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# Second-Order Regulation of Law Enforcement

John Rappaport

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# CHICAGO

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## SECOND-ORDER REGULATION OF LAW ENFORCEMENT

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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## Second-Order Regulation of Law Enforcement

John Rappaport\*

*This Article interrogates a critical, yet understudied, 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 policy makers, 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 policy makers to write the conduct rules. Framed differently, the Court, as*

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*principal, enlists political policy makers as its agents in the regulatory enterprise. Although first-order regulation predominates, a careful search uncovers hints of second-order regulation in spaces such as inventory searches and interrogation, and analogies in fields like employment discrimination and desegregation.*

*The Article claims that second-order regulation should—in some domains and when executed correctly—benefit suspects and criminal defendants in the aggregate by increasing the expected value of their constitutional protections. It should meanwhile facilitate efficient prosecution of the guilty. The benefits of agency, in other words, should in some cases outweigh the costs. Shifting rulemaking responsibility from the Court to political leaders may harness certain 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 often be reduced to tolerable levels.*

*After making the general case for the second-order approach, the Article sketches where it should work especially well or poorly. It then reimagines several of the Court’s first-order decisions in a second-order model. Finally, it suggests a role in second-order regulation for other potential catalyst institutions, such as legislatures and state courts.*

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## INTRODUCTION

Two police officers arrest a robbery suspect 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 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 the impermissible aspects of the lineup procedure. Although pronounced in the context of an individual dispute, such a decision has obvious prospective regulatory consequences.<sup>1</sup> Alternatively, the Court could aim its

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1. For the view of criminal procedure decisions as 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 Justice*, 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)).

commands at political policy makers—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 judicial review. 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 policy makers 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 frame the question is in principal-agent terms: Should the Court regulate street-level officers directly, or should it enlist political policy makers as its agents in the regulatory enterprise? The general tradeoffs between the two strategies are familiar.<sup>2</sup> The agents—political actors—may have superior expertise in law enforcement matters 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, the Court not only pronounces constitutional principles, but also chooses between these regulatory methodologies. It seems to do so unwittingly, however, and scholarly analysis has largely neglected the methodological issues as well.<sup>3</sup> My normative claim is that the benefits of agency will sometimes outweigh the costs. Specifically, the expected value of constitutional protections to suspects and defendants—the strength of the Constitution’s rights multiplied by the likelihood that the rights will be respected—will rise. In some domains, that is, law enforcement conduct will hew closer to constitutional norms if the Court gets political policy makers to write the conduct rules than if it writes the rules itself. Meanwhile, the resulting rules should facilitate efficient prosecution of the guilty.<sup>4</sup> Even to those ultimately unpersuaded by my normative case, the Article should, at the least,

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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”); Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31, 33 (2009) (opining that “focusing on rights surreptitiously elides (or is mistakenly taken to solve) the regulatory issues”).

4. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 4–7, 63–85 (2006) (developing a case for this sort of rule-consequentialist metric for institutional-choice problems).

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 slightly more provocatively, my normative claim is that there exists a set of cases—the bounds of which I begin to sketch below—in which the Supreme Court has taken the wrong approach to regulating law enforcement. The Court 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, as a contemporary system of regulation, the results are mixed at best.<sup>5</sup> Precise figures are hard to come by, but there is little dispute that compliance with constitutional criminal procedure norms could be better. Rights on paper are one thing; practical protections are quite another.<sup>6</sup>

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5. See, e.g., CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 37–56 (1993) (listing the 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*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding widespread constitutional violations stemming from New York City’s “stop and frisk” program); NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *FAIRNESS AND EFFECTIVENESS IN POLICING* 264 (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter NAT’L RESEARCH COUNCIL] (summarizing field study in which 29 percent of searches were conducted unconstitutionally); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT* (2011) (finding that the New Orleans Police Department “has been largely indifferent to widespread violations of law and policy by its officers”); Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENTER RES. BULL. 1, 4 & tbl.1 (1986) (stating that 19 percent of surveyed law enforcement officers self-reported having conducted searches of “questionable constitutionality” at least once a month, and 4 percent reported searches they *knew* to be illegal); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1652–57 (2012) (collecting evidence that “police search individuals at higher rates than the Constitution permits”); 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 CALIF. 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); Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 2, 2013 (reporting that in 2011 in New York City “hundreds of drug cases were dismissed after several police officers were accused of mishandling evidence”); Peter Keane, *Why Cops Lie*, S.F. CHRON., Mar. 15, 2011 (commenting, based on experience as San Francisco police commissioner, that police-officer perjury in narcotics cases is the “routine way of doing business in courtrooms everywhere in America”); Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Richard J. Berry, Mayor of Albuquerque (Apr. 10, 2014), available at [http://www.justice.gov/crt/about/spl/documents/apd\\_findings\\_4-10-14.pdf](http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf) (finding that Albuquerque police department “engages in a pattern or practice of use of excessive force, including deadly force, in violation of the Fourth Amendment”). Peter Schuck suggests four causes of official misconduct that seem pertinent here: failures of the comprehension, capacity, motivation, and care required to obey the law. PETER H. SCHUCK, *SUING GOVERNMENT: CIVIL REMEDIES FOR OFFICIAL WRONGS* 3–12 (1983).

The stakes 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.”<sup>7</sup> And the challenge is immense: law enforcement officers wield great power and “a good deal of low-visibility discretion.”<sup>8</sup> Those concerned predominantly with crime control are not happy either; they see a set of rigid, ill-advised conduct rules that hamstring law enforcement more than necessary.<sup>9</sup> It is this state of affairs that drives the search for a better approach.

Some terminology aids the discussion that follows. I call the Court’s typical strategy *first-order regulation* because it acts directly upon the front-line agents who interface with the public—those I refer to as the “rank and file.” I characterize the alternative, agency approach as *second-order regulation*, as it induces and shapes first-order regulation. Second-order regulation speaks not directly to officers in the field, but to the political policy makers who oversee those officers, and who in turn promulgate first-order rules of their own.<sup>10</sup> These policy makers include legislators and law enforcement administrators like police and bureau chiefs. Note that *these* actors are the “agents” in my agency model. Although the rank and file are government “agents” in some general sense, here they are the regulated parties; they are not the Court’s agents in the rulemaking enterprise. We can think of political policy makers as the Court’s agents in this context because, when they regulate with care and effort, the Court—which bears the ultimate duty to ensure governmental compliance with the Constitution—benefits.<sup>11</sup> This is not the only way to conceptualize the relationship among the parties involved; it is merely one helpful perspective that permits us to leverage what we already know about how principals and agents interact.

The term *second-order regulation*, I will explain, is a placeholder for a diversity of doctrinal phenomena unified by one feature: a judicial emphasis on ends rather than means. The defeasible default rule and safe harbor described earlier are just two examples. Second-order regulation positions the Court 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.<sup>12</sup> Second-order decisions,

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

8. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 97 (1980).

9. *See, e.g.*, BRADLEY, *supra* note 5, at 129–30.

10. There is some ambiguity 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.” *See* H.L.A. HART, *THE CONCEPT OF LAW* 21–22 (1961); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 50 (1975).

11. *See* Posner, *supra* note 2, at 225 (defining agency relationship).

12. 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).



that is, begin rather than end conversations with political policy makers about the precise bounds of acceptable law enforcement conduct. The approach assumes, as the Court has said, that any number of safeguards may suffice to protect a single constitutional value.<sup>13</sup> And it tolerates a variety of interpretive theories—it does not, for instance, require Thayerian deference to the legislature on questions of constitutional meaning,<sup>14</sup> and even some originalists, I will show, may be brought into the fold.

Unlike most criminal procedure scholarship, which debates the contents of the conduct rules the Supreme Court decrees,<sup>15</sup> this Article entertains an antecedent question: whether the Court should be writing the rules in the first place.<sup>16</sup> In doing so, the Article contributes to the small but significant literature tying criminal procedure to related fields that typically receive separate scholarly treatment, including constitutional law, administrative law, and remedies.<sup>17</sup> It also adds to the nascent line of scholarship discussing principal-agent problems in criminal procedure.<sup>18</sup> And it gives content to the

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

14. A Thayerian approach defers to legislative interpretations of constitutional meaning unless they are clearly mistaken. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see also VERMEULE, *supra* note 4, at 254–55 (discussing Thayer).

15. See, e.g., 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).

16. Other scholars have recently broached this question. See, e.g., Harmon, *supra* note 3, at 764; 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. 485 (2013); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 827 (2006). All of us echo older voices. See, e.g., Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 541–42 (1975); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193 n.67 (1969).

17. On criminal procedure as constitutional law, see AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1998); Fallon & Meltzer, *supra* note 1; Carol S. Steiker, “*First Principles*” of *Constitutional Criminal Procedure: A Mistake?*, 112 HARV. L. REV. 680, 684 (1999) (book review) (describing criminal procedure scholarship as “too often isolated”); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988). As administrative law, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006); 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) [hereinafter *Comparative Domestic Constitutionalism*]. On remedies, see Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002 (2010).

18. 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 the Court as principal); Dhammika Dharmapala et al., *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure* (Ill. Pub. Law Research Paper No. 13-47, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2278597](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278597).

often-hazy concept of interbranch dialogue, while pushing that literature to include law enforcement as well as legislatures in the conversation.<sup>19</sup>

The Article proceeds as follows. In Part I, I erect the basic descriptive framework by marshaling examples of first- and second-order decisions. I also comment briefly on why the framework does more than merely instantiate the rules-standards debate. 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 discrimination, and school desegregation. These cases help illustrate the diverse doctrinal mechanisms that can effectuate second-order regulation and inform the development of successful second-order strategies. I should note that I distinguish first- and second-order decisions in a binary fashion for ease of exposition. This binary, however, is somewhat artificial. A first-order decision will often have policy repercussions that capture the attention of policy makers. And a restrictive (second-order) command directed at policy makers 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 explore the normative tradeoffs between first- and second-order regulation—the costs and benefits of agency. Shifting rulemaking responsibility from the Court to political actors may harness certain comparative advantages of political institutions and permits experimentation in search of workable, well-tailored safeguards for 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 most salient risk of the second-order approach is slippage—that political policy makers will draft lax criminal procedure protections. The second-order strategy seems to entrust the henhouse to the foxes’ watch. My project, however, is emphatically *comparative*. As Neil Komesar quipped, “[F]oxes might be assigned to guard the chicken coop where the alternatives (bears, weasels, and so forth) are worse.”<sup>20</sup> When it comes to protecting suspects and defendants from law enforcement misconduct, the Supreme Court can be a bear, or so I make an effort to establish.

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19. Much of the dialogue work in criminal procedure focuses on court-legislature interchanges. See, e.g., David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149 (2014); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); Murphy, *supra* note 16; Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747 (2005).

20. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 204 (1994); 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).

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. My more modest contention is that, in some areas of criminal procedure regularly litigated in criminal cases, second-order regulation should benefit defendants overall, while freeing political policy makers to choose the most cost-effective constitutional safeguards that will get the job done. I conclude Part II by analyzing judicial and political incentives to participate in the cooperative process that second-order regulation requires. I suggest how the Court can craft second-order decisions that encourage desirable responses, as well as the conditions under which second-order regulation should work well, i.e., when the benefits of agency should outweigh the costs.

In Part III, I implement and extend the theory. I first illustrate how courts will adjudicate criminal procedure rights in individual cases under second-order regulation. I argue that violations of policies promulgated by political actors 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, and touch on the NSA surveillance controversy, now the subject of dueling federal-court opinions. Finally, I show how institutions besides the Supreme Court, such as legislatures and state courts, can serve as catalysts for political regulation of law enforcement.

## I.

### CLASSIFYING COURT DECISIONS

In most constitutional cases, the Supreme Court reviews some legislative or administrative regulation (hence “judicial *review*”). In criminal procedure, by contrast, the Court typically writes the regulations itself.<sup>21</sup> This Part examines the different ways in which the Court approaches this latter task. Part I.A illustrates the Court's dominant first-order regulatory mode. Part I.B describes the significantly rarer second-order alternative. Part I.C explains why the Court confronts a choice between the first- and second-order modes in virtually every case.

These strategies, to reiterate, are not actually dichotomous, but rather points along a continuum. The relationship resembles that between design and performance standards in administrative law. A design standard “specifies precisely how, say, a machine must be built.”<sup>22</sup> 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,

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21. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970).

22. STEPHEN BREYER, REGULATION AND ITS REFORM 105 (1982).

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.”<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup> 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. The two pairs of concepts are related, but they are not isomorphic. 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.<sup>26</sup> A second-order decision is one addressed to political policy makers; it will typically announce a standard rather than a rule to leave policy makers some autonomy over implementation. In a well-functioning system of second-order regulation, therefore, we should generally expect to see the Court directing constitutional standards to political policy makers, who in turn will issue rules to govern street-level officers. Policy makers may opt for standards instead, but they run the risk that reviewing courts will determine they have insufficiently cabined line agents’ discretion.<sup>27</sup>

First-order standards resemble second-order decisions in the sense that they leave open policy-making space and create some incentive for political policy makers to regulate. As I will explain, however, this incentive is weaker than one might think. To give just one example, decades ago the Supreme Court issued a first-order standard to govern eyewitness-identification lineups, yet a national survey in 2013 found that 84 percent of law enforcement agencies still have no written lineup policy in place.<sup>28</sup> One reason is that, under

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23. *Id.*

24. *Id.*

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

26. 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 for knock-and-announce searches (internal quotation marks omitted)).

27. 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”).

28. See POLICE EXEC. RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 46–47 (2013), available at [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Eyewitness\\_Identification/a%20national%20survey%20of%20eyewitness%20identification%20procedures%20in%20law%20enforcement%20agencies%202013.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Eyewitness_Identification/a%20national%20survey%20of%20eyewitness%20identification%20procedures%20in%20law%20enforcement%20agencies%202013.pdf); see also *Neil v. Biggers*, 409 U.S. 188 (1972).

a first-order standard, courts simply determine whether investigating officers complied with the standard (as the reviewing court interprets it). Legislative and administrative policies meant to implement the standard are irrelevant. Under a second-order decision, in contrast, courts check to see whether policy makers have promulgated a constitutionally adequate policy and whether the investigating officers complied with that policy; the constitutional valence of an officer's conduct may differ depending on what policy makers have done (or failed to do). This difference in the focus of judicial review—and the concomitant change in incentives for political action—is a crucial distinction between a first-order standard and a second-order decision.

The second caveat is that 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 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.<sup>29</sup> 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 involving law enforcement, the Supreme Court addresses its commands directly to street-level officers. Indeed, the Court has self-consciously described its role as “guid[ing] police officers.”<sup>30</sup> Over time, the Court's rulings have accreted into what Justice Scalia derided as “an intricate federal Code of Criminal Procedure imposed on the States by [the] Court in pursuit of perfect justice.”<sup>31</sup> These rulings “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.”<sup>32</sup>

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29. Some commentators have argued that the Court began to regulate directly out of necessity, because political actors were completely unwilling. *See, e.g.,* Amsterdam, *supra* note 21, at 790.

30. *Dunaway v. New York*, 442 U.S. 200, 214 (1979); *accord* *New York v. Quarles*, 467 U.S. 649, 658 (1984); *see also, e.g.,* *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004) (touting “objective rule designed to give clear guidance to the police”).

31. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

32. 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 . . .”); NAT’L RESEARCH COUNCIL, *supra* note 6, at 254 (characterizing the Court’s decisions as a “regime of criminal procedure that tells individual police officers when and how they can interact with criminal suspects on the street; minutely regulate[s] the nature of police interrogations of suspects in custody;

Consider the Fourth Amendment: the Court's decisions allow law enforcement agents armed with a warrant to 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.<sup>33</sup> And "[i]n 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."<sup>34</sup> Without a warrant, in contrast, searching the home is presumptively unreasonable and thus unconstitutional.<sup>35</sup> 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."<sup>36</sup> 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."<sup>37</sup>

As for seizures of persons, "[officers] may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs."<sup>38</sup> At the opposite extreme, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead."<sup>39</sup> 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."<sup>40</sup> 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."<sup>41</sup>

Fifth Amendment doctrine that implements the Self-Incrimination Clause similarly speaks directly to rank-and-file officers. 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

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and spell[s] out in detail the procedures that police must follow before they conduct searches or engage in related forms of surveillance" (footnotes omitted).

33. *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011).

34. *L.A. Cnty., Cal. v. Rettele*, 550 U.S. 609, 614 (2007) (per curiam).

35. *King*, 131 S. Ct. at 1856.

36. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

37. *Id.*

38. *King*, 131 S. Ct. at 1858.

39. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

40. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

41. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (quoting *Terry*, 392 U.S. at 24).

states that he wants an attorney, the interrogation must cease until an attorney is present.<sup>42</sup>

“Critically, however, a suspect can waive these rights.”<sup>43</sup> “[A]fter a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.”<sup>44</sup> 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.”<sup>45</sup>

Perhaps as important, *Miranda*’s conduct rules do not always apply. First, “[t]here 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.”<sup>46</sup> 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.”<sup>47</sup> 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.<sup>48</sup>

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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 this 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 the public.<sup>49</sup> And the existence and content of even 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.<sup>50</sup> The incentives for legislatures and agencies to promulgate policies, or ensure the constitutional

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42. *Maryland v. Shatzer*, 559 U.S. 98, 103–04 (2010).

43. *Id.* at 104.

44. *Davis v. United States*, 512 U.S. 452, 461 (1994).

45. *Id.* at 466 (Souter, J., concurring in judgment).

46. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (footnote omitted).

47. *Illinois v. Perkins*, 496 U.S. 292, 295–96 (1990).

48. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

49. 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 so forth.” MICHAEL K. BROWN, WORKING THE STREET 122 (1981); see also Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 368 (1986).

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

adequacy of extant ones, are therefore indirect at best.<sup>51</sup> The absence of any judicial check on officer compliance 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.<sup>52</sup>

### B. *Second-Order Decisions: Speaking to Policy Makers*

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 policy makers to make those decisions in a responsible fashion informed by constitutional values. The Court “inject[s] normative considerations into [policy makers’] decisions about how to structure the day-to-day operations” of the agency.<sup>53</sup>

Second-order decisions concerning law enforcement fall along a spectrum reflecting the specificity of the Court’s substantive guidance to policy makers. They can be divided roughly into two groups. The first contains *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 policy-making process. The best examples of open-ended second-order regulation come from the Court’s Fourth Amendment “special needs” doctrines, such as inventory and administrative searches and roadblocks. In this area, the Court has upheld searches conducted pursuant to facially neutral policies and invalidated unregulated searches.

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51. See, e.g., POLICE EXEC. RESEARCH FORUM, *supra* note 28, at 46–47 (finding that 84 percent of agencies have no written policy for lineups despite decades of first-order regulation); Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1 (2014) (finding that many lineup policies that do exist fail to incorporate well-known best practices). 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). Walker explains that “[m]any critical areas of police work remain ungoverned by rules”; 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, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 502–18 (1990) (emphasis omitted).

52. See HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* 163 (1990); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515–21 (2004).

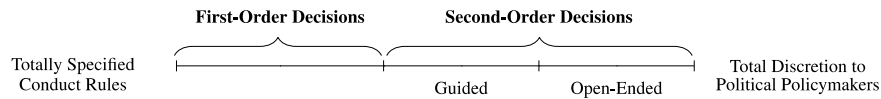
53. Sturm, *supra* note 12, at 522; cf. Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (arguing that judicial pronouncement of broad standards induces salutary moral deliberation).



The second group contains *guided second-order decisions*. In these cases, the Court allows political policy makers 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 Self-Incrimination Clause, for example, would not be satisfied by a policy that merely prevented *arbitrary* interrogations; appropriate safeguards must protect against coercion.

The relationship among the various decision types is diagrammed 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 policy makers likewise increase, as they bear increasing responsibility to formally attend to line agents' exercise of that discretion.

**FIGURE 1: Ordering of Decision Types**



Second-order regulation, I should note, presumes that constitutional adjudication can be carved into conceptually distinct pieces. That is, the theory assumes that judicial determinations of what the Constitution means can be dis severed from doctrinal rules that direct how courts are to determine whether the Constitution has been obeyed. The theory therefore necessarily embraces a distinction known (in subtle variations) by several names, such as “constitutional meaning” versus “constitutional doctrine.”<sup>54</sup> Second-order regulation preserves for the Court the task of determining constitutional *meaning*, but assigns the development of constitutional *doctrine* or implementing rules to political policy makers. 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

54. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 67 (1997) [hereinafter Fallon, *Implementing*]; see, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 50–51 (2004) (“constitutional operative propositions” vs. “constitutional decision rules”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (“constitutional norms” vs. constitutional “rules”). 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).

generality at which the various pieces of constitutional adjudication are specified.<sup>55</sup>

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 unless it is clearly mistaken. But a court applying a second-order approach could employ a different interpretive method—say, Ronald Dworkin’s “moral reading,” which understands the Bill of Rights to incorporate abstract moral principles that judges must apply in resolving concrete controversies<sup>56</sup>—and reach a different conclusion. Only then would the court delegate to political policy makers the task of designing safeguards. So even some originalists—those who accept the distinction between constitutional interpretation and construction<sup>57</sup>—could potentially be brought aboard, as the model does not foreclose them from vying for originalist interpretations of constitutional meaning.

### 1. *Open-Ended Second-Order Decisions*

An aversion to arbitrary government action drives a number of criminal procedure doctrines. It manifests most clearly in Fourth Amendment search-and-seizure settings. For instance, an airport-security system that permitted agents to 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. As would be a policy dictating that every fifth person be screened. The content of the policy (assuming it is not, for example, facially discriminatory) is less important than the policy’s existence, which itself ensures that compliant officers will not act arbitrarily. In the Court’s words, the question is whether the search is “sufficiently regulated to satisfy the Fourth Amendment” or whether “the discretion of the official in the field [is] circumscribed, at least to some extent.”<sup>58</sup> 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

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55. See Fallon, *Implementing*, *supra* note 54, at 62 (explaining that “some constitutional norms may be too vague to serve directly as effective rules of law”).

56. See RONALD DWORKIN, *FREEDOM’S LAW* 7 (1997).

57. See generally Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013).

58. *Florida v. Wells*, 495 U.S. 1, 5 (1990) (source of first quotation); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (source of second quotation).

validity of a search on the existence of and compliance with an even-handed policy, they create strong incentives for political policy makers to promulgate and police such policies.<sup>59</sup> And in a sense, the exclusionary rule acts as a penalty default rule, specifying the treatment of evidence in jurisdictions that have not promulgated a 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 municipal codes. These searches typically require a warrant.<sup>60</sup> “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.”<sup>61</sup> “A warrant, by contrast, [provides] assurances from a 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*.”<sup>62</sup> 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.”<sup>63</sup>

The “inventory search” cases, concerning 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.<sup>64</sup> This ensures that “an inventory search [is not] a ruse for a general rummaging in order to discover incriminating evidence.”<sup>65</sup> Inventory searches *not* conducted pursuant to standard police procedures are *not* reasonable.<sup>66</sup> 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.”<sup>67</sup> And policies may leave line agents some discretion, “so long as that discretion is exercised

59. See LaFare, *supra* note 51, at 451–70.

60. See *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967); See *v. City of Seattle*, 387 U.S. 541, 545–46 (1967).

61. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 323 (1978).

62. *Id.* (emphasis added).

63. *Camara*, 387 U.S. at 538 (emphasis added).

64. *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976). The Court suggested that evidence that a standard procedure is a “pretext concealing an investigatory police motive” might justify an exception to this general principle. *Id.* at 376.

65. *Florida v. Wells*, 495 U.S. 1, 4 (1990).

66. *Colorado v. Bertine*, 479 U.S. 367, 374 n.6 (1987).

67. *Id.* at 374.

according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.”<sup>68</sup>

## 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 guided second-order decisions, the Court enunciates the pertinent substantive values and encourages political policy makers to implement safeguards that protect those values. The conception of rights that emerges from these decisions resembles that in Michael Dorf and Charles Sabel’s theory of “democratic experimentalism.” Dorf and Sabel propose to reconceptualize 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.”<sup>69</sup> Three examples help illustrate the concepts.

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

Several weeks after the defendant in *United States v. Wade*<sup>70</sup> was indicted for robbery, an FBI agent, with no notice to the defendant’s counsel, placed the defendant in a lineup, where two witnesses identified him as the robber; the same witnesses identified him again at trial.<sup>71</sup> The question on appeal was whether counsel’s absence from the lineup session 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.”<sup>72</sup> Without counsel’s assistance, the accused is unable “effectively to reconstruct at trial any unfairness that occurred at the lineup.”<sup>73</sup> And without an accurate reconstruction, the defendant is deprived of “his only opportunity meaningfully to attack the credibility of the witness’ *courtroom* identification.”<sup>74</sup> “[W]here

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68. *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).

69. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 389 (1998). For a helpful catalog of collaborative constitutional doctrines, covering some of the cases discussed in this Article, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001).

70. 388 U.S. 218 (1967).

71. *Id.* at 220.

72. *Id.* at 228.

73. *Id.* at 232.

74. *Id.* (emphasis added).

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.”<sup>75</sup>

The Court imposed 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.’”<sup>76</sup> 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 . . . remove the basis for regarding the stage as ‘critical.’”<sup>77</sup> The counsel prescription, in other words, is effective only until politically promulgated regulations quell the constitutional concerns that demanded its adoption. In what can only have been an effort to guide subsequent political action, the Court then catalogued examples of suggestive practices and “impediments to meaningful confrontation at trial,” and attached extensive footnotes describing academic and foreign solutions.<sup>78</sup>

The *Wade* decision stumbled slightly out of the blocks. The federal reaction was unproductive,<sup>79</sup> and some agencies simply shifted to photographic displays, which do not trigger Sixth Amendment protections.<sup>80</sup> 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.”<sup>81</sup> Courts reviewing these procedures

75. *Id.* at 235.

76. *Id.* at 237.

77. *Id.* at 239. The decision is a species of what Henry Monaghan influentially labeled “constitutional common law.” Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19–21 (1975).

78. See *Wade*, 388 U.S. at 236–37 n.26, 238 n.29, 239 n.30. On this guidance-giving conception of the judicial role, see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000).

79. 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, § 701(a), 82 Stat. 197, 211 (codified at 18 U.S.C. § 3502 (2012)); FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 244–46 (1970) (contextualizing congressional response to *Wade*). The Government has never successfully invoked the statute, to my knowledge.

80. *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).

81. 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, 1369–71 (1977).

have approved them as substitutes for the presence of counsel, exactly as *Wade* contemplated.<sup>82</sup>

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.<sup>83</sup> This goes far toward explaining why erroneous eyewitness identifications remain the foremost contributor to wrongful convictions. I will return to this topic below.

*b. Miranda v. Arizona: Custodial Interrogation*

*Miranda v. Arizona*<sup>84</sup> illustrates several pertinent concepts. Like *Wade*, *Miranda* combines interim first-order rules with second-order incentives. Its first-order aspects are familiar: prior to custodial interrogation, law enforcement officers must recite certain warnings and must respect the suspect's invocation of his rights, or else any statement the suspect makes will be inadmissible.<sup>85</sup> But importantly, these requirements apply 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."<sup>86</sup>

The decision first identifies the pertinent constitutional values and the 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."<sup>87</sup> 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."<sup>88</sup>

Although the Court then prescribed the now-familiar warnings, supplanting the traditional totality-of-the-circumstances voluntariness test, the warnings were said to be defeasible:

[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the

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82. See 2 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 7.3(a) (3d ed. 2007) (citing cases); 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) (same).

83. See *Kirby v. Illinois*, 406 U.S. 682, 690–91 (1972) (plurality opinion).

84. 384 U.S. 436 (1966).

85. See, e.g., *id.* at 444–45.

86. *Id.* at 444.

87. *Id.* at 460; see Klein, *supra* note 82, at 1039 (opining that "the warnings themselves do not embody the rule or value contained in the privilege").

88. *Miranda*, 384 U.S. at 457, 462 (quoting *Ziang Sung Wan v. United States*, 266 U.S. 1, 14 (1924)).

interrogation process as it is presently 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.<sup>89</sup>

Shortly after *Miranda*, Congress passed a law making the voluntariness of a confession the sole measure of its admissibility.<sup>90</sup> Decades later, the Fourth Circuit held that, in doing so, Congress had properly accepted the Court's invitation to provide alternative safeguards.<sup>91</sup> 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."<sup>92</sup> 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.<sup>93</sup> *Miranda*'s failure to stimulate substitute regulation is another 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*<sup>94</sup> exemplifies the back end of the process—what it looks like when the Court acts as a backstop, reviewing the constitutional validity of criminal procedure regulation (rather than an individual officer's isolated act). Based on evidence obtained pursuant to New York's electronic eavesdropping statute, the prosecution indicted the defendant in *Berger* of conspiracy to bribe a public official, and he was eventually convicted.<sup>95</sup> The Supreme Court framed its task on appeal 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.<sup>96</sup> "The claim is that the statute sets up a *system of surveillance* which involves

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89. *Id.* at 467; see Monaghan, *supra* note 77, at 19–21 (describing *Miranda* as an example of "constitutional common law").

90. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210–11 (codified at 18 U.S.C. § 3501 (2012)).

91. *United States v. Dickerson*, 166 F.3d 667, 691 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

92. *Dickerson v. United States*, 530 U.S. 428, 442 (2000).

93. See Dorf & Sabel, *supra* note 69, at 459–60.

94. 388 U.S. 41 (1967).

95. *Id.* at 44–45.

96. *Id.* at 43. Compare this question with the one articulated in *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," that is, whether the Government's "agents acted in an entirely defensible manner.").

trespassory intrusions into private, constitutionally protected premises [and] authorizes 'general searches' for 'mere evidence.'"<sup>97</sup>

The Court's job, therefore, was to "determine the basis of the search and seizure authorized" by the statute upon judicial order.<sup>98</sup> Reviewing the preconditions for issuance of an order, the statute's "broad sweep" was "immediately observable."<sup>99</sup> 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."<sup>100</sup> The recurring theme was that New York's statute left "too much to the discretion of the officer executing the order."<sup>101</sup>

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."<sup>102</sup> It cited prior decisions that "sustained the use of eavesdropping devices" where "the 'commission of a specific offense' was charged, [the devices'] use was 'under the most precise and discriminate circumstances' and the effective administration of justice in . . . court was at stake."<sup>103</sup> New York's statute was flawed, the Court clarified, only "[a]s it [wa]s written."<sup>104</sup> The Court's decision, so crafted, created incentives for policy makers who valued the eavesdropping tool to rein in the discretion of street-level officers who would actually conduct the searches. The Court's analysis and its citation to prior cases sustaining eavesdropping practices provided the guidance necessary for policy makers 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.<sup>105</sup> The Court's decision was expected to have "substantial impact" on Congress's work.<sup>106</sup> 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

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97. *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.").

98. *Id.* at 54 (majority opinion).

99. *Id.*

100. *Id.* at 60.

101. *Id.* at 59–60.

102. *Id.* at 63.

103. *Id.* (quoting *Osborn v. United States*, 385 U.S. 323, 329–30 (1966)).

104. *Id.* at 64.

105. *See id.* at 112 (White, J., dissenting); Kerr, *supra* note 19, at 848.

106. *Berger*, 388 U.S. at 113 (White, J., dissenting).



Congress drafted Title III to meet *Berger's* standards.<sup>107</sup> Subsequent constitutional challenges to Title III were universally rebuffed.<sup>108</sup>

### 3. *Second-Order Regulation Outside the Law Enforcement Context*

*Wade* and *Miranda* show how default rules can function (with varying degrees of success) as a mechanism for second-order regulation.<sup>109</sup> But as I stated at the outset, the doctrinal tools embraced by the second-order model are considerably more diverse. Because the second-order approach is used so rarely in regulating law enforcement, I widen my focus to capture additional decisions possessing second-order characteristics. These examples also provide data points 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*,<sup>110</sup> the Court required the States to provide indigent defendants with a trial transcript *or* “other means of affording adequate and effective appellate review.”<sup>111</sup> “The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice,” it noted, and “[w]e are confident that the State will provide corrective rules to meet the problem which this case lays bare.”<sup>112</sup> In subsequent years courts approved a variety of transcript alternatives, including, to give one example, a “summary agreed upon by prosecuting and defense attorneys.”<sup>113</sup>

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

108. See Kerr, *supra* note 19, at 851 n.304 (collecting cases).

109. Default rules might be rules 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 policy makers 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 845–50, 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 2076–81; see also Ferejohn & Friedman, *supra*, at 857–59. The “political correction” 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.

110. 351 U.S. 12 (1956) (plurality opinion).

111. *Id.* at 20.

112. *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.”).

113. 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 139 (1965); see, e.g., *Britt v. North Carolina*, 404 U.S. 226 (1971) (court reporter’s notes); *Taylor v. Alabama*, 477 So. 2d 509 (Ala. Crim. App. 1985) (audio tapes); *Herick v. Mun. Court*, 8 Cal.

*b. Habeas Corpus*

The Court took a safe-harbor approach in *Martinez v. Ryan*,<sup>114</sup> a federal habeas case. State prisoners generally have no constitutional right to counsel for state collateral proceedings. But 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's performance. 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."<sup>115</sup>

Yet the Court 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 of the trial-counsel claim. 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."<sup>116</sup> The Court gave States an incentive to provide effective counsel in state collateral proceedings by foreclosing federal habeas review only where this is done. But the Court did not *require* the provision of counsel, let alone any particular system of counsel appointment.<sup>117</sup>

*c. Employment Discrimination*

Recognizing that "Title VII is designed to encourage the creation of anti-harassment 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."<sup>118</sup> Its decisions offer employers a safe harbor from hostile-environment harassment claims if they "exercised reasonable care to avoid harassment and to eliminate it when it might occur."<sup>119</sup> 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

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App. 3d 967 (1970) ("settled statement"); *Illinois v. Hanson*, 359 N.E.2d 188, 193–94 (Ill. App. Ct. 1977) (certified or stipulated report of proceedings).

114. 132 S. Ct. 1309 (2012).

115. *Id.* at 1319.

116. *Id.* at 1319–20.

117. *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).

118. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

119. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

sexual harassment norm articulated by the Supreme Court.”<sup>120</sup> “Organizations, in turn, have developed processes to address sexual harassment . . . in context, over time, and in relation to broader patterns of bias or dysfunction.”<sup>121</sup> As Susan Sturm has explained, 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.”<sup>122</sup>

#### d. Reapportionment

The Court’s first venture into the “political thicket” of legislative apportionment can be read in a second-order light. For decades the Court had refused to consider malapportionment claims.<sup>123</sup> In the absence of even the potential for judicial involvement, state legislators had little incentive to redraw district lines; in fact, the incentives cut in the opposite direction, in favor of preserving the apportionment schemes under which they had been elected. The Court changed course in *Baker v. Carr*, holding malapportionment challenges justiciable.

Yet the Court declined to formulate any substantive standard, i.e., any first-order conduct rule.<sup>124</sup> The appellants had argued that the simple act of condoning judicial involvement would prompt legislative remedies,<sup>125</sup> several of the Justices apparently agreed.<sup>126</sup> “Legislatures all over the country,” one contemporaneous commentator wrote of *Baker*, “have been bidden to redistrict or to face the prospect of having the judiciary do the job for them.”<sup>127</sup> And indeed, state legislatures “were inordinately active in trying to ward off judicial intervention”: over half the States adopted new districting plans within two years.<sup>128</sup> At that point—two years after *Baker*, in *Reynolds v. Sims*<sup>129</sup>—the

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120. Sturm, *supra* note 12, at 482.

121. *Id.* at 479.

122. *Id.*

123. See *Baker v. Carr*, 369 U.S. 186, 277–97 (1962) (Frankfurter, J., dissenting) (reviewing “uniform course of decision” not to consider such claims).

124. See *id.* at 237 (majority opinion).

125. Brief for Appellants at 35, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), 1961 WL 101846.

126. *Baker*, 369 U.S. at 250 n.5 (Douglas, J., concurring); William O. Douglas, Conference Notes, *Baker v. Carr* (Oct. 13, 1961) (on file with the Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1266) (documenting Brennan’s prediction that an “assertion of [judicial] power will cause the Tennessee legislature to act”).

127. Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 58 (1962).

128. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 244 (2000); McCloskey, *supra* note 127, at 58 (“Under th[e] spur [of court intervention], and sometimes in anticipation of it, a number of [legislatures] have set going their laborious machinery of conflict and compromise.”).

129. 377 U.S. 533 (1964).

Court, in a “dramatic shift in approach,” imposed a conduct rule of one-person, one-vote.<sup>130</sup>

*e. School Desegregation*

In *Brown v. Board of Education*,<sup>131</sup> the Supreme Court famously held unconstitutional separate-but-equal school systems that segregated students along racial lines.<sup>132</sup> Rather than specifying a set of first-order conduct rules for integration, however, 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.”<sup>133</sup> Policy makers in some localities responded quickly and began to implement the Court’s decision.<sup>134</sup> Some areas of the country, however, vehemently resisted, and further judicial intervention, often of increasing scope and detail, proved necessary.<sup>135</sup>

*f. Lawsuits Against Federal Government Officials*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>136</sup> the Court held that federal officials are vulnerable to damages suits for Fourth Amendment violations. Its ruling rested on the absence of any “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.”<sup>137</sup> By suggesting that it would step aside where Congress

130. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 260 (1991). The reasons for the move are unclear: the Court may have viewed the aggressive reactions to *Baker* as evincing a consensus, or it may have thought one-person, one-vote the only administrable standard. *See id.* at 260–61.

131. 347 U.S. 483 (1954).

132. *See id.* at 493.

133. *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955); *see* SCHUCK, *supra* note 6, at 191 (reading *Brown* to state the 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”).

134. *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; *see also* 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).

135. *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. Blaustein & Clarence C. Ferguson, Jr., *Avoidance, Evasion & Delay*, in *THE IMPACT OF SUPREME COURT DECISIONS* 96, 96–105 (Theodore L. Becker ed., 1969).

136. 403 U.S. 388 (1971).

137. *Id.* at 397.

provides a statutory remedy for rights violations, 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.<sup>138</sup>

### 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 does it operate under methodological constraints? The answer, I think, is fairly straightforward: a second-order decision is always an option unless the constitutional text specifies a particular mechanism to protect the value it expresses. It may be, for instance, 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.<sup>139</sup> The Fifth Amendment also requires most federal felony prosecutions to proceed by indictment; an alternative charging procedure thought to be equally effective may not suffice. In the vast majority of cases, however, it would be disingenuous to maintain that the text demands the Court's chosen conduct rules rather than equally effective alternative rules, and that there is "no room whatever for reasonable difference of judgment or play in the joints."<sup>140</sup> The Constitution's "specifics," Judge Friendly pithily observed, "simply are not that specific."<sup>141</sup> There are usually more permissible solutions to a constitutional problem than the one the Court selects.

## II.

### COMPARING REGULATORY APPROACHES

The framework constructed in Part I enables distinction—which I treat as binary to facilitate exposition—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 observation 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 policy makers as its agents in the lawmaking enterprise. With that in mind, Part II.A walks through some of the potential benefits accompanying a shift to the agency model.

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

139. See *Coolidge v. New Hampshire*, 403 U.S. 443, 497–98, 510 (1971) (Black, J., concurring and dissenting).

140. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 954 (1965).

141. *Id.* (internal quotation marks omitted).

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. The compliance effects, in particular, give me some optimism about the agency approach, though the costs I discuss in Part II.B temper this sentiment slightly. In Part II.C, I attempt to sketch out—albeit imprecisely—conditions under which the benefits are most likely to 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 policy makers the responsibility for writing conduct rules to govern street-level officers. For two key reasons, we might hope the content of the law would improve in such a regime: political policy makers have certain institutional advantages over the Court, and decentralized lawmaking better captures the benefits of experimentation. Both hypotheses are plausible, but they turn out to be somewhat contingent and qualified. Political policy makers do possess some traits that make them attractive rulemakers, but also certain disadvantages that counsel in favor of continued Court involvement and careful attention to the circumstances in which each institution should predominate.

First, we might think that, like many agents, political policy makers have greater expertise than their principal.<sup>142</sup> They know more about crime rates, budgets, and the challenges the rank and file face on the job.<sup>143</sup> They can solicit input from a range of sources, including experts and interest groups on both sides of divisive issues, in search of cost-effective solutions to constitutional challenges.<sup>144</sup> The Court, in contrast, typically proceeds on a narrow factual record and stylized legal briefs from the parties focused (at least formally) on a past event.<sup>145</sup> Perhaps unsurprisingly, the Court not only lacks critical

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142. See Klein, *supra* note 82, at 1060; Stuntz, *supra* note 16, at 827.

143. 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 16, 22–23 (Monique Marks & David Sklansky eds., 2012) (discussing importance to reform of line agents’ “craft knowledge”).

144. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65–68 (1969); SCHUCK, *supra* note 6, at 129.

145. 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 19, 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); Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 446 (2013) (“In criminal procedure cases, much of the information courts require to create effective criminal procedure

information, but also has been known to rest decisions on “legislative facts” of dubious veracity.<sup>146</sup> In addition, the Court is poorly positioned, relative to political policy makers, to observe (and thus learn from) the consequences of the policy choices its conduct rules incorporate.<sup>147</sup>

It is not clear, however, that policy makers consistently put their epistemic advantages to good use. “[P]olitical forces” may cause policy makers “to use the information they possess in distorted ways.”<sup>148</sup> And whatever their institutional capabilities in theory, it is hard to be confident that political actors *actually* “do a better job than courts of airing and weighing the concerns of all relevant constituencies.”<sup>149</sup> Law enforcement executives, in particular, have narrow interests that tend to cut against individual rights. Moreover, while law enforcement almost certainly possesses expertise superior to the Court’s, the claim is more tenuous for legislators (especially those whose portfolios do not include policing issues).<sup>150</sup> Amicus briefs may in many cases suffice to catch the Justices up to speed.<sup>151</sup> In the end, policy makers probably have superior information in some cases, or maybe many, but the implications of this fact are contestable.

Second, there may be advantages to political, prospective, legislative-style lawmaking over adjudication. Legislative lawmaking permits the lawmaker to survey an entire area of the law 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.”<sup>152</sup> The Supreme Court’s common law method of lawmaking struggles in this regard. 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.<sup>153</sup> Likewise, the Court cannot write the law in a unified fashion; its “interventions are necessarily of a random nature,

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decision rules—the measures necessary to ensure police safety . . . , etc.—is in the hands of the actors criminal procedure rules are meant to regulate.”)

146. See generally Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847 (2014).

147. See Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 678 (1972) (stating that “judges . . . may not grasp fully the wider implications and consequences of the rules they promulgate within the four corners of the isolated record before them”); see also Stuntz, *supra* note 1, at 4, 26–28, 60–65 (explaining how justice system’s dynamics exacerbate this institutional shortcoming).

148. ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 86–87 (2009).

149. Murphy, *supra* note 16, at 535.

150. Granting legislators broader policy-making authority should, however, motivate them to deepen their expertise. See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1444–45 (2011); see also Monaghan, *supra* note 77, at 28 (discussing Congress’s “special institutional competence” at “protecting individual liberty,” including “a special ability to develop and consider the factual basis of a problem”).

151. See Solove, *supra* note 19, at 772.

152. McGowan, *supra* note 147, at 672.

153. See, e.g., *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in 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 21, at 786–90.

shaped by reference only to the facts of the individual cases which reach [it] for adjudication.”<sup>154</sup> Doctrine can differ wildly depending on the order in which cases arrive in the courts.<sup>155</sup> 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.”<sup>156</sup>

But there is another side to this story, too. Legislators, like courts, often make law in issue-specific ways and not holistically. The common law method, moreover, has its own epistemic advantages. Its decisions rest on the “rough empiricism” of “rational traditionalism.”<sup>157</sup> And it harnesses “the remarkable human pattern-recognition skills to facilitate sensible lawmaking”—through “[r]epeated encounters with the same issues,” a common law court can “distill[] massive complexity down into simple, sometimes elegant rules.”<sup>158</sup> Even the valence of delay is unclear—uncertainty can reflect not indecision but caution and care.<sup>159</sup> Again I tend to think that policy makers have the edge, but the point should not be oversold.

A third potential benefit of second-order regulation is related to the second. Second-order decisions may alleviate “the distorting force of particulars” in two respects.<sup>160</sup> First, rules are no longer made by the Court in “‘hard cases’ where the full consequences of decision may [be] clouded by understandable outrage over the facts at hand.”<sup>161</sup> Second, less policy is made during altercations between law enforcement officers and the citizens they police. Right now, the Court’s first-order decisions frequently delegate policy-making authority to line agents by deferring to their “heat of the moment” choices.<sup>162</sup> Second-order regulation—by encouraging law enforcement

154. McGowan, *supra* note 147, at 678; see LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 195 (1983) (quoting Warren Burger criticizing Court for “revising the code of criminal procedure and evidence ‘piecemeal’ on a case-by-case basis, on inadequate records and incomplete factual data”).

155. See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *IOWA L. REV.* 601 (2001).

156. Kerr, *supra* note 19, at 859, 868–69, 883.

157. David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 891–94 (1996).

158. Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 *U. CHI. L. REV.* 933, 960–63 (2006).

159. 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.”).

160. VERMEULE, *supra* note 4, at 38 (emphasis omitted). See generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. CHI. L. REV.* 883 (2006).

161. Friendly, *supra* note 140, at 930; see Amsterdam, *supra* note 21, at 792, 813.

162. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989); BROWN, *supra* note 49, at 3–5 (illustrating the “crucial policy-making powers” of patrolmen, whose discretion “is tantamount to political decision making”); DAVIS, *supra* note 144, at 222 (showing how patrol officers “are among



executives to make rules to guide the discretion of patrolling officers—would transfer some or most of this authority to law enforcement leadership.<sup>163</sup> More policy choices would be made by individuals with greater experience and expertise,<sup>164</sup> potentially in consultation with legal counsel and stakeholders,<sup>165</sup> in periods of relative calm,<sup>166</sup> and in a more transparent and visible (and thus publicly accountable) fashion.<sup>167</sup>

To be fair, though, calling case-specific facts “distorting” loads the dice. These are the same “particulars” that explain the Constitution’s “case or controversy” requirement and ban on advisory opinions.<sup>168</sup> Particulars sharpen judgment. Nor is the Court’s view really all that narrow; even setting aside amicus briefs, the very practice of consulting precedents and reasoning by analogy broadens the Court’s perspective beyond the facts before it.<sup>169</sup> And to the extent particulars are indeed distorting, political actors are hardly immune to their influence.<sup>170</sup>

Fourth, we might think political policy makers better at updating the law to respond to new and changing facts. Political actors operate free from stare decisis norms that limit the Justices’ ability to pivot quickly.<sup>171</sup> Congress enacted the Electronic Communications Privacy Act to regulate the privacy of

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the most important policy-makers of our entire society,” making “far more discretionary determinations in individual cases than any other class of administrators”).

163. Note the salience of this point to the Court’s approval of border-patrol checkpoints in *United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 566 (1976). For the basic argument, see McGowan, *supra* note 147, at 680; *cf.* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 496–500 (1996) (discussing the benefits of transferring lawmaking authority from the judiciary to the executive and, within the executive, from individual U.S. Attorneys to the Justice Department).

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

165. See DAVIS, *supra* note 144, 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”); 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) (advocating police consultation with stakeholders through regulatory negotiation); McGowan, *supra* note 147, at 667 (urging police consultation with counsel).

166. See Amsterdam, *supra* note 21, at 812; see also DAVIS, *supra* note 144, 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 (observing that rules may reduce risk of error because content is determined in time of tranquility).

167. See DAVIS, *supra* note 144, 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 21, at 812.

168. Schauer, *supra* note 160, at 892–93, 914–15.

169. See generally Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919 (2006).

170. Political regulation is often shaped by outrage over heinous crimes. See Schauer, *supra* note 160, at 912; see also Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Governmental Design*, 87 CORNELL L. REV. 549, 572–75 (2002) (discussing cognitive errors among legislators).

171. See BRADLEY, *supra* note 5, at 71–77.

Internet communications, for example, and amended it *eleven* times between 1988 and 2002.<sup>172</sup> 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.”<sup>173</sup>

There are many counterexamples here too, however. The Court sometimes overrules even recent constitutional precedents,<sup>174</sup> and Congress fails to update statutes, including those affecting criminal procedure.<sup>175</sup> The latter may be unsurprising given the well-known difficulties of enacting legislation.<sup>176</sup> This problem may be less severe for state legislatures than Congress, however, and is almost certainly so for law enforcement leadership.

Finally, we might think that, unlike the Court, the political policy makers who write the conduct rules in a second-order world will capture the “happy incidents of the federal system.”<sup>177</sup> They can experiment with solutions to constitutional problems tailored to local needs and resources. This is not to say the Supreme Court works in isolation when it writes rules. It sits atop a judicial pyramid of state and federal courts, and the process that brings cases before it is one of “trial and error with both parallel and hierarchical mechanisms for improving legal rules.”<sup>178</sup> Still, if the potential benefits just discussed are actualized, we might prefer to have political policy makers, rather than the Court, running our experiments.

In sum, political policy makers possess some traits that may help them improve upon the rules the Court can write. But their advantages, and the correlative disadvantages of the Court, are not as stark or universal as it might at first seem. Nor are all political policy makers equivalent—certain measures favor law enforcement leadership over legislatures, state actors over federal, and so on. Capturing the benefits political actors can provide for the law’s content will thus require some attention to circumstance and context.

## 2. *Compliance with the Law*

The case for improved compliance under second-order regulation is somewhat clearer. Several features of the second-order system, developed below, stand out: political policy makers, who write the conduct rules in a

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172. Kerr, *supra* note 19, at 871.

173. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 943 (2003).

174. See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 28 (1999).

175. See Murphy, *supra* note 16, at 533–34; Solove, *supra* note 19, at 768–71.

176. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267–68 (1974); William N. Eskridge, Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. (Apr. 19, 2012), <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.full.pdf+html>.

177. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); accord *LaFave*, *supra* note 51, at 455.

178. Rachlinski, *supra* note 158, at 952.

second-order world, are more likely than the Court to implement structural reforms and preventive regulations in the form of rules (as opposed to standards). Even more important, their work is more likely to elicit buy-in from rank-and-file officers who interface with the public. I address these points in turn.

First, second-order regulation may improve compliance by replacing some *standards* governing law enforcement conduct with *rules*. Consistent with the conventional distinction between rulemaking and adjudication,<sup>179</sup> political policy makers tend to make more rules, and the Court, standards.<sup>180</sup> 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 . . . law enforcement activities."<sup>181</sup> And its decisions sometimes do establish rules, either directly or through the precedential effect of holdings on the constitutionality of specific conduct.<sup>182</sup> 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 that the rules will produce the outcomes desired. The Court's limited resources and expertise create uncertainty that should naturally lead it to delegate discretion by promulgating standards rather than rules.<sup>183</sup> It is 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."<sup>184</sup> Without overstating the point, we should 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.<sup>185</sup> Even if law enforcement administrators

179. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City & Cnty. of Denver*, 210 U.S. 373 (1908).

180. See Kerr, *supra* note 19, 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, 604 (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].").

181. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)).

182. See, e.g., *Maryland v. Shatzer*, 559 U.S. 98 (2010); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 577–79, 611–16 (1992) (discussing precedent).

183. See O'Rourke, *supra* note 145, at 430–33 (applying agency law's uncertainty principle to criminal procedure); see also Kaplow, *supra* note 182, at 568–69; Stephenson, *supra* note 150, at 1440–41.

184. *Missouri v. McNeely*, 133 S. Ct. 1552, 1564 (2013).

185. Kaplow, *supra* note 182, at 569; see *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."); see also DAVID DIXON, *LAW IN POLICING* 279 (1997) ("[J]udicial decisions seem to create particular problems of assimilation."). 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

attempt to translate Court standards into internal policy rules, they will have difficulty confidently predicting what the standards will mean in practice. All else equal, we would expect rules, and thus second-order decisions, to induce behavior more in accord with underlying norms.<sup>186</sup>

Second, a system of second-order regulation places greater reliance on ex ante preventive regulation. In enforcing first-order decisions, the Court examines only whether a constitutional violation occurred in the past. If one did occur (and it was not harmless), the Court sanctions the government by reversing the conviction. Much of the law second-order decisions generate, in contrast, consists of safeguards designed to prevent violations of constitutional rights before they occur. For example, law enforcement executives might promulgate lineup rules 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 find a constitutional violation. First- and second-order decisions therefore should correlate, respectively, with two different modes of law enforcement: ex post liability for harm and ex ante preventive regulation.<sup>187</sup> 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.”<sup>188</sup>

There are substantial impediments to the successful use of ex post judicial sanctions to deter illegal law enforcement behavior. As an initial matter, the case-by-case adjudicatory process is poorly designed to catch systemic problems involving unequal treatment across cases. But the more nagging concern is that the vast majority of constitutional violations go unpunished.<sup>189</sup> (Note that I do not argue the exclusionary rule is impotent, a point to which I will return.) Suppose that a law enforcement officer violates the Fourth Amendment by conducting a stop-and-frisk without reasonable suspicion. A slew of contingencies must come to pass before he might be punished as a result of court-administered sanctions—the search must yield evidence of a

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decisions. 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).

186. See Bar-Gill & Friedman, *supra* note 6, at 1648–51 (showing how clearer legal commands can enhance deterrence); Kaplow, *supra* note 182, 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. See Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 257 (1993).

188. Murphy, *supra* note 16, at 537.

189. 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 can work 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. JUST. 371, 381 (2004).

crime, he must arrest the suspect, the prosecution must charge the suspect and use the evidence in its case-in-chief, and so on.<sup>190</sup>

If the system produces too little deterrence, perhaps because the probability of detection and punishment is too low, the natural response would be to increase the severity of the sanction. (Committing ourselves to detect and punish more constitutional violations would be a considerably costlier approach.) But the universe of available sanctions in criminal adjudication is 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.<sup>191</sup> 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.”<sup>192</sup> And there is some encouraging evidence that preventive regulation can work. For example, a New York City Police Department rule restricting officers’ use of

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190. For data on the likelihood of these contingencies and more, see Slobogin, *supra* note 185, at 373–76; see also Gould & Mastrofski, *supra* note 6, at 332 (finding that only 3 percent of unconstitutionally searched individuals were arrested and prosecuted). For more general critiques, see Bar-Gill & Friedman, *supra* note 6, at 1622–26 (surveying exclusionary rule’s “manifold failings”); 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”).

191. To oversimplify things a bit, civil-damages suits are often ineffective due to qualified immunity, indemnification, and organizational culture. Criminal prosecutions of misbehaving officers are rare and difficult to sustain. And while DOJ lawsuits under 42 U.S.C. § 14141 hold some promise, resource constraints may sap the statute of its power. On civil suits, see NAT’L RESEARCH COUNCIL, *supra* note 6, at 278–80; Bar-Gill & Friedman, *supra* note 6, at 1626–34; Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (finding qualified immunity denied in only 20 percent of cases); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that, because government actors do not respond to financial incentives, deterrence of government misconduct by civil damages may not be optimal); 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. 885 (2014) (finding that police officers almost never personally satisfy civil and punitive damages). *But see, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001). On criminal prosecutions, see Harmon, *supra* note 190, at 41–44. On § 14141, see Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 20–25 (2009); Stuntz, *supra* note 16, at 798. In general, see Armacost, *supra* note 52, 464–78 (cataloguing reasons why individual remedies are ineffective at changing police institutions); Harmon, *supra* note 190, at 39–53 (describing inadequacy of entire toolset of federal remedies).

192. Shavell, *supra* note 187, at 261; see also Bar-Gill & Friedman, *supra* note 6, at 1636–52 (arguing that failure of ex post litigation to deter Fourth Amendment violations points to need for stronger ex ante regulation through warrants). Reversing convictions also fails from a restorative-justice perspective. See *Sheppard v. Maxwell*, 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.”).

weapons led to a decline in the use of deadly force with little cost in terms of crime or officer safety.<sup>193</sup>

We can now see that a shift from liability to prevention may be socially beneficial. Second-order decisions also rest frontline responsibility for administering the preventive 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 fact given the reliance of preventive regimes on more frequent imposition of lighter sanctions.<sup>194</sup>

Third, second-order regulation can facilitate crucial structural reforms. Scholars increasingly recognize that many intractable problems of law enforcement misconduct are institutional—and not individual—in origin. Remedies aimed at individual incidents involving specific officers treat the symptom, not the disease.<sup>195</sup> There is, in addition, a general scholarly consensus about the institutional reforms best suited to attack these problems.<sup>196</sup> “Police reformers agree,” for example, “that some form of an ‘early warning system’—that identifies officers who commit a disproportionate share of illegal acts—is essential for successful police reform.”<sup>197</sup> It is difficult to imagine the Court, in an ordinary criminal case, ordering law enforcement agencies to adopt any of these measures, and it may be unwise for the Court to do so given its epistemic constraints.<sup>198</sup> Second-order decisions enable the Court to encourage institutional progress without mandating it. The Court can create incentives for reform by offering a safe harbor to agencies that voluntarily adopt best practices after consultation with experts and relevant stakeholders. The Department of Justice (DOJ) facilitates some of these reforms through guidance and even grants, which lower the costs

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193. See James Joseph Fyfe, *Shots Fired: An Examination of New York City Police Firearms Discharges* (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.

194. See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 382–83 (2003).

195. See, e.g., BROWN, *supra* note 49, at 75–95; GOLDSTEIN, *supra* note 52, at 29–30; JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 12–15, 90–93 (1993); Armacost, *supra* note 52, 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).

196. See, e.g., Harmon, *supra* note 3, at 795; Walker, *supra* note 51, at 6–7.

197. Armacost, *supra* note 52, 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.

198. See Friedman, *supra* note 180, 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.”); see also Monaghan, *supra* note 77, at 29 (noting that “a common law court can seldom do more than announce a rule and create a sanction for its violation,” in contrast with the “range of remedies” available to Congress).

of change.<sup>199</sup> And, significantly, second-order decisions can begin to address structural problems in a domain beyond the reach of other institution-focused remedies: federal law enforcement.<sup>200</sup>

The fourth and most intriguing compliance-related feature of second-order regulation is its potential to elicit buy-in from law enforcement officers who are afforded an opportunity to participate in their own self-governance. Buy-in creates an intrinsic desire to defer 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 yields good behavior even when officers know they are not being watched, as is frequently true of the rank and file.

One basis for the buy-in hypothesis is Tom Tyler's 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.<sup>201</sup> 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 grouped under the label “procedural justice.”<sup>202</sup> Officer perceptions of legitimacy and value-congruence in turn are molded by feelings about procedural fairness—fair decision making and interpersonal treatment—including whether the procedures used to formulate rules incorporate objective data and allow for officer input.<sup>203</sup> The theory posits that officers who are treated fairly in this sense identify with the organization, which motivates good organizational citizenship.<sup>204</sup> Tyler concludes that organizational self-regulation may surpass external regulation at motivating rule adherence by the rank and file.<sup>205</sup>

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

199. See Harmon, *supra* note 190, at 53–54 & nn.87, 89; see also Harmon, *supra* note 190, at 36–42, 50–51 (advocating safe harbor from DOJ suits under § 14141 for police departments that adopt preset array of reform measures specified by DOJ).

200. See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 738 & n.337 (2011) (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 *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/police.php> (last visited Jan. 4, 2015).

201. Tyler's subjects were 209 officers from a large federal law enforcement agency and one of the biggest city police departments. Tom R. Tyler et al., *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457, 473 (2007). 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). For a related argument from contract law, see Wendy Netter Epstein, *Public-Private Contracting and the Reciprocity Norm*, 64 AM. U. L. REV. 1 (2014).

202. Tyler et al., *supra* note 201, at 476.

203. *Id.* at 468, 470–71, 476–79.

204. *Id.* at 467, 469.

205. *Id.* at 480.

organizations are ubiquitous in the policing literature.”<sup>206</sup> 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.<sup>207</sup> Although the data remain somewhat scarce, “the limited experience we have with participatory management in law enforcement suggests that . . . giving employees a say in the shaping of their work strongly increases their job satisfaction and their attachment to the organization’s mission.”<sup>208</sup> A well-known case study of the Madison, Wisconsin, Police Department in the 1990s found that participatory management contributed significantly to task identity and job satisfaction.<sup>209</sup> And more recently, a study of the Broken Arrow Police Department in suburban Oklahoma produced similarly encouraging results.<sup>210</sup> There, 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.<sup>211</sup> After eighteen months, the data showed a heightened sense of pride in and commitment to the agency.<sup>212</sup> Officers viewed the leadership team’s policies on performance, discipline, and promotion as significant improvements upon prior policy, and regarded organizational processes as more predictable, transparent, and fair.<sup>213</sup>

The perceptions of fairness and value-congruence the subjects in these 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, but one famous study does suggest a link. In the 1970s, the police

206. Armacost, *supra* note 52, at 541–45 & n.575; see DIXON, *supra* note 185, 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 195, at 187; Simmons, *supra* note 165, at 524.

207. 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 143, at 5; SKOLNICK & FYFE, *supra* note 195, 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).

208. Marks & Sklansky, *supra* note 207, at 5; see FRANK ANECHARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY 202 (1996) (stressing the 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”).

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

210. The Department employs 176 full-time personnel and serves a community of 95,000. Brigitte Steinheider & Todd Wuestewald, *From the Bottom-Up: Sharing Leadership in a Police Agency*, in POLICE REFORM FROM THE BOTTOM UP, *supra* note 143, at 43.

211. *Id.*

212. *Id.* at 49.

213. *Id.* at 47–50.



department in Oakland, California, instituted a nonpunitive peer-review panel that advised officers on problems they encountered during patrol.<sup>214</sup> 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.”<sup>215</sup> Following participation in the peer-review panels, the involvement of certain violence-prone officers in altercations with citizens decreased by half.<sup>216</sup> A derivative project in Dade County, Florida, in the 1980s reduced officer use of force and citizen complaints by 30 to 50 percent.<sup>217</sup>

The link between this research and second-order decision making should be clear, I hope. Second-order decisions take criminal procedure policy choices from the Court and shift them to actors closer to the ground, including those whose conduct they actually regulate. This sort of self-regulation should 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.<sup>218</sup> A fair evaluation and discipline apparatus—which solicits officer input, requires objective information, and minimizes bias—should bolster officer perceptions of fairness, and therefore motivate rule compliance.<sup>219</sup>

The same research casts first-order regulation, which relies more heavily on the threat of external, ex post sanctions, in a relatively unflattering light. To put the point intuitively (if simplistically), the rank and file are likely to regard the Court as “the enemy” in a way they would not view their own departments and local lawmakers.<sup>220</sup> Court decisions emanate from nine politically sheltered

214. See HANS TOCH ET AL., *AGENTS OF CHANGE* (1975).

215. Steinheider & Wuestewald, *supra* note 210, at 41; see also 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).

216. TOCH ET AL., *supra* note 214, at 322–31 (reporting results, though noting that not all were positive and/or statistically significant). The program fell victim to budget cuts, and politics prevented its reinstatement. JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE* 151–52 (1986); Sklansky, *supra* note 215, 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).

217. SKOLNICK & FYFE, *supra* note 195, at 183–84; see also Scott E. Wolfe & Alex R. Piquero, *Organizational Justice and Police Misconduct*, 20 CRIM. JUST. & BEHAV. 1 (2011) (finding, based on survey study, that officers who view their agency's managerial practices as fair and just engage in lower levels of several forms of police misconduct).

218. For models of rank-and-file participation in law enforcement management, see SKLANSKY, *supra* note 201, at 180–86.

219. See Tyler et al., *supra* note 201, at 471.

220. Cf. Richard R. Bennett & Erica L. Schmitt, *The Effect of Work Environment on Levels of Police Cynicism: A Comparative Study*, 5 POLICE Q. 493, 494 (2002) (reporting that rank and file view administrators as relatively less alien than general public is). 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 10–11.

judges in Washington through a process that allows for minimal meaningful participation by, and no interaction with, those who hold the biggest stake in the outcome. Commentators have long reported that the rank and file take umbrage at the Court telling them how to do their jobs.<sup>221</sup> Thus the deterrence that first-order rules generate, Tyler and others have argued, is “especially poor, just as we would expect, because the rules and their accompanying sanctions enjoy little legitimacy in the eyes of the police to whom they are addressed.”<sup>222</sup> “The policing literature,” one scholar summarized, “provides no grounds to believe that externally controlled, punishment-oriented regimes are effective.”<sup>223</sup>

The Court can encourage participatory rulemaking by deferring more heavily to solutions that result from participatory practices.<sup>224</sup> 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, we should still expect compliance to improve relative to the first-order model.<sup>225</sup> Moreover, we should certainly expect the upper-level officials *themselves* to buy in and to regard the rules they write as legitimate. (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.<sup>226</sup> Sanctions “in the

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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 guardianship over the rank and file.

221. 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 164, at 428 (“Police, like everyone else, tend to be resentful of—and to resist—restrictions placed upon them by somebody else.”); McGowan, *supra* note 147, 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”).

222. 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). Interestingly, this insight informed the Court’s strategy in *Brown II* of returning desegregation cases to school boards and district courts, which the Court thought less likely to be seen as interlopers. KLARMAN, *supra* note 135, at 317.

223. DIXON, *supra* note 185, at 309; see *id.* at 299–311; see also Christopher J. Harris & Robert E. Worden, *The Effect of Sanctions on Police Misconduct*, 60 CRIME & DELINQ. 1258 (2014) (finding that officers who received more severe sanctions for misconduct were more likely than nonsanctioned officers to commit additional misconduct).

224. Cf. *Comparative Domestic Constitutionalism*, *supra* note 17, at 2545–47 (describing administrative law doctrines that encourage, but do not require, use of robust agency procedures).

225. See Tyler et al., *supra* note 201, at 470 (observing that use of procedural-justice principles in management need not “involve wide employee participation”); cf. Amsterdam, *supra* note 164, 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.”).

226. See Amsterdam, *supra* note 164, at 428 (“[W]hen police-made rules are not obeyed, they are most likely to be effectively enforced against the disobedient.”); Amsterdam, *supra* note 21, at 786 (observing that the Court “lacks the sort of supervisory power over the practices of the police that is

currency of esteem or reputation” can be “highly motivating,” for example.<sup>227</sup> So can pay reductions, demotions (or lack of promotions), reassignment to less desirable duties, or termination, the ultimate “internal” sanction. Law enforcement agencies, unlike courts, can also tailor sanctions to individual wrongdoers, recalibrating as necessary over time.<sup>228</sup>

Similarly, where legislators rather than law enforcement executives write the conduct rules, it seems reasonable to expect increased use of legislative oversight mechanisms to monitor compliance.<sup>229</sup> Legislative oversight 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.”<sup>230</sup> Unlike courts, legislative investigative bodies can “inform themselves broadly, rely on experts at will, follow trails wherever they may lead, and disregard strict courtroom rules of evidence.”<sup>231</sup> They can also engender “greater police cooperation” than litigation typically can, and can “move forward with relative speed.”<sup>232</sup>

### 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, clearing away some lighter objections before confronting the weightiest ones. Specifically, I consider objections to the second-order model based on the expected cost and complexity of the resulting body (or bodies) of conduct rules, the legitimacy of the lawmaking method, the competency of the Court to adjudge the constitutionality of politically promulgated rules, and the protectiveness of the

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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 49, at 96–131. *Compare* MUIR, JR., *supra* note 207, at 235–57 (portraying sergeants as sovereigns holding many carrots and sticks, but the chief as having only sticks), *with* SKOLNICK & FYFE, *supra* note 195, 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”).

227. Levinson, *supra* note 194, at 383; *see* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358–65 (1997).

228. *See* Levinson, *supra* note 194, at 363–64, 384–85.

229. *See* Cheh, *supra* note 6, at 13.

230. *Id.* 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 (1997), available at <http://www.law.harvard.edu/programs/criminal-justice/fbi.pdf> (describing legislative control and supervision of FBI as model for other nations).

231. Cheh, *supra* note 6, at 9–10.

232. *Id.* at 10; *see* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 654–55 (1997) (calling for “greater oversight” 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”).

rules political policy makers can be expected to write. I also ask whether judicial or legislative inertia doom the project.

### 1. *Cost and Complexity*

One might object, as an initial matter, that second-order decisions will impose heavy transition costs on the myriad political policy makers who will now be required to develop criminal procedure policies themselves rather than rely on rules the Court selects. This may be true but is somewhat shortsighted. Over time, locally tailored policies should create efficiencies that will help recoup transition costs and generate long-term savings.

A related objection maintains that second-order decisions will generate a patchwork of regulations that will be unduly complex and difficult for the Court to oversee. 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.<sup>233</sup> 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 cluster around a few “leading” solutions or, quite possibly, a single solution that represents “best practices” learned over time.<sup>234</sup> Model regulations drafted by public bodies or prominent professional organizations might facilitate this process.<sup>235</sup> And the Court will be assisted in judicial review by the lower courts, which will rapidly become familiar with the regulations in their respective jurisdictions.

### 2. *Legitimacy*

Another objection goes to judicial legitimacy.<sup>236</sup> Second-order decision making might be thought illegitimate for two reasons. First, in focusing on the existence and content of, and compliance with, generalized policies, it substitutes systemic interests for individual ones, in conflict with the

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233. See Klein, *supra* note 82, 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); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 60–61 (1977).

234. Cf. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1435 (1991); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004).

235. See, e.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft 1975).

236. The primary argument would be that second-order decisions are “legally” 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). For a thorough defense of politically reversible “semisubstantive” constitutional doctrines, including some this Article discusses, see Dan T. Coenen, *The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules*, 77 FORDHAM L. REV. 2835 (2009).

conventional view that courts “issu[e] rulings on the cases and controversies properly before [them], and nothing more.”<sup>237</sup> Perhaps, but the actual practice of constitutional criminal adjudication does not match the conventional view. Advancing systemic interests through individual criminal cases is nothing new; individual cases frequently result in rulings designed entirely to benefit the public at large. 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.<sup>238</sup> The Court’s institutional disadvantages may hamstring its *ability* to achieve its systemic goals,<sup>239</sup> but that does not mean the pursuit itself is either novel or illegitimate.

Second, one might object that second-order decisions abdicate responsibility to interpret the Constitution, passing the buck to political policy makers, resulting in a Constitution that means different things in different places.<sup>240</sup> It is, after all, both the “province *and duty*” of the Court to “say what the law is.”<sup>241</sup> The appropriate role of political actors 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 policy makers can and do play a meaningful role in reading the Constitution.<sup>242</sup> 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.<sup>243</sup> Third, we might just as well conclude that second-order decision making is *more* legitimate because it effectuates the “established practice of permitting the States, within the broad bounds of the Constitution, to experiment with

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237. *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).

238. *See, e.g., Herring v. United States*, 555 U.S. 135, 141 (2009); *see also* Laurin, *supra* note 17, 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. Mearns & 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).

239. *See supra* notes 142–74.

240. *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)).

241. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

242. *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); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

243. *See* Monaghan, *supra* note 77, at 24–26.

solutions to difficult questions of policy.”<sup>244</sup> “[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.”<sup>245</sup> 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.’”<sup>246</sup> This is the dynamic second-order decisions generate.

### 3. Competency

One might also think the Court incompetent to determine whether politically generated solutions are adequate to safeguard the constitutional 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.<sup>247</sup> That does not mean, of course, that 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 to keep data on the effects of their politically crafted safeguards, 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.<sup>248</sup>

Perhaps more fundamentally, the judgments this task demands do not differ in kind from those the Court regularly makes in criminal procedure (and

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244. *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 54, at 200–01.

245. *Smith*, 528 U.S. at 275.

246. *Id.* (quoting *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring)) (alteration in original) (citation omitted).

247. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771–92 (2008) (assessing whether statute 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”).

248. 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); 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 has 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).

other constitutional<sup>249</sup>) cases. Defining rights and remedies frequently requires consequentialist analysis about the likely effects of constitutional doctrine on law enforcement behavior.<sup>250</sup> 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.”<sup>251</sup> 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 Nation.<sup>252</sup>

In the end, that adequacy judgments may be difficult for the Court, or are irreducibly empirical, are fair points. These deficiencies, however, are not unique to 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.<sup>253</sup>

#### 4. *Slippage*

Perhaps the gravest normative objection, and the largest potential cost of second-order regulation, is what the agency model calls “slippage.” Slippage here refers to the risk that political policy makers will write loose rules because they do not, in Donald Dripps’s pithy wording, “give a damn about the rights of the accused.”<sup>254</sup> Dripps is hardly the only scholar to make the point,<sup>255</sup> but his

249. 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”).

250. 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 238, at 736–40; Meltzer, *supra* note 191, at 290–92 (showing how immunity doctrines, constitutional privilege against defamation, and exclusionary rule all require such calculations).

251. Amsterdam, *supra* note 164, at 419.

252. 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].

253. 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 51, at 504–06 (analogizing judicial review of police rules to hard look review).

254. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079 (1993). Here, again, the parallel to desegregation is apt—the Court’s second-order approach

account is exemplary. (Dripps's argument focuses on legislatures but would seem to apply as well to law enforcement leaders.) Dripps observes that "legislatures have done little by way of limiting the discretion of police . . . , or requiring the criminal courts to observe procedural safeguards."<sup>256</sup> This is because "an overwhelming preponderance of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods."<sup>257</sup>

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."<sup>258</sup> The beneficiaries of "broad police powers and pro-government trial procedures" include the police, prosecutors, and their powerful bureaucracies, as well as Americans who fear they may one day be victims of crime—"just about everyone in the country."<sup>259</sup> The "intended beneficiaries of criminal procedure rules," in contrast, are largely young men,<sup>260</sup> many of them men of color.

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. The baseline against which the second-order model must be compared—the Court's first-order doctrine—is often shockingly lax itself. Dripps observes as much. For instance, in contrast to *Wade*'s requirement that counsel be present at *post-indictment* lineups, 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.'"<sup>261</sup> And "[e]ven then, a so-called independent identification by the witness in court may be allowed."<sup>262</sup> As the innocence movement has highlighted, these rules have permitted faulty eyewitness testimony to send "many innocent people to

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turned over enforcement of *Brown* to southern school districts, many of which felt neither legally nor morally compelled to vindicate the values the Court had pronounced. See KLARMAN, *supra* note 135, at 314–20.

255. See, e.g., Amsterdam, *supra* note 164, at 378–79; Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723–30 (2005).

256. Dripps, *supra* note 254, at 1079.

257. *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").

258. Dripps, *supra* note 254, at 1081, 1089.

259. *Id.* at 1091, 1092.

260. *Id.* at 1089–90. 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." *Id.* at 1090.

261. *Id.* at 1086 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)); see Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 82–85.

262. Dripps, *supra* note 254, at 1086.



prison.”<sup>263</sup> Dripps shares this example to make a point about “legislative indifference to glaring defects in the criminal process.”<sup>264</sup> 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 policy makers will write is limited.<sup>265</sup> Perhaps this is not surprising—after all, courts are subject to many of the same interest-group pressures as political actors.<sup>266</sup> This is especially true of elected judges.<sup>267</sup>

Indeed, if William Stuntz’s political-economy critique is right, first-order decisions may be hurting defendants as much as helping them.<sup>268</sup> Stuntz argued that the Court’s first-order decisions ally prosecutors 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. Furthermore, 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-order) 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, and toward the less socially productive field of 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.”<sup>269</sup> Second-order decisions, by increasing political buy-in, would alleviate many of the pressures that fuel this dynamic. Stuntz’s account

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263. *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).

264. Dripps, *supra* note 254, at 1086 (emphasis added).

265. See KOMESAR, *supra* note 20, 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.”).

266. 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).

267. See Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 35–36 (2007).

268. Stuntz developed the argument in Stuntz, *supra* note 16, among other places. For a similar position, see Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411 (2002).

269. 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, 398–400 (1978).

has some notable detractors,<sup>270</sup> but the possibility that it is even partially correct suggests that reducing reliance on first-order decisions could generate diffuse and non-obvious benefits.

The head-on response to the slippage 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. Even without the prodding of second-order incentives, political policy makers have done more to protect suspects’ and defendants’ rights than the conventional wisdom holds, and than theory might predict. Examples abound.<sup>271</sup> For instance, regulation of law enforcement interrogation began in the nineteenth century with state statutes banning the “third degree.” New York required that suspects be warned of their rights as early as 1829.<sup>272</sup> By the time *Miranda* was decided, the FBI had been issuing warnings for years.<sup>273</sup> Across the country, police departments in a number of major metropolitan areas had also begun warning suspects of their rights.<sup>274</sup> 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 even greater protection than *Miranda* ended up giving.<sup>275</sup> And notwithstanding *Miranda*, by one count statutes in eleven States and the District of Columbia today require the taping of interrogation sessions.<sup>276</sup>

Congress has also acted to protect the rights of suspects and defendants. Orin Kerr has detailed how the conventional wisdom “overstates the impact of the Fourth Amendment and understates the role of legislative privacy

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270. See, e.g., Steven J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045 (2013) (reviewing STUNTZ, *supra* note 269); John Paul Stevens, *Our “Broken System” of Criminal Justice*, 58 N.Y. REV. OF BOOKS (Nov. 10, 2011) (reviewing STUNTZ, *supra* note 269).

271. In addition to the examples that follow, see Stuntz, *supra* note 16, at 795–96 (explaining from a political economy perspective 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 20, 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”).

272. Stuntz, *supra* note 16, at 801 & nn.119–22 (collecting statutory sources).

273. 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).

274. *Id.* at 1411 & n.265.

275. See *id.* at 1409–11.

276. Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9 (2010), available at <http://jolt.richmond.edu/v16i3/article9.pdf>. Then-State Senator Obama was the driving force behind Illinois’s videotaping law. See Charles Peters, *Judge Him by His Laws*, WASH. POST, Jan. 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/03/AR2008010303303.html>.

protections” against new surveillance tools.<sup>277</sup> “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.”<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup> 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.”<sup>281</sup> And state legislatures have moved when they have perceived Congress as unwilling.<sup>282</sup>

There is more. Before the Court applied the exclusionary rule 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.<sup>283</sup> Eleven years after the Supreme Court blocked most victims of police brutality from pursuing injunctive relief against the police departments that victimized them, Congress passed 42 U.S.C. § 14141, which authorizes the DOJ to seek broad injunctions by proving a pattern of constitutional violations.<sup>284</sup> Following the Court’s decision in *Whren v. United States*,<sup>285</sup> which barred Fourth Amendment claims in racial profiling cases, more than a dozen States passed racial profiling legislation; the DOJ expanded its profiling rules just last year to prohibit federal agents from considering not only race, but also religion, national origin, gender, and sexual orientation in their investigations.<sup>286</sup> 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.<sup>287</sup>

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277. Kerr, *supra* note 19, at 839.

278. *Id.* at 840.

279. *See id.* at 840–47; *see also* *Berger v. New York*, 388 U.S. 41, 45–49 (1967).

280. *See* Kerr, *supra* note 19, at 855–56 & nn.324, 326–29 (collecting statutory sources).

281. Murphy, *supra* note 16, at 535 (emphasis added). *But see* DANIEL J. SOLOVE, NOTHING TO HIDE 165 (2011).

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

283. *Elkins v. United States*, 364 U.S. 206, app. 224–25 tbl.1 (1960); Lain, *supra* note 273, at 1379. Rhode Island enacted its statute after a judge *rejected* the exclusionary rule the year before. Lain, *supra*, at 1379.

284. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified in relevant part at 42 U.S.C. § 14141 (2000)); *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

285. 517 U.S. 806, 810–16 (1996).

286. Stuntz, *supra* note 16, 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. 15, 2014, at A1.

287. *See* *Herrera v. Collins*, 506 U.S. 390 (1993); Stuntz, *supra* note 16, at 799–800 & n.109.

One last example bears mention. In his analysis of legislative incentives, Dripps observed that “legislatures have not taken steps to regulate police [eyewitness] identification procedures.”<sup>288</sup> As the earlier discussion of the political response to *Wade* shows, however, many police departments had.<sup>289</sup> And insofar as Dripps’s analysis was intended to be predictive—recall his identification 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 has continued to be active as well.<sup>290</sup> Although eyewitness-identification reform has a long way to go,<sup>291</sup> the trend is positive and, in my view, 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. With these changes, the risks of experimenting with some form of supervised self-regulation have decreased.<sup>292</sup> Many agencies have learned, too, that treating suspects and defendants fairly can actually enhance rather than hinder their crime-control missions.<sup>293</sup> 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.”<sup>294</sup>

There is a second and independent response to the slippage 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.

288. Dripps, *supra* note 254, at 1086.

289. See *supra* notes 79–82 and accompanying text.

290. See, e.g., MD. CODE ANN. PUB. SAFETY § 3-506 (West 2014) (requiring law enforcement agencies to adopt policies consistent with U.S. DOJ standards); WIS. STAT. § 175.50 (2013) (requiring law enforcement agencies to adopt policies after considering model policies, other jurisdictions’ policies, and certain specified best practices); W. VA. CODE § 62-1E-2 (West 2013) (dictating specified best practices and establishing task force to draft more comprehensive guidelines after considering other recommendations); 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).

291. See POLICE EXEC. RESEARCH FORUM, *supra* note 28, at 46–47 (finding that 77 percent of 600 surveyed agencies reported no written policy for show-ups, 64 percent for photo lineups, and 84 percent for live lineups); Garrett, *supra* note 51 (reporting that many lineup policies fail to incorporate well-known best practices, including those contained in state model policies).

292. See Sklansky, *supra* note 215, at 1212; Samuel Walker, *Racial Minority and Female Employment in Policing: The Implications of “Glacial” Change*, 31 CRIME & DELINQ. 555, 556, 565 (1985).

293. See INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS (2006), available at [http://www.theiacp.org/Portals/0/pdfs/protecting\\_civil\\_rights.pdf](http://www.theiacp.org/Portals/0/pdfs/protecting_civil_rights.pdf)

294. Amsterdam, *supra* note 164, at 421; see DAVIS, *supra* note 144, 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 163, at 497.

What matters is what law enforcement officers *do*, not what the rules *say*. “[P]rotecting defendants’ rights,” in other words, “is quite different from protecting defendants,” and rights protection alone may serve even to legitimize the status quo.<sup>295</sup> We should not regret the loss of paper-tiger rights if they are replaced with rules that, because better obeyed, will actually improve net social realities.<sup>296</sup> In different terms, 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 established by the Court’s first-order decisions.<sup>297</sup>

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 policy makers 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 with second-order regulation (i.e., they make some individuals worse off). The thinking is that, without these doctrines, courts would be reluctant to give rights robust content.<sup>298</sup> 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.<sup>299</sup>

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295. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2191 (2013); see, e.g., Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW 641, 657 (David Kairys ed., 3d ed. 1998) (noting that “[f]ormal rights without practical enforceable content are easily substituted for real benefits”).

296. See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 173 (2012) (“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 CALIF. 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); cf. THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003) (fearing that constitutional rights would amount to mere “parchment barriers”).

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

298. 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. 1 (1990) (harmless error); see also John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (qualified immunity).

299. Indeed, one critique of rights discourse is that it promotes a sort of “isolated individualism” that “converts social problems into matters of individualized, dehistoricized injury and entitlement.” Butler, *supra* note 295, at 2188 (internal quotation marks omitted).

A third and final response: my proposal is not to give political policy makers plenary power over the law of criminal procedure.<sup>300</sup> On the front end, the Court retains interpretive control. It fixes the size of its agents' "discretionary window."<sup>301</sup> Perhaps more important, the Court, like any principal, does not delegate authority and then walk away; it monitors its agents' work. Aided by the lower courts, the Court polices political policy makers' output. It remains empowered (and obliged) to reject politically crafted safeguards that fail sufficiently to protect the Constitution's values. Indeed, it has shown itself willing to do so.<sup>302</sup>

### 5. *Futility*

A final objection might posit that, even if second-order regulation is not harmful, it's futile, because either the Court will not buy in or political policy makers will not play ball if it does.

#### a. *The Court's Incentives*

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"—such as jurisdiction stripping and impeachment—"to punish the Court for politically unpopular decisions."<sup>303</sup> How can a Court vulnerable to politics be expected to catalyze or backstop the political process consistently over time? The best 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 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

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300. Cf. Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 25, 41 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (discussing institutional power-sharing arrangements); David A. Strauss, *Miranda, The Constitution, and Congress*, 99 MICH. L. REV. 958, 974 (2001) (arguing that, in reviewing legislation designed to substitute for judicially prescribed constitutional safeguards, the Court "should acknowledge that Congress may have superior competence to make the institutional judgments that are involved in deciding what regime should govern . . . , while still making sure that the courts play their historic role of protecting the rights of criminal suspects").

301. See Stephenson, *supra* note 150, at 1440.

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

303. 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).

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.<sup>304</sup>

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.”<sup>305</sup> Put differently, second-order decisions narrow the range of issues for decision and permit resolution of cases at a higher level of generality, thus potentially facilitating consensus among “liberal” and “conservative” Justices who disagree about the best way to implement the Constitution.<sup>306</sup>

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 policy makers implement in response to its incentives.<sup>307</sup>

#### *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 emphasis, 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? *Miranda* might be thought to prove the point. Apart from Congress’s effort to overrule the decision, no jurisdiction has attempted to replace *Miranda*’s warnings with alternative safeguards to

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304. 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.”); O’Rourke, *supra* note 145, at 430–33, 443–47.

305. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

306. See Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995) (describing the “familiar phenomenon of a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about particular cases”).

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

protect the right against self-incrimination.<sup>308</sup> Doesn't that show that second-order decisions won't work?

There are several responses, 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.<sup>309</sup> Indeed, we have already seen that several of the Court's second-order decisions have worked, at least to some extent. Policy makers have responded to the Court's invitation by writing rules the courts have then reviewed for constitutional adequacy.

Second, the Court's first-order decisions may have effectively ousted political policy makers 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.<sup>310</sup> This was also William Stuntz's claim. Stuntz believed that the Court's first-order decisions crowd 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.<sup>311</sup> Second-order decisions would not have this effect.

Third, as David Sklansky has argued, the Court's first-order decisions may "let politicians off the hook; once the Court weighs in, legislators can move on to other questions."<sup>312</sup> Again, second-order 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 policy makers 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

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308. See, e.g., Klein, *supra* note 82, 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.

309. See Joseph Ignagni 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 Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340, 1375-77 (2007).

310. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 382-83 (2010) (Alito, J., concurring in judgment); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment).

311. Stuntz, *supra* note 16, at 793, 807-14.

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



democratic perspective.<sup>313</sup> This phenomenon may partially explain *Miranda*. Although *Miranda* was “[w]idely maligned at first,”<sup>314</sup> “precincts across the country” that were giving 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.”<sup>315</sup>

Fourth, second-order decisions change the incentive structure policy makers confront. Political failure to regulate in a world of first-order decisions has little to no consequence; the Supreme Court shoulders the lawmaking 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. An invalid policy will trigger the same remedies. Our experience with *Wade* and *Berger* suggests that these incentives make a difference.

To be sure, as stated above, the exclusionary rule presently provides insufficient general deterrence. But this is largely because its sting is too seldom felt and law enforcement does not internalize all 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.<sup>316</sup> 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 policy makers to promulgate and enforce regulations to control the behavior of the rank and file.<sup>317</sup>

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313. As explained earlier, some default rules attempt to estimate political preferences; we should *hope* such rules stick. *See generally* Elhauge, *Preference-Estimating*, *supra* note 109. But even if a penalty default rule were chosen to *elicit* policy makers’ preferences, Elhauge persuasively argues, 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 109, at 2226–35.

314. Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 501 (1996).

315. Lain, *supra* note 273, at 1418. Giving *Miranda* warnings essentially immunizes all subsequent statements, and many believe that the warnings themselves do not deter confessions at a significant rate. *See, e.g.*, Schulhofer, *supra* note 314, at 541. Indeed, some commentators have argued that *Miranda* helped more than hindered law enforcement in the investigation of crime. *See, e.g.*, Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 744–45 (1992).

316. *See, e.g.*, HOROWITZ, *supra* note 233, at 227–32; Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372–74 (2008). *But see* Slobogin, *supra* note 185, at 393–94.

317. *See* Bar-Gill & Friedman, *supra* note 6, at 1650 (arguing that ex ante prevention model can achieve greater deterrence than ex post model even when backed by same sanctions, like exclusion

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 perks 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? There is reason to hope so. At least in some cases, prosecutors can exert pressure on law enforcement agencies by screening cases for prosecution.<sup>318</sup>

Dripps concedes that incentives like these make a difference. He admits that the legislature may limit the police when "the courts have declared that certain law enforcement techniques may be constitutional if and only if these techniques are subjected to legislative regulations."<sup>319</sup> This closely tracks the concept of second-order regulation. The "classic example," according to Dripps, is the federal wiretap statute.<sup>320</sup> 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."<sup>321</sup> Dripps seems to discount Congress's 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."<sup>322</sup> I, however, am not sure Congress's motivations should matter if the bottom line is good.

Finally, *Miranda*'s failure simply demonstrates that the devil is in the details. Despite its experimentalist rhetoric, *Miranda* created less safe policy-

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of evidence). In this way, "the rights of individual [defendants] functio[n] as levers for prompting systemic criminal justice reforms." Primus, *supra* note 296, 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 190, at 40 & n.28 (describing "secondary political and reputational costs" of exclusion on government leaders, including the "sting of critical popular sentiment").

318. 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 233, at 247 (opining that "prosecutorial screening may be the most effective way of enforcing the *Mapp* rule"); SKOLNICK, *supra* note 221, 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. 749, 755–86 (2003); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 58–84 (2002).

319. Dripps, *supra* note 254, at 1082; see also Amsterdam, *supra* note 164, at 379 ("Under the stimulus or apprehension of constitutional decisions by the courts, legislatures may be moved to act.").

320. Dripps, *supra* note 254, at 1082.

321. *Id.* at 1082, 1083 (footnote omitted).

322. *Id.* at 1082.

making space than it might seem. (Indeed, internal evidence suggests that at least some of the Justices never expected that any alternatives to the warnings would suffice.<sup>323</sup>) 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 silent and to have the assistance of counsel will suffice.<sup>324</sup> In other words, a cautious reading of *Miranda* would seem to require warnings. Videotaping interrogations—thought by many to be an adequate, if not superior, safeguard that would permit courts to scrutinize interrogations for coercive pressures<sup>325</sup>—would appear not to suffice on this reading. Thus understood, *Miranda* doesn’t doom my project, but rather highlights the importance of carefully crafted incentives.

What about a slightly different futility concern—that second-order regulation will devolve into a game of “Whac-a-Mole,” in which political policy makers embroil the Court in a never-ending cycle of policy invalidation and re-promulgation? This dynamic seems fairly unlikely to materialize. Even in countries where legislatures have the power to override judicial constitutional decisions, they rarely do; judicial interpretations usually “stick.”<sup>326</sup> Recrafting and relitigating law enforcement policies is costly. The risk of a bad-faith political response can be mitigated, moreover, by calibrating the adjudicative consequences of policy invalidation, as I discuss below. And if at some point political policy makers 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. *Delegating Effectively*

To minimize the risk of futility, three general principles should guide the Court’s second-order decisions. All three derive fairly easily from the agency model.

First, the Court’s second-order decisions must speak to political policy makers in clear tones.<sup>327</sup> Agents lacking final authority will always be concerned about efforts wasted developing proposals the principal will reject;

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323. See Memorandum from Jim Hale et al. to Earl Warren, *Miranda v. Arizona* (June 10, 1966) (on file with the Library of Congress, Manuscript Division, Papers of Earl Warren, Box 617); Letter from William J. Brennan, Jr. to Earl Warren, *Miranda v. Arizona* at 5 (May 11, 1966) (on file with the Library of Congress, Manuscript Division, Papers of Earl Warren, Box 616).

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

325. 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 (2003).

326. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 43–76 (2008); Emmett Macfarlane, *Dialogue or Compliance? Measuring Legislatures’ Policy Responses to Court Rulings on Rights*, 34 INT’L POL. SCI. REV. 39 (2012).

327. See Tara Mikkilineni, Note, *Constitutional Default Rules and Interbranch Cooperation*, 82 N.Y.U. L. REV. 1403, 1423–25, 1430–31 (2007).

uncertainty about the principal's objectives or instructions exacerbates this concern. *Miranda*'s failure likely stems in part from its muddled message. The Court's opinion creates some 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 did it aim more modestly to ensure that coerced confessions would not be admitted in court? A requirement to videotape all interrogations 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."<sup>328</sup> *Miranda* contrasts in this sense with more successful second-order decisions like *Berger* and *Griffin*, which guided political policy makers more clearly.

Second, the Court must promise (and deliver) meaningful deference to policy makers' solutions.<sup>329</sup> Increasing an agent's real authority, as deference does, promotes initiative.<sup>330</sup> Skepticism about whether the Court's default rules are genuinely defeasible (or how much they may be altered) is understandable if the Court's default solutions tend to calcify into constitutional commands.<sup>331</sup> The Court may have struck the right balance in the *Bivens* cases by assuring it would accept alternative solutions that were "equally effective *in the view of Congress*," even if those solutions do not afford plaintiffs "complete relief."<sup>332</sup> Even so, it was certainly correct in *Dickerson* to reject Congress's putative response. Deference has its limits.

Third, the Court must create a safe environment in which policy makers 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.<sup>333</sup> Political actors will understandably hesitate to implement new procedures for fear they will be deemed inadequate when challenged in court, potentially casting doubt on every conviction to which the procedures contributed. This dilemma faced any jurisdiction that contemplated replacing the *Miranda* warnings, for example.

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328. Klein, *supra* note 82, at 1070.

329. See Mikkilineni, *supra* note 327, at 1430–32.

330. Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 24 (1997).

331. See Klein, *supra* note 82, at 1070; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1692–1707 (2005).

332. *Bush v. Lucas*, 462 U.S. 367, 376, 388 (1983) (emphasis added) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)) (internal quotation mark omitted); see Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 752 (1992).

333. See Posner, *supra* note 2, at 231.

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.<sup>334</sup>

### C. *When Might the Benefits Outweigh the Costs?*

Armed with a sense of the potential benefits and costs of second-order regulation, the next question is when the former will likely outweigh the latter. 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. Unfortunately, we cannot decide in the abstract precisely how much second-order regulation is appropriate. The choice between the regulatory approaches “depends on an array of pragmatic considerations and on judgments about the capacities of various institutional actors.”<sup>335</sup>

Nevertheless, I will venture a few general principles. First, there are certain domains in which we might think political policy makers’ institutional advantages especially great, increasing the expected benefits from a second-order approach. Privacy regulation of new and evolving technologies, for example, demands specialized expertise implemented through prompt and flexible law; this may advantage political actors relative to the Court.<sup>336</sup> The point holds even when political actors’ institutional advantages are slight, if the error costs of a poorly crafted rule are high—for instance, if a bad rule would gravely threaten officer or public safety.

Second, second-order regulation may be worthwhile when little expert consensus exists about optimal constitutional safeguards or when different safeguards are likely to be optimal in different places. Police interrogation is a good example. In a busy, dense jurisdiction like Manhattan, requiring a defense attorney to be present for all questioning might create little burden; the distance between the public defender’s office and the stationhouse should not be too great, and the public defender’s staff may even be big enough to assign an attorney to the stationhouse at all times. The same rule could create huge hassles in Wyoming, which is more spread out and sparsely populated. Videotaping interrogations might work better there.

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334. See Dorf & Sabel, *supra* note 69, at 459–64; Klein, *supra* note 82, at 1069.

335. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 30 (1996) (discussing choice between judicial minimalism and maximalism).

336. See Kerr, *supra* note 19, at 867–82. *But see* Solove, *supra* note 19.

Third, there may be scenarios in which the Court perceives some political policy makers to be better agents than others, making second-order regulation preferable with respect to the former group but not the latter. If federal law enforcement is markedly more professional than its local counterparts, or has shown a unique initiative to pursue innovative reforms, for example, we might want second-order regulation in the federal context only.

Fourth, if judicial remedies are especially inadequate or problematic, second-order regulation may be preferable. If the only promising solution to recurring misconduct is a structural reform the Court is unwilling to impose directly, for example,<sup>337</sup> a second-order decision creating incentives for reform may work better than either first-order rules or no rules at all.

Finally, the case for second-order regulation is strongest when the Court faces an issue that is currently receiving democratic attention. Clear signs that political policy makers are willing to regulate invite the Court to guide their efforts and catalyze other policy makers. *Berger* illustrates this dynamic. The Court knew when it considered *Berger* that Congress was developing wiretapping regulations and anticipated that its decision would influence the legislation, given that Congress wished to preserve a crucial law enforcement tool.<sup>338</sup>

At the other extreme, second-order decisions should be avoided where democracy functions especially poorly.<sup>339</sup> This might be in cases that involve disfavored rights or persons, such as defendants in child pornography cases. When political policy makers are dead-set against reform, meaningful experimentation and implementation of adequate solutions is unlikely. Instead we might fear sharply underprotective rules and rule evasion. The jurisdictions that resisted *Brown*'s desegregation mandate are a good example. The Court must be willing to step in when political policy makers fail. Note, however, that some jurisdictions complied with *Brown* in good faith—political considerations are not uniform across space or time.<sup>340</sup>

We can generalize a bit more by picturing the criminal justice system as a giant funnel, as 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.<sup>341</sup> “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

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337. See *supra* notes 195–200 and accompanying text.

338. See, e.g., *Berger v. New York*, 388 U.S. 41, 112 (White, J., dissenting); Kerr, *supra* note 19, at 839–50.

339. Cf. Sunstein, *supra* note 335, at 30–33.

340. Compare sources cited *supra* note 134, with sources cited *supra* note 135; see also Sklansky, *supra* note 215, at 1240–41 (discussing how police culture has changed in ways that may reopen doors previously thought closed to reform).

341. Stuntz, *supra* note 16, at 782.

million more charged with misdemeanors.”<sup>342</sup> 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.”<sup>343</sup> Our confidence in the second-order strategy should generally 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.

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Given the complex of potential benefits and costs of second-order regulation, there is room for reasonable disagreement over which approach better suits a particular case or legal issue. What seems less reasonable, however, is the notion that all will be the same regardless of which model the Court selects. If I am right about this, then I have proven my descriptive case and established, at the very least, that the choice between first- and second-order regulation is a meaningful one deserving of scholarly attention.

### III. IMPLEMENTATION AND EXTENSION

Before concluding, I wish to sketch out briefly how second-order regulation will work in practice. In Part III.A, I show how courts might adjudicate constitutional claims in individual criminal cases. In Part III.B, I reimagine some first-order law in the second-order model. Finally, in Part III.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 conduct. These motions will present several scenarios involving the validity of, and compliance with, 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.<sup>344</sup> If he succeeds, the policy will be invalidated prospectively and a constitutional violation found in the present case.<sup>345</sup> If not, there will be no constitutional violation.<sup>346</sup>

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342. *Id.*

343. *Id.* at 783.

344. See Herman Goldstein, *Trial Judges and the Police: Their Relationships in the Administration of Criminal Justice*, 14 CRIME & DELINQ. 14, 24 (1968) (urging judges to “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”).

345. 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

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 policy makers pay for the policy-making space the Court affords. But equating policy violations with constitutional violations may actually work against the project's purposes by deterring policy makers from writing detailed rules—the more rules they create, the more potential constitutional violations that can trigger exclusion or reversal.<sup>347</sup> 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 policy makers 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<sup>348</sup> and severity of the violation<sup>349</sup> should inform the analysis.<sup>350</sup> And the law enforcement response to the violation should be

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reasonable reliance on statute subsequently declared unconstitutional). This exception 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 51, at 495–98.

346. See Solove, *supra* note 19, at 775 (arguing that, “[i]f law enforcement officials follow a statutory provision that departs from regular Fourth Amendment procedures” but “satisf[ies] the basic principles of the Fourth Amendment,” “then courts should conclude that the search was valid”).

347. See *United States v. Caceres*, 440 U.S. 741, 755–56 (1979).

348. 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 51, at 509.

349. Weighing the severity of the violation roughly tracks the distinction the Court drew in *Caceres* between violations of regulations compelled by the Constitution, which trigger exclusion, and violations of regulations not so compelled, which do not. See 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, 160.7, 290.2 (Proposed Official Draft 1975) (applying exclusionary rule only to “substantial” code violations).

350. For general discussion, see HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 122–24 (1977); *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).



relevant to whether the exclusionary rule applies.<sup>351</sup> 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 exclusion.<sup>352</sup>

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 policy makers 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 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 uncertainty is a virtue, not a vice. If line agents could determine *ex ante* which policy violations would lead to constitutional violations, they might 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.<sup>353</sup>

#### B. Second-Order Alternatives to Some First-Order Doctrines

I argued above that second-order decisions will be possible in most cases concerning law enforcement and desirable in at least some. Some concrete examples may at this point be overdue. In the Fourth Amendment context, 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 1970s advocated police rulemaking to address the entire gamut of Fourth Amendment issues: the decision to arrest, to use particular methods of surveillance, to enter a home, to order crowds to disperse, to use force, to seize

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351. *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).

352. The chronology of criminal adjudication will likely necessitate a rule requiring defendants to give early notice of an intention to allege a policy violation. *Cf., e.g.*, FED. R. CRIM. P. 12.1 (requiring notice of alibi defense).

353. 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).

property, and so on.<sup>354</sup> The American Law Institute, along with several foreign countries, has shown how this can be done.<sup>355</sup>

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, syllogized the point: "[a]rbitrary 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."<sup>356</sup>

The second-order model may also provide the best way to understand Justice Alito's four-Justice concurrence in *United States v. Jones*,<sup>357</sup> 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."<sup>358</sup> Within the conventional paradigm, this statement is jarring—why say a legislative solution may be best and then constitutionalize the issue, taking it out of legislative hands?<sup>359</sup> The answer, I have suggested, is that constitutional law need not elbow legislators out. It can impose interim first-order standards and encourage political policy making that might render judicial regulation unnecessary going forward.<sup>360</sup>

354. See, e.g., 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 1-4.3 (2d. ed. supp. 1986); DAVIS, *supra* note 144, at 80–96; NAT'L ADVISORY COMM'N ON CRIM. JUSTICE STANDARDS & GOALS, POLICE 21–28 (1973); CHALLENGE OF CRIME, *supra* note 252, at 103–06; TASK FORCE REPORT, *supra* note 206, at 18–21; Amsterdam, *supra* note 164; Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500 (1971); Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); McGowan, *supra* note 147.

355. 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)); *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 51, at 33–37.

356. Amsterdam, *supra* note 164, at 417.

357. 132 S. Ct. 945 (2012).

358. *Id.* at 964 (Alito, J., concurring in judgment).

359. See, e.g., Lior J. Strahilevitz, *Can the Police Keep Up with Jones?*, CHI. TRIB., Jan. 27, 2012, [http://articles.chicagotribune.com/2012-01-27/opinion/ct-perspec-0127-privacy-20120127\\_1\\_facial-recognition-gps-device-cameras](http://articles.chicagotribune.com/2012-01-27/opinion/ct-perspec-0127-privacy-20120127_1_facial-recognition-gps-device-cameras).

360. Indeed, in a subsequent case, Justice Alito joined the Court's constitutional holding, yet said that he "would reconsider the question presented . . . if either Congress or state legislatures, after

A second-order approach could also help reframe the constitutional law of racial profiling. In *Whren v. United States*,<sup>361</sup> the Court foreclosed Fourth Amendment claims grounded in the allegedly discriminatory motives of law enforcement officers; the only question under *Whren* is whether officers had probable cause to justify a stop (regardless of their subjective motivation).<sup>362</sup> 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.<sup>363</sup> Moreover, evidence that officers deviated from agency policy, as the officers in *Whren* allegedly did, should tend to establish a constitutional violation.<sup>364</sup>

In the context of pre-indictment lineups, the Court's first-order conduct rules filter out only the most egregious identification procedures—those that create “a very substantial likelihood of irreparable misidentification.”<sup>365</sup> Even those procedures are not strictly prohibited—evidence obtained pursuant to such procedures may still be admitted if other factors, extrinsic to the identification procedure, indicate that the evidence is reliable.<sup>366</sup> 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. Claims arising out of non-reforming 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.

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assessing the legitimate needs of law enforcement and the privacy interests of [individuals], enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.” *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring in part and concurring in judgment).

361. 517 U.S. 806 (1996).

362. *See id.* at 813–14.

363. As noted previously, some political policy makers took steps to address racial profiling even in the absence of Court-created incentives. *See supra* notes 285–86 and accompanying text; *see also* Klein, *supra* note 82, at 1059 & n.137 (collecting federal materials).

364. *See Whren*, 517 U.S. at 815; LaFave, *supra* note 51, at 490–91.

365. *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (internal quotation marks omitted).

366. *See* Garrett, *supra* note 261, at 79–88.

Finally, the entire *Miranda* doctrine might be jettisoned in a jurisdiction adopting a substitute like videotaping, questioning by a magistrate,<sup>367</sup> an attorney in the interrogation room,<sup>368</sup> or some combination of the above.<sup>369</sup>

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 is easy to imagine a first-order approach going badly. Congress has imposed some restrictions on access to and dissemination of the telephone metadata the government collects, but there is reason to think the restrictions are insufficient and often disobeyed.<sup>370</sup> 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. That the controversy is receiving sustained political attention somewhat increases the likelihood of achieving this goal.

### C. Beyond the Supreme Court

My focus on the Supreme Court is not meant to foreclose the possibility of second-order regulation by other institutional actors. It reflects instead the Court's centrality within the regulatory system. Legislatures and state courts, to be certain, can also regulate law enforcement by providing incentives rather than imposing conduct rules.

Wisconsin's reform of eyewitness-identification law, which involved all three government branches, is a good example of second-order regulation originating outside the Court.<sup>371</sup> In March of 2005, the Wisconsin Department

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

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

369. See Klein, *supra* note 82, at 1058 (suggesting "[v]ideotaping plus a list of unacceptable police tactics").

370. For an overview, see *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). For a conflicting view, see *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013).

371. For a useful discussion, see Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645 (2006). There are other examples, including outside of policing. The New Jersey Supreme Court 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. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1031–32 (2005); see also Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 688–89 & nn.61–64 (2014) (collecting state-court decisions approving jury instructions that caution jurors about unreliable eyewitness identifications and unrecorded interrogations, which should tend to encourage reform but do not require it). Congress, too, has occasionally enacted second-order-style regulation. See, e.g., KENNETH S. ABRAHAM, *DISTRIBUTING RISK* 37 (1986) (describing how the McCarran-Ferguson Act made federal antitrust law applicable to the insurance industry only to the extent that States failed to regulate, which spurred all States to action); Larry Yackle, *The New Habeas*

of Justice distributed to local law enforcement agencies a Model Policy and Procedure for Eyewitness Identification.<sup>372</sup> 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 eyewitnesses, and assessments of confidence immediately after identifications.”<sup>373</sup> 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.<sup>374</sup> 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.”<sup>375</sup>

The final piece, and the cornerstone, was legislation that required each police agency to adopt a written policy for eyewitness identifications.<sup>376</sup> Instead of dictating policy content, the statute requires that policies “be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.”<sup>377</sup> 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.”<sup>378</sup> Finally, the legislation requires biennial review of agency procedures, encouraging incorporation of evolving best practices.<sup>379</sup>

#### 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 some. 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. The rules, moreover, reflect an

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*Corpus in Death Penalty Cases*, 63 AM. U. L. REV. 1791 (2014) (discussing how Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 creates incentives for States to provide adequate counsel in state postconviction proceedings by offering expedited federal review in exchange).

372. WIS. DEP’T OF JUSTICE, MODEL POLICY & PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005), available at <http://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf>.

373. *Id.* at 1–6.

374. *State v. Dubose*, 699 N.W.2d 582, 595 ¶ 36 (Wis. 2005).

375. Kruse, *supra* note 371, at 689.

376. 2005 Wis. Act. 60, § 17 (Dec. 16, 2005) (codified at WIS. STAT. § 175.50(2) (2014)).

377. WIS. STAT. § 175.50(2) (2014).

378. *Id.* § 175.50(4), (5).

379. *Id.* § 175.50(3).

approach to regulation that is neither constitutionally nor logically necessary, but is instead the product of a choice the Court has made repeatedly but mostly unwittingly. A choice this significant should be deliberate, informed by careful consideration of the available alternatives. Second-order regulation promotes 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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