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Second-Order Regulation of Law Enforcement

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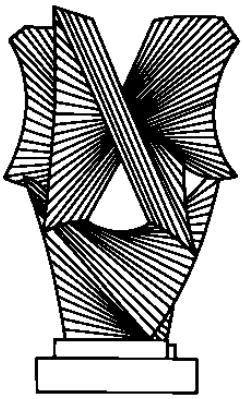

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This Article interrogates a critical, yet unexamined, regulatory design choice the Supreme Court makes in each criminal case raising constitutional questions about law-enforcement conduct: not what the Constitution requires but how to implement its requirements. In particular, the Court must decide whether to address its decision directly to rank-and-file officers or instead to political policymakers, such as legislators and police administrators, who in turn will regulate officers on the street. In the former, dominant model, termed here first-order regulation, the Court tells officers precisely what they can and cannot do. In the latter model, second-order regulation, the principal objective instead is to enunciate constitutional values and create incentives for political policymakers to write the conduct rules. Framed differently, the Court, as principal, enlists political policymakers as its agents in the regulatory enterprise. This Article is the first to apply an agency framework to the production of criminal-procedure law. Although first-order regulation predominates, a careful search uncovers bits of second-order regulation in spaces such as "special needs" searches and interrogation, and analogies in fields like employment and desegregation.

The Article claims that second-order regulation should, in many domains, benefit suspects and defendants in the aggregate by maximizing the expected value of their constitutional protections. The benefits of agency, that is, will frequently outweigh the costs. Shifting rulemaking responsibility from the Court to political actors harnesses the comparative advantages of political institutions and permits experimentation in search of workable, well-tailored safeguards to protect constitutional rights. Even more important, social science research suggests that affording law-enforcement greater opportunity to participate in its own regulation encourages "buy in" that leads to improved compliance. The agency costs, in contrast, including "slippage" in the form of potentially underprotective rules, can be reduced to tolerable levels. After making the general case for the second-order approach, the Article maps where it should work especially well or poorly. It then reimagines several of the Court's first-order decisions in a second-order model and shows how the model marks a path for taming the NSA surveillance controversy. Finally, it suggests a role in second-order regulation for other potential catalyst institutions, such as state courts and legislatures.

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INTRODUCTION

Two police officers arrest a suspect in a robbery and drive him to the stationhouse. They orchestrate a lineup, and the lone eyewitness fingers the suspect as the robber. The accused maintains his innocence, but he is prosecuted and convicted on the basis of the eyewitness identification. On appeal, the defendant argues that the lineup procedure was suggestive and therefore violated due process. His conviction is affirmed but the U.S. Supreme Court grants certiorari. All nine Justices vote to reverse and overturn the conviction. As it sets out to generate an opinion, with the case's outcome resolved, the Court faces a critical, but grossly understudied, question of regulatory design: *to whom* should its commands be addressed?

One option is for the Court to speak directly to the arresting officers, identifying which aspects of the lineup procedure were impermissible. Although pronounced in the context of an individual dispute, such a decision

has obvious, prospective, regulatory consequences.[1] Alternatively, the Court could aim its commands at political policymakers—legislators and law-enforcement administrators. Here it would enunciate the constitutional values at stake and create incentives for political actors to develop measures to safeguard those values, subject to review in court. For example, the Court might require eyewitness-identification reforms recommended by the Department of Justice, but only as a defeasible default solution. This would encourage policymakers to study the problem and substitute equally effective but lower-cost safeguards. Similarly, the Court could offer a safe harbor of relaxed constitutional scrutiny to jurisdictions that voluntarily adopt and comply with reforms, promising more stringent review of identification claims arising from other jurisdictions.

How should the Court choose? One way to approach the question is to frame it in principal-agent terms: Should the Court regulate street-level officers directly, or should it enlist political policymakers as its agents in the regulatory enterprise? The general tradeoffs between the two strategies are familiar.[2] The agents—political actors—have superior expertise in law enforcement and can monitor the rank and file more efficiently than the Court can. Their preferences, however, may diverge from the Court's, leading them to employ means or pursue ends that are at odds with, or even directly undermine, the Court's goals. This creates costly "agency slack," or "slippage." The Court, in turn, can mitigate these costs through a combination of incentives, monitoring, and control over the agents' "discretionary window."

My descriptive claim is that, in virtually every criminal-procedure case involving law enforcement (and not just our hypothetical), the Court not only pronounces constitutional principles, but also chooses between regulatory methodologies. It seems to do so unwittingly, and scholarly analysis has neglected the methodological issues as well.[3] My normative claim is that the benefits of agency will frequently outweigh the costs. My metric is the

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[1] For discussion of criminal-procedure decisions as a form of substantive regulation of law-enforcement officers and other state actors, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Law*, 107 YALE L.J. 1, 12, 16-22 (1997); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1739 (1991) ("[I]n the context of criminal procedure, the Warren Court's decisions … had a broad, regulatory quality difficult to assimilate … with a traditional conception of the judicial function as limited to deciding discrete disputes between particular parties." (footnote omitted)); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1004 n.2 (2010) (collecting sources).

[2] For an overview, see Eric A. Posner, *Agency Models in Law and Economics*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000).

[3] *See, e.g.*, Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012) (observing that scholarship has paid "little attention to the comparative roles, capacities, and incentives of nonjudicial institutions that can influence police conduct"). The problem recurs more generally. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 5 (1994) ("Embedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution.").

expected value of the Constitution's protections to suspects and defendants in the aggregate—the strength of the Constitution's rights multiplied by the likelihood that the rights will be respected. In other words, on the whole, law-enforcement conduct will hew closer to constitutional norms in a system in which the Court gets political policymakers to write the rules than in one in which it writes them itself.[4] Even to those ultimately unpersuaded by my normative case, the Article should, at the very least, solidify the importance of the descriptive one—that the Court's (typically implicit) selection of regulatory strategy, wholly apart from the content given the Constitution's clauses, has important consequences that warrant rigorous treatment.

Stated more provocatively, my normative claim is that the Supreme Court typically takes the wrong approach to regulating law enforcement. It nearly always regulates street-level officers directly. Five decades of such decisions have likely reduced the incidence of the very worst law-enforcement practices, but it seems fair to say that, as a contemporary system of regulation, the results are mixed at best.[5] Precise figures are hard to come by, but there is little dispute that compliance with constitutional criminal-procedure norms could be better.[6] Rights on paper are one thing; practical protections are quite another.

The wages here are high: beyond the individual harms misconduct inflicts, "abuses of public power fundamentally threaten the integrity of the legal order itself, eroding the values of a law-abiding people."[7] And the challenge is immense: law-enforcement officers wield enormous power and "a good deal of low-visibility discretion."[8] Those concerned predominantly with crime control aren't happy either; they see a set of rigid, ill-advised conduct rules that

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[4] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 4-7, 63-85 (2006) (developing case for rule-consequentialist metric for institutional-choice problems).

[5] *See, e.g.*, CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 37-56 (1993) (listing Warren Court's initial successes, which were followed by "[c]riticism from [a]ll [q]uarters" (emphasis omitted)).

[6] *See, e.g.*, Floyd v. City of New York, No. 08-CIV-1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013) (finding widespread Fourth Amendment and equal protection violations stemming from New York City's "stop and frisk" program); NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING 264 (Wesley Skogan & Kathleen Frydl eds., 2004) (summarizing field study in which 29% of searches were conducted unconstitutionally); Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 J. LEGIS. 1, 12-13 (2005) (collecting commission reports "chronicling beatings, violations of civil rights, patterns of bribe taking, and other wrongful conduct in the nation's police forces"); Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 403 (2007) (referencing "systematic problems in law enforcement," including "patterns of suggestive eyewitness identification," revealed by DNA exonerations); Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 316 (2004) (finding, based on observational field study, that roughly one-third of investigations involved Fourth Amendment violations). Peter Schuck suggests four causes of official misconduct: failures of the comprehension, capacity, motivation, and care required to obey the law. PETER H. SCHUCK, SUING GOVERNMENT 3-12 (1983).

[7] SCHUCK, *supra* note 6, at xi.

[8] JOHN HART ELY, DEMOCRACY AND DISTRUST 97 (1980); *see* Tom R. Tyler et al., *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457, 460 (2007).

hamstring law enforcement more than necessary.[9] It is this state of affairs that drives the search for a better approach.

Some terminology facilitates the discussion that follows. Because it acts directly upon the front-line agents who interface with the public—those I refer to as the "rank and file"—I call the Court's typical strategy *first-order regulation*. The alternative, agency approach I call *second-order regulation*, as it speaks not directly to officers in the field, but to the political policymakers who oversee those officers (who in turn promulgate first-order rules of their own). These policymakers include legislators and law-enforcement administrators like police and bureau chiefs. Note that *these* actors are the "agents" in my agency model. The rank and file, though "agents" of the government in a general sense, are here the regulated parties; they are not the Court's agents in the lawmaking enterprise. There is some ambiguity, I concede, in asserting that a decision is "addressed" or "speaks" to particular actors. I intend here the customary usage, to denote the individuals to whom the decision applies and whom it encourages to behave in certain ways, *i.e.*, the decision's "norm-subjects."[10]

The term "second-0rder regulation," I will explain, is actually a placeholder for a diversity of phenomena unified by one feature: in each instance, the Court acts as a catalyst for the political resolution of criminal-procedure problems and, aided by lower courts, as a backstop to test the constitutional adequacy of, and compliance with, the output of political lawmaking.[11] The defeasible default rule and safe harbor described earlier are just two examples. (We might think of the default rule as an interim first-order rule coupled with second-order incentives.) The Court's second-order decisions begin, rather than end, conversations with political policymakers about the precise bounds of acceptable law-enforcement conduct. The second-order approach assumes, as the Court has said, that any number of safeguards may suffice to protect a single constitutional value.[12] The model also tolerates a variety of interpretive theories—it does not, for instance, require Thayerian deference to the legislature on questions of constitutional meaning, and even some originalists, I will show, may be brought into the fold.

The Article pioneers its principal-agent approach to the production of criminal procedure's conduct rules.[13] Unlike most criminal-procedure

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[9] *See, e.g.*, BRADLEY, *supra* note 5, at 129-30.

[10] *See* H.L.A. HART, THE CONCEPT OF LAW 21-22 (1961); JOSEPH RAZ, PRACTICAL REASON AND NORMS 50 (1975).

[11] The catalyst-backstop conception of the judicial role is Susan Sturm's. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 483 (2001).

[12] *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 272 (2000).

[13] *See* Richard H. McAdams, *Bill Stuntz and the Principal-Agent Problem in American Criminal Law*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE 47, 49 (Michael Klarman et al. eds., 2012) (surveying literature and finding "no sustained or comprehensive analysis" of agency problems in criminal law and no treatment of Court as principal).

scholarship, which debates the contents of the rules the Supreme Court decrees,[14] this Article trains on an antecedent question: whether the Court should be writing the rules in the first place.[15] In doing so, it contributes to the small but significant literature relating criminal procedure to linked fields that typically receive separate scholarly treatment, including constitutional law, administrative law, and remedies.[16]

The Article proceeds as follows. In Part I, I erect the basic framework by describing examples of first- and second-order decisions. Within the second-order camp, I begin with decisions involving law enforcement, like *Miranda*. I then widen the focus to encompass cases from a variety of contexts both in and outside the criminal-justice system, including habeas corpus, employment, and school desegregation. These cases help illustrate the diversity of the second-order alternative, which, I show, presents itself in nearly every case.

Throughout the Article, I distinguish first- and second-order decisions in a binary fashion for conceptual convenience. But first-order decisions will often have policy repercussions that demand the attention of policymakers.[17] And a restrictive (second-order) command directed at policymakers might be thought to leave so little discretion as to amount, in effect, to a (first-order) command directly to the rank and file. In practice, the two approaches operate as points along a spectrum of specificity.

In Part II I highlight the normative tradeoffs between first- and second-order regulation—the costs and benefits of agency. Shifting rulemaking responsibility from the Court to political actors harnesses the comparative advantages of political institutions and permits experimentation in search of workable, well-tailored safeguards to protect constitutional rights. Even more

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[14] Some recent examples include Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21 (2013); Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293 (2013).

[15] A handful of scholars have broached this question. *See, e.g.*, Harmon, *supra* note 3, at 764 ("[R]egulating the police requires allocating responsibility among institutional actors to ensure a regime capable of intelligently choosing and efficiently promoting the best ends of policing."); *see also* Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 1 (2012); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 827 (2006). These scholars echo older voices. *See, e.g.*, Francis A. Allen, *The Judicial Question for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 541-42 (contending that "the Court will not succeed [in regulating the criminal-justice system] unless it stimulates a constructive response from the localities and the other branches of government").

[16] On the relationship between criminal procedure and the rest of constitutional law, see AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE (1997). On administrative law, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998); Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 HARV. L. REV. 2530 (2006). On remedies, see Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998); Laurin, *supra* note 1.

[17] *Cf.* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 165-66 (2012) (discussing policy responses to recent first-order-style decision). The policy repercussions of first- and second-order decisions will differ, however. The former are more likely to be focused on fashioning procedures to implement the substantive policy choices *the Court* makes, whereas the latter involve decisions of both substantive policy and implementation. *See id.*

important, social science research suggests that affording law-enforcement greater opportunity to participate in its own regulation encourages "buy in" that leads to improved compliance. The most salient risk of the second-order approach is slippage—that political policymakers will draft lax criminal-procedure protections. The second-order strategy, after all, seems to entrust the henhouse to the foxes' watch. My project, however, is emphatically *comparative*. As Neil Komesar colorfully observed, "foxes might be assigned to guard the chicken coop where the alternatives (bears, weasels, and so forth) are worse."[18] When it comes to protecting suspects and defendants from law-enforcement misconduct, the Supreme Court is one of Komesar's bears, or so I make a substantial effort to establish.

I do not claim that second-order regulation is *always* better than first-order regulation, or that it can solve all of the justice system's problems. Indeed, conceived of as an instrument for reform, second-order regulation has obvious shortfalls, including the inability to reach law-enforcement misconduct that does not give rise to constitutional issues litigable in criminal cases. An important example is the use of excessive force in effecting a search or seizure.[19] My more modest contention is that, in many areas of criminal procedure regularly litigated in criminal cases, second-order regulation should benefit defendants overall. And it should do so in a way that's palatable to crime-control interests as well, by freeing political policymakers to choose the most cost-effective safeguards that will get the job done. I conclude Part II by analyzing the Court's and political policymakers' incentives to participate in the cooperative process second-order regulation requires. I suggest how the Court can craft successful second-order decisions that encourage desirable responses, as well as the conditions under which second-order regulation should be used, *i.e.*, in which the benefits of agency outweigh the costs.

In Part III I implement and extend. I first illustrate how criminal-procedure rights will be adjudicated in individual cases. I argue that violations of political policy should be evidence of a constitutional violation, but not necessarily conclusive evidence. I then reimagine several of the Court's first-order doctrines and decisions, such as racial-profiling and search-and-seizure law, in the second-order model. I also suggest how the model marks a path for taming the NSA surveillance controversy, now the subject of dueling federal-court opinions. Finally, I show how institutions besides the Supreme Court, such as state courts and legislatures, can serve as catalysts through second-order regulation.

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[18] KOMESAR, *supra* note 3, at 204; *cf.* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667-73 (2002) (defending incumbent control of redistricting).

[19] *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 135-36. In addition, many acts that laypeople might characterize as "misconduct," such as retaliatory arrests for trivial offenses, do not actually violate the Constitution. I certainly do not disagree with those, like Rachel Harmon, who maintain that "the problem of regulating the police extends beyond constitutional law." Harmon, *supra* note 3, at 763, 776-81. In future work, for example, I will discuss the role of municipal liability insurers in regulating rank-and-file behavior.

I. CLASSIFYING COURT DECISIONS

In most constitutional adjudication, the Supreme Court reviews regulation authored by a legislature or agency (hence "judicial *review*"). In criminal procedure, by contrast—whether or not it sees itself as doing so—the Court typically writes the regulations itself. Section A illustrates the Court's dominant first-order regulatory mode. Section B describes the significantly rarer second-order alternative. Section C explains why the Court confronts a choice between them in virtually every case.

These strategies, to reiterate, are really points along a continuum. The relationship is something like that between design and performance standards in administrative law. A design standard "specifies precisely how, say, a machine must be built."[20] In that sense, like a first-order decision, it speaks directly to the workers who actually build the machine. Yet it undoubtedly requires the attention of company executives who create the assembly line and develop systems—such as training, monitoring, and discipline—to ensure worker compliance. A performance standard, by contrast, like a second-order decision, "states its obligations in terms of ultimate goals that must be achieved. The firm is then free to achieve those goals in any appropriate way."[21] Scholars recognize that, "[i]n practice, the notions of 'performance' and 'design' tend to converge," for example when performance standards can be "met only by a machine of a certain design."[22] Yet despite our "theoretical ability to transpose performance and design standards, the underlying tension remains," founded upon tradeoffs between the two ideal forms, and binary treatment enables clearer comparative analysis.[23] The same is true here.

Two brief caveats before jumping in: First, it may be tempting to think that first-order decisions are simply rules and second-order decisions are standards.[24] But the relationship is not that simple. A first-order decision is one addressed to line agents; it may announce either a rule or a standard. Indeed, the Supreme Court's first-order criminal-procedure decisions *do* employ both rules and standards.[25] A second-order decision is one addressed to political policymakers; it will typically announce a standard rather than a rule to leave policymakers space to determine how to implement the law. In a

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[20] STEPHEN BREYER, REGULATION AND ITS REFORM 105 (1982).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 105-06; Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 713 (2003).

[24] A rule is regulation given content before individuals act and before adjudication (*e.g.*, "don't drive over 25 miles per hour"), while a standard is regulation given content after individuals act (*e.g.*, "don't drive unnecessarily quickly"). This is the terminology of Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992), among others.

[25] *Compare, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 110 (2010) (instructing officers to wait fourteen days after break in custody before interrogating suspect who previously invoked right to counsel), *with* Hudson v. Michigan, 547 U.S. 586, 590 (2006) (discussing the Court's "necessarily vague" "reasonable wait time" standard, which tells officers how long they must wait after knocking before entering home (internal quotation marks omitted)).

well-functioning system of second-order regulation, therefore, we should generally expect to see the Court directing constitutional standards to political policymakers, who in turn will issue rules to govern street-level officers. Policymakers are permitted to opt for standards instead, but they run the risk that reviewing courts will determine they have insufficiently cabined line agents' discretion.[26]

Second, I report the Court's cases in this Part solely for descriptive purposes. I remain agnostic about questions such as whether the Court correctly interpreted the Constitution, whether it afforded suspects and defendants an adequate level of constitutional protection, or even (for now) whether it chose the best regulatory strategy to resolve the issues before it and pursued that strategy effectively. Nor do I attempt to explain why, as a historical matter, the Court chose a second-order strategy in some cases but not others. Its decisions give little clue, and I refrain from speculation here.[27] Indeed, part of my argument is that the Court does *not* appear to be making a considered, deliberate choice between the two regulatory modes, despite the significance of the decision.

A. First-Order Decisions: Speaking Directly to the Rank and File

In the vast majority of its criminal-procedure decisions, the Supreme Court addresses its commands directly to street-level officers investigating crime. Indeed, the Court has self-consciously described its role as "guid[ing] police officers."[28] Over time, the Court's rules have accreted into what Justice Scalia recently derided as "an intricate federal Code of Criminal Procedure imposed on the States by [the] Court in pursuit of perfect justice."[29] These rules "do not just set outer boundaries for police conduct, with the day-to-day judgments governed by state or local law or custom. With respect to police misconduct, constitutional criminal procedure occupies the field."[30]

Consider the Fourth Amendment first. Law-enforcement agents armed with a warrant, the Court's decisions instruct, may enter a home and search for items specified in the warrant. While doing so, "officers may seize evidence in plain view" even if it is outside the warrant's scope.[31] And "[i]n

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[26] *Cf.* Illinois v. Krull, 480 U.S. 340, 359 (1987) ("statutory provisions that circumscribe officers' discretion may be important in establishing a statute's constitutionality").

[27] Some commentators have argued that the Court began to regulate directly out of necessity, because political actors were completely unwilling. *See, e.g.*, Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. REV. 785, 790 (1970).

[28] Dunaway v. New York, 442 U.S. 200, 213-14 (1979); *accord* New York v. Quarles, 467 U.S. 649, 658 (1984); *see also, e.g.*, Yarborough v. Alvarado, 541 U.S. 652, 668, 669 (2004) (touting "an objective rule designed to give clear guidance to the police").

[29] Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

[30] Stuntz, *supra* note 1, at 17 ("When the police frisk a suspect on the street, make an arrest, search or impound a car, enter a dwelling or office, or ask a suspect questions, Fourth and Fifth Amendment rules govern their conduct."); *see* BRADLEY, *supra* note 5, at 3 ("Law students are taught, essentially correctly, that the only source of law that matters in this area is Supreme Court cases ….").

[31] Kentucky v. King, 131 S.Ct. 1849, 1858 (2011).

executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search."[32] Without a warrant, in contrast, a search of the home is presumptively unreasonable and thus unconstitutional.[33] Nevertheless, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[34] Officers may also "make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in 'hot pursuit' of a fleeing suspect."[35]

As for seizures of persons, "officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs."[36] At the opposite extreme, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[37] Many seizures lie somewhere in between. For instance, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot"—the so-called "*Terry* stop."[38] And "'[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' the officer may conduct a patdown search 'to determine whether the person is in fact carrying a weapon.'"[39]

Fifth Amendment doctrine designed to implement the Self-Incrimination Clause operates similarly. Although the *Miranda* decision has a significant second-order component, which I will discuss below, the first-order rules *Miranda* and its progeny established continue to dictate how law-enforcement officers may question criminal suspects:

> [P]olice officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present.[40]

"Critically, however, a suspect can waive these rights."[41] "[A]fter a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests

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[32] Los Angeles Cnty. v. Rettele, 550 U.S. 609, 614 (2007) (per curiam).
[33] *King*, 131 S.Ct. at 1856.
[34] Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
[35] *Id.*
[36] *King*, 131 S.Ct. at 1858.
[37] Tennessee v. Garner, 471 U.S. 1, 11 (1985).
[38] Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (citing Terry v. Ohio, 392 U.S. 1 (1968)).
[39] Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (quoting *Terry*, 392 U.S. at 24).
[40] Maryland v. Shatzer, 559 U.S. 98, 103-04 (2010).
[41] *Id.* at 104 (citing *Miranda*, 384 U.S. at 475).

an attorney."[42] And "the Constitution does not forbid law enforcement officers to pose questions … aimed solely at clarifying whether a suspect's ambiguous reference to counsel was meant to assert his Fifth Amendment right."[43]

Perhaps as important, *Miranda*'s conduct rules do not always apply. First, "there is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make."[44] Second, the Court has never held that "an undercover law enforcement officer must give *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response."[45] And third, an "officer may ask [a] detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions" without giving *Miranda* warnings.[46]

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To be sure, legislatures do regulate law-enforcement conduct in some respects. And law-enforcement agencies promulgate operational policies that govern alongside first-order constitutional restraints. The Court's decisions sometimes note a policy's presence in passing. But many of these policies regulate behavior of purely internal and administrative concern, such as the appropriate use of departmental vehicles, and not interactions between officers and members of the public.[47] And the existence and content of even the outward-looking policies, as well as officer compliance with them, are rarely relevant to the Court's constitutional analysis. The Court nearly always strips away any policy context and evaluates officer conduct in isolation from it. Indeed, at times the Court expressly rejects the notion that departmental policies might be relevant.[48] The incentives to promulgate policies, or ensure the constitutional adequacy of extant ones, are therefore indirect at best.[49] The absence of any judicial check on officer compliance

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[42] Davis v. United States, 512 U.S. 452, 461 (1994).

[43] *Id.* at 466 (Souter, J., concurring in the judgment).

[44] *Miranda*, 384 U.S. at 478 (footnote omitted).

[45] Illinois v. Perkins, 496 U.S. 292, 295-96 (1990).

[46] Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

[47] For example, in one set of case studies, most patrolmen in three police departments reported that supervisors are primarily concerned with enforcing rules "pertaining to minor problems of discipline such as personal appearance, tardiness, too much time at a coffee shop, … and the like." MICHAEL K. BROWN, WORKING THE STREET 122 (1981); *see* Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 368 (1986).

[48] *See* Virginia v. Moore, 553 U.S. 164, 178 (2008); Whren v. United States, 517 U.S. 806, 814 (1996).

[49] Samuel Walker, a preeminent policing scholar, reports that police rulemaking "has been haphazard and inconsistent." Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 17 (2003). "Many critical areas of police work remain ungoverned by rules," Walker explains; many rules "are not as comprehensive as they could be"; and, most important, "the existence of a written rule hardly guarantees that it is implemented as intended." *Id.* Wayne LaFave posits three reasons for the lack of "synergism" between police rulemaking and judicial analysis: (1) "[i]nsufficient judicial encouragement of rulemaking," (2) "[n]onexistent or inadequate judicial evaluation of rules," and (3) "[f]ailure of litigants to focus on rules and their rationale." Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use,*

with agency policies, moreover, permits a sort of "double-messaging" to pervade many law-enforcement agencies—formal policy prohibits misconduct but on-the-ground organizational culture tolerates or even encourages it.[50]

B. Second-Order Decisions: Speaking to Policymakers

In contrast to a first-order regulatory scheme, second-order regulation puts legislative and administrative policy at the center of the constitutional inquiry. The Court's role is not to decide on a granular level what line agents may or may not do, but instead to motivate policymakers to make those decisions, and to do so in a responsible fashion informed by constitutional values. The Court "inject[s] normative considerations into [policymakers'] decisions about how to structure the day-to-day operations" of the agency.[51]

The second-order decisions concerning law enforcement fall along a spectrum reflecting the specificity of the Court's substantive guidance to policymakers. They can be divided roughly into two groups. The first comprises *open-ended second-order decisions*. In these cases, the Court's primary aim is simply to prevent arbitrary or discriminatory law-enforcement behavior. The constitutional evil exists when *no* policy regulates officers in the field. Nearly any nondiscriminatory policy will cure this infirmity, and the Court's principal task is simply to catalyze the political policymaking process. The best examples of open-ended second-order regulation come from the Court's Fourth Amendment "special needs" doctrines. In this area, the Court has upheld searches conducted pursuant to facially neutral policies and invalidated searches otherwise.

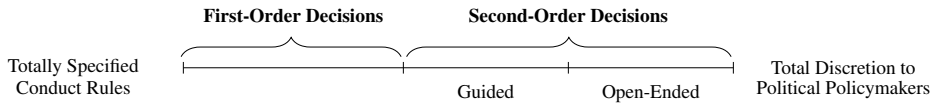
The second group contains *guided second-order decisions*. In these cases, the Court allows political policymakers some discretion in crafting solutions to constitutional problems, but not nearly as much as in the open-ended cases. Substantive constitutional principles bound the universe of acceptable policy responses. The demands of the Self-Incrimination Clause, for example, would not be met by a policy that merely prevented *arbitrary* interrogations; appropriate safeguards must protect against coercion.

The relationship among the various decision types is pictured below. As one moves from the first-order end of the spectrum toward the second-order side, past the guided second-order decisions all the way to the open-ended ones, the level of discretion afforded law enforcement increases; demands on political policymakers likewise increase, as they bear increasing responsibility to formally attend to line agents' exercise of that discretion.

Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 MICH. L. REV. 442, 502-18 (1990) (emphasis omitted).

[50] *See* HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING 163 (1990) ("Police agencies have long been notorious for urging rank-and-file officers to do one thing while rewarding them for doing something else."); Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515-21 (2004); *see also* Cheh, *supra* note 6, at 19 (reporting case study finding that many acts of misconduct during demonstrations in Washington "were already prohibited by internal orders and policies").

[51] Sturm, *supra* note 11, at 522.



Note that the entire notion, central to the concept of a second-0rder decision, that the Court can pronounce constitutional values and leave their implementation primarily to political policymakers, presumes that constitutional adjudication can be carved into conceptually distinct pieces—that judicial determinations of what the Constitution means can be dissevered from doctrinal rules that direct how courts are to determine whether the constitutional meaning has been complied with. The theory necessarily embraces a distinction known (in subtle variations) by many names, such as "constitutional doctrine" versus "constitutional meaning."[52] Second-order regulation preserves for the Court the task of determining constitutional *meaning*, but assigns the development of constitutional *doctrine* to political policymakers. This particular institutional arrangement is contemplated, but not required, by the constitutional theories just mentioned, which focus less on regulatory design and more on the levels of generality at which the various pieces of constitutional adjudication are specified.[53]

Significantly, this means that second-order regulation can accommodate any number of theories of constitutional interpretation. It does not dictate how constitutional *meaning* is to be determined. Despite the heavy role for political actors, for instance, second-order regulation need not be Thayerian. Suppose, for example, the legislature determined the Self-Incrimination Clause prohibits only physical, and not psychological, coercion. A Thayerian would defer to that determination because it is not clearly mistaken.[54] But a court applying a second-order approach could employ a different interpretive method—say, Dworkin's "moral reading"[55]—and reach a different conclusion. Only then would it delegate to political policymakers the task of designing safeguards. Even some originalists—those who accept the distinction between

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[52] Richard H. Fallon, Jr., *Foreword—Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) [hereinafter Fallon, *Implementing*]; *see, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) ("constitutional rules" vs. "constitutional norms"); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 50-51 (2004) ("constitutional decision rules" vs. "constitutional operative provisions"). I need not, however, reject the "pragmatist" insights, which question the coherence of such distinctions and insist that constitutional adjudication is instrumental all the way through. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988). I am inclined to think that (as the pragmatists say) "forward-looking, empirical, and all-things-considered analyses pervade constitutional adjudication," yet that it's nevertheless meaningful and helpful "to deliberate about how a constitutional right or guarantee would best be implemented" (an unintelligible endeavor for a rigid pragmatist). Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1313-17 (2006).

[53] *See* Fallon, *Implementing*, *supra* note 52, at 62 (explaining that "some constitutional norms may be too vague to serve directly as effective rules of law").

[54] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); *see* VERMEULE, *supra* note 4, at 254-55.

[55] *See* RONALD DWORKIN, FREEDOM'S LAW (1997).

constitutional interpretation and construction[56]—could potentially be brought aboard, as the model does not prevent them from vying for originalist interpretations of constitutional meaning.

1. Open-Ended Second-Order Decisions

An aversion to arbitrary government action motivates a number of criminal-procedure doctrines. It manifests most clearly in Fourth Amendment search-and-seizure settings.[57] For instance, an airport-security system that permitted agents to stop and screen whomever they like, for no reason whatsoever, would strike many as ripe for discrimination (and other abuses of discretion) and therefore constitutionally suspect. But the system we actually have, in which everyone is screened, is constitutionally unobjectionable to most. So is a policy dictating that every fifth person be screened.[58] The precise content of the policy (assuming it is not, for example, facially discriminatory) is less important than the policy's mere existence, which itself ensures that complying officers will not act arbitrarily. In the Court's words, the question is whether the search is "sufficiently regulated to satisfy the Fourth Amendment"[59] or whether "the discretion of the official in the field [is] circumscribed, at least to some extent."[60] If a defendant believes the policy pursuant to which he was searched is inadequate or discriminatory, he can raise that challenge at a suppression hearing before the trial court. Because these decisions hinge the constitutional validity of a search on the existence of and compliance with an even-handed policy, they create strong incentives for political policymakers to promulgate and police such policies.[61] And in a sense, exclusion acts as a penalty default rule, specifying the treatment of evidence in jurisdictions that have not promulgated policy.

Consider first the so-called "administrative search" doctrine, which governs, for instance, a city inspector's search of a residence or business to ensure compliance with housing or fire codes. These searches typically require a warrant.[62] "The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers," the Court has cautioned, "particularly those in the field, as to when to search and whom to search."[63] "A warrant, by contrast, [provides] assurances from a

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[56] *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

[57] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.").

[58] *See, e.g.*, New Jersey v. Coccomo, 427 A.2d 131 (N.J. Super. Ct. 1980) (upholding police practice of stopping every fifth car to detect and deter drunk driving).

[59] Florida v. Wells, 495 U.S. 1, 5 (1990).

[60] Delaware v. Prouse, 440 U.S. 648, 661 (1979).

[61] *See* LaFave, *supra* note 49, at 451-70.

[62] *See* Camara v. Mun. Court, 387 U.S. 523, 534 (1967); See v. City of Seattle, 387 U.S. 541, 545-46 (1967).

[63] Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); *see also Prouse*, 440 U.S. at 655.

neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is *pursuant to an administrative plan containing specific neutral criteria*."[64] Put another way, given the strong governmental interest in inspection, "'probable cause' to issue a warrant to inspect … will not necessarily depend upon specific knowledge of the condition of the particular dwelling"—the analog to the ordinary criminal standard—but is also present "if *reasonable legislative or administrative standards for conducting an area inspection are satisfied* with respect to a particular dwelling."[65]

The "inventory search" cases, dealing with law-enforcement searches of vehicles or personal possessions upon impoundment or arrest, sound similar themes. The governing principle in these cases is that "inventories pursuant to standard police procedures are reasonable" under the Fourth Amendment.[66] This ensures that "an inventory search [is not] a ruse for a general rummaging in order to discover incriminating evidence."[67] Inventory searches *not* conducted pursuant to standard police procedures are *not* reasonable.[68] Inventory policies need not be the least intrusive policies possible; "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[69] And policies may leave line agents some discretion, "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."[70]

2. Guided Second-Order Decisions

Open-ended second-order decisions suffice only where bare caprice is the principal constitutional evil to be averted. In many cases, different and arguably more specific constitutional principles will circumscribe the set of acceptable policy solutions. In a guided second-order decision, the Court enunciates the pertinent substantive values and encourages political policymakers to implement safeguards that protect those values. The resulting conception of rights resembles that in Michael Dorf and Charles

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[64] *Marshall*, 436 U.S. at 323 (emphasis added); *see also See*, 387 U.S. at 545 (holding that "the decision to enter and inspect" business must "not be the product of the unreviewed discretion of the enforcement officer in the field").

[65] *Camara*, 387 U.S. at 538 (emphasis added).

[66] South Dakota v. Opperman, 428 U.S. 364, 372, 376 (1976). Evidence that a standard procedure is a "pretext concealing an investigatory police motive," the Court suggested in *Opperman*, might justify an exception to this general principle. *Id.*

[67] Florida v. Wells, 495 U.S. 1, 4 (1990).

[68] Colorado v. Bertine, 479 U.S. 367, 374 n.6 (1987).

[69] *Id.* at 374.

[70] *Id.* at 375. Similarly, roving-patrol stops, which subject individuals to the "unreviewable discretion" of field agents, are impermissible absent individualized suspicion, whereas stationary checkpoints, which constrain line-agent discretion, may be permissible. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

Sabel's theory of "democratic experimentalism." Dorf and Sabel propose reconceptualizing the Constitution's individual rights, including criminal-procedure rights, as "fundamental legal norms deeply entrenched yet always provisional in the sense that the means by which core values are both protected and ultimately defined are deliberately exposed to experimentalist understanding."[71] Three examples help illustrate the concepts.

a. *United States v. Wade*: Post-Indictment Lineups

Several weeks after he was indicted for robbery, the defendant in *United States v. Wade*,[72] without notice to his appointed counsel, was placed in a lineup, where two witnesses identified him as the robber; the same witnesses identified him again at trial.[73] The question on appeal was whether counsel's absence from the lineup procedures violated the Sixth Amendment. The Supreme Court held that it did. The fundamental danger, the Court wrote, is the "degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[74] Without counsel's assistance, the accused is unable "effectively to reconstruct at trial any unfairness that occurred at the lineup."[75] And without an accurate reconstruction, the defendant is deprived of "his only opportunity meaningfully to attack the credibility of the witness' *courtroom* identification"[76]—deprived, in other words, of his rights to a fair trial and to the effective assistance of trial counsel. "[W]here so many variables and pitfalls exist," the Court explained, "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself."[77]

The Court imposed what might be considered an interim first-order rule. Because a post-indictment lineup is a "critical stage" of a criminal prosecution, both the defendant "and his counsel should [be] notified of the impending lineup, and counsel's presence should [be] a requisite to conduct of the lineup, absent an 'intelligent waiver.'"[78] I say "interim" because the Court made its rule defeasible: "Legislative or other regulations," the Court advised, "such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'"[79] The counsel prescription was effective only until

[71] Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 389, 398 (1998).

[72] 388 U.S. 218 (1967).

[73] *Id.* at 220.

[74] *Id.* at 228.

[75] *Id.* at 232.

[76] *Id.* (emphasis added).

[77] *Id.* at 235.

[78] *Id.* at 237; *see also* Moore v. Illinois, 434 U.S. 220 (1977) (extending *Wade*'s counsel rule to "show-ups").

[79] *Wade*, 388 U.S. at 239.

politically promulgated regulations eliminated the constitutional evil against which the Due Process Clause and right to counsel are arrayed.

Citing academic literature and case law, the Court detailed numerous "risks of abuse and unintentional suggestion" that offend the Constitution.[80] Defendants, for example, had been picked out of lineups that singled them out by race, hair color, height, or age group.[81] Similarly, the Court walked through the "impediments to meaningful confrontation at trial"—among these, that "the [lineup] participants' names are rarely recorded or divulged at trial."[82] And in what can only have been an effort to guide subsequent political action, the Court attached extensive footnotes describing academic proposals and foreign solutions.[83]

The Court's decision stumbled slightly out of the blocks. The federal reaction was unproductive,[84] and some agencies avoided the use of post-indictment lineups, substituting photographic displays, which do not trigger Sixth Amendment protections.[85] One must strain to call either of these a success story. But over time, empirical surveys have found, *Wade* did indeed "stimulat[e] new efforts" to devise lineup procedures to eliminate "the most obvious forms of abusive practice," such as by requiring that "lineup participants be of generally the same age, sex, height, weight, and race."[86] Courts reviewing these procedures have approved them as substitutes for the presence of counsel, exactly as *Wade* contemplated.[87]

Despite these successes, *Wade*'s contribution was blunted by a later decision expressly limiting it to the post-indictment context. Law-enforcement agencies can conduct *pre*-indictment lineups subject to only the most permissive due-process constraints. This goes far toward explaining why erroneous eyewitness identifications remain the foremost contributor to wrongful convictions. I will return to this topic below.

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[80] *See id.* at 228-29, 232-35 & nn.6-9, 17-25.

[81] *See id.* at 232 & n.17, 233.

[82] *Id.* at 230, 231.

[83] *See id.* at 236-37 n.26, 238 n.29, 239 n.30. On this conception of the judicial role, see Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998).

[84] In 1969, Congress attempted to overrule *Wade* without eliminating the risk of suggestive procedures. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 18 U.S.C. § 3502); FRED P. GRAHAM, THE SELF-INFLICTED WOUND 244-46 (1970) (contextualizing congressional response to *Wade*). The Government has never invoked the statute, to my knowledge.

[85] United States v. Ash, 413 U.S. 300 (1973); Walter W. Steele, Kirby v. Illinois*: Counsel at Lineups*, 9 CRIM. L. BULL. 49, 53 (1973).

[86] Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1084 (1973); *see* Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 36-39 (1984); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1368-70 (1977).

[87] *See* Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1055 n.113 (2001) (citing cases); 2 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 7.3(a) (3d ed. 2013) (same).

b. *Miranda v. Arizona*: Custodial Interrogation

Miranda v. Arizona[88] and its subsequent history usefully illustrate several pertinent concepts. Like *Wade*, *Miranda* combines interim first-order rules with second-order incentives. Its first-order rules are familiar: prior to custodial interrogation, law-enforcement officers must recite certain warnings and must respect the suspect's invocation of his rights.[89] But these requirements apply, importantly, only "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it"—that is, unless the government "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[90]

The decision first identifies the pertinent constitutional values and the interrogation practices that threaten them. The "constitutional foundation underlying the privilege" against self-incrimination, the Court instructed, "is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[91] A suspect's statement may be used against him, consistent with the privilege, only when the statement "was, in fact, voluntarily made"—when it was "the product of free choice."[92]

Although the Court then prescribed the now-familiar warnings, they were intended to be defeasible:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is present conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.[93]

Shortly after *Miranda*, Congress passed a law that, in essence, hinged the admissibility of statements given during custodial interrogation solely on their voluntariness.[94] Decades later, the Fourth Circuit held that, in doing so, Congress had properly accepted the Court's invitation to provide alternative

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[88] 384 U.S. 436 (1966).

[89] *See, e.g.*, *id.* at 444-45.

[90] *Id.* at 444.

[91] *Id.* at 456, 460; Klein, *supra* note 87, at 1039 (opining that "the warnings themselves do not embody the rule or value contained in the privilege").

[92] *Miranda*, 384 U.S. at 457, 462 (quoting Wan v. United States, 266 U.S. 1, 14-15 (1924)) (internal quotation marks omitted).

[93] *Id.* at 467.

[94] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified at 18 U.S.C. § 3501).

safeguards—"we cannot say that Congress's decision to eliminate the irrebuttable presumption created by *Miranda* lessens the protections afforded by the privilege," the court concluded.[95] The Supreme Court reversed. *Miranda*, the Court clarified, clearly held that "something more than the totality test was necessary" to protect against "the risk of overlooking an involuntary custodial interrogation."[96] Meanwhile, in the decades since *Miranda*, various States and localities have supplemented the required warnings, but none has successfully replaced them with wholly alternative safeguards.[97] *Miranda*'s failure in this regard is a point to which I will return.

c. *Berger v. New York*: Electronic Eavesdropping

If *Wade* and *Miranda* illustrate the Supreme Court's role as catalyst in a second-order scheme, *Berger v. New York*[98] exemplifies the back end of the process—what it looks like when the Court acts as a backstop, reviewing the constitutional validity of a piece of criminal-procedure regulation (rather than an individual officer's isolated act). The defendant in *Berger* was convicted of conspiracy. It was undisputed that the only evidence presented to the grand jury for indictment was obtained pursuant to New York's electronic eavesdropping statute.[99] The Court framed its task as reviewing not the conduct of the officers who eavesdropped, but instead the "validity of New York's permissive eavesdrop statute" that authorized the officers' acts.[100] "The claim is that the statute sets up a *system of surveillance* which involves trespassory intrusions into private, constitutionally protected premises [and] authorizes 'general searches' for 'mere evidence,'" the Court explained.[101]

The Court's job, therefore, was to "determine the basis of the search and seizure authorized" by the statute upon judicial order.[102] Reviewing the preconditions for issuance of an order, the statute's "broad sweep" was "immediately observable."[103] The Court detailed the statute's flaws, which boiled down to its "blanket grant of permission to eavesdrop … without adequate judicial supervision or protective procedures."[104] Again, rather than rebuke the officers who executed the eavesdropping order, the Court's opinion blames the policymakers who set the (overly permissive) conditions for the

[95] United States v. Dickerson, 166 F.3d 667, 691 (4th Cir. 1999).
[96] Dickerson v. United States, 530 U.S. 428, 442 (2000).
[97] *See* Dorf & Sabel, *supra* note 71, at 459-60.
[98] 388 U.S. 41 (1967).
[99] *Id.* at 44-45.
[100] *Id.* at 43. *Compare* Katz v. United States, 389 U.S. 347, 354 (1967) ("The question … for decision … is whether the search and seizure conducted in this case complied with constitutional standards," *i.e.*, whether the Government's "agents acted in an entirely defensible manner.").
[101] *Berger*, 388 U.S. at 43-44 (emphasis added). Four Justices, each writing separately, objected to this framing. *See, e.g.*, *id.* at 111 (White, J., dissenting) ("The question here is whether *this* search complied with Fourth Amendment standards.").
[102] *Id.* at 54 (majority opinion).
[103] *Id.*
[104] *Id.* at 60.

order's issuance. In fact, the theme recurring throughout the Court's analysis is that New York's statute left "too much to the discretion of the officer executing the order."[105]

The Court, however, rejected the notion that "neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements."[106] It cited prior decisions that "sustained the use of eavesdropping devices" where "the 'commission of a specific offense' was charged, its use was 'under the most precise and discriminate circumstances' and the effective administration of justice in … court was at stake."[107] New York's statute was flawed, the Court clarified, only "[a]s it is written."[108] The Court's decision, so crafted, created incentives for policymakers who valued electronic eavesdropping to rein in the discretion of street-level officers who would actually effect the searches. The Court's analysis and its citation to prior cases sustaining eavesdropping practices provided the guidance necessary for policymakers to do so in a manner that satisfied Fourth Amendment concerns.

The Justices clearly had subsequent legislation in mind when they decided *Berger*. As Justice White observed in dissent, Congress was at the time engaged in "extensive hearings" to revise the federal wiretap statute along the lines of New York's law.[109] The Court's decision was expected to have "substantial impact" on Congress' work.[110] And it did. Two weeks after *Berger* issued, a bill incorporating *Berger*'s teachings was introduced in Congress. This bill, along with one previously pending, formed the basis for Title III, which continues to govern today. The Senate Report shows that Congress had drafted Title III to meet *Berger*'s standards.[111] Subsequent constitutional challenges to Title III were universally rebuffed.[112]

3. Second-Order Decisions Outside the Law-Enforcement Context

Wade and *Miranda* (and possibly *Berger*[113]) show how default rules can function (with varying degrees of success) as a mechanism for second-order

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[105] *Id.* at 59; *see also id.* at 60 ("Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties.").

[106] *Id.* at 63.

[107] *Id.* (quoting Osborn v. United States, 385 U.S. 323, 329-30 (1966)).

[108] *Id.* at 64.

[109] *See* Orin S. Kerr, *The Constitution and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 848 (2004); *Berger*, 388 U.S. at 112 (White, J., dissenting).

[110] *Berger*, 388 U.S. at 113 (White, J., dissenting).

[111] *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

[112] *See* Kerr, *supra* note 109, at 851 n.304 (collecting cases).

[113] Some have suggested that *Berger* should be understood as a sort of penalty default rule, threatening to ban wiretapping outright unless the legislature stepped in to regulate it. *See* William J. Stuntz, *Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns—Understanding the Unraveling of American Criminal Justice*, 119 HARV. L. REV. F. 148, 155 (2006); Tara Mikkilineni, Note, *Constitutional Default Rules and Interbranch Cooperation*, 82 N.Y.U. L. REV. 1403, 1411, 1426-28 (2007).

regulation.[114] But as I stated at the outset, the second-order model is considerably more diverse. Because the approach is used so rarely in regulating law enforcement, I must widen my focus to capture additional examples. These examples also provide data to inform the development of guidelines for successful second-order regulation, an endeavor I take up below.

a. Meaningful Access to Court

The Court has used second-order decisions to regulate access to the courts by indigent criminal defendants. In *Griffin v. Illinois*,[115] the Court held that the States must provide indigent defendants with a trial transcript *or* "other means of affording adequate and effective appellate review to indigent defendants."[116] "The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice," it added, and "[w]e are confident that the State will provide corrective rules to meet the problem which this case lays bare."[117] In subsequent years courts approved a surprising variety of transcript alternatives.[118] A 1965 study, for example, found that, in many jurisdictions, "it is customary to use a summary agreed upon by prosecuting and defense attorneys."[119]

b. The Fourth Amendment Exclusionary Rule

The Court's recent exclusionary-rule decision in *Herring v. United States*,[120] expounding on the so-called "good-faith exception," might be seen as taking a second-order approach. *Herring* involved a search incident to arrest;

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[114] In general, default rules might be those the Court views as normatively attractive. *See* John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 850-53 (2006). Or they might attempt to estimate the solution most policymakers would prefer. *See id.* at 840-45, 856-59; *cf.* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) [hereinafter Elhauge, *Preference-Estimating*]. Alternatively, they might elicit that solution by inviting political override. *See* Ferejohn & Friedman, *supra*, at 845-52, 856-59; *cf.* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) [hereinafter Elhauge, *Preference-Eliciting*]. The last option, akin to a "penalty" or "preference-eliciting" default rule, is most appropriate where political preferences are unclear, the interim costs inflicted by the default rule are acceptable, and political correction is likely. *See* Elhauge, *Preference-Eliciting*, *supra*, at 2170-81; *see also* Ferejohn & Friedman, *supra*, at 857-59. The last condition will frequently be satisfied here because the burdened parties—prosecutors, law enforcement, and the anti-crime lobby, are politically powerful. Elhauge, *Preference-Eliciting*, *supra*, at 2194 & n.99.

[115] 351 U.S. 12 (1956) (plurality opinion).

[116] *Id.* at 20.

[117] *Id.*; *see also id.* at 24 (Frankfurter, J., concurring in judgment) ("Illinois may prescribe any means that are within the wide area of its constitutional discretion.").

[118] *See, e.g.*, Britt v. North Carolina, 404 U.S. 226 (1971) (court reporter's notes); Taylor v. Alabama, 477 So.2d 509 (Ala. Ct. Crim. App. 1985) (audio tapes); Herick v. Mun. Ct., 8 Cal. App. 3d 967 (1970) ("settled statement"); Illinois v. Hanson, 359 N.W.2d 188, 193-94 (Ill. Ct. App. 1977) (certified or stipulated report of proceedings).

[119] 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 139 (1965).

[120] 555 U.S. 135 (2009).

the arrest warrant, which was listed in a police database, had been recalled months earlier, which meant that the search was illegal.[121] The Court held that, because the error in the database resulted from "isolated negligence attenuated from the arrest," the exclusionary rule did not apply.[122] It cautioned, however, that, "[i]f the police have been shown to be reckless in maintaining a warrant system, … exclusion would certainly be justified."[123] Similarly, "[i]n a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system."[124] The Court's decision thus provided a second-order incentive for political policymakers to ensure the reliability of law-enforcement recordkeeping systems by offering the good-faith exception's safe harbor only to those that do. While other aspects of the decision may be troubling,[125] those who call the decision a "complete disaster" appear to overlook the potential benefits of this second-order incentive.[126]

c. Habeas Corpus

The Court used a safe-harbor approach again in *Martinez v. Ryan*.[127] Although prisoners generally have no constitutional right to counsel for state collateral proceedings, Martinez argued in his federal habeas petition that such a right existed (and was violated) in his case, where those proceedings were the first place to raise a claim regarding *trial* counsel. The Court rejected Martinez's constitutional argument, noting that it "would require the appointment of counsel in initial-review collateral proceedings" and "would impose the same system of appointing counsel in every State."[128] But it granted relief on an equitable basis: it held that ineffective assistance of counsel at initial-review collateral proceedings may establish "cause" to excuse procedural default, permitting a federal habeas court to reach the merits. This ground, the Court observed, "permits States a variety of systems for appointing counsel in initial-review collateral proceedings" and, perhaps more important, "permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings."[129] The Court gave

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[121] *Id.* at 136-39.
[122] *Id.* at 137, 147-48.
[123] *Id.* at 146.
[124] *Id.*
[125] *See, e.g.*, Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009); Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing*, 111 COLUM. L. REV. 670 (2011).
[126] LaFave, *supra* note 125, at 787. *But see* Laurin, *supra* note 125, at 732-39 (acknowledging potential of *Herring*'s "systemic negligence" test but speculating that it may converge with demanding test for municipal liability and possibly make both tests more demanding). Note that the exclusionary rule itself is said to be defeasible. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 597-99 (2006).
[127] 132 S.Ct. 1309 (2012).
[128] *Id.* at 1319.
[129] *Id.* at 1319-20.

States incentive to provide effective counsel in state collateral proceedings—by foreclosing federal habeas review only where adequate counsel was available—without requiring the provision of counsel, let alone any particular system of counsel appointment.[130]

d. DNA Discovery

The Court can speak to political policymakers not only by ruling against them, but also by ruling in their favor *because* they took preventive measures. In *District Attorney's Office for the Third Judicial District v. Osborne*,[131] the Court rejected a prisoner's due-process claim for the release of biological evidence for DNA testing.[132] The crux of the Court's rationale was that Alaska had, in the Court's view, already provided adequate procedures to handle such claims.[133] A few States had not, and percipient observers viewed the Court's decision as a call to the legislatures in these outlier States to step in and address the issue.[134] The States responded—each has since enacted a DNA testing statute.[135]

e. Employment

Recognizing that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms," the Supreme Court has made employer liability for supervisors' behavior "depend in part on an employer's effort to create such procedures."[136] Its decisions offer employers a safe harbor from hostile-environment harassment claims if they can show that they "exercised reasonable care to avoid harassment and to eliminate it when it might occur."[137] The Court's approach "offers incentives to create internal processes that can be shown to be legitimate and effective when assessed in relation to other workplaces and to the underlying principles reflected in the general sexual harassment norm articulated by the Supreme Court."[138] "Organizations, in turn, have developed processes to address sexual

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[130] *See, e.g.*, Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 475, 477, 481, 485, 488 (2013). *But see* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2451-55 (2013) (doubting that States will provide postconviction counsel)..

[131] 557 U.S. 52 (2009).

[132] *See id.* at 56.

[133] *See id.* at 69-75. *But see id.* at 90-93 (Stevens, J., dissenting) (disputing adequacy of Alaska procedures on which majority relied).

[134] *See* Interview by Council for Responsible Genetics Staff with Nina Morrison, Innocence Project, http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=208 (last visited Jan. 2, 2014) (calling *Osborne* "a call to action on the part of state legislatures").

[135] Postconviction DNA Act, 2013 Okla. Sess. Laws § 317 (codified at Okla. Stat. tit. 22, § 1373 et seq. (2013)); An Act Providing Access to Forensic and Scientific Analysis, 2012 Mass. Acts. ch. 38 (codified at Mass. Gen. Laws. ch. 278A (2012)). Alaska also updated its DNA-access laws after *Osborne*. *See* 2010 Alaska Sess. Laws ch. 20 (codified at Alaska Stat. § 12.73.010 et seq. (2010)).

[136] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

[137] Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998).

[138] Sturm, *supra* note 11, at 482.

harassment … in context, over time, and in relation to broader patterns of bias or dysfunction."[139] As Susan Sturm has shown, the Court's "decisions can be read to cast the judiciary in an important but de-centered role" that "moves beyond the traditional choice between deregulation and rule-enforcement by adopting a structural approach that encourages effective problem-solving."[140]

f. School Desegregation

In *Brown v. Board of Education*,[141] the Supreme Court famously held unconstitutional separate-but-equal school systems that segregated students along racial lines.[142] Rather than specifying a set of first-order conduct rules, the Court effectively delegated that task to school districts. "School authorities have the primary responsibility for elucidating, assessing, and solving these problems," the Court instructed; "[district] courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[143] Policymakers in some localities responded quickly to begin to implement the Court's decision.[144] Many areas of the country, however, vehemently resisted, and further judicial intervention, often of increasing scope and detail, proved necessary.[145]

By including this example, I do not mean to suggest that *Brown* has been entirely successful, as de facto segregation persists. In fact, I include it mostly as a cautionary note. Nevertheless, the appropriate comparison against which to judge the Court's second-order strategy is not a perfect world without segregation, but instead the counterfactual world in which the Court took a first-order approach from the outset.[146] It is hard to be confident how that world would appear.

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[139] *Id.* at 479.

[140] *Id.*

[141] 347 U.S. 483 (1954).

[142] *Id.* at 493.

[143] Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955); *see* SCHUCK, *supra* note 6, at 191 (reading *Brown* as stating Court's "willingness to consider more intrusive relief if the political branches, after being given a full opportunity to consider the implications of the [C]ourt's findings, fail to design a legislative or administrative remedy for it").

[144] *See, e.g.*, Erin Adamson, *Breaking Barriers: Topekans Reflect on Role in Desegregating Nation's Schools*, TOPEKA CAP.-J. (May 11, 2003); *Little Effect on Topeka*, TOPEKA CAP.-J., May 18, 1954; Robert B. McKay, *"With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. Rev. 991, 991 (1956); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1022 (2004).

[145] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970) (busing); Alexander v. Holmes Cnty. Bd. of Educ., 396 U.S. 19 (1969) ("desegregation now"); Cooper v. Aaron, 358 U.S. 1 (1958); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 344-68 (2004); Albert P. Blausten & Clarence C. Ferguson, *Avoidance, Evasion & Delay*, *in* THE IMPACT OF SUPREME COURT DECISIONS 96-105 (Theodore L. Becker ed. 1969).

[146] *Cf.* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 145-46 (1999) ("The unanswerable question is [what] would have occurred without *Brown*.").

g. Lawsuits Against Federal Government Officials

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[147] the Court held that federal officials are amenable to suit by individuals for at least some violations of the Constitution. The Court indicated its intervention was appropriate only because there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."[148] By offering to abstain when Congress provides a statutory remedy, the Court encouraged Congress to act. Congress responded by enacting remedial schemes to address several kinds of constitutional torts, which the Court subsequently held to displace the *Bivens* remedy.[149]

C. When Is the Second-Order Alternative Available?

Before proceeding to normative questions, I pause briefly to trace the boundary of the second-order category. Does the Court *always* have a choice between regulatory regimes? Or, at the opposite extreme, are my examples a biased selection that make up the entire second-order regulatory universe? My intuition is that a second-order decision is always an option unless the constitutional text specifies a particular mechanism to protect the value at stake. It may be, for instance—as Justice Black thought—that the very words of the Fifth Amendment *require* an exclusionary rule (a conduct rule for trial judges, who must exclude evidence upon finding a constitutional violation), whereas exclusion is only one of myriad acceptable remedies for a Fourth Amendment violation.[150] The Fifth Amendment also requires most federal felony prosecutions to proceed by indictment; an alternative charging procedure thought to be equally effective will not suffice. In the vast majority of cases, however, it would be disingenuous to maintain that the Court's chosen conduct rules are strictly required, and that there is "no room whatever for reasonable difference of judgment or play in the joints."[151] The Constitution's "specifics," Judge Friendly pithily observed, "are simply not that specific."[152] There are usually more permissible answers to a constitutional question than the one the Court elects to give.

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[147] 403 U.S. 388 (1971).

[148] *Id.* at 397.

[149] *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 423 (1988); Bush v. Lucas, 462 U.S. 367, 388 (1983).

[150] *See* Coolidge v. New Hampshire, 403 U.S. 443, 497-98, 510 (1971) (Black, J., concurring and dissenting).

[151] Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 954 (1965).

[152] *Id.* (internal quotation marks omitted).

II. COMPARING REGULATORY APPROACHES

The framework constructed in Part I enables distinction—which I treat as binary for conceptual purposes—between first- and second-order decisions. The Court, we can now see, is constantly choosing between these two regulatory approaches (nearly always opting for the former). This realization in turn invites a normative inquiry: is either strategy preferable and, if so, under what conditions? The key observation driving the analysis is that second-order regulation positions the Court as a principal and political policymakers as its agents in the lawmaking enterprise. With that in mind, Section A walks through some of the expected benefits of agency in this setting. Although the two concepts are intertwined, it is helpful here to think first about the content of the conduct rules each system will produce and then about expected line-agent compliance with those rules. Some of the features I list as benefits are contestable; some readers may dispute that they exist, or that they register as benefits rather than costs. I provide contrary authorities intermittently, and then take on costs more fully in Section B. In Section C, I attempt to sketch out—albeit imprecisely—conditions under which the benefits should outweigh the costs, suggesting a net gain from the agency relationship.

A. Potential Benefits of Second-Order Regulation

1. Content of the Law

In second-order regulation, the Supreme Court delegates to political policymakers the responsibility for writing conduct rules to govern street-level officers on a daily basis. Gains from the approach, therefore, will generally stem from comparative institutional advantages policymakers possess, or from the decentralization of lawmaking authority. I draw heavily in this section from literature on institutional choice.[153] For convenience, I treat legislators and law-enforcement officials together, distinguishing them only when helpful or necessary.[154]

First, like many agents, political policymakers possess greater expertise than their principal.[155] They know more about crime rates and budgets, and

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[153] Where possible, I rely on sources specific to law-enforcement institutions. For helpful general overviews covering many of the points that follow, see DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22-67 (1977); KOMESAR, *supra* note 3, at 138-42; MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 79-110 (2008); ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2009) (focusing on epistemic characteristics); VERMEULE, *supra* note 4; Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1922-29 (2013). Murphy covers some of this ground as well in the course of proposing an interbranch, collaborative approach to privacy protections. *See* Murphy, *supra* note 15, at 53-60.

[154] This is an approach others take. *See, e.g.*, KOMESAR, *supra* note 3, at 9; TUSHNET, *supra* note 153, at 79 n.1.

[155] Klein, *supra* note 87, at 1060; Stuntz, *supra* note 15, at 827. *But see, e.g.*, VERMEULE, Law, *supra* note 153, at 86-87 (observing that "political forces may cause legislators to use the information they possess

about challenges the rank and file face on the job.[156] They can solicit input from a range of sources, including experts and interest groups on both sides of controversial issues, in a search for cost-effective solutions to constitutional challenges.[157] And granting these agents broader policymaking authority should, if anything, increase their initiative to use these institutional advantages to further develop their expertise.[158] The Court, in contrast, typically proceeds on a narrow factual record and stylized legal briefs from two parties (and sometimes amici) focused (at least formally) on a past event.[159] Perhaps unsurprisingly, the Court not only lacks essential information, it has also been known to rest decisions on "legislative facts" of dubious veracity.[160] In addition, the Court is poorly positioned, relative to political policymakers, to observe (and thus learn from) the consequences of the policy choices its conduct rules incorporate.[161]

Second, the Supreme Court's common-law method of lawmaking also disadvantages it relative to political policymakers. Part of the problem is again epistemic. The common-law method does not permit the Court to "see the whole system" or learn from experience in any systematic way.[162]

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in distorted ways").

[156] *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453-54 (1990) ("[F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."); *see also* David H. Bayley, *Police Reform: Who Done It?*, *in* POLICE REFORM FROM THE BOTTOM UP 22-23 (Monique Marks & David Sklansky eds., 2012) (discussing importance to reform of line agents' "craft knowledge"); Hans Toch, *Police Officers as Change Agents*, *in* POLICE REFORM FROM THE BOTTOM UP, *supra*, at 34-35 (similar).

[157] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65-68 (1969); SCHUCK, *supra* note 6, at 129. *But see* Murphy, *supra* note 15, at 51-52 (concluding that, in case of privacy protection, "it is not clear that the political processes do a better job than courts of airing and weighing the concerns of all relevant constituencies"). For the basic point in administrative law, see Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1828 (1978).

[158] *See* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1444-45 (2011).

[159] *See, e.g.*, Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1510, 1513 (2012) (questioning whether Court "has sufficient expertise and information in the record to mandate" requested relief). Orin Kerr's discussion of the respective "information environments" of courts and legislatures is helpful, although he confines the point to regulation of new technologies. *See* Kerr, *supra* note 109, at 875-82. I tend to think the point applies more generally. *See* Harmon, *supra* note 3, at 772-76 & n.48 (contesting limits on Kerr's position).

[160] *See* Seth W. Stoughton, *Policing Facts*, 88 TULANE L. REV. __ (forthcoming 2014).

[161] *See* Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 678 (1972) ("Lawyers striving for victory in adversary litigation cannot be expected invariably to put 'the individual case in the context of the overall policy involved.' The judges, accordingly, may not grasp fully the wider implications and consequences of the rules they promulgate within the four corners of the isolated record before them." (quoting Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1006 (1965))); *see also* Stuntz, *supra* note 1, at 4, 26-28, 60-65 (explaining how justice system's dynamics exacerbate this institutional shortcoming).

[162] *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) ("Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us."); BRADLEY, *supra* note 5, at 55; Amsterdam, *supra* note 27, at 786-90. Of course, the common law has its epistemic advantages as well, as its decisions rest on the "rough empiricism" of "rational traditionalism." *See* David. A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891-94 (1996). Even in the second-order model, the Court acts in a common-law method in performing its backstopping function.

Likewise, the Court cannot write the law in a unified fashion; its "interventions are necessarily of a random nature, shaped by reference only to the facts of the individual cases which reach [it] for adjudication."[163] Legislative-style lawmaking, in contrast, "permits the whole area to be surveyed at once, with the result that the provisions made for various parts of the process can be related to, and made consistent with, each other."[164] Common-law rulemaking by its nature also leaves important questions open, creating uncertainty about the law's content. This uncertainty can linger for years as a legal question works its way up to the Court. "Uncertain rules result in uncertain restrictions on government practices, which can either allow abuses or else chill practices needed to pursue important investigations."[165]

Third, the Court's constitutional regulation is more abiding, and less easily revised to respond to new and changing facts. Although the Court as a decisionmaking body may be more nimble than legislatures, strong stare-decisis norms limit the Justices' ability to pivot quickly. Political actors operate free from these constraints.[166] Congress enacted the Electronic Communications Privacy Act to regulate the privacy of Internet communications, for example, and amended it *eleven* times between 1988 and 2002.[167] And even were they willing to change course more readily, judges are ill-equipped to track factual trends in society precisely enough "to warrant jettisoning … settled constitutional rules."[168]

Fourth, second-order decisions alleviate "the distorting force of particulars" in two respects.[169] First, the rules are no longer made by the Court in "'hard cases' where the full consequences of decision may have been clouded by understandable outrage over the facts at hand."[170] Second, less

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[163] McGowan, *supra* note 161, at 678; *see* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 195 (1983) (quoting Warren Burger criticizing Court for "revising the code of criminal procedure piecemeal, on a case-by-case basis, on inadequate records and incomplete factual data").

[164] McGowan, *supra* note 161, at 672.

[165] Kerr, *supra* note 109, at 859, 868-69, 883. *But see* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 45 (1938) ("Judicial finding of law has a real advantage in competition with legislation in that it … generalizes only after a long course of trial and error in the effort to work out a practicable principle.").

[166] *See* BRADLEY, *supra* note 5, at 71-77 (noting that "[w]hen a legislature wishes to declare a new law, or to change an old one, it simply does so," and describing how stare decisis interferes with establishment of clear rules). *But see* TUSHNET, *supra* note 146, at 28 (giving examples in which Court has overruled recent constitutional precedents); Murphy, *supra* note 15, at 49-50, 52 (showing that "Congress has not always proven adept at maintaining the currency of legal standards"). We could dispense with stare decisis, but it seems implausible to think the benefits of doing so, in terms of positioning the Court to regulate law enforcement more effectively, would outweigh the substantial countervailing costs.

[167] Kerr, *supra* note 109, at 871.

[168] Cass R. Sunstein & Adrian Vermeule, *Interpretations and Institutions*, 101 MICH. L. REV. 885, 943 (2003).

[169] VERMEULE, *supra* note 4, at 38 (emphasis omitted); *see* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006). *But see* Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933 (2006) (describing countervailing advantages of common law).

[170] Friendly, *supra* note 151, at 930; *see* Amsterdam, *supra* note 27, at 792, 813; Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 3.

policy is made during altercations between law-enforcement officers and the citizens they police. Right now, the Court's first-order decisions frequently delegate policymaking authority to line agents by deferring substantially to their "heat of the moment" choices.[171] Second-order regulation—by encouraging law-enforcement executives to make rules to guide the discretion of patrolling officers—would transfer some or most of this authority to law-enforcement leadership.[172] More policy choices would be made by individuals with greater experience and expertise,[173] potentially in consultation with legal counsel and stakeholders,[174] in periods of relative calm,[175] and in a more transparent and visible (and thus publicly accountable) fashion.[176]

Finally, unlike the Court, the political policymakers who write the conduct rules in a second-order world can capture the "happy incidents of the federal system."[177] They can experiment with varying solutions to constitutional problems tailored to local needs and resources.

2. Compliance with the Law

Independent of its content, there are reasons to expect better line-agent compliance with the law in a second-order system in which political policymakers write the conduct rules. First, consistent with the conventional distinction between rulemaking and adjudication,[178] political policymakers tend to create prospective rules ex ante, while the Court gives content to law ex post in a case-by-case process. In the language many legal economists use,

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[171] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396 (1989); BROWN, *supra* note 47, at 3-5 (illustrating the "crucial policy-making powers" of patrolmen, whose discretion "is tantamount to political decision making"); DAVIS, *supra* note 157, at 222 (showing how patrol officers "are among the most important policy-makers of our entire society," making "far more discretionary determinations in individual cases than any other class of administrators").

[172] Note the salience of this point to the Court's rejection of a Fourth Amendment challenge to border-patrol checkpoints in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 566 (1976). For the basic argument, see McGowan, *supra* note 161, at 680; *cf.* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 496-500 (1996).

[173] *See* SCHUCK, *supra* note 6, at 103; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423 (1974).

[174] *See* DAVIS, *supra* note 157, at 88-91 (observing that police policy "is made primarily by subordinates" and advocating rulemaking in part "to transfer most of the policy-making power from patrolmen to the better qualified heads of departments, acting on the advice of appropriate specialists"); McGowan, *supra* note 161, at 667 (urging police consultation with counsel); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008); Walker, *supra* note 49, at 25-27 (describing "auditor model" of citizen oversight in which citizens recommend policy changes).

[175] *See* Amsterdam, *supra* note 27, at 812; *see also* DAVIS, *supra* note 157, at 90 (noting influence on policy of police officer's "emotions or even his whims of the moment"); *cf.* RAZ, *supra* note 10, at 59-60 (rules may reduce risk of error because content is determined in time of tranquility).

[176] *See* DAVIS, *supra* note 157, at 90-91 (contending that rulemaking would help to "educate the public … that the police make vital policy" and "bring policy-making out into the open for all to see"); *see also* Amsterdam, *supra* note 27, at 812.

[177] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *accord* LaFave, *supra* note 49, at 455.

[178] *See* Bi-Metallic Invest. Co. v. State Bd. of Equalization, 239 U.S. 141 (1915); Londoner v. City & County of Denver, 210 U.S. 373 (1908).

political actors make more *rules*, and the Court more *standards*.[179] This oversimplifies, to be sure. The Court plainly recognizes the government's interest in "administrable rules" that are "applicable by the police in the context of the law enforcement activities in which they are necessarily engaged."[180] And its decisions sometimes establish rules, either directly or through the precedential effect of holdings that specific conduct does or does not violate a constitutional standard.[181] My claim is not that political actors *must* or *always* write rules or that the Court *never* does.

Nevertheless, writing detailed rules entails significant enactment costs, and requires confidence (informed by expertise) that the rules will produce the outcomes desired. The uncertainty created by the Court's limited resources and knowledge should naturally lead it to delegate discretion by promulgating standards rather than rules.[182] It's therefore not surprising that "[n]umerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments."[183] Without overstating the point, if we had to guess, we would expect the ratio of rules to standards to be higher under second-order decisions.

This matters because rules are generally easier than standards to understand, apply, and follow. Because interpreting a standard requires predicting how a court will decide questions that are already answered in the case of a rule, advice about a standard is more costly.[184] People know more about how rules will apply to their conduct than they do about standards. This may help explain why, as studies have shown, local police are not able consistently to comprehend and apply the Supreme Court's standard-heavy criminal-procedure decisions.[185] And even if law-enforcement administrators attempt to translate Court standards into internal policy rules, they too will have difficulty confidently predicting what the standards will mean in application. All else equal, we would expect rules, and thus second-order

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[179] *See* Kerr, *supra* note 109, at 868; *see also* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 820-25 (1967) ("[I]n formulating general rules to govern whole classes of cases, courts do not find it easy to lay down obviously precise, quantitative rules."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 603-04 (1988) ("We are more likely to find that judicial solutions veer towards [standards], while it is legislatures that are more apt to … tilt towards [rules]."). For the rules/standards terminology, see Kaplow, *supra* note 24, at 559-62.

[180] Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (internal quotation marks omitted).

[181] *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98 (2010); Kaplow, *supra* note 24, at 577-79, 611-16 (discussing precedent).

[182] *See* Kaplow, *supra* note 24, at 569; Stephenson, *supra* note 158, at 1440-41.

[183] Missouri v. McNeely, 133 S.Ct. 1552, 1564 (2013).

[184] Kaplow, *supra* note 24, at 569; *see also id.* at 610 ("[T]he difficulty of learning about laws promulgated by legislatures may differ from those promulgated by courts … because of the manner in which legislative enactments and judicial opinions are written, published, and indexed."); DAVID DIXON, LAW IN POLICING 279 (1997) ("[J]udicial decisions seem to create particular problems of assimilation.").

[185] Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 394 n.130 (collecting sources); *see also* SCHUCK, *supra* note 6, at 4-6 (discussing "comprehension-based illegality" of official behavior).

decisions, to induce behavior more in accord with underlying norms.[186]

Second, the sanctioning schemes that tend to correlate with first- and second-order decisions differ as well. In enforcing its first-order decisions, the Court cares only whether a constitutional violation occurred in the past. If one did (and it was not harmless), the Court sanctions the government by reversing the conviction. Much of the law generated by second-order decisions, in contrast, takes the form of safeguards designed to prevent violations of constitutional rights before they occur. For example, law-enforcement executives might promulgate rules on how to conduct a lineup, intended to prevent the use of undue suggestion while nonetheless facilitating identifications. They might enforce these rules by penalizing an officer who violates them regardless whether a court would hold that the officer had violated the Constitution. First- and second-0rder decisions therefore tend to correlate, respectively, with two different modes of law enforcement: ex post liability for harm and ex ante preventive regulation.[187] Consistent with this hypothesis, Erin Murphy reports that "Congress alone"—and not the Court—"has demonstrated a willingness … to impose structural checks that do more to deter violations ex ante than might ex post alternatives."[188]

There are substantial impediments to the successful use of ex post judicial sanctions to deter illegal law-enforcement behavior.[189] As an initial matter, the case-by-case adjudicatory process is poorly designed to catch any kind of systemic problem involving unequal treatment across cases. But the more nagging problem is that the vast majority of constitutional violations go unpunished.[190] (Note that I do not argue the exclusionary rule is inherently impotent, a point to which I will return.) Suppose that a law-enforcement officer conducts a stop-and-frisk without reasonable suspicion, in violation of the Fourth Amendment. He will face no consequence unless: the search yields evidence of a crime; the officer decides to arrest the suspect; the prosecution decides to charge him with a crime and use the evidence in its case-in-chief; the suspect-turned-defendant's attorney develops the issue and files a

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[186] *See* Kaplow, *supra* note 24, at 564, 577, 609 & n.142, 622 ("Rules may be preferred to standards in order to limit discretion, thereby minimizing abuses of power.").

[187] Strictly speaking, by "prevention" I refer to both true preventive measures and act-based (as opposed to harm-based) sanctions. Prevention "rests on physical force or something close to it"—electing not to hire an officer candidate whose past suggests a propensity for violence, for example. Act-based sanctions are triggered by the commission of specified acts, before harm results (and independent of whether it ever does). *See* Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 257 (1993).

[188] Murphy, *supra* note 15, at 53.

[189] *See, e.g.*, Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 836 (1999) ("[P]olice scholars have long agreed that it is a serious mistake to view police accountability exclusively 'in terms of identifying and taking action against wrongdoing.'" (quoting HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 159 (1977)).

[190] When officers are punished for misconduct, moreover, it is often long after the fact. Slobogin, *supra* note 185, at 376. Research suggests that, while deterrence works in this context, a lack of certainty and celerity significantly detracts from punishment's deterrent effect. *See* Greg Pogarsky & Alex R. Piquero, *Studying the Reach of Deterrence: Can Deterrence Theory Help Explain Police Misconduct?*, 32 J. CRIM. JUSTICE 371, 381 (2003).

suppression motion; the case proceeds long enough for the suppression motion to be adjudicated, *i.e.*, the defendant does not plead guilty before adjudication occurs; the defendant wins the motion; the exclusionary rule applies; and the law-enforcement agency learns of the courtroom outcome and punishes the officer for his misconduct, which it would be unlikely to do if the defendant is convicted notwithstanding the evidentiary exclusion.[191] If the defendant is convicted and prevails on the Fourth Amendment issue on appeal, moreover—which he can do only if he didn't waive his appellate rights in a plea agreement—his conviction will remain intact unless the error is found to be prejudicial. And even if it is prejudicial, the government can usually retry him (albeit at some expense).

If, given the low probability of detection and punishment, the total level of deterrence the system produces is too low, the natural response would be to increase the severity of the sanction.[192] (Committing ourselves to detect and punish more constitutional violations would be a considerably costlier approach.) But the universe of sanctions available to courts in criminal adjudication is quite limited, and reversal is as severe as it typically gets. Nor is the problem solved simply by factoring in the possibility of civil damages, administrative sanctions, or other existing remedies for law-enforcement misconduct. These tools have had at best mixed success in reforming the police.[193] All this points to the importance of preventing constitutional harms before they occur, for "[i]f the magnitude of possible sanctions is too low, then sanctions cannot be used to deter, and prevention must be employed to control unwanted behavior."[194] There is some encouraging evidence that preventive

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[191] For data on the likelihood of the various contingencies in this sequence, see Slobogin, *supra* note 185, at 373-76; *see also* Gould & Mastrofski, *supra* note 6, at 332 (finding that only 3% of unconstitutionally searched individuals were arrested and prosecuted); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 39 (2012) (discussing exclusionary rule's "well-known structural limits").

[192] *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[193] At the risk of oversimplifying, civil damages suits are often ineffective due to indemnification, separation from internal disciplinary systems, lack of salience, budgetary arrangements, and organizational culture. Criminal prosecutions of misbehaving officers are rare and difficult to sustain. And DOJ lawsuits under 42 U.S.C. § 14141 hold some promise, but resource constraints may sap the statute of its power. On civil suits, see NAT'L RESEARCH COUNCIL, *supra* note 6, at 278-80; Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 283-86 (1988); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. __ (forthcoming 2014). On criminal prosecutions, see Harmon, *supra* 191, at 41-44. On § 14141, see Stuntz, *supra* note 15, at 798; Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 20-25 (2009). In general, see Armacost, *supra* note 50, 464-78 (cataloguing reasons why individual remedies are ineffective at changing police institutions); Harmon, *supra* note 191, at 39-53 (describing inadequacy of entire toolset of federal remedies).

[194] Shavell, *supra* note 187, at 261; *see also* Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 645 (2012) ("Preventing conduct that affects large numbers of people at the source, by changing policies and common conduct, may better resolve problems than conceiving the right as arising only later once intractable questions of individual harm and causation arise."). Reversing convictions also fails from a restorative-justice perspective. *See* Maxwell v. Sheppard, 384 U.S. 333, 363 (1966) ("[R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.").

regulation can work—for example, a New York City police department rule restricting officers' use of weapons led to a decline in the use of deadly force with little cost in terms of crime or officer safety.[195]

I have already said that second-order decisions tend to shift the enforcement emphasis from liability to prevention, which we can now see may be socially beneficial. Second-order decisions also rest front-line responsibility for administering the ex ante regulatory strategy on the lower-cost regulators. Unlike a liability regime, which requires intervention only when a constitutional violation occurs, a preventive regime necessitates continuous monitoring. Law-enforcement executives, especially, will have far lower monitoring costs than courts. They will also have lower costs in adjudicating and punishing misconduct, an important point given the reliance of preventive regimes on more frequent imposition of lighter sanctions.[196]

Third, there is a growing recognition among scholars that many of the intractable problems of law-enforcement misconduct today are structural (or institutional, or cultural), and not individual, in origin. Remedies aimed at individual incidents by specific officers treat the symptom, not the disease.[197] There is, in addition, a general scholarly consensus about a set of institutional reforms best-suited to attack these problems.[198] "Police reformers agree," for example, "that some form of an 'early warning system'"—that identifies problem officers who commit a disproportionate share of illegal acts—"is essential for successful police reform."[199] It is difficult to imagine the Court, in an ordinary criminal case, ordering law-enforcement agencies to adopt any given measure,[200] and it may be unwise for the Court to do so in light of its epistemic limitations. Second-order decisions enable the Court to encourage institutional progress without mandating it. It can raise the benefits of reform by offering a safe harbor to agencies that voluntarily adopt best practices after consultation with experts and relevant stakeholders. The DOJ facilitates some of these reforms through guidance and even grants, which lower the costs of change.[201] And, significantly, second-order decisions can begin to address institutional problems in a domain beyond the reach of other civil

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[195] *See* James Joseph Fyfe, Shots Fired (Apr. 1978) (unpublished Ph.D. dissertation, State Univ. of N.Y. at Albany); *see also* GEOFFREY P. ALPERT, POLICE PURSUIT (1997) (finding preventive policies reduced incidence of and damage from high-speed pursuits); NAT'L RESEARCH COUNCIL, *supra* note 6, at 184-85.

[196] *See* Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 382-83 (2003).

[197] *See, e.g.*, BROWN, *supra* note 47, at 75-95; GOLDSTEIN, *supra* note 50, at 29-30; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 12-15, 90-93 (1993); Armacost, *supra* note 50, at 464-78, 493-522. *But see* NAT'L RESEARCH COUNCIL, *supra* note 6, at 130-33 (finding insufficient evidence to measure influence of culture on police practices).

[198] *See, e.g.*, Harmon, *supra* note 3, at 795; Walker, *supra* note 49, at 6-7.

[199] Armacost, *supra* note 50, at 527 & n.464 (collecting sources). Other best practices include data collection, statistical monitoring, and peer review. *See id.* at 529-30, 535 & n.513.

[200] *See* Friedman, *supra* note 179, at 822 ("The courts do not innovate certain kinds of new programs because they lack power—in the sense of legitimate authority—to do so.").

[201] *See* Harmon, *supra* note 191, at 53-54 & nn.87, 89; Harmon, *supra* note 193, at 36-42, 50-51 (advocating safe harbor from DOJ suits under § 14141 for police departments that commit to adopting preset array of reform measures specified by DOJ).

remedies: federal law enforcement.[202]

The fourth and most enticing feature of second-order decisions is their potential to elicit "buy-in" from law-enforcement officers who are afforded an opportunity to participate in their own self-governance. This buy-in creates an intrinsic desire to defer voluntarily to rules and policies irrespective of the expected sanctions for disobedience. In addition to being a more reliable mechanism for rule adherence generally, voluntary deference produces good behavior even when officers know they are not being closely supervised, which describes the environment in which the rank and file frequently operate.[203]

One basis for this hypothesis is Tom Tyler's experimental psychology research on why people obey the law. Expanding on prior work, Tyler and his colleagues studied why law-enforcement agents follow job requirements and comply with organizational policies.[204] Their answer: officers' perception that an agency is led by legitimate authorities and structured around legitimate rules, and that the agency's values are consistent with their own—traits lumped under the label "procedural justice."[205] Officer perceptions of legitimacy and value-congruence in turn are molded by feelings about procedural fairness—fair decisionmaking and interpersonal treatment—including whether the procedures used to formulate rules incorporate good, objective data and allow for officer input.[206] The theory posits that officers who are treated fairly in this sense identify with the organization, which motivates good organizational citizenship.[207] Tyler concludes that self-regulation may surpass external regulation at motivating rule adherence by the rank and file.[208]

Law-enforcement case studies tend to confirm what Tyler's research suggests.[209] "Calls for some form of collegial self-regulation by police

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[202] *See* Laurin, *supra* note 125, at 738 & n.337 (observing that *Bivens* and Federal Tort Claims Act are premised only on individual and vicarious liability, respectively). Nor can the DOJ sue federal agencies under § 14141. *See* U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/spl/police.php (last visited Jan. 1, 2014).

[203] Early work in a variety of settings found that participatory models "produce change more completely, effectively and permanently than other styles of intervention." HANS TOCH ET AL., AGENTS OF CHANGE 3 (1975) (discussing studies).

[204] Tyler's subjects were 209 officers from a large federal law-enforcement agency and one of the largest American metropolitan city police departments. Tyler et al., *supra* note 8, at 473. For a helpful overview of "bringing the benefits of democracy to police officers," including a discussion of Tyler's work, see DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 155-88 (2008).

[205] Tyler et al., *supra* note 8, at 476.

[206] *Id.* at 468, 470-71 476-79.

[207] *Id.* at 467, 469.

[208] *Id.* at 480.

[209] There is other confirmatory research as well. For instance, although Tyler's data were self-reported through surveys, self-reported data and externally measured performance tend to produce similar findings in workplace settings. *See* William H. Bommer et al., *On the Interchangeability of Objective and Subjective Measures of Employee Performance*, 48 PERSONNEL PSYCH. 587 (1995). Tyler's findings are also consistent with studies of private-sector employees. *See* Tom R. Tyler & Steven Blader, *Can Business Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143 (2005).

organizations are ubiquitous in the policing literature."[210] Contemporary police scholars tout the "extraordinary potential" of so-called "bottom-up" approaches to police reform, which engage law-enforcement officers, including the rank and file, in decisions that affect them.[211] Although the data remain somewhat scarce, "the limited experience we have with participatory management in law enforcement suggests that here, as in other sectors, giving employees a say in the shaping of their work strongly increases their job satisfaction and their attachment to the organization's mission."[212] Inclusive decisionmaking practices appear to foster greater rank-and-file commitment to organizational initiatives such as community policing, for example.[213] A notable case study of the Madison, Wisconsin Police Department in the 1990s found that participatory management contributed significantly to task identity and job satisfaction.[214] And more recently, a case study of the Broken Arrow Police Department in suburban Oklahoma produced similarly encouraging results.[215] The Department formed a "leadership team" comprising a cross-section of all employees, including the rank and file, to assist in running the agency. Much of the team's work involved drafting formal policy.[216] After eighteen months, the data showed a heightened sense of pride in and commitment to the agency.[217] The policies produced by the leadership team on performance, discipline, and promotion were viewed as significant improvements upon prior policy, and organizational processes were viewed as far more predictable, transparent, and fair.[218]

The perceptions of fairness and value-congruence the subjects in these

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[210] Armacost, *supra* note 50, at 541-45 & n.575; *see* DIXON, *supra* note 184, at 157, 308-11; PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 21 (1967) [hereinafter TASK FORCE REPORT]; SKOLNICK & FYFE, *supra* note 197, at 187; Livingston, *supra* note 189, at 848-52; Simmons, *supra* note 174, at 524.

[211] Monique Marks & David Sklansky, *Introduction: The Role of the Rank and File and Police Unions in Police Reform*, *in* POLICE REFORM FROM THE BOTTOM UP, *supra* note 156, at 5; SKOLNICK & FYFE, *supra* note 197, at 259-60 ("More lasting and tension-free changes result from *enlisting* officers in reform efforts."). The position echoes "workplace democracy" policing literature of the 1960s and '70s. *See, e.g.*, GEORGE E. BERKLEY, THE DEMOCRATIC POLICEMAN (1969); WILLIAM KER MUIR, JR., POLICE: STREETCORNER POLITICIANS (1977).

[212] Marks & Sklansky, *supra* note 211, at 5; *see* FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY 202 (1996) (stressing importance to police reform of ensuring that officers "identify with the agency's mission, are proud of the agency, and believe that good performance will lead to promotions").

[213] Brigitte Steinheider & Todd Wuestewald, *From the Bottom-Up: Sharing Leadership in a Police Agency*, *in* POLICE REFORM FROM THE BOTTOM UP, *supra* note 156, at 39-40 ("Participative management strategies that bring together the major stakeholders in police organizations in collaborative decisionmaking seem to offer promise for labor-management relations, building employee commitment, improving public service, and reducing rank-and-file resistance to police reform initiatives.").

[214] *See* MARY ANN WYCOFF & WESLEY K. SKOGAN, COMMUNITY POLICING IN MADISON (1994); Mary Ann Wycoff & Wesley K. Skogan, *The Effect of a Community Policing Management Style on Officers' Attitudes*, 40 CRIME & DELINQ. 371 (1994).

[215] The Department employs 176 full-time personnel and services a community of 95,000. Steinheider & Wuestewald, *supra* note 213, at 43.

[216] *Id.*

[217] *Id.* at 49 (reporting officer's statement that "I have an extreme commitment to my organization, to my Department, to my Chief, and I've never had that before").

[218] *Id.* at 47-50.

studies reported are the same type Tyler's research found to motivate rule adherence. The real-world data on this latter point—that these views in fact motivate rule adherence among law-enforcement officers—are exceedingly scarce,[219] but one famous study does suggest a link. In the 1970s, the police department in Oakland, California instituted a nonpunitive peer-review panel that advised officers on problems they encountered during patrol.[220] The results "seemed to support th[e] view that training in democratic values, use of participatory supervision techniques, and involvement of rank-and-file officers in decision-making and problem solving could improve police-citizen interactions and address issues of police violence."[221] More concretely, following participation in the peer-review panels, the involvement of certain violence-prone officers in altercations with citizens decreased by half.[222] A derivative project in Dade County, Florida in the 1980s reduced officer use of force and citizen complaints by 30 to 50 percent.[223]

The link between this research and second-order decisionmaking should be fairly clear, I hope. Second-order decisions take criminal-procedure policy choices away from the Supreme Court and give them to actors closer to the ground, including those whose conduct they actually regulate. We should expect this sort of self-regulation to exert its strongest effect on rule adherence when rank-and-file officers are involved in the lawmaking process, whether through focus groups, commissions, notice-and-comment rulemaking, or some other participatory mechanism.[224] A fair evaluation and discipline apparatus—in which officer input is solicited, objective information is required, and bias is controlled—should also positively influence officer perceptions of fairness, and therefore motivate rule compliance.[225]

The same findings cast first-order regulation, which relies more heavily on the threat of external sanctions, in a relatively unflattering light. As Tyler and others have elsewhere argued, "fear of sanctions by itself generates only weak, poorly motivating incentives, which in turn produce at best a sullen, resentful, imperfect form of compliance."[226] For this reason, "the payoff from instrumental deterrence … is especially poor, just as we would expect, because

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[219] *See* Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 78 (2004).

[220] *See* Toch, *supra* note 156, at 36-37; TOCH ET AL., *supra* note 203.

[221] David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1240 (2006).

[222] TOCH ET AL., *supra* note 203, at 322-31 (reporting results, though noting that not all were positive and/or statistically significant). The program fell victim to budget cuts, and reactionary police activism at the time counseled against its reinstatement. JEROME K. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE 151-52 (1986); Sklansky, *supra* note 221, at 1240-41. "The Oakland police began to experience violence problems almost as soon as the interventions were discontinued." HANS TOCH & J. DOUGLAS GRANT, POLICE AS PROBLEM SOLVERS 85 (1991).

[223] SKOLNICK & FYFE, *supra* note 197, at 183-84.

[224] On different models of rank-and-file participation in law-enforcement management, see SKLANSKY, *supra* note 204, at 180-86.

[225] *See* Tyler et al., *supra* note 8, at 471.

[226] Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 357 (2011).

[first-order] rules and their accompanying sanctions enjoy little legitimacy in the eyes of the police to whom they are addressed."[227] "The policing literature," one commentator summarized, "provides no grounds to believe that externally controlled, punishment-oriented regimes are effective."[228] Tyler's research does not establish that law-enforcement officers will always and automatically view rules promulgated by political actors as more legitimate than Court decisions. But the latter emanate from nine politically insulated judges in Washington in a process that allows for minimal meaningful participation by, and no interaction with, those who hold the biggest stake in the outcome. It would not be surprising if the rank and file took umbrage at the Court telling them how to do their jobs. There has long been a sense among commentators that this is the case.[229]

The Court can encourage participatory rulemaking by deferring more heavily to solutions that result from participatory practices.[230] Nevertheless, line-agent involvement in lawmaking may not always be feasible. Rulemaking responsibilities may frequently land on upper-level officials alone. Yet as long as the rank and file view their superiors' governance as more legitimate than the Supreme Court's—which, again, seems plausible in light of the procedural-justice considerations—we should still expect compliance to improve relative to the first-order model.[231] Moreover, we should certainly expect the upper-level officials *themselves* to buy in and to regard the rules they write as at least as legitimate and worthy of enforcement as the Court's decisions. (This is part of why second-order regulation holds promise even though extant internal oversight fails to deter a good deal of misconduct.) These officials can—and, just as important, should feel motivated to—leverage oversight and enforcement mechanisms vastly superior to the Court's.[232] Sanctions "in the currency of esteem or reputation"

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[227] *Id.*

[228] DIXON, *supra* note 184, at 309; *see id.* at 299-311 (discussing limits of external regulation of police).

[229] *See, e.g.*, JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 228 (1975) ("[T]he police typically view the court with hostility for having interfered with their capacities to practice their craft" by excluding evidence.); Amsterdam, *supra* note 173, at 428 ("Police, like everyone else, tend to be resentful of—and to resist—restrictions placed upon them by somebody else."); McGowan, *supra* note 161, at 676 (reporting "the growing disenchantment, shared by some of the most sympathetic observers, with the effectiveness of externally originated rules to achieve their purposes").

[230] *Cf.* Note, *supra* note 16, at 2545-47 (describing administrative-law doctrines that encourage, but do not require, use of robust agency procedures).

[231] *See* Amsterdam, *supra* note 173, at 428 ("The closer the rulemaker to the officer on the street, the fewer the levels of invariably distorting, and sometimes wholly obstructive, authority through which the rules must pass."); Tyler et al., *supra* note 8, at 470 (observing that use of procedural-justice principles in management need not "involve wide employee participation"). Schuck points out that operatives in the field "often feel remote and alienated from the source of formal authority in their agency," and thus "sometimes regard directives from headquarters" as "illegitimate." SCHUCK, *supra* note 6, at 10-12. Even so, it is hard to imagine why line officers would not feel *more* remote and alienated from the Court, which, unlike "headquarters," bears no responsibility for the well-being of the rank and file. *Cf.* Richard R. Bennett & Erica L. Schmitt, *The Effect of Work Environment on Levels of Police Cynicism*, 5 POLICE Q. 493, 494 (2002) (reporting that rank and file view administrators as relatively less alien than general public is).

[232] *See* Amsterdam, *supra* note 173, at 428, 431 ("[W]hen police-made rules are not obeyed, they are most likely to be effectively enforced against the disobedient."); Amsterdam, *supra* note 27, at 786

can be "highly motivating," for example.[233] So can pay reductions, demotions (or lack of promotions), or reassignment to less desirable duties. Termination, of course, is the ultimate "internal" sanction. Law-enforcement agencies, unlike courts, can also tailor sanctions to individual wrongdoers, recalibrating as necessary over time.[234]

Similarly, where legislators rather than law-enforcement executives write the conduct rules, it seems rational to expect increased use of legislative oversight mechanisms to monitor compliance.[235] Legislative tools such as investigations, public hearings, and legislation itself aim "not to micro-manage police decisions, but to structure those decisions in line with best practices and to maintain constitutional boundaries."[236] Unlike courts, legislative bodies can "inform themselves broadly, rely on experts at will, follow trails wherever they may lead, and disregard strict courtroom rules of evidence."[237] They can also engender "greater police cooperation" than litigation typically can, and can "move forward with relative speed."[238]

B. Potential Costs of Second-Order Regulation

Having laid out what I see as the relative benefits of second-order regulation, I turn now to its primary potential costs. I consider objections to the second-0rder model based on the expected complexity of the resulting body (or bodies) of conduct rules, the legitimacy of the constitutional lawmaking method, the competency of the Court to adjudge the constitutionality of politically promulgated rules, and the fairness of the rules political policymakers can be expected to write. I also consider whether the project is doomed by judicial and legislative inertia.

(observing that the Court "lacks the sort of supervisory power over the practices of the police that is possessed by the chief of police or the district attorney"); *cf.* SCHUCK, *supra* note 6, at 103-05, 132-33. The organizational structure of law-enforcement agencies, however, can complicate the use of administrative controls. *See, e.g.*, BROWN, *supra* note 47, at 96-131; *compare* MUIR, *supra* note 211, at 235-57 (portraying sergeants as sovereigns holding many carrots and sticks, but the chief as having only sticks), *with* SKOLNICK & FYFE, *supra* note 197, at 122-24, 136 (contending that sergeants are hamstrung by their own rule violations, whereas the chief "is the main architect of police officers' street behavior").

[233] Levinson, *supra* note 196, at 383; *see* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358-65 (1997); *cf.* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 & n.20 (1997).

[234] *See* Levinson, *supra* note 196, at 363-64, 384-85.

[235] *See* Cheh, *supra* note 6, at 13 (arguing that, when "lawmakers themselves are calling for reform, they are directly invested in the effort, and they possess the levers to implement change").

[236] Cheh, *supra* note 6, at 2. Cheh concludes that "legislative investigations and oversight can have dramatic and salutary effects." *Id.* at 21; *see also* James X. Dempsey, Legislative Oversight of the FBI in the United States, http://www.law.harvard.edu/programs/criminal-justice/fbi.pdf (describing legislative control and supervision of the FBI as model for other nations).

[237] Cheh, *supra* note 6, at 9-10.

[238] *Id.* at 10; Debra Livingston, *Police Discretion and the Quality of Life in Public Places*, 95 COLUM. L. REV. 551, 654-55 (1997) (calling for "greater oversight role" of police by legislative bodies, which can employ unique "formal mechanisms of political control"). *But see* Cheh, *supra* note 6, at 13 n.100 (citing limitations, including partisanship, on use of legislative investigations to reform police); Livingston, *supra*, at 655 (opining that "these formal mechanisms of political accountability may be too far removed from the concerns of local neighborhoods to insure responsiveness to [community] concerns").

1. Complexity

One might object, as an initial matter, that the patchwork of regulations second-order decisions will generate will be unduly complex and difficult to administer. In one sense, this is really an objection to our federal system, in which state and local authorities exercise police powers. Regulation of law-enforcement is not a uniquely federal concern that cannot be effectively treated without national intervention.[239] In any event, we should not expect, in practice, to see as many constitutional rule-sets as there are law-enforcement jurisdictions. In all likelihood, States and law-enforcement agencies will coalesce around a relatively small set of "leading" solutions or, quite possibly, a single solution that represents "best practices" learned over time.[240] Model regulations drafted by public bodies or prominent professional organizations might facilitate this process.[241] And the Court, of course, will be assisted in judicial review by the inferior courts, which will rapidly become familiar with the regulations in their respective jurisdictions.

2. Legitimacy

Another objection goes to judicial legitimacy.[242] Second-order decisionmaking might be thought illegitimate for at least two reasons. First, in focusing on the existence and content of, and compliance with, generalized policies, it substitutes systemic for individual interests, in conflict with the conventional view of courts that "issu[e] rulings on the cases and controversies properly before [them], and nothing more."[243] Perhaps, but the actual practice of constitutional criminal adjudication does not match the conventional model. Individual criminal cases frequently result in rulings the entire purpose of which is to benefit the public at large; advancing systemic interests through individual cases is nothing new. For example, the Court's exclusionary-rule decisions are patently motivated not by fairness to the defendant but by a desire to achieve optimal deterrence system-wide.[244]

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[239] *See* Klein, *supra* note 87, at 1052. In fact, decentralized responsibility for law enforcement makes it a poor candidate for centralized Court regulation. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970); HOROWITZ, *supra* note 153, at 60-61.

[240] *Cf.* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1435 (1991) ("Over time, courts' decisions assessing the adequacy of particular remedial efforts may reveal patterns of effective remedial processes and outcomes in particular institutional contexts."); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004).

[241] *See, e.g.*, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft 1975).

[242] The argument is that second-order decisions are "legally" and, perhaps in some instances, "morally" illegitimate. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-1801 (2005) (disentangling legal, sociological, and moral claims regarding legitimacy).

[243] United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1183 (9th Cir. 2010) (en banc) (Bea, J., concurring in part and dissenting in part).

[244] *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) ("[T]he exclusionary rule is not an individual right and applies only where it '"result[s] in appreciable deterrence."'" (quoting United States v. Leon, 468 U.S. 897, 909 (1984) (quoting United States v. Janis, 428 U.S. 433, 454 (1976))) (alteration in original)); Meltzer, *supra* note 193, at 249, 267-78 (classifying exclusionary rule as "deterrent remedy," "the principal, or at times exclusive, purpose of [which] is to benefit the public at large (or at least some portion

Second, one might object that second-order decisions abdicate responsibility to interpret the Constitution, passing the buck to political policymakers, resulting in a Constitution that means different things in different places.[245] It is, after all, both the "province *and duty*" of the Court to "say what the law is."[246] The debate over the appropriate role of political involvement in reading the Constitution is far more than I can tackle in this project. I will rest here on three brief replies. First, there is at least a substantial theoretical argument that political policymakers can and do play a meaningful role in reading the Constitution.[247] Second, it is common for the Constitution to be implemented differently in different places; the Constitution frequently requires fair hearings, for instance, without specifying what procedures must be followed. Third, we might just as well conclude that second-order decisionmaking is *more* legitimate because it effectuates the "established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy."[248] "[I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system," the Court has written, "to avoid imposing a single solution on the States from the top down."[249] The better course is to "evaluate state procedures one at a time, as they come before us, while leaving 'the more challenging task of crafting appropriate procedures … to the laboratory of the States in the first instance.'"[250] This is the dynamic second-order decisions generate.

3. Competency

One might also think the Court lacks the capacity to determine whether politically generated solutions are adequate to safeguard the constitutional

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of it) by deterring government conduct that threatens to violate the constitutional rights of others"); *see also* Laurin, *supra* note 1, at 1075 ("[C]ontemporary exclusionary rule jurisprudence, harmless error, and non-retroactivity doctrines all reflect a structural approach that administers criminal procedure doctrine in a manner that frequently appears to privilege systemic over individual rights-based interests."); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 737 (2000) (arguing that "higher level" balancing of liberty and order interests, contrasted with weighing costs and benefits in a particular case, is "pervasive" in criminal procedure).

[245] *See, e.g.*, Whren v. United States, 517 U.S. 806, 815 (1996) ("[P]olice enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." (citations omitted)).

[246] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

[247] *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL DIALOGUES 273 (1988); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 207-28 (1999); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993); Metzger, *supra* note 153.

[248] Smith v. Robbins, 528 U.S. 259, 272 (2000); *see* Chapman v. California, 386 U.S. 18, 48 (1967) ("The Court has no power … to declare which of many admittedly constitutional alternatives a State may choose."); Strauss, *supra* note 52, at 200-01. For the same point in the administrative-law context, see Byse, *supra* note 157, at 1828.

[249] *Smith*, 528 U.S. at 275.

[250] *Id.* (quoting Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)) (alteration in original) (citation omitted).

values they are fashioned to protect. How will the Court measure adequacy? As an initial matter, *Berger*, *Dickerson*, and cases from related contexts complicate this objection—in each case, the Court passed on the validity of regulation offered to protect constitutional principles.[251] That does not mean, of course, the Court was qualified to do so—after all, the adequacy of constitutional safeguards might be thought an empirical question. In this spirit, the Court might require jurisdictions implementing politically crafted safeguards to keep data on their practical effects, enabling defendants to mount challenges to rules that appeared adequate on their face but are later shown not to work effectively. The Court can also protect against errors by catching egregious cases in which safeguards earlier adjudged adequate permit conduct that violates core constitutional norms in unforeseen ways.[252]

Perhaps more fundamentally, the judgments this task demands do not differ in kind from those the Court is regularly required to make in criminal-procedure (and other constitutional[253]) cases. Defining rights and remedies frequently requires consequentialist analysis about the likely effects of constitutional doctrine on law-enforcement behavior.[254] If anything, in a second-order model, instances of investigatory activity "that come before the courts for judgment would be better understood within the framework of the general practice that they exemplify, or from which they deviate."[255] In first-order decisions, in contrast, because it is seldom "defined in detail how and under what conditions certain police practices are to be used, … the courts often must rely exclusively on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire

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[251] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 771-92 (2008) (reviewing statute to determine whether it provided adequate substitute for habeas corpus); Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2624 (2013) (explaining how, in adequacy challenges to state procedural rules asserted to block habeas corpus challenges, "the federal court analyzes the relevant procedural rules and asks whether the state is unduly burdening the exercise of federal rights for an entire class of defendants").

[252] For example, the Court reviews confessions for voluntariness even when *Miranda*'s safeguards are satisfied. *See* Dickerson v. United States, 530 U.S. 428, 434 (2000); *see also* Herring v. United States. 555 U.S. 135, 146-47 (2009) (holding that negligent police mistakes do not trigger exclusionary rule but "systemic error or reckless disregard of constitutional requirements" may); *cf.* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 365 (1984) (arguing that adherence to regulation should not preclude liability for harm). The Court suggested the notion of an "egregious" constitutional violation in another context. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (plurality opinion) (holding that exclusionary rule may apply in removal proceedings for "egregious" Fourth Amendment violations).

[253] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (asking, in evaluating time, place, or manner restrictions under First Amendment, whether "they leave open ample alternative channels for communication of the information").

[254] *See, e.g.*, United States v. Watson, 423 U.S. 411, 431 (1976) (declining to require warrant where it would "hamper effective law enforcement"); *see also* Harmon, *supra* note 3, at 768-72; Meares & Harcourt, *supra* note 244, at 736-40; Meltzer, *supra* note 193, at 290-92 (showing how immunity doctrines, constitutional privilege against defamation, and exclusionary rule all require such calculations). And federal habeas doctrine directly calls on federal courts to evaluate the adequacy of state procedures. *See, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002); Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedure Rules*, 103 COLUM. L. REV. 243, 262-65 (2003).

[255] Amsterdam, *supra* note 173, at 419.

Nation."[256] In the end, that adequacy judgments may be difficult for the Court, or are irreducibly empirical, are fair points, but they are not unique deficiencies of the second-order system.

If concerns remain, the Court can also look to second-best measures, such as the thoroughness and transparency of the rulemaking process, to evaluate the adequacy of politically promulgated safeguards. This approach, familiar from administrative law's "hard look" review, has the additional benefit of encouraging a careful and participatory process, which in turn may improve both the quality of rules and officers' compliance with them.[257]

4. Fairness

Perhaps the gravest normative objection (the largest potential cost of second-order regulation) is what the agency model calls "slippage"—the risk that political policymakers will write loose rules because they don't, in Donald Dripps's pithy wording, "give a damn about the rights of the accused."[258] Dripps is hardly the only scholar to make the point,[259] but his account is exemplary. (Dripps's argument focuses on legislatures but would seem to apply, if anything, more forcefully to law-enforcement leaders.) "[L]egislatures have done little by way of limiting the discretion of police and prosecutors, or requiring the criminal courts to observe procedural safeguards against unjust conviction," Dripps observes.[260] This is because "an overwhelming preponderance of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods or convicting the innocent."[261]

These incentives, moreover, "appear to be of indefinite duration" because "legislators undervalue the rights of the accused for no more sinister, and no more tractable a cause than that a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant."[262] The beneficiaries of "broad police powers and pro-government trial procedures"

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[256] PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 94 (1967) [hereinafter CHALLENGE OF CRIME].

[257] *See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 397-400 (2000); LaFave, *supra* note 49, at 504-06 (analogizing judicial review of police rules to hard look review).

[258] Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice: Or, Why Don't Legislatures Given a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079 (1993).

[259] *See, e.g.*, Amsterdam, *supra* note 173, at 378-79 ("Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police."); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723-30 (2005) (comparing interest-group dynamics of criminal sentencing with other regulatory contexts).

[260] Dripps, *supra* note 258, at 1079.

[261] *Id.* at 1081; *see* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 295 (1994) (asserting that "criminal defendants are poorly represented in the political process, while state and federal prosecutors … are unusually well represented").

[262] Dripps, *supra* note 258, at 1081, 1089.

include "the police and the prosecutors themselves" and their powerful bureaucracies, as well as "Americans who fear that they might become victims of crime"—"just about everyone in the country."[263] The "intended beneficiaries of criminal procedure rules," in contrast, "are apparent, not actual criminals"—largely young men.[264] Not only are young men a small segment of the electorate, but their interests in criminal-procedure safeguards "are problematic," as they are "not only the likely perpetrators of criminal aggression, they are also among its likely victims."[265]

This is a serious objection worthy of a robust and direct response. Before proceeding, however, it's worth reminding that my project is, to its core, a comparative one.[266] The baseline against which the second-0rder model must be compared—the Court's first-order doctrine—is often shockingly lax itself. Dripps observes as much. For instance, in contrast to *post-indictment* lineups, at which *Wade*'s counsel requirement kicks in, the "constitutional rules" regulating pre-indictment identification procedures "do no more than forbid procedures that create 'a very substantial likelihood of irreparable misidentification,' while unnecessary suggestiveness 'without more does not violate due process.'"[267] And "[e]ven then, a so-called independent identification by the witness in court may be allowed."[268] As the innocence movement has highlighted, these rules have permitted faulty eyewitness testimony to send "many innocent people to prison."[269] Dripps shares this example to make a point about "*legislative* indifference to glaring defects in the criminal process."[270] But of course it also illustrates *the Court's* indifference to the very same problems. The point is that, at least in some areas of criminal-procedure doctrine, the downside of swapping out the Court's first-order rules for those political policymakers will write is limited. Perhaps this is not surprising—after all, courts are subject to many of the same interest-group pressures as political actors.[271]

Indeed, if the political-economy critique William Stuntz developed is right, first-order decisions may be hurting defendants as much as helping them.[272] Stuntz argued that the Court's first-order decisions ally prosecutors

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[263] *Id.* at 1091, 1092.

[264] *Id.* at 1089-90.

[265] *Id.* at 1090.

[266] *See* KOMESAR, *supra* note 3, at 201 ("[R]ecognition of a problem in the political branches is an insufficient basis for institutional choice" given "the inevitable existence of imperfections in alternative institutions like the judiciary.").

[267] Dripps, *supra* note 258, at 1086 (quoting Neil v. Biggers, 409 U.S. 188, 198 (1972)); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 82-85

[268] Dripps, *supra* note 258, at 1086.

[269] *Id.*; *see* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78-81 (2008); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 540 (2005).

[270] Dripps, *supra* note 258, at 1086 (emphasis added).

[271] *See* Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355 (1999); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66-87 (1991).

[272] Stuntz developed the argument in Stuntz, *supra* note 15, among other places. For a similar

and legislatures against the Court. Legislatures that disagree with the Court's conduct rules (and there are many) help prosecutors nullify them by broadening the criminal code, raising sentences, and underfunding public defenders. These adjustments strengthen the government's bargaining position. And prosecutors have strong incentives to exact guilty pleas, in no small part because the Court's intricate doctrine has made the criminal trial process long, expensive, and unpredictable. As expected, the guilty-plea rate has risen alongside the Court's (first-0rder) reforms. Criminal-procedure doctrine, the argument continues, has also influenced funding decisions in harmful ways, directing money away from policing and adjudication, where Supreme Court regulation occupies the field, toward (less socially productive) corrections, about which the Court has had significantly less to say. In sum, Stuntz says, "the unintended consequences" of the Court's first-order decisions "swamp the intended kind."[273] Second-order decisions would alleviate many of the pressures that fuel this dynamic. Stuntz's account has some notable detractors,[274] but the possibility that it's even partially correct suggests that reducing reliance on first-order decisions may generate certain diffuse and non-obvious benefits.

The head-on response to the fairness objection has several parts. First, whatever the theoretical deficiencies of political actors and institutions—capture, gridlock, and so on—the historical record casts considerable doubt on the caricature common to critiques like Dripps's. Political policymakers have done more to protect suspects' and defendants' rights than the conventional wisdom holds, and than theory would predict. Examples abound.[275] Regulation of law-enforcement interrogation began with state statutes banning the "third degree." Most of these were passed early in the twentieth century, though some came even sooner. New York required that suspects be warned of their rights as early as 1829.[276] By the time *Miranda* was decided, the FBI had been issuing warnings for years.[277] Across the country, police

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position, see Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002).

[273] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 216 (2011). Lon Fuller argued that, under precisely these circumstances—"when the polycentric elements" of a problem "have become … predominant"—"the proper limits of adjudication have been reached," and recourse to political methods that can better accommodate competing interests becomes necessary. Lon. L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 397-98, 400 (1978).

[274] *See, e.g.*, Steven J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045 (2013); John Paul Stevens, *Our "Broken System" of Criminal Justice*, N.Y. REV. OF BOOKS, Nov. 10, 2011.

[275] In addition to the examples that follow, see Stuntz, *supra* note 15, at 795-96 (explaining from political economy why legislative regulation of policing is "more politically attractive than the conventional wisdom would have it," largely because the number of individuals who may potentially interact with law-enforcement agents is sizable); *see also* KOMESAR, *supra* note 3, at 56-57 (collecting critiques of interest-group political theory based on existence of "broad-based, ideological, and even public interested" legislation); VERMEULE, *supra* note 4, at 259 (citing "ample evidence" that constituents "at least some of the time" demand that legislators "enforce constitutional rules").

[276] Stuntz, *supra* note 15, at 801 & nn.119-22 (collecting statutory sources).

[277] Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1411 (2004).

departments in a number of metropolitan areas—including Denver, Detroit, Minneapolis, Oklahoma City, Philadelphia, Sacramento, and Seattle—had also begun warning suspects of their rights.[278] Meanwhile, the American Law Institute was studying the problem of coercive interrogation. Its draft model code—"which was thought to represent the views of the nation's most influential law enforcement and conservative legal figures"—provided, if anything, greater protection than *Miranda* ended up giving.[279] And notwithstanding *Miranda*, today eleven States and the District of Columbia require the taping of interrogation sessions by statute.[280]

Orin Kerr has detailed how the conventional wisdom "overstates the impact of the Fourth Amendment and understates the role of legislative privacy protections" against new surveillance tools.[281] "Fourth Amendment decisions have affected the shape of legislation in important ways," Kerr explains, "but legislation rather than the Fourth Amendment has provided the primary protection against invasions of privacy from wiretapping."[282] Congress, federal executive agencies, and many States outlawed eavesdropping and wiretapping—save for authorized law-enforcement use in certain cases—long before the Court brought these practices under the Fourth Amendment's aegis.[283] Congress has also acted on its own initiative to protect privacy interests in sundry other settings: government databases, cable television subscriptions, stored emails and online communications, video store customer lists, and bank records.[284] Surveying these laws, Erin Murphy concluded that, "in many respects, statutes turn out to protect privacy rights *more* than the constitutional warrant and probable cause requirement."[285] And state legislatures have moved when they have perceived Congress as unwilling.[286]

There is more. Before the Court held the exclusionary rule applicable to the States in 1961, eight States had already adopted the rule by statute—four since only 1949, when the Court had held the opposite.[287] Eleven years after the Supreme Court held that victims of police brutality cannot pursue injunctive relief against the police departments that victimized them, Congress passed 42 U.S.C. § 14141, which authorizes the DOJ to seek broad

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[278] *Id.* at 1411 & n.265.

[279] *See id.* at 1409-11.

[280] Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, XVI RICH. J.L. & TECH. 9 (2010), http://jolt.richmond.edu/v16i3/article9.pdf. Then-State Senator Obama was the driving force behind Illinois' videotaping law. *See* Charles Peters, *Judge Him by His Laws*, WASH. POST, Jan. 4, 2008.

[281] Kerr, *supra* note 109, at 839.

[282] *Id.* at 840. Erin Murphy has catalogued numerous distinctions—cutting in each direction—between Congress' principal privacy protections and judicial ones. *See* Murphy, *supra* note 15, at 9-50.

[283] *See* Kerr, *supra* note 109, at 840-47; *see also* Berger v. New York, 388 U.S. 41, 45-49 (1967).

[284] *See* Kerr, *supra* note 109, at 855-56 & nn.324, 326-29 (collecting statutory sources).

[285] Murphy, *supra* note 15, at 51 (emphasis added).

[286] *See* Somini Sengupta, *No U.S. Action, So States Move on Privacy Law*, N.Y. TIMES, Oct. 30, 2013, at A1.

[287] Elkins v. United States, 364 U.S. 206, app. 224-25 tbl.1 (1960); Lain, *supra* note 277, at 1379. Rhode Island enacted its statute after a judge *rejected* the exclusionary rule the year before. Lain, *supra*, at 1379.

injunctive relief by proving a pattern of constitutional violations.[288] Following the Court's decision in *Whren v. United States*,[289] which effectively barred Fourth Amendment claims in racial-profiling cases, more than a dozen States passed racial-profiling legislation; the DOJ expanded its profiling rules just this year to prohibit federal agents from considering not only race, but also religion, national origin, gender, and sexual orientation in their investigations.[290] And the Court's decision barring habeas corpus relief for freestanding innocence claims was answered by state and federal legislation facilitating DNA-based claims of innocence.[291]

One last example bears mention. In his analysis of legislative incentives, Dripps, as noted, observed that "legislatures have not taken steps to regulate police [eyewitness] identification procedures so as to reduce the chances of wrongful conviction."[292] As the preceding discussion of the political response to *Wade* shows, Dripps's assertion was not entirely accurate even when written in 1993.[293] But, insofar as Dripps's analysis was intended to be predictive—recall his assertion of "political incentives that appear to be of indefinite duration"—it clearly missed the mark. A number of state legislatures in recent years have passed innovative statutes designed to alleviate precisely the problems Dripps identified; law-enforcement agencies and executives have been active as well.[294] Although eyewitness-identification reform has a long way to go,[295] the trend is positive and significant.

Most law-enforcement agencies, moreover, no longer resemble the lawless institutions that demanded the Warren Court's manifold interventions. They are more professional and significantly more diverse along lines including race, sex, and sexual orientation. With these changes, the risks of experimenting with supervised self-regulation have decreased.[296] Many

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[288] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in relevant part at 42 U.S.C. §14141 (2000)); City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

[289] 517 U.S. 806, 810-16 (1996).

[290] Stuntz, *supra* note 15, at 799 n.105 (collecting statutory sources); Matt Apuzzo, *U.S. To Expand Rules Limiting Use of Profiling by Federal Agents*, N.Y. TIMES, Jan. 16, 2014, at A1.

[291] *See* Herrera v. Collins, 506 U.S. 390 (1993); Stuntz, *supra* note 15, at 799-800 & n.109.

[292] Dripps, *supra* note 258, at 1086.

[293] *See supra* notes 84-87 and accompanying text.

[294] *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 3-506 (requiring law-enforcement agencies to adopt policies consistent with U.S. DOJ standards); WIS. STAT. § 175.50 (requiring law-enforcement agencies to adopt policies after considering model policies, other jurisdictions' policies, and certain specified best practices); NAT'L INST. JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE (1999); WIS. DEP'T OF JUSTICE, MODEL POLICY & PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005).

[295] A 2013 national survey of over 600 agencies found that 77 percent reported no written policy for show-ups, 64 percent for photo lineups, and 84 percent for live lineups. Police Exec. Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies 46-47 (Mar. 8, 2013), http://policeforum.org/library/eyewitness-identification/NIJEyewitnessReport.pdf. And even where written policies do exist, recent research suggests that many fail to incorporate well-known best practices, including those contained in state model policies. *See* Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 3 VA. J. CRIM. L. __ (forthcoming 2014).

[296] *See* Sklansky, *supra* note 221, at 1212 ("[T]he diversification already accomplished should prompt reconsideration of avenues of reform previously thought too dangerous because of the solidarity and insularity of the police."); Samuel Walker, *Racial Minority and Female Employment in Policing: The Implications of "Glacial" Change*, 31 CRIME & DELINQ. 555, 556, 565 (1985).

agencies have learned, too, that treating suspects and defendants fairly can actually enhance rather than hinder their crime-control missions.[297] Sunlight, we hope, will reinforce these changes: "It is a grave mistake," one commentator wrote, "to assume that all of the things that policemen do in a state of rulelessness would continue to be done under a regime of rules. Many practices now tolerated in individual cases … would not be approved … by the police command structure itself if it were required to assume responsibility for determining the propriety of those practices as a general mode of departmental operation."[298]

There are signs, too, that the punitive tide of America's politics may be starting to recede. It would be incautious to rest too much weight upon disparate anecdotal data like these, yet they seem at least relevant to a comprehensive analysis. Consider a few examples (beyond those discussed above): California's governor commuted the sentence of a woman convicted of killing her granddaughter shortly after the Supreme Court overturned a grant of habeas relief.[299] California's voters reined in the State's notorious three-strikes sentencing law as well.[300] Colorado and Washington legalized marijuana, and many other States and localities have decriminalized possession of small amounts; the federal government elected not to challenge these new state laws.[301] Congress reduced the sentencing disparity between crack and powder cocaine offenses in 2010; a pending bipartisan bill would expand the Act's application.[302]

In perhaps the highest-profile initiative, Attorney General Eric Holder announced a "Smart on Crime" project in 2013 that would divert individuals convicted of low-level offenses to drug treatment and community-service programs and expand a prison program to allow for release of some elderly, non-violent offenders.[303] Holder also altered DOJ policy to avoid charging low-level, non-violent drug offenders with offenses carrying mandatory minimum sentences. Public response was strongly positive.[304] The Obama

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[297] *See* INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS (2006), *available at* http://www.cops.usdoj.gov/files/ric/Publications/e06064100.pdf.

[298] Amsterdam, *supra* note 173, at 421; *see* DAVIS, *supra* note 157, at 95 ("[E]ven the police themselves need to be educated in the realities of what they are doing; many of them would refuse to participate if they were more sharply aware of the realities."); *cf.* Kahan, *supra* note 172, at 497.

[299] *See* Smith v. Cavazos, 132 S.Ct. 2 (2011); Emily Bazelon, *Jerry Brown Shows Mercy to Shirley Lee Smith*, SLATE (Apr. 6, 2012, 4:08 PM) http://www.slate.com/articles/news_and_politics/crime/2012/04/jerry_brown_pardons_shirley_ree_smith_in_an_old_sad_shaken_baby_case_.html.

[300] Three Strikes Reform Act of 2012, 2012 Cal. Legis. Serv. Prop. 36 (West) (codified at Cal. Penal Code § 1170.126).

[301] Dan Frosch, *Measures To Legalize Marijuana Are Passed*, N.Y. TIMES, Nov. 7, 2013, at A18; Jack Healy, *Voters Ease Marijuana Laws in 2 States, But Questions Remain*, N.Y. TIMES, Nov. 7, 2012, at P15; Ashley Southall & Jack Healy, *U.S. Won't Sue To Reverse States' Legalization of Marijuana*, N.Y. TIMES, Aug. 29, 2013, at A11.

[302] *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; Smarter Sentencing Act of 2013, S. 1410, 113th Cong.

[303] U.S. DEP'T OF JUSTICE, SMART ON CRIME (2013), http://www.justice.gov/ag/smart-on-crime.pdf.

[304] *See, e.g.*, Jonathan Caulkins, *The Attorney General and Mandatory Drug Laws*, THE AMERICAN (Sept. 23, 2013), http://www.american.com/archive/2013/september/a-critique-of-eric-holders-new-mandatory-minimum-sentencing-initiative.

Administration even went so far as to encourage individuals serving sentences for low-level crack-cocaine offenses to apply to the President for clemency.[305]

Around half the States, too, have recently directed money away from prison construction and toward programs and services such as treatment and supervision that are designed to reduce the problem of repeat offenders.[306] Such initiatives enjoy strong public support, uniting traditionally liberal social-justice interests with conventionally conservative anti-union and austerity sentiments. For example, 84% of respondents in a recent national poll agreed (and over half strongly agreed) that "[s]ome of the money we are spending on locking up low-risk, non-violent inmates should be shifted to strengthening community corrections programs like probation and parole"; even for violent offenders, respondents favored shorter sentences coupled with mandatory post-release supervision.[307] Shared concerns over budget constraints are increasingly seen to favor a more moderated approach to criminal punishment.[308]

Moving now to a second and independent response to the fairness objection: If one accepts, as I have argued, that line-agent compliance will improve under second-order decisions, then the system can tolerate somewhat less protective safeguards yet still make suspects and defendants better off in the aggregate. What matters is what law-enforcement officers *do*, not what the rules *say*; "the doctrine is less important in achieving its supposed purpose—the proper administration of criminal justice—than might once have appeared to be the case."[309] As members of the critical legal studies movement argued in their "critique of rights," "protecting defendants' rights is quite different from protecting defendants," and it may serve even to legitimate the status quo.[310] We should not regret the loss of paper-tiger rights

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[305] Matt Apuzzo, *Justice Dept. Starts Quest for Inmates To Be Freed*, N.Y. TIMES, Jan. 31, 2014, at A13.

[306] Kevin Johnson, *Easing Sentences for Non-Violent Acts Wins Support*, USA TODAY (Aug. 12, 2013, 7:23 PM), http://www.usatoday.com/story/news/nation/2013/08/12/punishment-non-violent-offenders-support/2642405; Pete Yost, *Eric Holder Proposes Drug Sentencing Reforms*, HUFFINGTON POST (Aug. 12, 2013, at 2:45 PM), http://www.huffingtonpost.com/2013/08/12/eric-holder-drug-sentences_n_3744717.html; Press Release, PEW Charitable Trusts, Holder: Justice Reinvestment Policies Improve Public Safety, http://www.pewstates.org/news-room/press-releases/holder-justice-reinvestment-policies-improve-public-safety-85899496937.

[307] PUB. OPINION STRATEGIES & MELLMAN GROUP, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 1, 6 (Mar. 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf; Brian Tierny, *Unionizing the New Jim Crow?*, COMMON DREAMS (June 3, 2012), https://www.commondreams.org/view/2012/06/03.

[308] *See, e.g.*, Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1986 (2006); Chris Suellentrop, *The Right Has a Jailhouse Conversion: How Conservatives Came To Embrace Prison Reform*, N.Y. TIMES, Dec. 24, 2006, § 6 (Magazine), at 46 (documenting increased conservative interest in prisoner reentry programs and tempered drug sentences).

[309] Robert Weisberg, *Foreword—Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832, 854 (1985).

[310] Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2191 (2013); *see* Robert Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW 657 (David Kairys ed., 3d ed. 1998) (noting that "[f]ormal rights without practical enforceable content are easily substituted for real benefits").

if they're replaced with rules that, because better obeyed, will actually improve net social realities.[311] In different language, even if the value of each constitutional protection decreases, if compliance increases enough to outweigh that diminution, the expected value of the Constitution's protections will rise. Not only that, but poorer, less sophisticated defendants should reap a disproportionate share of the benefits. Right now, these defendants are less likely to invoke the (by hypothesis) stronger but more readily and frequently evaded rights the Court's first-order decisions establish.[312]

Still, one might reply, some defendants will be worse off, as conduct that would have violated the Court's first-order rules will pass muster under the (by hypothesis) more permissive rules political policymakers will establish. This objection cannot succeed, however, without dismantling some of the justice system's key supports. The doctrines of nonretroactivity and harmless error, for example, share this attribute (*i.e.*, that some individuals are worse off) with second-order regulation. The thinking is that, without these doctrines, courts would be reluctant to give rights robust content.[313] Like law-enforcement conduct rules that are more lenient but better obeyed, they make some individual defendants worse off in service of systemic values that are thought to benefit defendants in the aggregate.[314]

A third and final response: My proposal is not to give political policymakers plenary power over the law of criminal procedure. On the front end, the Court retains supreme authority to interpret the Constitution's meaning. It fulfills law's expressive function and fixes the size of its agents' "discretionary window."[315] Perhaps more important, the Court, like any principal, does not delegate authority and then walk away; it monitors its agents' work. Aided by the inferior courts, the Court polices political policymakers' lawmaking output. It remains empowered (and obliged) to

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[311] *See* Bibas, *supra* note 17, at 173 ("The Court's more relaxed approach, creating incentives and then allowing semiprivate ordering to respond, may paradoxically make reform more successful and less likely to be evaded or ignored."); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 7-8 (2010) (defending proposed structural vision of federal habeas review on ground that, even though fewer claims would be cognizable, incidence of individualized prejudicial error should decrease in aggregate).

[312] *See generally* Note, *Simplicity as Equality in Criminal Procedure*, 120 HARV. L. REV. 1585 (2007).

[313] *See, e.g.*, Fallon & Meltzer, *supra* note 1, at 1739 (nonretroactivity); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right To Appeal*, 57 U. CHI. L. REV. 48-49 (1990) (harmless error).

[314] The remedial scheme second-order decisions set up is consistent, moreover, with the structure of constitutional remedies more generally: individual remedies for rights-violations are typically, but not always, required, so long as the overall system of remedies is "effective in maintaining a regime of lawful government." Fallon & Meltzer, *supra* note 1, at 1777-91. This pair of principles, Fallon and Meltzer argue, "promote[s] corrective justice and the rule of law" while "accommodat[ing] the practical difficulties thrown up by an imperfect world and the sometimes unpredictable turns that legal doctrine may take." *Id.* at 1791. The "critique of rights" comes to mind again—rights discourse, the argument goes, promotes a sort of "isolated individualism" that "converts social problems into matters of individualized, dehistoricized injury and entitlement." Butler, *supra* note 310, at 2188 (internal quotation marks omitted); WENDY BROWN, STATES OF INJURY 124 (1995).

[315] On the expressive function of law, see Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043; Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996). On agency law's "discretionary window," see Stephenson, *supra* note 158, at 1440.

invalidate politically crafted safeguards that fail sufficiently to protect the Constitution's values.

As discussed, there is reason to question at least the strong version of the conventional account that portrays political policymakers as enemies of a Court committed to protecting the rights of suspects and defendants. But even if this is wrong, it does not necessarily follow that second-order decisions are a bad idea. In a recent paper, Jacob Gersen and Adrian Vermeule identify numerous circumstances in which, contrary to the traditional "ally principle," it may make sense for a principal to delegate authority to an agent that is, or may be, the principal's "enemy."[316] For one thing, delegating to an agent like this can help the principal "smoke out" enemies; in our context, delegating lawmaking authority to political policymakers may help the Court determine, by observing how that authority is exercised, whether the policymakers are indeed hostile to the rights of suspects and defendants. And the risk of this endeavor is limited because the Court can—and has shown itself willing to—overrule policymakers' acts if they fall short of the constitutional standard.[317]

5. Futility

a. The Court's Incentives

A final objection might posit that, even if second-order regulation is not harmful, it's futile. In areas in which the Court has done a poor job protecting constitutional values, such as eyewitness identifications, why should we expect the Court to be more assertive in a second-order regime? After all, the Court is populated through, and thus endogenous to, the political process, and there are "a variety of legislative sticks"—like jurisdiction-stripping and impeachment—"to punish the Court for politically unpopular decisions."[318] How can a Court vulnerable to politics be expected to catalyze the political process consistently over time? Lifetime tenure and salary protection, of course, shield the Justices from direct accountability to law-and-order interests. But this is not an especially satisfying answer. A slightly more persuasive, albeit still incomplete, response may be that a second-order approach removes certain institutional and political constraints that tend to favor a narrow interpretation of constitutional protections.

First, as mentioned earlier, the Court frequently lacks the expertise

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[316] Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193 (2012).

[317] *Id.* at 2199; *see, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000) (invalidating congressional replacement of *Miranda* warnings); Richards v. Wisconsin, 520 U.S. 385 (1997) (invalidating state knock-and-announce exception for drug cases); Penson v. Ohio, 488 U.S. 75 (1988) (striking state procedure permitting indigent's defense counsel to withdraw even if court found arguable issues); *cf.* Boumediene v. Bush, 553 U.S. 723 (2008) (invalidating Congress' procedures for determining whether detainees were "enemy combatants").

[318] Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 583 (2005); *see generally* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013).

necessary to craft sensible, detailed conduct rules for the rank and file. By imposing only minimal requirements in some of its first-order decisions, the Court, as agency law's "uncertainty principle" predicts, effectively delegates discretion to street-level officers to ensure them the flexibility necessary to discharge their duties safely. Second-order decisions permit the Court to protect constitutional rights more assertively in the face of these epistemic difficulties.[319] Next, second-order decisions provide an attractive mode of regulation to Justices who tend to see first-order conduct rules as treading on state prerogatives. They allow the Court to articulate constitutional norms without enlarging the "federal Code of Criminal Procedure."[320] Put differently, more than first-order decisions do, they facilitate consensus among "liberal" and "conservative" Justices who disagree about the best way to implement the Constitution by narrowing the range of issues for decision and permitting resolution of cases at a higher level of generality.[321] Finally, a second-order approach reduces the risk of political and popular blowback that attends the imposition of rights-protective first-order decisions. The Court can take credit for enforcing the Constitution yet avoid blame for the disruptive consequences of the conduct rules political policymakers implement in response to its incentives.[322]

b. Political Incentives

A separate futility concern focuses on the political actors. They are completely free, after all, to regulate law-enforcement conduct alongside the constitutional rules the Court's first-order decisions establish. But notwithstanding the foregoing examples—which, it bears mention, are the exceptions, not the rule—political regulation plays a much smaller role in this field than we might expect. Why should we think things will be any different under a system of second-order regulation?

Several responses come to mind, all of which may play a part. First, although first-order decisions establishing and enforcing conduct rules create indirect incentives for political response (to avoid rule violations in the future), studies suggest that an explicit judicial invitation for political action does make a response more likely.[323]

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[319] *See, e.g.*, Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1510, 1513 (2012) ("The case turns in part on the extent to which this Court has sufficient expertise and information in the record to mandate, under the Constitution, the specific restrictions and limitations sought by those who challenge the visual search procedures at issue."); *see also* Harmon, *supra* note 3, at 776 ("[C]ourts sometimes set deferential standards or disallow remedies not because they find facts that justify those determinations but because they recognize their inability to draw more rigorous conclusions about the context and consequences of their rulings.").

[320] Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

[321] *Cf.* Fallon, *Implementing*, *supra* note 52, at 109-26.

[322] *Cf.* Lisa Schultz Bressman, Chevron's *Mistake*, 58 DUKE L.J. 549, 568 (2009) (discussing congressional motives to delegate).

[323] *See* Joseph Ignani et al., *Statutory Construction and Congressional Response*, 26 AM. POL. Q. 459 (1998); Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court*

Second, it may be that the Court's first-order decisions have effectively ousted political policymakers from the areas of law the decisions cover. The Justices often cite this concern, although they tend to be vague about the mechanism through which the "ousting" occurs.[324] This was also William Stuntz's claim. Stuntz believed that the Court's decisions crowded out political actors by making innovation more expensive. Once the Court institutes its own regulation, the marginal benefit of additional (political) regulation falls while its marginal cost—in the form of lost prosecutions—rises because the "lost cases" become increasingly harder to replace. This encourages political actors to regulate and spend in domains, such as corrections, that the Court's decisions only lightly touch.[325] Second-order decisions would not have this effect.

Third, as David Sklansky has argued (channeling Thayer, and in response to Stuntz), it may be that the Court's first-order decisions "let politicians off the hook; once the Court weighs in, legislators can move on to other questions."[326] Again, second-0rder decisions would not have this effect, with one important exception: Where the Court implements a second-order holding through a default rule, and the default rule is politically palatable and not obviously more costly than its alternatives, the default rule may let policymakers off the hook just as a first-order decision would. Default rules, in other words, may be sticky. But this should not be troubling from a democratic perspective.[327]

Finally, second-order decisions change the incentive structure policymakers confront. Political failure to regulate in a world of first-order decisions has little to no consequence; the Supreme Court shoulders the load itself. A second-order approach changes the calculus. Consider, for example, an investigatory action, such as an inventory search, that is permissible only if undertaken pursuant to a policy; failure to promulgate a policy will trigger the exclusion of evidence (or reversal) in *every* case involving the tactic. Likewise where policy is invalidated. Our experience with *Wade* and *Berger* suggests that these incentives make a difference.

To be sure, as I said earlier, the exclusionary rule presently provides

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Tax Cases, 1954-2005, 82 N.Y.U. L. REV. 1340, 1375-77 (2007).

[324] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 382-83 (2010) (Alito, J., concurring in judgment); *id.* at 392 (Scalia, J., dissenting); Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S 52 *passim* (2009); Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) ("[J]udicial imposition of a categorical remedy … might pretermit other responsible solutions being considered in Congress and state legislatures.").

[325] Stuntz, *supra* note 15, at 793, 807-14.

[326] David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 64 (2006).

[327] As explained earlier, and as Einer Elhauge has examined in the context of statutory interpretation, some default rules attempt to estimate political preferences; we should *hope* such rules stick. *See generally* Elhauge, *Preference-Estimating*, *supra* note 114. But even if a penalty default rule were chosen to *elicit* policymakers' preferences, Elhauge argues that the Court should generally adhere to the rule in the absence of political override. This is because a practice of abandoning rules (too quickly, at least) reduces the incentive for political response, and because the lack of override signals that the rule does in fact estimate political preferences, even if that did not seem so at the time the rule was announced. *See* Elhauge, *Preference-Eliciting*, *supra* note 114, at 2226-35.

insufficient general deterrence. But this is largely because its sting is too seldom felt, and law enforcement does not internalize enough of the costs of misconduct. There is certainly evidence that exclusion does deter to some degree, and does lead law-enforcement agencies to train and manage their officers more effectively.[328] But the incentives are indirect. A failure to regulate (*i.e.*, take preventive measures) will not *necessarily* lead to exclusion—it will merely increase the odds of that result (because it will permit violations that preventive measures may have thwarted). Through second-order decisions the Court can "turn up the heat," intensifying the deterrent effect of exclusion to pressure political policymakers to promulgate and enforce regulations to control the behavior of the rank and file.[329]

Safe-harbor second-order decisions alter the other side of the calculus, raising the benefits of reform rather than the costs of inertia. True, a safe harbor's benefits inure to prosecutors, not law enforcement, which bears the upfront costs of reform. Will law-enforcement agencies respond to the incentives safe harbors create, and can prosecutors do anything to make them respond? I think so. Prosecutors can, and very well may, exert pressure on law-enforcement agencies by declining to prosecute their cases unless they pursue reforms. While my intuition on this point is admittedly based on anecdotal evidence, prosecutorial declination as a means of encouraging cleaner law enforcement is well documented.[330]

Dripps concedes that such incentives make a difference. He argues "the legislature will not impose limits on the police … *unless* one of two conditions is present."[331] Dripps's first condition, the one of interest here, occurs when "the courts have declared that certain law enforcement techniques may be constitutional if and only if these techniques are subjected to legislative regulations."[332] This closely tracks the concept of second-order regulation.

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[328] *See, e.g.*, HOROWITZ, *supra* note 153, at 227-32 (describing deterrent effects of *Mapp* as varying across localities and offense types); Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372-74 (2008) (describing changes to police departments resulting from exclusionary rule). *But see* Slobogin, *supra* note 185, at 393-94.

[329] In this way, "the rights of individual [defendants] functio[n] as levers for prompting systemic criminal justice reforms." Primus, *supra* note 311, at 3, 7-8, 32-33 (proposing a "structural vision" of federal habeas corpus which would "catalyze reform through the traditional habeas remedy of releasing prisoners, one by one"); *see also* Harmon, *supra* note 191, at 40 & n.28 (describing "secondary political and reputational costs" of exclusion on government leaders, including the "sting of critical popular sentiment"; collecting sources).

[330] I posed the question to an experienced former Assistant U.S. Attorney, who believed that his office likely would have exerted this kind of pressure given the right incentives. Telephone Interview with Former Assistant U.S. Attorney (Aug. 28, 2013); *see also* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 47 (1992) (reporting that chief prosecutor "is extremely concerned about police behavior" and makes efforts to improve it); HOROWITZ, *supra* note 153, at 246-47 (opining that "prosecutorial screening may be the most effective way of enforcing the *Mapp* rule"); SKOLNICK, *supra* note 229, at 201-02 (describing how prosecutor "not only interprets criminal[-procedure] law to the policeman, but also, in the process of interpretation, *legitimizes its authority* and tempers police resentment"); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 739, 755-86 (2003).

[331] Dripps, *supra* note 258, at 1082 (emphasis added).

[332] *Id.*; *see also* Amsterdam, *supra* note 173, at 379 ("Under the stimulus or apprehension of constitutional decisions by the court, legislatures may be moved to act."); Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500, 506 (1971) ("To the extent

The "classic example," according to Dripps, is the federal wiretap statute.[333] The reason that statute "imposes procedural safeguards on wiretapping," Dripps posits, "is that in *Berger v. New York*, the Supreme Court held that wiretapping amounted to a search within the meaning of the Fourth Amendment"; Congress was spurred to implement protections "to provide a law enforcement tool that would otherwise be disallowed by the courts."[334] Dripps discounts Congress' efforts because they were "in reality motivated by the desire to punish as much crime as possible," not to provide "statutory protections for the accused."[335] I, however, am not sure Congress' motivations should matter if the bottom line is good.

What about a slightly different futility concern—that second-0rder regulation will devolve into a game of "Whac-a-Mole," in which political policymakers embroil the Court in a never-ending cycle of policy invalidation and re-promulgation? This dynamic is fairly unlikely to materialize, I think. Even in countries where legislatures have the power to override judicial constitutional decisions, they rarely do; judicial interpretations usually "stick."[336] Recrafting and relitigating law-enforcement policies is costly. The risk here can be mitigated, moreover, by calibrating the adjudicative consequences of policy invalidation, as I discuss below. And if at some point political policymakers are so intransigent that the Court is forced to revert to first-order regulation to impose conduct rules on law enforcement, little is lost except the efforts wasted in pursuit of a better system.

c. The *Miranda* Experience

But what about *Miranda*? Apart from Congress' effort to overrule the decision, no jurisdiction has attempted to replace *Miranda*'s warnings with alternative safeguards to protect the right against self-incrimination.[337] I do not think it follows that political policymakers will never respond to the Court's incentives. The lesson to draw from *Miranda* is not that second-order decisions will never work, but rather that the devil is in the details.

Three points deserve mention. First, despite its experimentalist rhetoric, *Miranda* created far less policymaking space than it might seem. Although at times the opinion refers to political flexibility to craft "procedural safeguards effective to secure the privilege against self-incrimination," it elsewhere says that only alternative methods to inform suspects of their rights to remain

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that the judiciary seeks out police policy as an aid in its own decisionmaking, instead of focusing only on the conduct of the officers involved in a particular case, it can inspire more rulemaking by the police.").

[333] Dripps, *supra* note 258, at 1082.

[334] *Id.* at 1082, 1083 (footnote omitted).

[335] *Id.* at 1082.

[336] TUSHNET, *supra* note 153, at 43-76; Emmett Macfarlane, *Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights*, 34 INT'L POL. SCI. REV. 39 (2013).

[337] *See, e.g.*, Klein, *supra* note 87, at 1057 (calling Miranda a "dismal failure of a prophylactic rule to foster a constructive and respectful exchange between Congress and the Court"); *see generally* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61.

silent and to have the assistance of counsel will suffice.[338] In other words, *Miranda* seemed to require *warnings*—it permitted flexibility only as to the precise content of those warnings.[339] (And there has been experimentation in that regard.[340]) Videotaping all interrogations—thought by many to be an adequate, if not superior, safeguard that would permit courts to scrutinize interrogations for coercive pressures[341]—would appear not to suffice.

Second, law-enforcement agencies likely found *Miranda*'s default solution fairly unobjectionable. Giving *Miranda* warnings essentially immunizes all subsequent statements, and many believe that the warnings themselves do not deter confessions at a significant rate.[342] For this reason, some commentators have argued that *Miranda* helped more than hindered law enforcement in the investigation of crime.[343] Indeed, although *Miranda* was "[w]idely maligned at first,"[344] "precincts across the country" that had implemented warnings even before *Miranda* "reported that warnings had no effect whatsoever on the ability of police to obtain confessions, a discovery given ample press coverage and buttressed by the FBI's experience."[345]

Finally, we have already seen that several of the Court's other second-0rder decisions have worked, at least to some extent. Policymakers have responded to the Court's incentives by writing rules the courts have then reviewed for constitutional adequacy. This alone casts doubt on whether *Miranda*'s experience should be generalized. It suggests that, instead, that we should consider how to maximize the odds that policymakers will respond productively to the Court's incentives. I turn to that task now.

d. Delegating Effectively

Three general principles should guide the Court in administering a second-order regulatory regime. All three are fairly intuitive, and all can be derived from the agency model.

First, the Court's second-order decisions must speak to political policymakers in clear tones.[346] Agents lacking final authority will always be concerned about efforts wasted developing proposals the principal will reject; uncertainty about the principal's objectives or instructions exacerbates this

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[338] *Compare* Miranda v. Arizona, 384 U.S. 436, 444, 458 (1966), *with id.* at 444, 467, 490.

[339] *See* Dickerson v. United States, 530 U.S. 428, 442 (2000) ("*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.").

[340] *See, e.g.*, Florida v. Powell, 559 U.S. 50 (2010).

[341] *See, e.g.*, BRADLEY, *supra* note 5, at 85; Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681-92 (1996); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2004).

[342] *See, e.g.*, Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996).

[343] *See, e.g.*, Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259 (1996); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 744-45 (1992).

[344] Schulhofer, *supra* note 342, at 501.

[345] Lain, *supra* note 277, at 1418.

[346] *See* Mikkilineni, *supra* note 113, at 1423-25, 1430-31.

concern. *Miranda*'s failure likely stems in part from its muddy messaging. The Court's opinion creates doubt on the crucial questions whether *warnings* (as opposed to some other safeguard) are required and what criteria would determine whether political alternatives would be deemed "equally effective." Did the Court seek to eradicate coercion from the stationhouse, or more modestly to ensure that coerced confessions would not be admitted in court? A videotaping requirement might satisfy the latter aim but not the former. The uncertainty the Court's opinion generated meant that its prophylactic safeguards became a "substitute for rather than a protector of the constitutional norm."[347] *Miranda* contrasts in this sense with more successful second-order decisions like *Berger* and *Griffin*, which guided political policymakers more clearly.

Second, the Court must promise (and deliver) meaningful deference to policymakers' solutions.[348] Increasing an agent's real authority, as deference does, promotes initiative.[349] Historically, policymakers' skepticism about whether the Court's default rules are genuinely defeasible (or how much they may be altered) is understandable because the Court's default solutions, like the *Miranda* warnings, have tended to calcify into constitutional commands.[350] The *Bivens* cases are exemplary in their assurance that the Court would accept alternative solutions that were "equally effective *in the view of Congress*," even if those solutions do not afford plaintiffs "complete relief."[351] That said, while the Court was correct to uphold political responses to cases like *Bivens*, it was also correct to reject Congress' putative response in *Dickerson*. Deference has its limits.

Third, the Court must create a safe space in which policymakers may experiment. This is related to, but distinct from, the second point. The second point addresses the size of the discretionary window—the range of political responses the Court will deem constitutionally adequate. The point here relates to the consequences that follow when political actors choose a solution outside the window. A risk-averse agent will be reluctant to exert effort absent some insurance against unlucky outcomes.[352] Political actors will understandably be reticent to implement new procedures for fear they will be deemed inadequate when challenged in court, potentially casting doubt on

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[347] Klein, *supra* note 87, at 1070.

[348] *See, e.g.*, Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1510, 1513-14 (2012) ("[C]ourts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security."); Mikkilineni, *supra* note 113, at 1430-32.

[349] Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 24 (1997) ("For incentive purposes, it may … be optimal for the superior to commit to overruling the agent only if the noncongruent project yields a negative profit, in that overruling in the other case is ex post optimal for the principal but reduces initiative too much to be worth it ….").

[350] *See* Klein, *supra* note 87, at 1070; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1692-1707 (2005).

[351] Bush v. Lucas, 462 U.S. 367, 376, 388 (1983) (emphasis added); *see* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 752 (1992).

[352] *See* Posner, *supra* note 2, at 231.

every conviction to which they contributed. This dilemma faced any jurisdiction that contemplated replacing the *Miranda* warnings, for example. The solution may be for the Court to calibrate its retroactivity and good-faith doctrines to reduce the risks associated with experimentation. Decisions invalidating politically crafted constitutional safeguards need not operate retroactively; they can preclude use of the safeguards going forward but preserve all cases—including but not limited to final convictions—in which a law-enforcement officer relied in good faith upon the invalid procedures, up to the date of decision. If the Court finds that particular safeguards were a sham, however, its decision could give rise to both prospective and retrospective relief.[353]

C. When Will the Benefits Outweigh the Costs?

Armed with a sense of the potential benefits and costs of second-order regulation, the $64,000 question is when the benefits will outweigh the costs, such that we should support a shift from first- to second-order decisions. As we have seen, the wisdom of delegating through second-order decisions will depend largely on the magnitude of the costs and benefits of agency. Second-order regulation will be desirable when the benefits of the principal-agent relationship second-0rder decisions establish outweigh the costs. Unfortunately, I do not think we can decide in the abstract whether and how much second-order regulation is appropriate. The choice between first- and second-order regulation "depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors."[354]

Nevertheless, I will venture a few general principles. First, the case for second-order regulation is the strongest when the Court addresses an issue that is currently receiving democratic attention. Clear signs that political policymakers are willing to regulate invite the Court to guide their efforts and catalyze other policymakers. *Berger* illustrates this dynamic. The Court knew when it considered *Berger* that Congress was developing wiretapping regulations, and knew that its decision would influence the legislation, as Congress wished to preserve a crucial law-enforcement tool.[355]

At the opposite extreme, second-order decisions should be avoided where democracy functions especially poorly.[356] This might be in cases that involve disfavored rights or classes, such as defendants in child pornography cases. When political policymakers are dead-set against reform, meaningful experimentation and implementation of adequate solutions is unlikely.

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[353] *See* Dorf & Sabel, *supra* note 71, at 459-64; Klein, *supra* note 87, at 1069. Regarding the good-faith exception, see Illinois v. Krull, 480 U.S. 340 (1987).

[354] Cass Sunstein, *Foreword—Leaving Things Undecided*, 110 HARV. L. REV. 4, 30 (1996) (discussing choice between judicial minimalism and maximalism).

[355] *See, e.g.*, Berger v. New York, 388 U.S. 41, 112 (White, J., dissenting); Kerr, *supra* note 109, at 839-50.

[356] *Cf.* Sunstein, *supra* note 354, at 30-33.

Instead we might fear inertia, sharply underprotective rules, rule evasion, or some combination of these pathologies. The jurisdictions that resisted *Brown*'s desegregation mandate are a good example. The Court must be willing to step in when political policymakers fail. Note, however, that some jurisdictions complied with *Brown* in good faith—political considerations are not necessarily uniform across space or time.[357]

We can generalize a bit more by picturing the criminal-justice system as a giant funnel, as William Stuntz suggested. "Entering the broad end of the funnel are the tens of millions of men and women whom the police search or seize each year," Stuntz explained.[358] "Slide down the funnel, and that broad pool of suspects narrows considerably, producing a smaller pool of criminal defendants: about two million per year charged with felonies, and several million more charged with misdemeanors."[359] And so on. The point is this: "as one proceeds from policing to adjudication to punishment, the system's targets grow fewer, less politically attractive, and less likely to vote."[360] Our confidence in the second-order strategy should be highest, then, for issues that arise in the earliest investigatory stages. We might, on this logic, proceed incrementally, starting with Fourth Amendment law before trying the Fifth Amendment. My ultimate intuition, however, is that second-order regulation will produce net benefits in the mine-run case.[361]

III. IMPLEMENTATION AND EXTENSION

Before concluding, I wish to sketch out how second-order regulation will work in practice. To this end, in Section A I show how courts will adjudicate constitutional claims in individual criminal cases. In Section B I reimagine some first-order law in the second-order model. Finally, in Section C, I suggest how institutions besides the Supreme Court can use second-order regulation as well.

A. Adjudicating Individual Cases

In a second-order regime, suppression motions will remain the principal vehicle through which criminal defendants challenge law-enforcement

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[357] *Compare* sources cited *supra* note 144, *with* sources cited *supra* note 145; *see also* Sklansky, *supra* note 221, at 1240-41 (discussing how police culture has changed in ways that may reopen doors previously thought closed to reform).

[358] Stuntz, *supra* note 15, at 782.

[359] *Id.*

[360] *Id.* at 783.

[361] There is a parallel here to administrative law, where "command-and-control" regulation—the analog to first-order regulation—has been losing favor. *See, e.g.*, David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 299-301 (2013) (describing the "waning appeal of command and control regulation"). Increasing emphasis has been placed on self-regulation, for example, in which private parties develop a system of substantive rules they monitor and enforce against themselves, sometimes subject to agency oversight. *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 101-32 (1992) (discussing self-regulation, enforced self-regulation, and coregulation).

conduct. These motions will present several scenarios involving compliance with, and the validity of, politically promulgated policies. First, the challenged law-enforcement conduct may have followed from a policy the adequacy of which has never been tested. Here, the defendant can argue that the policy itself is inadequate.[362] If he succeeds, the policy will be invalidated prospectively, and a constitutional violation found in the present case.[363] If not, there will be no constitutional violation. Second, the conduct may have followed from a politically promulgated policy *previously* adjudicated to be constitutionally adequate. If experience since the judicial validation of the policy calls into question that prior determination, the defendant might mount a new challenge to the policy; otherwise, there will be no constitutional violation in all but the most egregious case.

The third scenario is the most complex: What is the significance of a policy *violation*—does every policy violation amount to a constitutional violation triggering exclusion? There is an argument that it should: formulating adequate policies and monitoring compliance with them is the consideration policymakers pay for the policymaking space the Court affords. But equating policy violations with constitutional violations may actually work against the project's purposes by deterring policymakers from writing detailed rules—the more rules they create, the more potential constitutional violations that can trigger exclusion or reversal.[364] Of course, the Court can invalidate policies it views as insufficiently detailed to constrain officer discretion (countering this deterrent effect), but the basic point remains—political policymakers would include as little detail as possible to satisfy the Court.

A better solution may be to count a policy violation as *evidence* of a constitutional violation, making other considerations relevant as well. In particular, the type of policy[365] and severity of the violation[366] should inform

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[362] *See* Herman Goldstein, *Trial Judges and the Police: Their Relationships in the Administration of Criminal Justice*, 14 CRIME & DELINQ. 14, 24 (1968) ("[I]n the review of police practices initiated by a motion to suppress evidence, a judge could promote a dialogue with the police by affording the law-enforcement agency an opportunity to justify and explain the practice at issue, thereby focusing judicial review upon the legality and propriety of department policies rather than the actions of an individual officer.").

[363] The Court could apply a good-faith exception to application of the exclusionary rule to preserve the case at bar. *Cf.* Illinois v. Krull, 480 U.S. 340, 346 (1987) (applying exception to officer's reasonable reliance on statute subsequently declared unconstitutional). This may overdeter adversarial testing of politically promulgated policy, however, as it would dilute defendants' incentives to challenge policies. For the arguments for and against importing the good-faith exception into this context, see LaFave, *supra* note 49, at 495-98.

[364] *See* United States v. Caceres, 440 U.S. 741, 755-56 (1979) ("[W]e cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.").

[365] For example, under the Court's open-ended second-order decisions—such as the inventory and administrative-search decisions—"the existence of and compliance with administrative regulations is—or ought to be—the very warp and woof of the controlling doctrine." LaFave, *supra* note 49, at 509. Compliance with regulations is the very essence of what it means to act in a constitutional manner.

[366] Counting the severity of the violation roughly tracks the distinction the Court made in *Caceres* between violations of regulations compelled by the Constitution, which trigger exclusion, and violations of

the analysis.[367] And law-enforcement response to the violation should be relevant to whether the exclusionary rule applies.[368] When a defendant alleges a policy violation, the burden should shift to the government to show that it investigated the allegation and, if appropriate, reprimanded the offending officer in a manner roughly proportional to the wrong, or at least in a manner likely to prevent the recurrence of the wrong. The absence of a response would be evidence in favor of finding a constitutional violation. (The chronology of criminal adjudication will likely necessitate a rule requiring defendants to give early notice of an intention to allege a policy violation.[369])

Defendants will have incentives to bring policy violations to light, because they are a necessary (though not sufficient) element of proving a constitutional violation (and therefore of triggering exclusion or reversal). Political policymakers will have incentives (created by the Court's second-order decisions) to craft policies that will survive judicial review, which requires imposing adequate constraints on officer discretion; the aforementioned incentive *not* to write detailed rules will be reduced because minor policy violations, and violations that are remedied internally, will be unlikely to trigger court sanctions. And line officers will have incentives to follow policy because policy violations will typically trigger internal sanctions (even if not court sanctions).

The outputs of this doctrinal test may be difficult to predict. But this is a virtue, not a vice. If line agents could determine ex ante which policy violations would lead to constitutional violations, they may adjust their behavior accordingly, negating some of the discretion-channeling benefits of the policy rules. The system described allows the law to maintain higher degrees of both deterrence (of law-enforcement misconduct) and law-enforcement autonomy than could otherwise coexist.[370]

B. Reimagining First-Order Decisions

I argued above that second-order decisions will be possible in most cases concerning law enforcement and desirable in many. Some concrete examples may at this point be long overdue. In the Fourth Amendment context,

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regulations not so compelled, which do not. *See Caceres*, 440 U.S. at 749-57. That is, "severe" violations will involve regulations so central to the mission of safeguarding constitutional interests as to be more or less constitutionally required, whereas "minor" violations will involve more peripheral regulations that are better viewed as voluntarily assumed. *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 150.3, SS 160.7, 290.2 (Proposed Official Draft 1975) (applying exclusionary rule only to "substantial" code violations).

[367] For a general discussion, see GOLDSTEIN, *supra* note 189, at 122-24; THE URBAN POLICE FUNCTION std. 4.4(b)(ii), pp. 137-38, supp. 31 (Approved Draft 1973); *cf.* BRADLEY, *supra* note 5, at 129-32 (discussing discretionary exclusionary rules in foreign countries).

[368] *Cf.* Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001) (discussing relevance to employer liability under Title VII of employer's reaction to harassing acts by employee).

[369] *Cf., e.g.*, FED. R. CRIM. P. 12.1 (requiring notice of alibi defense).

[370] The arrangement is what Meir Dan-Cohen calls "selective transmission" of legal norms. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634-36 (1984).

legislatures or law-enforcement agencies could promulgate regulations to sort out many of the details the Court's first-order decisions resolve about when and how searches and seizures may be effected. Domestic commentators in the 1960s and '70s advocated police rulemaking to address the entire gamut of Fourth Amendment issues: the decision to make an arrest, to use particular methods of surveillance, to enter a home, to order crowds to disperse, to use force, to seize property, and so on.[371] It's a big task, but it's doable—the ALI did it, and so have several foreign countries.[372]

There is no reason judicial decisions, rather than law-enforcement guidelines (or legislation), must direct officer discretion in these situations. The trick is getting the guidelines written, which is what second-order decisions are designed to do. In the second-order model, search-and-seizure activity must be undertaken pursuant to adequate guidelines to pass constitutional muster. One of rulemaking's outspoken proponents, Anthony Amsterdam, captured the point syllogistically: "Arbitrary searches and seizures are 'unreasonable' searches and seizures; ruleless searches and seizures practiced at the varying and unguided discretion of thousands of individual peace officers are arbitrary searches and seizures; therefore, ruleless searches and seizures are 'unreasonable' searches and seizures."[373]

The second-order model may also provide the best way to understand Justice Alito's four-Justice concurrence in *United States v. Jones*,[374] the GPS-tracking case. "[T]he best solution to privacy concerns," Justice Alito wrote, "may be legislative"; but because "Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes[,] [t]he best that we can do in this case is to apply existing Fourth Amendment doctrine."[375] Within the conventional paradigm, this statement is jarring—why say a legislative solution would be best and then constitutionalize the issue, taking it out of legislative hands?[376] The answer, I have suggested, is that constitutional law need not elbow legislators out. It can impose interim first-order standards and encourage political policymaking that might render judicial regulation unnecessary going forward.

A second-order approach could also help reframe the constitutional law of

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[371] *See, e.g.*, 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 1-4.3 (2d. ed. supp. 1986); DAVIS, *supra* note 157, at 80-96; NAT'L ADVISORY COMM'N ON CRIM. JUSTICE STANDARDS & GOALS, POLICE 21-28 (1973); CHALLENGE OF CRIME, *supra* note 256, at 103-06; TASK FORCE REPORT, *supra* note 210, at 18-21; Amsterdam, *supra* note 173; Caplan, *supra* note 332; Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); McGowan, *supra* note 161.

[372] *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE pts. IA, II (Proposed Official Draft 1975); BRADLEY, *supra* note 5, at 96-108 (reporting "general agreement" that England's statutory code enacted in 1984 to remedy "the patchwork system that had developed over the centuries" was basically successful (alternations in original) (internal quotation marks omitted)); *see id.* at 108-32 (discussing codes of criminal procedure in France, Germany, Italy, Canada, and Australia). Consent decrees entered in DOJ lawsuits also require administrative rulemaking in areas such as use of force. *See* Walker, *supra* note 49, at 33-37.

[373] Amsterdam, *supra* note 173, at 417.

[374] 132 S.Ct. 945 (2012).

[375] *Id.* at 964 (Alito, J., concurring in judgment).

[376] *See, e.g.*, Lior J. Strahilevitz, *Can the Police Keep Up with* Jones*?*, CHI. TRIB., Jan. 27, 2012.

racial profiling. In *Whren v. United States*,[377] the Court foreclosed Fourth Amendment claims grounded in the allegedly discriminatory motives of law-enforcement officers; the only question under *Whren* is whether the officers had probable cause to justify a stop (regardless of the officers' subjective motivation).[378] The opposite first-order holding—permitting defendants to suppress evidence by demonstrating racially selective policing—may have triggered a flood of new litigation, with potentially drastic consequences for the criminal-justice system. A second-order decision, however, would permit a less disruptive form of Court intervention. The Court could turn *Whren*'s rule into a safe harbor available only to jurisdictions that have implemented safeguards to protect against racial profiling. For example, data collection and publication would enable political accountability that could substitute for constitutional conduct rules.[379] Moreover, evidence that officers deviated from agency policy, as the officers in *Whren* allegedly did, should constitute evidence tending to establish a constitutional violation.[380]

In the context of preindictment lineups, the Court's first-order conduct rules reach only the most egregious identification procedures—those that create "a very substantial likelihood of irreparable misidentification."[381] Even those procedures aren't strictly prohibited—evidence obtained pursuant to such procedures may still be admitted if other factors, extrinsic to the identification procedure, indicate reliability.[382] Institutional limitations may have made the Court reluctant to implement more specific rules. As in the previous example, a better approach would be a second-order safe harbor awarding this lenient standard of judicial review only to jurisdictions that have implemented meaningful reforms to guard against erroneous identifications, ideally after consultation with experts and relevant stakeholders.[383] Claims arising out of other jurisdictions would receive more rigorous review, especially given our knowledge that erroneous identifications frequently contribute to wrongful convictions. Alternatively, if there is reasonable scholarly consensus on the best available reforms, the Court could impose those reforms as default safeguards, subject to revision by political institutions.

Finally, the entire *Miranda* doctrine might be jettisoned by a jurisdiction adopting a substitute like videotaping, questioning by a magistrate,[384] an

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[377] 517 U.S. 806 (1996).

[378] *See id.* at 813-14.

[379] As noted previously, some political policymakers took steps to address racial profiling even in the absence of Court-created incentives. *See supra* notes 289-290 and accompanying text; *see also* Klein, *supra* note 87, at 1059 & n.137 (collecting federal materials).

[380] *See Whren*, 517 U.S. at 815; LaFave, *supra* note 49, at 490-91.

[381] Neil v. Biggers, 409 U.S. 188, 198 (1972) (internal quotation marks omitted).

[382] *See* Garrett, *supra* note 267, at 79-88.

[383] *See, e.g.*, Gary L. Wells et al., *Eyewitness Identification Procedures, Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV., No. 6, at 1 (1998) (recommending reforms).

[384] *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

attorney in the interrogation room,[385] or some combination of the above.[386]

Looking forward, second-order regulation may mark the clearest path toward resolving the NSA phone-record surveillance controversy. The subject matter is highly technical and the costs of overtaxing intelligence-gathering activities may be high. Yet deferring entirely to the political branches, many reasonably fear, could open the door for Big Brother. It's easy to imagine a first-order approach going badly. Congress has imposed some restrictions on access to and dissemination of the telephone metadata it collects, but there is reason to think the restrictions are insufficient and often disobeyed.[387] The Court's aim should be to motivate Congress to take Fourth Amendment concerns more seriously, as in *Berger*, and the Executive to obey the political safeguards. The controversy's wide political salience increases the odds of pulling this off.

C. Beyond the Supreme Court

In many respects, the Supreme Court is the chief regulator of law-enforcement activity. This Article has explored how the Court should discharge its duties in that role. None of this, however, forecloses the possibility of second-order regulation by other institutional actors. Legislatures and state courts can also regulate by providing incentives rather than imposing conduct rules. Although outside the law-enforcement context, the New Jersey Supreme Court, for example, ordered the state attorney general to promulgate charging guidelines for prosecutors; trial courts were then to review charges for compliance with the guidelines. After a few years, based on trial-court feedback, the supreme court ordered the attorney general to revise the guidelines to reduce inter-county disparities.[388]

An especially interesting example is Wisconsin's reform of eyewitness-identification law, which involved all three government branches.[389] In March of 2005, the Wisconsin Department of Justice distributed to local law-enforcement agencies a Model Policy and Procedure for Eyewitness Identification.[390] Based on a review of the social science research, the policy recommended "double-blind, sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to

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[385] *See* Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417 (1994).

[386] *See* Klein, *supra* note 87, at 1058 (suggesting "[v]ideotaping plus a list of unacceptable police tactics").

[387] For an overview, see Klayman v. Obama, No. 13-0851, 2013 WL 6571596 (D.D.C. Dec. 16, 2013). For a conflicting view, see Am. Civil Liberties Union v. Clapper, No. 13 Civ. 3994(WHP), 2013 WL 6819708 (S.D.N.Y. Dec. 27, 2013).

[388] *See* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1031-32 (2005).

[389] For a very useful discussion, see Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645.

[390] WIS. DEP'T OF JUSTICE, MODEL POLICY & PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005), http://www.doj.state.wi.us/dles/tns/Eyewitness_Public.pdf.

eyewitnesses, and assessments of confidence immediately after identifications."[391] But the Model Policy was just that—a model—and local agencies were not required to adopt it.

That July, the Wisconsin Supreme Court held that the state constitution bars from evidence any out-of-court identification arising from an "unnecessarily suggestive" procedure.[392] As discussed earlier, the federal standard allows courts to admit identification evidence obtained using suggestive identification procedures as long as the court determines for itself that the identification was nonetheless reliable. The Wisconsin court eliminated this reliability "escape-hatch."[393]

The final piece, and the cornerstone, was legislation that required each police agency to adopt a written policy for eyewitness identifications.[394] Instead of dictating policy content, the statute requires that policies "be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases."[395] It mandates that local agencies "consider model policies and policies adopted by other jurisdictions" as well as suggested "practices to enhance the objectivity and reliability of eyewitness identifications."[396] Finally, the legislation requires biennial review of agency procedures, encouraging incorporation of evolving best practices.[397]

IV. CONCLUSION

The prospect of loosening our grip on the Supreme Court's old-style, command-and-control, first-order conduct rules is doubtless disquieting to many. No one wants a return to the third degree. But however reassuring some of these rules appear on paper, they are unlikely to quell the intractable problem of law-enforcement misconduct, let alone the contemporary criminal-justice system's myriad other problems. Second-order regulation permits experimentation with promising reforms while holding risk at tolerable levels. If done right, and in the right places, the reward may be worth the risk.

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[391] *Id.* at 1-6.
[392] Wisconsin v. Dubose, 699 N.W.2d 582, ¶ 36 (2005).
[393] Kruse, *supra* note 389, at 689.
[394] 2005 Wis. Act. 60, § 17 (Dec. 1, 2005) (codified at Wis. Stat. § 175.50(2)).
[395] Wis. Stat. § 175.50(2).
[396] *Id.* § 175.50(4), (5).
[397] § 175.50(3).

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