops, it may be possible to form some educated assumptions about which laws are more likely to affect unique policing practices.

How, then, does one identify a law's incidental effects on policing? The first place to look for improvements would be within the legislative process itself at both the state and federal level. To provide a greatly simplified explanation of the legislative process, bills are proposed and assigned to committees for evaluation, which may further assign them to subcommittees for review. In systems that permit multiple committee assignments—as in the United States House of Representatives and, to a lesser extent, the United States Senate—proposed legislation that would encompass police agencies could be assigned by the parliamentarian to a Police Practices Committee, in addition to the other committee(s) with jurisdiction.<sup>205</sup> Committee involvement does not have to end when a law is enacted. As the ongoing debate about the Patient Protection and Affordable Care Act demonstrates, legislators care about the effects of enacted legislation. Positive political theory tells us that legisla-

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highly unlikely to impact police practices—the possibility of attenuated incidental effects remains. *See id.*

204. Civil service laws, labor laws, lobbying laws, and local government human resources ordinances or policies all come to mind as possible targets for further exploration, as do non-criminal laws that target disorder, such as local code enforcement and zoning laws. *See generally* NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA (2009).

205. The question of jurisdiction is a challenging one for systems that evaluate committee jurisdiction by referring only to the face of proposed legislation. By definition, laws that have only an incidental effect on policing are unlikely to explicitly evoke law enforcement. The study of committee jurisdiction in the federal system is beyond the scope of this paper. *See generally* DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION (1997).

tors can and do build “fire-alarm” and other monitoring mechanisms into regulatory statutes.<sup>206</sup> Moreover, as both political scientists and legal scholars have explained, legislative committees can be a mechanism for on-going monitoring of the unintended consequences of laws.<sup>207</sup> Both mechanisms could be used to identify laws that have a significant incidental effect on police behavior. The committee or subcommittee could hold hearings to forecast or review the impact of the law on officer behavior and police legitimacy and could make recommendations for modification based on its findings.

Direct legislative attention to the problem of incidental regulation may be the first best solution, but changing procedural rules can be a daunting task. A more direct solution that could lend itself to the same result would be the creation, by the legislature or the executive, of a special advisory committee.<sup>208</sup> Federal advisory committees must “be fairly balanced in terms of the points of view represented and the functions to be performed,”<sup>209</sup> and state and local advisory committees are typically created to provide subject matter expertise and policy suggestions, making them a natural meeting point for academics and researchers, police experts, and civil liberty advocates.<sup>210</sup> Once appointed, the committee can itself identify likely legislation, conduct research, and hold open hearings to identify the extent to which a particular law incidentally effects policing. In addition to its information-gathering function, the committee would also provide a source of contact for interest groups

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206. Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 95 (1992); Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”: Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 505 (1989); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989).

207. See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456, 1490–94 (2003).

208. In the federal system, the Federal Advisory Committee Act permits the establishment of an advisory committee by statute, executive order, or agency authority. 5 U.S.C. app. § 2.

209. 5 U.S.C. app. § 5.

210. The committee charter can establish membership criteria such as minimum qualifications or required expertise. See WENDY R. GINSBERG, RESEARCH SERV., R40520, *FEDERAL ADVISORY COMMITTEES: AN OVERVIEW* 17 (2009).

with a stake in police practices.<sup>211</sup> Once compiled, the committee could provide its findings to legislators.

Academics and interest groups, too, have a role in the identification of laws that will have an incidental regulatory effect on police, a sphere that is currently almost completely occupied by police lobbyists. Sociologists and criminologists have sought to create a model of police behavior by isolating the correlates of policing style and officer discretion. Social scientists can find the correlates of police behavior while legal scholars, with an expertise in law and reduced reliance on grant funding, can identify the legal foundations of those correlates to facilitate a more thorough understanding of the law's emergent effects on policing. Legal scholars can bring their expertise to bear by identifying the types of legal decisions that have significant, if incidental, regulatory effects on the police. Those conclusions could then be used by interest groups to target proposed legislation for in-depth review, with the findings published and provided to law- and policy-makers.

Regardless of the mechanism—legislative committees, advisory committees, or independent academics—the goal is identifying, to the extent possible, the incidental effects of legislation on the police. Like the Congressional Budget Office, which provides formal “cost estimates” for most bills approved by a full House or Senate committee,<sup>212</sup> predictions about the impact of legislation on officer behavior and police legitimacy would seek to estimate the “cost”—to liberty and social cohesion—of proposed legislation and to provide that information to legislators. Once lawmakers have been informed of the side-effects of any given proposal, the problem of incidental effects can be squarely addressed.

## B. EVALUATION

Once identified, the emergent effects of law can be subjected to normative evaluation. In some cases, law-makers may decide that they approve of the way that a policing-neutral law shapes officer behaviors. This discussion, when it happens, is about the relative costs and benefits of specific police practices. Perhaps, for example, the type of interagency competition fostered by the territorial approach to local government jurisdic-

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211. *Cf.* Stoughton, *supra* note 34 (discussing the promise and problems of relying on interest groups for information about police practices).

212. *Our Processes*, CONG. BUDGET OFFICE, <http://www.cbo.gov/about/our-processes> (last visited Apr. 21, 2013).

tion is socially desirable in that it both encourages the competing agencies to be more responsive to citizen concerns and increases the quantity and quality of police services.<sup>213</sup> That determination, if made, would resolve my skepticism over the incidental effects of local government law; although I might disagree with the conclusion, there would be little argument that the decision was reached in a more informed, deliberative manner than the current norm regularly provides for. Policing and police behaviors are, of course, deeply controversial, and in a great many cases, I suspect, the effects of incidental regulation will defy any universal assessment, leaving reasonable people to disagree about whether to accept the resulting police practice.

### C. ADDRESSING INCIDENTAL REGULATION

If normative evaluation leads to the conclusion that a given law pushes police to act in a way that society would prefer to avoid, the problem of incidental regulation must be addressed.<sup>214</sup> If the incidental effect of any given law on police needs to be mitigated, there are two mechanisms available: police-specific carve-outs and independent offsets. A police-specific carve-out is aimed at treating the underlying legal cause of the undesirable police behavior by exempting police from some or all of the underlying law as a way to avoid the incidental regulatory effect. An independent offset, in contrast, is intended to treat the symptom—the police behavior itself—rather than the underlying legal cause, so instead of exempting police from a generally applicable, policing neutral law, an offset would seek to compensate for the law’s incidental effects.

I will address both carve-outs and offsets momentarily, but it is worth acknowledging that the choice of mechanism is, to some extent, a question about how we prioritize competing values. In any given case, we must balance the underlying justification of the policing-neutral law against the values implicated by the police practice at issue. In some cases, society may be firmly wedded to the policy embodied in a particular law, so wedded, for example, that we are unwilling to allow police departments to make race-conscious patrol assignments because the benefit of increased public legitimacy is outweighed by the

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213. See *supra* note 93 and accompanying text.

214. Take, for example, the reductions in public perceptions of police legitimacy; few lawmakers would argue that reducing public trust in the police is a good thing. See *supra* notes 20–32 and accompanying text.

various costs.<sup>215</sup> In such a case, an offset would seem more appropriate and politically salable than a carve-out. Because the justifications for policing-neutral laws that have some incidental regulatory effect are varied, there is no single normative framework that would permit straight-forward, consistent selection of corrective mechanism. The justification for each law must be weighed individually against the benefits of changing police behavior before a rational decision about creating a police-specific carve-out or an independent offset can be made.

### 1. Police-Specific Carve-Outs

Law enforcement agencies and officers are the subject of statutory or common law exemptions from any number of otherwise applicable laws. What we think of as paradigmatic police powers are themselves exceptions from generally application legal prohibitions.<sup>216</sup> Where a private citizen would be generally subject to civil and criminal sanctions for false imprisonment, kidnapping, or battery, the police officer is authorized, and perhaps even obligated, to infringe on the rights of others by detaining, arresting, and using force.<sup>217</sup> The familiar sight of a police car with its lights flashing and siren wailing as it blows through a red light on the way to some emergency is possible only because officers are, under the right conditions, exempted from traffic laws.<sup>218</sup> Certain police operations—

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215. The costs could include problems with morale, allegations of “reverse racism,” and a reduction in public support in certain communities.

216. DIXON, *supra* note 154, at 64.

217. In the right circumstances, of course, a private civilian can exercise some aspect of police powers; citizen’s arrest remains part of the common law, individuals can use force in self-defense, and businesses can take steps, including detaining and searching, to protect their property.

218. See, e.g., N.Y. VEH. & TRAF. LAW § 1104 (McKinney 2011). Police officers are unlikely to get ticketed for on-duty traffic violations even when they are not operating in “emergency response” mode; to the extent that they are sanctioned at all, they are commonly subject only to internal discipline. See Josh Sweigart, *Some Public Workers Run Red Lights Freely*, DAYTON DAILY NEWS (July 17, 2012), <http://www.daytondailynews.com/news/news/local/some-public-workers-run-red-lights-freely-1/nPwbZ/>; Jeremy Rogalski, *Crashes Caused by Cops Leave Victims Wanting Justice*, KHOU.COM (Apr. 26, 2012), <http://www.khou.com/news/ITeamHPDAccidents-149102875.html>; Rene Stutzman & Scott Powers, *Day 1: Cops Crash Often, Ticketed Rarely*, ORLANDO SENTINEL, Feb. 11, 2012, [http://articles.orlandosentinel.com/2012-02-11/news/os-police-car-crashes-totals-mainbar-20120211\\_1\\_officers-crash-cops-crash-officer-mark-maupin](http://articles.orlandosentinel.com/2012-02-11/news/os-police-car-crashes-totals-mainbar-20120211_1_officers-crash-cops-crash-officer-mark-maupin). Even off-duty officers often avoid being ticketed for traffic violations, benefitting from “professional courtesy.” See Michael Dresser, *When Police Let Officers Skate, Respect for Traffic Law Tanks*, BALTIMORE SUN, Feb. 6, 2011, <http://articles.baltimoresun.com/2011-02>



principally undercover investigations—involve officers facilitating or committing acts that would ordinarily result in criminal sanction.<sup>219</sup> Most police agencies are constantly available to respond to emergencies, and police employees are generally exempted from various aspects of a locality’s human resources code, such as the expectation that city employees’ work shifts will coincide with typical business hours.<sup>220</sup> And in the context of liability under 42 U.S.C. § 1983, which provides for civil damages when a government official infringes on an individual’s federal statutory or constitutional rights, the Supreme Court has held that police officers can use the common law “defense of good faith and probable cause” even though the statute itself provides no such exceptions.<sup>221</sup>

In the context of addressing the effects of incidental regulation, police-specific carve-outs would exempt police agencies from some aspect of the pertinent law. At its extreme, the concept of police-specific carve-outs would take the form of a clear statement rule.<sup>222</sup> Imagine a statute that dictates, “No law, rule, or regulation shall be read to affect law enforcement agen-

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-06/features/bs-md-dresser-getting-there-02-09-20110204\_1\_police-officer-law-enforcement-professional-courtesy.

219. Joh, *Breaking the Law To Enforce It*, *supra* note 7, at 159; CHARLES R. SWANSON ET AL., *CRIMINAL INVESTIGATION* 629 (7th ed. 2000); GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* 62–68, 17–77 (1988); JOHN M. MACDONALD & JERRY KENNEDY, *CRIMINAL INVESTIGATION OF DRUG OFFENSES*, 113 (1983); George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 *TEX. L. REV.* 203, 216 (1975). Sometimes these acts can be fairly egregious. *See, e.g.*, John Diedrich and Raquel Rutledge, *ATF Uses Rogue Tactics in Storefront Stings Across Nation*, *JOURNAL SENTINEL*, Dec. 7, 2013, <http://www.jsonline.com/watchdog/watchdogreports/atf-uses-rogue-tactics-in-storefront-stings-across-the-nation-b99146765z1-234916641.html>.

220. *See, e.g.*, CITY AND COUNTY OF SAN FRANCISCO EMPLOYEE HANDBOOK 13 (2012) (“Except as otherwise provided . . . the typical workweek is 40 hours, consisting of five workdays of eight hours each. The City’s official business hours are from 8:00 a.m. to 5:00 p.m.”). For more on police scheduling, see WILLIAM W. STENZEL & R. MICHAEL BUREN, *POLICE WORK SCHEDULING: MANAGEMENT ISSUES AND PRACTICES* (1983). For more recent work that builds on the foundation laid by Stenzel and Buren’s earlier text, see ERIC J. FRITSCH ET AL., *POLICE PATROL ALLOCATION AND DEPLOYMENT* (2009).

221. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The Court’s decision in *Pierson* was the bedrock upon which the modern doctrine of qualified immunity was built. John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 *VA. L. REV.* 1461, 1467–68 (1989); Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 *YALE L. J.* 126, 130 (1985).

222. For more on clear statement rules as canons of statutory construction, see CALEB NELSON, *STATUTORY INTERPRETATION* 180–82 (2011).

cies unless a contrary intention is clearly stated therein.” Such an approach would, of course, be painfully over-inclusive; a blanket exception that, *inter alia*, permits police officers to make jams and preserves with more than five different types of fruits, despite the general regulatory prohibition on doing so,<sup>223</sup> would do little to alter the dynamic of modern policing, to say nothing of the administrative headache of adding statements of applicability to a huge body of laws and regulations or the judicial headache of determining when a statement is clear enough. The more measured approach would be for lawmakers to direct police-specific carve-outs at individual statutes, rules, or doctrines. A particular carve-out could be complete, exempting police agencies from the relevant statute entirely, but it need not be. Partial carve-outs could exclude police agencies from certain, specified aspects of the statute. In either case, the carve-out restricts the scope of a law that would otherwise regulate the police in some way.

How might this play out in practice? If descriptive research identified that the collective bargaining provisions that allow officers to challenge disciplinary proceedings result in agencies adopting a legalistic style of policing, and if normative consideration concludes that legalistic policing is problematic—perhaps because it results in too many arrests and insufficient police engagement with the community—the pertinent state law carve-out could take grievance procedures off the collective bargaining table, perhaps replacing them instead with a state-wide regulation that applies uniformly to all law enforcement agencies.<sup>224</sup>

Collective bargaining is hardly the only area of law where police-specific carve-outs could change the incidental regulatory effect of law on policing. Recall the problem of police legitimacy and the possibility that public perceptions could be improved by changing the racial composition of the police force to either more closely mirror the community or to ensure that officers do

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223. 21 C.F.R. § 150.160(2) (2012).

224. At least seventeen states have adopted some version of a Law Enforcement Officer Bill of Rights, which provide procedural protections to officers under administrative or criminal investigation. AITCHISON, *supra* note 109, at 244. I have not identified any state that allows police to engage in collective bargaining but prevents them from bargaining about grievance procedures. State law can exempt certain aspects of employment from collective bargaining as well as setting default rules that collective bargaining can modify. *See, e.g.*, OHIO REV. CODE ANN. § 4117.08 (2007).

not work in single-race groups.<sup>225</sup> Constitutional and statutory anti-discrimination law present legal hurdles to the otherwise obvious solution: establish hiring and promotional quotas or take race into account when making duty assignments. Police-specific carve-outs are possible. In the statutory context, Congress could amend Title VII to permit law enforcement agencies to take race into account in the limited context of assigning patrol officers only for the purpose of improving the public's perception of legitimacy. Constitutionally, bolstering perceptions of police legitimacy could possibly be considered a "compelling government interest," allowing narrowly tailored efforts to survive strict scrutiny under the Equal Protection clause.<sup>226</sup>

## 2. Independent Offsets

In some cases, there may be powerful reasons to not create police-specific carve-outs to generally applicable laws. In the anti-discrimination context, for example, perceptions of reverse discrimination may actually undermine rather than bolster the public image of the police or reduce officers' morale to such an extent that it negatively impacts their performance,<sup>227</sup> counteracting the effects of increased police legitimacy. And practical considerations, including the relatively low probability of the Court accepting police legitimacy as a compelling government interest or the political difficulty of amending state law in a contentious area like collective bargaining, may militate against law enforcement exemptions. When police-specific carve-outs are not available or are not appropriate, concerns about the incidental regulation of police could be addressed with an independent offset.

I use the phrase "independent offset" to describe the relationship of the response to the law that exerts an incidental regulatory effect on police. A response is "independent" in that it does not affect the scope of the applicable law. Instead of exempting police from a generally applicable law, a response can "offset" the incidental effect of that law through other means, compensating for the undesirable aspects of incidental regula-

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225. *See supra* Part II.C.

226. I acknowledge that tinkering with anti-discrimination law is likely to be a controversial proposition; I submit this truncated example only to demonstrate the potential range and scope of police-specific carve-outs to generally applicable laws. Though the question is worthy of more extended analysis, that is a task for future work.

227. *Cf.* NATHAN F. IANNONE ET AL., *SUPERVISION OF POLICE PERSONNEL* 194 (7th ed. 2009) (describing the importance of officer morale).

tion by way of a countervailing law or policy. In short, rather than attempting to change police behavior by modifying the underlying cause—a law that incidentally regulates police—an independent offset seeks to compensate for the symptom itself—the effect of incidental regulation. Like police-specific carve-outs, the concept of offsets already has a place in modern law. At least seventeen states have adopted some form of a Law Enforcement Officers’ Bill of Rights, for example, which provides procedural protections to officers being investigated for disciplinary or criminal infractions beyond those enjoyed by the public at large or other government employees.<sup>228</sup> Officers remain subject to administrative and criminal sanctions for misfeasance and malfeasance, but they benefit from special securities that are commonly justified by the need to offset an officer’s heightened “vulnerab[ility] to false accusations” and safeguard his reputation,<sup>229</sup> which is particularly relevant to certain aspects of policing.<sup>230</sup>

Consider, for example, the incidental effect of territorial jurisdiction in permitting, and even encouraging, displacement as a policing strategy. Recall the example of Florida Agricultural & Mechanical University’s Homecoming, where the city and county police push heavy traffic out of their jurisdiction, and the on-going accusations that police departments are addressing their local transient population by relocating homeless people, dropping them off beyond the city limits or even in neighboring jurisdictions.<sup>231</sup> An independent offset might seek to discourage police from engaging in displacement-oriented actions, but without making any attempt to change the essential

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228. AITCHISON, *supra* note 109, at 244; *see also* VA. CODE §§ 9.1-500–07 (2007); R.I. GEN. LAWS § 42.28.1–17 (2007); FLA. STAT. § 112.532 (2008).

229. *See, e.g.*, FRATERNAL ORDER OF POLICE, DUE PROCESS RIGHTS FOR LAW ENFORCEMENT OFFICERS, <http://www.grandlodgefop.org/legislative/issues/leobr/index.shtml> (last visited Apr. 21, 2013).

230. An officer with a reputation for dishonesty can jeopardize prosecutions with which he is involved. *See* Lisa A. Judge, *Disclosing Officer Untruthfulness to the Defense: Is a Liars Squad Coming to Your Town?*, THE POLICE CHIEF (Nov. 2005), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=744&issue\\_id=112005](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=744&issue_id=112005) (cited in Harmon, *supra* note 5, at 805 n. 181). An officer thought to be dishonest may also face additional pressure from judges (and, when relevant, prosecutors) when submitting arrest or search warrant applications. *Cf.* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 105–12 (1992) (describing the mixed responses of prosecutors and judges to “boilerplate” language in warrant applications and the possibility of perjurious testimony).

231. *Supra* note Part II.A.

nature of local territorialism. For example, a state could require local governments to reimburse neighboring jurisdictions for the costs of dealing with specific disturbances that their police force had intentionally displaced.<sup>232</sup> Returning to the problem of police legitimacy, state and local governments, as well as individual police agencies that are aware of a racial deficit in police legitimacy, can pursue alternative means of improving public perceptions from increasing cultural awareness training to redoubling community outreach and education efforts. Similarly, one could imagine legal and administrative ways to counterbalance unionized agencies' tendency toward the legalistic policing and the high number of arrests that it produces. For example, an agency or locality could seek to foster a perception of arrests as a solution of last resort, an indication of some greater social failure rather than a metric on which officers are favorably evaluated.<sup>233</sup> State law could also provide alternatives to arrest by expanding police authority; giving officers the ability to leverage some legal, forward-looking, but non-criminal measures—imagine writing someone a “ticket” that requires them to attend substance abuse counseling or anger management classes<sup>234</sup>—could drive down officers' reliance on the formal criminal justice system.

Independent offsets present some of the same challenges as police-specific carve-outs; regardless of the corrective mechanism, after all, the effect of incidental regulation first must be identified and evaluated. To be effective, a given tactic must be reasonably calibrated to the incidental effect that it is intended to offset, which may require a similar degree of *ex post* verification and, when necessary, modification. Unlike police-specific

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232. I use the qualifiers “specific disturbances” that are “intentionally displaced” in anticipation of the observation that many aspects of policing, including targeted enforcement efforts and aggressive patrol, can effectively displace crime by raising the costs of committing criminal acts in a given jurisdiction, pushing would-be criminal actors into neighboring jurisdictions with lower costs. This “general displacement” essentially involves the voluntary relocation of criminal actors to avoid interacting with the police. In contrast, the “specific displacement” that I am most concerned with involves police-initiated involuntary relocation. For a general overview on the concept of general displacement, see René B.P. Hesseling, *Displacement: A Review of the Empirical Literature*, 3 CRIME PREVENTION STUD. 197 (1994); Robert Barr & Ken Pease, *Crime Placement, Displacement, and Deflection*, 12 CRIME & JUST. 227 (1990).

233. See Stoughton, *supra* note 34.

234. In practice, this could resemble diversion strategies commonly used by prosecutors' offices. See Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 656–58 (2002).

carve-outs to generally applicable laws, though, independent offsets are not necessarily statutory. They may be creatures of state or local law, but they can just as easily be grounded in city or departmental policy. Effecting a sublegal change may avoid some of the pitfalls of legislative modification, particularly when statutory carve-outs would be aimed at laws that, like collective bargaining, can evoke strong bipartisan sentiment.

### CONCLUSION

This Article illuminates a largely overlooked aspect of how society regulates police officers. Scholars conventionally seek to answer questions about policing by examining direct legal regulation, particularly constitutional doctrines, and a range of sublegal factors. These approaches have advanced our understanding of police, but they are incomplete. Policing is also subject to incidental regulation, the unexpected side-effects of laws that are not intended to have any specific impact on core police functions. There are reasons to be particularly concerned about the incidental regulation of law enforcement. The standard tools of policing—surveillance, search, detention, arrest, and interrogation—inherently infringe on sensitive liberty and privacy interests. Police also play special roles in modern society, both explicitly, such as public safety officers, and implicitly, as uniformed representatives of the legal order. In short, the values and interests implicated by policing should lead us to be skeptical of legal decisions that have an unconsidered regulatory effect.

Using three examples from three different legal areas—local territorial jurisdiction, state labor law, and federal anti-discrimination law—I explain how the incidental regulation of policing shapes officer behavior in unanticipated ways. As units of local government, police agencies are subject to state laws that govern geopolitical boundaries and the relationship between municipalities and counties. Though these laws are not intended to govern interagency relations, they can establish a competitive dynamic that can result in an expansion of high-visibility police services or cooperation that lends itself to a regional focus on crime prevention, detection, and investigation. The nature of territorial jurisdiction, which inherently limits the range of people to whom an agency is politically accountable, can also encourage officers to engage in a strategy of specific displacement; pushing crime and disorder into neighboring jurisdictions is safer and cheaper than handling it at home.

As employers, law enforcement agencies are subject to both state collective bargaining law and federal anti-discrimination law. One is intended to correct the imbalance of power between low-level employees and management; the other, to protect individual rights by ensuring that similarly-situated people are treated equally without regard to superficial personal characteristics. Neither appears intended to have a specific effect on policing, but both do. Collective bargaining changes the police role by emphasizing a legalistic approach to patrol characterized by aggressive criminal enforcement and a high number of arrests. It also creates and exacerbates internal tensions—between sworn and civilian employees, rank-and-file officers and front-line supervisors, and sometimes even between rank-and-file officers aligned with different unions—that can negatively affect officer morale and performance. Anti-discrimination law, which constrains how employers assign job duties, also has the incidental effect of inhibiting efforts to improve the public’s perception of police legitimacy, particularly in minority communities. When the police are viewed as illegitimate, violent crime increases and civilian cooperation with the police decreases; both phenomena prompt a negative response from the police themselves, changing the way that officers interact with community members.

These examples demonstrate that the law of the police is far more expansive than laws about policing, but they are just a starting point. Policing-neutral laws of general applicability play an important role in defining the police role, in part by allowing officers a voice in the development of criminal procedure, substantive criminal law, and criminal justice policy.<sup>235</sup> Consider how non-criminal laws are leveraged in a way that facilitates the exercise of police authority; within property law, for example, an individual’s right to exclude and the associated right to delegate that right to the police have played a major

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235. Huey & Hryniewicz, *supra* note 113, at 288 (discussing the “thin literature” on “the politics of the police”). For example, police unions and lobbyists are among the staunchest opponents of marijuana legalization. See Lee Fang, *The Top Five Special Interest Groups Lobbying to Keep Marijuana Illegal*, REPUBLIC REPORT (Apr. 20, 2012), <http://www.republicreport.org/2012/marijuana-lobby-illegal/>. A brief glance at the website of only one police interest group—the International Association of Chiefs of Police—reveals thirty-five separate “projects” on topics from juvenile justice to violent extremism to protecting civil rights. *Projects*, INT’L ASSOC. OF CHIEFS OF POLICE, <http://www.theiacp.org/PublicationsGuides/Projects> (last visited Apr. 21, 2013).

role in anti-vagrancy and other tough-on-crime initiatives.<sup>236</sup> Other laws can change police tactics by increasing or decreasing the costs of detecting criminal activity,<sup>237</sup> by offering alternatives to arrest,<sup>238</sup> or by providing civil enforcement options that complement traditional police action.<sup>239</sup> Yet other laws impact the dynamics of criminal enforcement by changing short-term priorities. For example, zoning law often pushes bars and nightclubs into a fairly close proximity, and state or local law frequently requires those establishments to close at a set time.<sup>240</sup> The mass exodus of people at “closing time” creates a large number of potential problems in a compressed period of time, which officers respond to, in part, by engaging in informal order maintenance rather than formal criminal enforcement so as to avoid getting “tied up” by making arrests. Each of these has an incidental, and often unexpected, effect on policing.<sup>241</sup>

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236. Under what is commonly known as the “Trespass Affidavit Program,” private property owners can authorize police officers to investigate instances of suspected trespass on their property and, upon their own initiative and without further consultation of the property owner, to ban people from the property. The now-infamous “Stop and Frisk” policy of the New York Police Department arose, in large part, in the context of “vertical patrols” of apartment buildings that are authorized by private agreements between landlords and police, permitting officers to investigate and expel or arrest suspected trespassers on their own initiative. See THE NEW YORK COUNTY DISTRICT ATTORNEY’S OFFICE, *Trespass Affidavit Program*, <http://manhattanda.org/trespass-affidavit-program> (last visited Apr. 10, 2013) (describing the Trespass Affidavit Program as “a valuable tool” for law enforcement).

237. San Francisco, for example, requires building permits for front-yard fences over three feet high. S.F. PLANNING DEPT., *Fences—Residential*, <http://www.sf-planning.org/index.aspx?page=2811#applying> (last visited Apr. 10, 2013).

238. In Washington, for example, localities may not prohibit religious organizations from providing “temporary encampments for the homeless,” expanding the range of options for officers dealing with a homeless individual even when that person has been banned from government-run shelters or when those shelters are full. WASH. REV. CODE. § 36.01.290 (2010).

239. LORRAINE MAZEROLLE & JANET RANSLEY, *THIRD PARTY POLICING* 76–77 (2005) (discussing the use of civil code enforcement and shifting the onus of compliance to property owners and landlords).

240. California state law, for example, forbids the sale of alcohol between 2 a.m. and 6 a.m. of the same day. CAL. BUS. & PROF. CODE. § 25631 (2008). In Atlanta, bar service ends at 2:30 a.m., with certain exceptions for businesses in a “special entertainment district.” ATLANTA, GA CODE § 10-209(c)-(d) (2012).

241. In this Article, I introduce the discussion of incidental regulation of police through examples of linear cause-and-effect relationships; *this* law results in *that* effect on police. It is possible, in some circumstances, that incidental regulation has important emergent properties in that the effect on police behavior is an irreducible attribute of the web of laws to which police are subject. See Keith Sawyer, *Emergence in Sociology: Contemporary Philosophy*



The problems presented by the incidental regulation of policing are not insurmountable. Lawmakers and interest groups need to pay special attention to proposals that would include the police as constituents of a broader regulatory ambit, forecasting the impact on police practices to the extent possible. The need to better identify incidental effects of legislation remains even after a law is enacted, and legal scholars and other academics are uniquely situated to do so. Once a law's results are described and normative decisions made about their worth, undesirable effects can be addressed in two ways: police-specific carve-outs could exempt police from generally applicable laws, either in part or in whole; and independent offsets could seek to compensate for the effects of incidental regulation through law or policy without upsetting the existent legal background.

There is an on-going academic discourse that seeks a more comprehensive understanding of police practices. The incidental regulation of policing is a necessary part of that conversation. By taking a more comprehensive view of the legal environment in which police operate, we can more fully understand how the law shapes officer behavior. That understanding, in turn, can pave the way to a tighter regulatory regime and more effective police reform.