CRITICAL LEGAL STUDIES AND THE POLICE

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Constitutional police regulation is a complex tangle of substantive rights, remedies, and procedural rules. Together, they appear to scaffold a cohesive system of police restraint. Legal scholars tend to focus criticism on specific rules, impelled by faith that the system can be made to serve its core purpose: protecting civilians against police overreach and abuse. Drawing on critical legal studies, this Article contends that constitutional police regulation is incapable of realizing its putative purpose. Constitutional police regulation frames policing as a series of isolated, individual police-civilian encounters. This is compounded by the unpredictable interpretive interplay between substantive, remedial, and procedural rules. That interplay generates systemic indeterminacy.

This Article offers a sociolegal account for why constitutional police regulation has developed as it has. Both courts and police derive legitimacy from the broadly shared perception that the former supervise the latter. The notion that there is a criminal justice system assumes a legal tether connecting the street to the courtroom. The tether is mythological. Constitutional police regulation symbolically sustains the appearance of judicial control over the police. That appearance mediates and disguises the chasm that separates the police from the courtroom. The descriptive account here supports calls for state and local legislatures to remake the police.

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INTRODUCTION

We speak of constitutional police regulation in terms of volume and vigor.[1] Have all the gaps been filled? Is the law that exists sufficiently

[1] I use the expression "constitutional police regulation" as a shorthand for the substantive constitutional principles like the Fourth and Fifth Amendments that apply to the police along

forceful? American policing's endemic racism and brutality suggest that the answer to both questions is "no." There are lots of examples, but to name just a few: the Supreme Court has refused to regulate racial bias in police stops,[2] refused to make police agencies pay for individual officers' abuses,[3] and expanded safety valves like qualified immunity to forgive officers' constitutional violations.[4] Each of these legal issues has generated its own literature replete with reform proposals.[5]

Courts and commentators tend to assume that the substantive, remedial, and procedural rules that apply to the police are more than the sum of their parts, capable of functioning as a regulatory whole.[6] By this view, if all the pieces worked properly, individuals would have effective redress for police abuse. This is not so much a demonstrable claim as an article of faith that is, in part, supported by the law's sprawl[7]: courts are able to review police misconduct across a range of civil and

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with the constellation of remedial and procedural rules that enable and limit complainants' ability to challenge police violations. "Constitutional police regulation," in other words, encompasses the subject matter studied by both criminal procedure scholars and constitutional torts scholars. These laws do not represent the sum of all law that governs the police, but they are the most salient feature of legal commentary about the police. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012) (critiquing its salience); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2471–72 (1996) (characterizing substantive constitutional criminal procedure rights as "conduct rules" for police).

2 *See* Whren v. United States, 517 U.S. 806, 818 (1996).

3 *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989).

4 *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

5 Recent debates about qualified immunity are an example. *See* Letter from Law Professors on Holding Police Accountable for Civil Rights Violations to Hon. Nancy Pelosi, Speaker of the House, Hon. Kevin McCarthy, Republican Leader, Hon. Mitch McConnell, Majority Leader & Hon. Charles Schumer, Minority Leader (July 2, 2020) [hereinafter Law Professors' Letter], https://www.scribd.com/document/467739324/Law-Professors-Letter-Calling-on-Congress-to-Hold-Police-Accountable#from_embed [https://perma.cc/WG93-KTTK]; *see also* Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES (Mar. 8, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/SWM7-2Z6C].

6 Courts and commentators make this assumption. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) (noting existence and interplay of different remedies to effect constitutional constraint on government); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1528 (2018) (detailing "collapse" of what is assumed to have been "an overarching and integrated system of remedies that is adequate to deter constitutional violations"); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (suggesting that the point of constitutional rights is "to function as operational limits on government" and that "an adequate structure of enforcement" is required to that end (emphasis omitted)).

7 *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 570 (1983) (critiquing the tendency in conventional legal thinking to impute unitary and transcendent coherence to laws).

criminal contexts,[8] with specific claims penetrating deeply into the granular details of police-civilian encounters.[9] Civil claimants can obtain both retrospective and prospective relief.[10] Guilty criminal defendants can even "get out of jail for free" upon showing the police committed a constitutional blunder.[11]

Commentators note that the parts sometimes work against one another. For example, ostensibly robust substantive rights might be undercut by restrictive procedural and remedial rules, like qualified immunity.[12] Eliminating the procedural and remedial restrictions would seem like an easy enough fix—just another discrete legal problem that, if solved, would free the underlying rights to do justice.[13]

But it is not so simple. An example from constitutional criminal procedure's early history suggests why. Soon after the liberal Warren Court made the exclusionary rule applicable to state criminal cases in 1961, the Court decided that the rule would not apply retroactively.[14] The Court thus allowed countless convictions based on illegally seized evidence to stand.[15] The two moves were hermeneutically tied: the Court's expansive reading of the exclusionary rule depended on the Justices' assumption that the rule's most serious consequences for existing convictions could be procedurally neutralized.[16] The foundational, progressive moment in constitutional police regulation was enabled by (and thus irreducibly linked to) a regressive countermoment.[17] There is a parable here about constitutional police regulation, if not law more generally.

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8 *See infra* Sections I.B–I.C.

9 *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 9 (2013) (police approaching front door with drug dog violated Fourth Amendment); Bond v. United States, 529 U.S. 334, 339 (2000) (police's prodding luggage violated Fourth Amendment); Arizona v. Hicks, 480 U.S. 321, 324–25 (1987) (police's handling of stereo violated Fourth Amendment).

10 *See infra* Section I.B.2.

11 Exclusion of the unconstitutional evidence is the remedy in criminal cases. *See* Brown v. Illinois, 422 U.S. 590, 603–05 (1975).

12 *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (noting that scope of constitutional right's protection depends on remedy); Steiker, *supra* note 1, at 2470.

13 *See infra* Section I.B.2.a.

14 *See* Linkletter v. Walker, 381 U.S. 618 (1965) (holding that state habeas petitioner did not receive benefit of *Mapp v. Ohio*, 367 U.S. 643 (1961)).

15 *See id.*

16 *See id.*; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738–39 (1991) (noting the connection between *Mapp* and *Linkletter*).

17 *See* Steiker, *supra* note 1, at 2470.

Drawing on critical legal studies (cls),[18] this Article argues that constitutional police regulation is incapable of performing its putative function of restraining the police. cls' adherents destabilized postwar orthodoxies in American legal thinking by, among other things, questioning whether courts could apolitically generate determinate "right answers" to legal questions.[19] cls did not advance a methodology so much as a series of critical stances. Some of the more salient stances are mobilized here to critique constitutional police regulation.

First, cls focused on the ideological frames that structure legal interpretation.[20] Traditionally, law was thought to be deduced logically and then applied to inert facts.[21] But cls contended that conscious and unconscious "interpretive frames" make some facts appear amenable to legal resolution and not others.[22] Framing creates rigid, often unrecognized forces that simultaneously enable and constrain legal interpretation.[23] Constitutional police regulation, for example, has framed the problem of policing in individualistic terms, training lawyers' and courts' attention on isolated officer-civilian encounters. This framing obfuscates policing's institutional determinants and harms.

Second, and perhaps most famously, cls advanced an indeterminacy thesis.[24] Contrary to the traditional idea that there are correct answers to legal questions, cls posited radical open-endedness.[25] American legal practice depends on the battle between principle and counterprinciple: rules often have exceptions, arguments always prompt counterarguments, and so on. The traditionalist imagines these battles, in the aggregate if not always individually, arcing toward legal rectitude. Not so according to cls.

This Article argues that systemic indeterminacy is endemic to the complex skein of rights, remedies, and procedural rules that constitute constitutional police regulation.[26] These rules shape each other in ways that are not obvious or predictable. The Warren Court example above

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18 I use its adherents' labeling convention. *See* Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1520–23 (1991) (relating historical origins of cls in American legal academy).

19 *See id.* at 1524.

20 *See infra* notes 65–73 and accompanying text.

21 *See infra* notes 65–73 and accompanying text.

22 *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 594–98 (1981) (noting the operation of conscious and unconscious interpretive frames in shaping how legal actors perceive issues in criminal law).

23 *See id.*

24 *See infra* notes 74–78 and accompanying text.

25 *See infra* notes 74–78 and accompanying text.

26 *See infra* Section I.B.2.

is illustrative. Devising remedial and procedural rules to curtail substantive rights' impact may ironically enable sweeping articulation of rights. Correspondingly, eliminating remedial and procedural restrictions may induce courts to read substantive rights restrictively. The net protection afforded the public from police abuse is thus contingent and uncertain.

cls noted that framing and systemic indeterminacy serve existing power relations.[27] This holds true for constitutional police regulation.[28] As suggested by the Warren Court example, these features of constitutional police regulation cannot be satisfactorily explained by courts' political leanings as customarily suggested in legal scholarship.[29] cls, however, did not proffer a sociolegal account for why courts reaffirm power relations in the name of checking them.[30] This Article develops such an account.

Constitutional police regulation has evolved not so much to protect the powerless as to mediate the contradictions that define courts' relationship to the police. Courts' and police's legitimacy depends on the appearance that there is a criminal justice system in which police exercise legal prerogatives subject to judicial review.[31] But courts exercise only episodic review over isolated instances of officer behavior. More significantly, courts have little bureaucratic control over police, nor do courts and police share a professional ethos.[32]

Drawing on sociologist Pierre Bourdieu's theories of communication and power,[33] this Article contends that courts and police inhabit distinct and separate "fields." A "field" describes groups of people that are hierarchically organized and who share a discourse for conceptualizing problems.[34] Over time, fields come to appear autonomous from the social, political, and economic structures that

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27 *See infra* notes 79–82 and accompanying text.

28 *See infra* Section I.B.3.

29 *See* Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3–4 (2010) (describing standard narrative).

30 *See* Tushnet, *supra* note 18, at 1526–27.

31 *See* Nirej Sekhon, Essay, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1737–38 (2019).

32 *See* John Van Maanen, *Working the Street: A Developmental View of Police Behavior* 45–48, 50–52 (M.I.T., Working Paper No. 681-73, 1973); *see also* Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55, 115–16 (2010).

33 *See* PIERRE BOURDIEU, LANGUAGE & SYMBOLIC POWER 38–39 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., Harvard Univ. Press 1991) (1982).

34 *See* John B. Thompson, *Editor's Introduction* to BOURDIEU, *supra* note 33, at 1, 14–16.

created them.[35] Bourdieu flagged the "juridical field" as a significant example.[36] It has a rigidly hierarchical division of labor and entrenches "durable dispositions" through specialized education and ongoing socialization in practice.[37]

Constitutional police regulation casts the police as if they were part of the juridical field or at least continuous with it. For example, lawyers and judges speak of officers *having* individualized suspicion for a seizure or search.[38] This rhetorical formulation posits law as contemporaneously shaping officers' engagement with street activity.[39] But this is descriptively inaccurate.

Police operate in a field all their own. Policing is intuitive, situationally driven work for which there is little formal training or direct supervision.[40] Police typically carry out their work in accordance with occupational norms that arise among officers.[41] For example, policing's occupational norms encourage officers to focus on racial cues of suspiciousness that would be unseemly, if not outright rejected, in the juridical field.[42] Similarly, police norms favor verbal and physical harshness to control street encounters.[43] These control-oriented attitudes are not moored in law and are often inconsistent with it.[44]

The chasm separating the juridical field from the police field threatens courts' and police's legitimacy. Both depend on the

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35 *See* Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 5 (2018) (describing operation of juridical field).

36 *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 814, 824, 838 (1987) ("[Juridical power creates] a chain of legitimation that removes . . . acts from the category of arbitrary violence." (emphasis omitted)); *see also* Richard Terdiman, *Translator's Introduction* to Bourdieu, *supra*, at 805, 807 (noting connection between juridical field and state legitimacy in Bourdieu's account).

37 *See* PIERRE BOURDIEU, THE LOGIC OF PRACTICE 58 (Richard Nice trans., Stanford Univ. Press 1990) (1980).

38 *See, e.g.*, United States v. Knights, 534 U.S. 112, 121 (2001) (noting different degrees of individualized suspicion required for different kinds of searches).

39 *See* Sekhon, *supra* note 31, at 1727–29.

40 *See, e.g.*, MICHAEL K. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 91, 135–36, 238 (1981) (describing nature of patrol work and contradictory relation to supervision); EGON BITTNER, NAT'L INST. OF MENTAL HEALTH, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE ROLE MODELS 46 (1970) (describing patrol work).

41 *See* PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT 25–27 (2008) (describing personal experience as Baltimore police officer); PETER K. MANNING, POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING 110 (1977); BROWN, *supra* note 40, at 137–38; BITTNER, *supra* note 40, at 11–12 (explaining that police rely on rough heuristics rather than formal law).

42 *See infra* Section II.C.1.

43 *See infra* Section II.C.1.

44 *See infra* Section II.C.1.

appearance of law binding them in a coordinated and limited exercise of the State's coercive power. Constitutional police regulation helps protect both institutions' symbolic capital by sustaining that appearance.[45]

Constitutional police regulation has developed weak signaling devices that buffer the police against negative judicial results. In the other direction, police typically construct a linearized, law-focused narrative justifying an encounter in police reports. These "sensemaking" exercises convert the jumbled, impressionistic chaos of the street into a linear, juridically palatable narrative.[46] Police report writing conventions suggest that law is less an organizing principle for street encounters than a narrative resource for reconstructing those encounters.

The idea that police are law bound and judicially supervised reflects our normative ideals, not our current reality. This Article is ultimately a call for legislative remaking of police in accordance with our normative ideals. State and local legislatures in the United States have not systematically considered the police function or tried to rationally calibrate it to specific public ends. This Article joins recent calls for legislatures to take this task seriously.[47]

The Article proceeds in three Parts. Part I draws on cls to suggest that constitutional police regulation is foundationally incapable of restraining the police as it is supposed to.[48] Part II adds to the growing body of legal scholarship that offers a sociologically grounded analysis of American policing.[49] It explains how constitutional police regulation serves a symbolic and mediative role that legitimates both courts and

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45 *See* Bourdieu, *supra* note 36, at 824 ("[J]udges introduce the changes and innovations which are indispensable for the survival of the [juridical field].").

46 *See* KARL E. WEICK, SENSEMAKING IN ORGANIZATIONS 13–14 (1995) (defining "sensemaking" and distinguishing from "interpretation").

47 A proposal along these lines had some momentum in Minneapolis following protests over George Floyd's death. *See* Liz Navratil, *Minneapolis Charter Commission Holds Hearing on Its Police Proposal*, STARTRIBUNE (July 28, 2020, 9:35 AM), https://www.startribune.com/minneapolis-charter-commission-holds-hearing-on-its-police-proposal/571926212 [https://perma.cc/9EV9-8VL6]; Krithika Varagur, *After George Floyd, Who Will Police Minneapolis?*, N.Y. REV. (July 17, 2020), https://www.nybooks.com/daily/2020/07/17/after-george-floyd-who-will-police-minneapolis [https://perma.cc/MPY3-6EFK].

48 I use the expressions "civil rights law" and "constitutional police regulation" interchangeably to describe the skein of substantive constitutional rights, remedies, and procedures that apply to the police.

49 *See, e.g.*, Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 945–54 (2021) (describing mismatch between conventional understanding of police and sociological reality); Harmon, *supra* note 1, at 792 (contending that goal of reform should be "harm-efficient" policing); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CALIF. L. REV. 617, 624–29 (2006) (describing municipal policing's harms in poor, minority neighborhoods).

police. Part III sketches the structural reform agenda that flows from the analysis.

I. CLS AND CONSTITUTIONAL POLICE REGULATION

Drawing on cls, this Part shows how constitutional police regulation legitimizes police by creating the appearance that they are law bound and subject to judicial supervision. The volumes of judicial opinions and legal commentary about the police are parsed into familiar legal categories: Fourth Amendment, criminal procedure remedies, civil remedies, jurisdictional bars, and so on. The panoply of legal principles (and counterprinciples) falsely suggests that the police are contained by a complex web of legal rules.

Ironically, legal complexity can be self-negating. Courts may be more inclined to announce robust substantive rights if confident that remedial or procedural rules will limit those rights' disruptive effects. Eliminating those remedial and procedural rules might lead courts to interpret the substantive rights more restrictively. Recent realist scholarship has noted this dilemma.[50] But like legal realists of the early twentieth century,[51] contemporary scholars shy away from the most troubling logical conclusions of realist analysis: constitutional police regulation's indeterminacy is not a correctable defect. It is structural and works to the police's advantage.

A. *cls*

Under the banner of cls, law scholars followed legal realism to its logical conclusions.[52] In the early twentieth century, legal realism offered a damning critique of nineteenth-century formalism.[53] Formalism's central precept was that law is analytically autonomous,

50 *See infra* Section I.B.2.

51 *See* Gary Peller, Neutral Principles *in the 1950's*, 21 U. MICH. J.L. REFORM 561, 577–81 (1988) (describing legal realists' reluctance to press their project in the face of criticism for moral relativism).

52 *See* David Kennedy & William W. Fisher III, *Introduction* to THE CANON OF AMERICAN LEGAL THOUGHT 1, 8–9 (David Kennedy & William W. Fisher III eds., 2006) (summarizing foundational writings); Tushnet, *supra* note 18, at 1523 (describing early proponents of cls); *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 [hereinafter Kennedy, *Form and Substance*], 1724 (1976) (noting works building upon longstanding critiques of law's autonomy).

53 *See* Kennedy & Fisher, *supra* note 52, at 8–10.

allowing courts to deduce a singular correct result in a given case.[54] Realists argued that formalist "deduction" was rhetorical posturing that smacked of "transcendental nonsense."[55] Judicial decision-making, realists contended, was a pragmatic exercise of providing (or withholding) remedies against a background distribution of power.[56] Realism had far-reaching consequences on legal scholarship and practice, but it went into abeyance as a legal movement following World War II.[57]

Scholars associated with cls revivified legal realism with a fury in the 1970s and 1980s. Leavened by continental political and social theory,[58] cls sought to identify the deep structures organizing legal discourse. cls scholars pegged legal discourse as patterned rhetorical practice lacking intrinsic capacity to produce determinate, nonideological results.[59] cls questioned the hard distinction between law and politics then axiomatic in legal thought,[60] suggesting that law was often a tool of social dominance rather than a check against it.[61]

cls took shape as a loosely bound cluster of critical stances rather than a methodology.[62] It offered strategies of immanent critique, laying

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54 *See* Peller, *supra* note 51, at 573–74.

55 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935).

56 *See* Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, *in* THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 52, at 83, 87 (characterizing the work of Robert Hale); *see also* John Dewey, *Logical Method and Law*, *in* THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 52, at 111, 115 (characterizing the work of John Dewey); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, *in* THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 52, at 131, 136 (characterizing the work of Karl Llewellyn).

57 This history is well documented. *See* Peller, *supra* note 51, at 579–82 (describing how legal realism and the larger philosophical currents that it was part of lost sway because of their tendency toward moral relativism, which seemed broadly unpalatable during a political moment dominated by fascism and Nazi atrocity); Kennedy & Fisher, *supra* note 52, at 10.

58 *See* Tushnet, *supra* note 18, at 1525; Kennedy, *Form and Substance*, *supra* note 52, at 1712 & n.73.

59 *See* J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 62–68 (1986) (arguing that doctrinal argument is possessed of a regularized structure, but without a logical endpoint); Kennedy, *Form and Substance*, *supra* note 52, at 1724 (contending that there is an "orderliness" to legal rhetoric even though law is not "autonomous").

60 *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 44–45 (1984); Unger, *supra* note 7, at 566–72; Kennedy, *Form and Substance*, *supra* note 52, at 1762.

61 *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 747 (1992) (concluding that *Brown* and *Miranda* stifled reform "by producing a false sense of closure and resolution"); Singer, *supra* note 60, at 46–47; Unger, *supra* note 7, at 571.

62 *See* David M. Trubek & John Esser, *"Critical Empricism" and American Critical Legal Studies: Paradox, Program, or Pandora's Box?*, 12 GERMAN L.J. 115, 143 (2011) ("[I]t is not easy to say what CLS 'is' . . . ."); Tushnet, *supra* note 18, at 1523–24. In this regard, the crits were much

contradictions bare by using interpretive practices familiar to those trained in law[63]: it was a leftist practice of reading law against its grain.[64] Three salient cls stances animate the discussion of constitutional police regulation to follow.

First, cls critiqued how preexisting ideological frames both enable and constrain legal interpretation. Frames operate antecedent to formal legal analysis and cast some questions as within law's purview while excluding others.[65] Mark Kelman offered a critique of substantive criminal law in this vein.[66] In his account, frames were reflexive modes of apprehension—"views" or "feelings"—shared by law-trained professionals.[67] Frames could, for example, prompt narrow or broad understandings of time, intentionality, or defendants that set the stage for some legal conclusions while foreclosing others.[68]

cls also suggested a more systemic concept of framing. Broadly shared perspectives among legal professionals cast some situations as suitable for judicial review while excluding others.[69] cls' critique of the Legal Process School that was ascendant after World War II might be read in this way. Legal Process posited that so long as courts logically applied neutral procedural rules to resolve conflicts, the results would be apolitical. On this view, "political" and "moral" questions should be left to the executive and legislative branches of government, shielding courts from the divisiveness of pluralistic conflicts.[70]

The problem was that ostensibly neutral principles could not inoculate substantive judicial results against pluralist conflict. Neutral principles could never be entirely neutral. Herbert Wechsler's skepticism of the Supreme Court's early desegregation efforts made a good target for cls.[71] Wechsler worried that there was no neutral rule by

like their realist predecessors. *See* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233–35 (1931) (noting that there is "no school of realists," but rather shared "points of departure").

63 *See* Unger, *supra* note 7, at 566–67 (contrasting cls to other left, radical critiques of law by characterizing the former as wholly originating and existing *within* existing legal sources); *see also* Seidman, *supra* note 61, at 684 (proceeding with a traditional analysis premised upon doctrinal reasoning's autonomy allows for expression of "external critique").

64 *See* Unger, *supra* note 7, at 578–80 (describing "deviationist doctrine").

65 *See* Kelman, *supra* note 22, at 594–98.

66 *See id.*

67 *See id.* at 596–97.

68 *See id.* at 593–97.

69 *See, e.g.*, Unger, *supra* note 7, at 571–72; Kennedy, *Form and Substance*, *supra* note 52, at 1766. "Ideology" became a kind of epithet, particularly when referring to law or legal institutions. *See* Peller, *supra* note 51, at 586.

70 *See, e.g.*, Singer, *supra* note 60, at 44–45; Unger, *supra* note 7, at 564–72; Kennedy, *Form and Substance*, *supra* note 52, at 1762.

71 *See* Peller, *supra* note 51, at 561–62.

which to prioritize antisegregation over segregationists' associational rights.[72] Neutral principles would call the impasse in favor of the status quo, leaving it for a legislature to strike a balance between these politically volatile, antipodal values.[73] To cls scholars this hardly seemed neutral, logical, or apolitical.

The second critical stance mobilized here is cls' claim that "indeterminacy" is endemic to law.[74] Law is indeterminate to the extent that it supports both principle and counterprinciple,[75] in endless cycles of rhetorical battle.[76] Even a single legal principle will support arguments and counterarguments.[77] Scaling up from this observation, it is implausible that a system of rules could bring about a comprehensive or transcendent order.[78] cls suggests that the principles, counterprinciples, and exceptions that make up any putative system of law inevitably betray coherence and determinacy.

Finally, cls suggested that formalists' denial of framing and indeterminacy consolidates social dominance.[79] Formalism aestheticizes legal outcomes as the singular, objectively correct results of apolitical, deductive reasoning.[80] Wechsler's argument about neutral principles is a prime example of how these aestheticizing moves reproduce relations of dominance.[81] cls tended to be vague about the sociolegal mechanisms by which relations of dominance were reproduced.[82] More about that in the next Part, though. For now, the Sections below mobilize these three critical stances to critique constitutional police regulation.

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72 *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

73 *See* Peller, *supra* note 51, at 608–09.

74 *See, e.g.*, Singer, *supra* note 60, at 14–18; Unger, *supra* note 7, at 570.

75 *See* Unger, *supra* note 7, at 625, 633–34; Kennedy, *Form and Substance*, *supra* note 52, at 1700–01.

76 *See* Balkin, *supra* note 59, at 39, 62–68; Kennedy, *Form and Substance*, *supra* note 52, at 1723–24.

77 *See* sources cited *supra* note 76.

78 *See* Unger, *supra* note 7, at 575.

79 *See* Tushnet, *supra* note 18, at 1526; Unger, *supra* note 7, at 584–85.

80 *See* Seidman, *supra* note 61, at 747; Singer, *supra* note 60, at 46–48; Unger, *supra* note 7, at 571, 585, 605–07.

81 *See supra* notes 71–73 and accompanying text.

82 *See* Tushnet, *supra* note 18, at 1527; Unger, *supra* note 7, at 584–85.

B. *Critiquing Constitutional Police Regulation*

cls' proponents had relatively little to say about the police.[83] Constitutional police regulation scholars returned the favor.[84] There are occasional examples like Louis Michael Seidman's argument that *Miranda v. Arizona* legitimated the coercive police practices that it sought to contain.[85] *Miranda* created a formalist convention—recitation of the iconic *Miranda* warning—in an ostensible effort to reduce the coerciveness of police interrogations.[86] But the Court by and large left the interrogation techniques themselves untouched. Police have adapted those techniques to minimize the *Miranda* warning's impact on suspects such that they rarely ask for counsel or remain silent.[87] *Miranda* warnings have conferred a rule-of-law sheen to police interrogation without fundamentally altering its coerciveness.

This Section takes cues from Seidman, arguing that constitutional police regulation has ironically legitimated the police's coercive power by purporting to constrain it. The discussion proceeds in three sections, informed by the three critical stances distilled from cls in Section I.A above.

First, constitutional regulation has framed the relevant harms of policing in terms of individual officer misconduct as opposed to institutional police practices. This framing casts constitutional regulation as a series of conduct rules for individual officers. Excluded from judicial review are questions about institutional policy and practice, not least of which are policing's race, class, and other distributive consequences. These are treated as political or policy questions not amenable to judicial review.

Second, the complex skein of substantive, remedial, and procedural rules that constitute constitutional police regulation tends toward systemic indeterminacy. This is ironic because the complexity also creates the appearance of a coherent and integrated scheme of police regulation. Third, individual framing and indeterminacy inure to

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83 *See* Sheri Lynn Johnson, *Confessions, Criminals, and Community*, 26 HARV. C.R.-C.L. L. REV. 327, 328–29 (1991) (arguing that cls' critique of rights made it largely incompatible with constitutional criminal procedure and thus unattractive to scholars in that field).

84 *See id. But see* Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 142–43 (1996) (arguing that criminal law is essentially formalist because of connection to punishment); Kelman, *supra* note 22, at 594–98.

85 *See* Seidman, *supra* note 61, at 744–46.

86 *See id.* at 743.

87 *See id.* at 744.

the police's advantage by creating redundant opportunities for courts to credit crime control over libertarian values.

1. The Frame: Police as Individual Officers

Constitutional police regulation focuses on individual police officers, sidestepping policing's institutional determinants and harms. The granular focus on individual officers' choices distinguishes constitutional police regulation from judicial review of other state action.[88]

We have come to understand the substantive rights at the heart of constitutional criminal procedure as prescribing conduct rules for individual officers.[89] Constitutional norms for searches, seizures, and interrogations ostensibly constrain police like criminal laws constrain civilians.[90] The individualized skew of constitutional jurisprudence was not the only doctrinal path available to the Supreme Court. Early on, Anthony Amsterdam warned against conceiving of the Fourth Amendment as a code of conduct for individual officers vis-à-vis civilians rather than regulatory principles for departments vis-à-vis officers.[91]

The procedural context of most constitutional police litigation has shaped its individualizing frame. Most constitutional litigation against the police occurs in suppression motions incident to a criminal case.[92] Suppression motions afford only one remedy: exclusion of incriminating evidence obtained because of the unconstitutional conduct.[93] Constitutional claims thus take shape as a contest between individual police officers and civilians they have arrested—a kind of dramatic prelude that has the potential to eclipse the main event.[94]

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88 *See* Steiker, *supra* note 1, at 2504. *But see* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313–14 (2002) (arguing that constitutional adjudication often casts conflicts in unduly personalistic terms).

89 *See* Steiker, *supra* note 1, at 2504.

90 *See id.*

91 *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 369 (1974).

92 *See* Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373, 375 (2010).

93 *See* Wong Sun v. United States, 371 U.S. 471, 487, 491–92 (1963).

94 *See* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (requiring that defendant has suffered personal injury for standing to assert Fourth Amendment claim).

Broader questions about how police departments distribute coercive power are not generally cognizable in suppression motions.[95]

Systemic challenges of policing are theoretically possible in civil suits for injunctions and damages, but such litigation is more theoretical than real.[96] The Supreme Court has discouraged structural challenges of police policymaking by erecting substantial burdens of proof.[97] It has similarly made it difficult for plaintiffs to obtain injunctive relief for systemic police practices by creating onerous standing requirements.[98] The Court has also cleaved municipalities from officers by eliminating respondeat superior liability for police's constitutional violations.[99] Holding an employer liable for a police officer's constitutional misconduct requires that plaintiffs surmount the high hurdle of showing that the employer caused the constitutional injury through a specific "policy or custom."[100]

Constitutional police regulation thus casts "the police" as individual officers and focuses on their individual constitutional fouls.

2. Complexity and Indeterminacy

Constitutional police regulation is a complex skein of substantive, remedial, and procedural rules. Courts and commentators assume that these laws are supposed to function together as a cohesive system of constraint.[101] Some of the individual conduct rules appear to penetrate deeply into officer-civilian interactions. Constitutional violations can

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95 *See* Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1221 (2011) (arguing that distributive questions should receive more attention by criminal justice actors).

96 Successful challenges are rare and the preserve of only well-funded, sophisticated litigators. *See* Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2355–57, 2362–63 (2020) (presenting case studies on how detailed evidence of wide-scale misconduct authorized by a central decisionmaker and/or clear targeting based on race may overcome evidentiary hurdles).

97 *See* Rizzo v. Goode, 423 U.S. 362, 366–67, 377–81 (1976) (rejecting class action suit brought by minority plaintiffs for sweeping equitable relief against Philadelphia Police Department for violations of various federal civil rights).

98 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 98–99, 105–06 (1983) (requiring concrete showing that plaintiff will be subject to challenged police misconduct again in the future as prerequisite for injunctive relief).

99 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692–94 (1978).

100 *See id.* at 694. There can be municipal liability for failure to train where the failure manifested "deliberate indifference to the rights of persons with whom the police come into contact." *See* City of Canton v. Harris, 489 U.S. 378, 388–91 (1989).

101 *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009); *Lyons*, 461 U.S. at 112–13 (point of judicial review is to deter police violations of the Constitution); Litman, *supra* note 6, at 1528; Jeffries, *supra* note 6, at 117.

be asserted in criminal or civil courts in the state or federal systems. Criminal defendants can move for exclusion. Civil plaintiffs can seek make-whole relief for past harms or prospective relief against future police misconduct.

The standard critique of this skein of rules, detailed in Section I.B.2.a below, is that since the 1970s, a conservative Supreme Court has manipulated procedural and remedial doctrines to choke off the availability of robust substantive rights.[102] The simple solution would appear to be eliminating the procedural and remedial constraints—recent calls to eliminate qualified immunity are an example.[103]

The problem with this view, as detailed in Section I.B.2.b below, is that it takes distinctions between right, remedy, and procedure as rigidly fixed, with each zipped in its own hermeneutic enclosure. This ignores the dynamic, interpretive interplay between substance, procedure, and remedies. Eliminating procedural and remedial barriers may lead courts to interpret the underlying substantive rights more restrictively. Robust substantive rights may ironically depend on courts' knowledge that the rights will have little effect.

a. Let Rights Do Right

Scholars lament the remedial and procedural barriers that cabin substantive rights. For example, Carol Steiker's often-cited 1996 article flagged the "explosion in 'inclusionary rules'" in constitutional criminal procedure.[104] She argued that increasingly conservative Supreme Courts had subverted the liberal Warren Court's expansion of constitutional rights, not by dismantling the rights, but by choking off remedies.[105] For example, incriminating evidence obtained because of unconstitutional conduct is usually suppressed.[106] But the Court has increasingly curtailed suppression's availability.[107]

It was certainly conservative courts that expanded inclusionary rules, but the ground was laid by the liberal Warren Court. Not long after incorporating the exclusionary remedy against the states, the Warren Court suggested that it was not constitutionally required.[108] It

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102 *See* Steiker, *supra* note 1, at 2469–70.

103 *See* Law Professors' Letter, *supra* note 5.

104 Steiker, *supra* note 1, at 2504.

105 *See id.* at 2470 (arguing that Burger Court "wag[ed] counter-revolutionary war against" criminal procedure rights by denying remedies).

106 *See* Wong Sun v. United States, 371 U.S. 471, 485–87 (1963).

107 *See* Steiker, *supra* note 1, at 2504. The ever-shrinking exclusionary rule has been much remarked upon. *See* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 343 & n.23 (2013) (summarizing literature).

108 *See* United States v. Calandra, 414 U.S. 338, 347–48 (1974).

cast exclusion as a subconstitutional device for deterring future police misconduct, not a remedy for the past constitutional harm the defendant suffered.[109] This understanding allowed subsequent Supreme Courts to eliminate exclusion where the deterrent effect seemed too low to justify letting defendants free.[110] For example, exclusion was eliminated for Fourth Amendment violations raised in habeas corpus,[111] in a parole revocation hearing,[112] for failures to knock and announce,[113] and for arrests based on faulty warrants.[114]

The Court also began demanding more of a causal connection between unconstitutional police misconduct and the evidence whose suppression is sought.[115] Such causal connection is lacking where, for example, constitutional investigative conduct would likely have yielded the same criminal evidence that the unconstitutional conduct yielded,[116] or the investigation was conducted pursuant to a warrant discovered after arrest.[117]

The agenda for progressive reform would seem clear enough: if the rights are robust and the inclusionary rules restrictive, eliminate the latter and let the rights do their work.[118] Analogous arguments are made regarding procedural and remedial barriers in the civil context.

The Supreme Court has curtailed exclusion in the criminal context on the premise that civil remedies are available for the rights violation.[119] This is more theoretical than real, in part because of all the procedural and remedial barriers in the civil context. As Fred O. Smith, Jr. recently observed, "The list of threshold jurisdictional and procedural issues that accumulate in these suits is almost diverse

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109 *Id.*

110 *See id.* at 348.

111 Stone v. Powell, 428 U.S. 465, 493–94 (1976).

112 Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998) ("The costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future criminal offenses than are average citizens." (citing Griffin v. Wisconsin, 483 U.S. 868, 880 (1987))).

113 Hudson v. Michigan, 547 U.S. 586, 594 (2006).

114 *See* Herring v. United States, 555 U.S. 135, 147–48 (2009) (police error); Arizona v. Evans, 514 U.S. 1, 3–4 (1995) (court clerk error).

115 *See* Brown v. Illinois, 422 U.S. 590, 603–04 (1975).

116 *See id.*

117 *See* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

118 *See* Steiker, *supra* note 1, at 2504.

119 *See* Hudson v. Michigan, 547 U.S. 586, 598 (2006) (noting availability of damages for knock-and-announce violations); Litman, *supra* note 6, at 1512 (noting "the Court's insistence that different remedies can substitute for one another").

enough to form the basis of an entire class in federal courts."[120] Smith focused on *Younger* abstention, which prohibits federal courts from hearing civil rights claims about ongoing state criminal cases.[121] Smith argued in favor of a new exception to *Younger* abstention that would permit federal courts to take up "systemic or structural constitutional violations."[122] Again, the trajectory for reform seems clear enough: eliminate the remedial and procedural barriers so that rights *can do* right.

Calls to eliminate qualified immunity are illustrative.[123] Qualified immunity shields all public officials except "the plainly incompetent or those who knowingly violate the law" from liability for constitutional violations.[124] Police can only be held liable for violation of "clearly established" constitutional rules, meaning judicial opinions clear enough to give reasonable officials notice that their acts were unlawful.[125] Initially characterized as a common-law affirmative

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120 Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2287 (2018) (noting the issues as "standing, mootness, absolute immunity . . . whether statelaw forums must be exhausted before a federal court can hear the underlying claim, the *Rooker-Feldman* rule against federal district court review of state judgments, habeas, and abstention"); *see also* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1958 (2018) ("[L]itigation of qualified immunity claims, rather than the cases' merits, has become the main event of constitutional tort litigation.").

121 *See* Smith, *supra* note 120, at 2287.

122 *See id.* at 2287–88.

123 The criticisms are longstanding in legal discourse. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 80 (2018) (Court should overrule or modify qualified immunity doctrine); John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS J. 857, 893 (2013) (remedy should not be denied in cases of substantive constitutional violation); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 275–76 (2006) (qualified immunity has become too close to absolute immunity and should be scaled back); Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273, 290 (1994) (rebutting strongest justifications for immunities against constitutional liability); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 74 (1989) (eliminating qualified immunity and indemnifying officials would protect valid government interests and ensure vindication of constitutional rights). Popular commentators have increasingly joined the fray. *See* Fuchs, *supra* note 5 (noting popular criticism of and political initiative to eliminate or reform qualified immunity).

124 Malley v. Briggs, 475 U.S. 335, 341 (1986).

125 Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *see also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 581, 617 (1998). The irony that making this showing is in and of itself fact intensive is frequently noted. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 53–54 (2017); Chen, *supra* note 123, at 237.

defense,[126] the Supreme Court has developed it to allow early termination of cases against public officials.[127] This is based on the premise that litigation distracts officials from doing their jobs.[128]

Critics charge that qualified immunity is unjust because it forecloses relief in cases where plaintiffs' rights were violated and because it prevents courts from developing substantive rights jurisprudence.[129] In cases where qualified immunity is in play, courts need not decide the content of constitutional principles before deciding whether the principles were "clearly established."[130] This allows courts to duck decisions on substantive rights.

Procedural limitations on injunctive relief similarly allow courts to dodge the merits of police abuse. And again, the reform prescription seems clear: eliminate the barriers and let the rights do justice. For example, Article III standing requires plaintiffs to show that they are likely to be subject to the challenged police practice in the future.[131] In *City of Los Angeles v. Lyons*, a plaintiff who had been put in a chokehold by LAPD officers was denied standing to enjoin the deadly practice because he failed to show that he was "likely to suffer future injury from the use of the chokeholds by police officers."[132]

Obtaining the kind of pattern-and-practice evidence that *Lyons* requires will be difficult if not impossible for most ordinary plaintiffs. Onerous procedural and remedial hurdles tend to favor sophisticated, well-funded lawyers who can marshal pattern-and-practice evidence.[133] Eliminate *Lyons*, and courts could more readily consider plaintiffs' substantive claims.

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126 *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982) (stating that the "objective reasonableness" test should "permit the resolution of many insubstantial claims on summary judgment"). *But see* Chen, *supra* note 123, at 237 (arguing that qualified immunity is more like absolute immunity than an affirmative defense).

127 *See* Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam); *see also* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (suggesting that qualified immunity doctrine "has been largely successful" in shifting immunity determinations earlier in litigation). *But see* Schwartz, *supra* note 125, at 20–21, 26–27 (quantitative study of district court dockets in five districts suggesting that qualified immunity is less important in early resolution of litigation than typically thought).

128 *See Harlow*, 457 U.S. at 814.

129 *See* Greabe, *supra* note 123, at 893; Chen, *supra* note 123, at 275–76.

130 *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

131 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

132 *Id.*

133 *See* Patel, *supra* note 96, at 2355–56, 2362–63, 2365 (noting reliance on statistical expertise and experience litigating similar claims).

Hidden in this approach to reform, though, is a "rights essentialist" view.[134] Eliminating procedural and remedial boundaries only helps if the underlying rights retain their robustness in the new procedural and remedial environment. There is no guarantee that will be true.

b. Complexity and Its Discontents

The substantive, procedural, and remedial rules that make up constitutional police regulation are numerous and interconnected. It is the density of these interconnections that suggests "an overarching and integrated system of remedies" for unconstitutional policing.[135] Ironically, though, those interconnections undermine determinacy.

There can be no guarantee that substantive rights will retain their robustness with serious changes to the remedial and procedural rules that they formerly interacted with. Constitutional police regulation's tangled skein of rights, remedies, and procedures are unpredictably enabling and negating. Scholars in recent years have brought realist insights to bear on this complexity.[136] Judicial interpretation is highly contingent, making it hard to predict the systemic effects of letting rights do right.

Rights' contingency was clear at the birth of the Warren Court's criminal procedure revolution. As described in the Introduction,[137] the Court expanded criminal defendants' ability to challenge the police on the condition that past convictions remain undisturbed.[138] Contrary to Steiker's claim,[139] this suggests that a procedural "counterrevolution" was embedded in the criminal procedure revolution from its inception. Courts, and the Supreme Court in particular, protect their legitimacy by cabining the most sociopolitically disruptive consequences of their

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134 *See* Levinson, *supra* note 12, at 858 (noting the persistence of "rights essentialism" in constitutional law).

135 *See* Litman, *supra* note 6, at 1528.

136 *See, e.g.*, *id.* at 1480–81 (describing the mechanism by which the Court has limited the remedies available for criminal procedure rights in different contexts); Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1218–19 (2014) (defining "spillover" as phenomenon of a right being read restrictively or broadly in light of a specific remedial context and then being applied in a different remedial context); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1022–23 (2010) (focusing on disjuncture between civil and criminal remedial schemes for substantive criminal procedure rights); John C. Jeffries, Jr., Essay, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 259–61 (2000) (criticizing Section 1983's transsubstantive remedial scheme because it serves different purposes in relation to different rights).

137 *See supra* notes 14–17 and accompanying text.

138 *See supra* notes 14–17 and accompanying text.

139 *See supra* notes 104–07 and accompanying text.

decisions.[140] Soaring rhetoric about constitutional rights may ironically depend on those rights having limited practical effect.[141]

The late William Stuntz was early to recognize that the content of Fourth Amendment norms reflects the deep etch of its most common remedy: exclusion.[142] Judges will be inclined to find against a rights violation in the suppression context because the consequence is freeing someone who might otherwise be convicted.[143] That consequence, coupled with the police's having seized incriminating evidence, triggers hindsight bias—the hard-to-resist feeling like the police must have had probable cause if they ended up finding evidence of guilt.[144] Stuntz argued that the Fourth Amendment's warrant preference was a response to hindsight bias.[145] But warrants are relatively rare,[146] leaving the bias Stuntz and others have worried about to exert significant influence on suppression results.

The hindsight bias endemic to criminal suppression might make the civil context seem more conducive to developing robust Fourth Amendment rights.[147] Courts might feel freer to articulate robust substantive rights in civil cases *because of* the welter of procedural and remedial rules that limit the practical effect of those rights.[148] Once announced, robust norms will not stay put in the civil context. They can migrate to the criminal context where the same rights apply, but where the remedy is different.[149] The progressive, reform-oriented scholar

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140 *See* Fallon & Meltzer, *supra* note 16, at 1739; *see also* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 68–69 (2015) (federal judiciary's institutional interests explain the courts' creation of fault rule, not partisan ideology); Seidman, *supra* note 61, at 680 (rather than "self-confident assertion[s] of judicial power, [*Brown v. Board of Education* and *Miranda*] are actually tactical retreats in the face of implacable obstacles to change").

141 *See* Seidman, *supra* note 61, at 752–53 (noting that while the Warren Court's soaring rhetoric about "consent and equality" dominates public conception of *Brown* and *Miranda*, the two cases have come to "support the status quo" that tolerates high levels of coercion and inequality).

142 *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 884 (1991) (exclusionary remedy explains Fourth Amendment doctrine regarding warrants).

143 *See id.* at 911–12.

144 *See id.* at 912.

145 *See id.* at 915–16; Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 431 (2012) (summarizing literature on judicial bias against granting suppression motions).

146 *See* Robert C. Hauhart & Courtney Carter Choi, *The Good Faith Exception to the Exclusionary Rule*, 48 CRIM. L. BULL. 316, 316–17 (2012).

147 *See* Leong, *supra* note 145, at 462–65 (arguing that litigating Fourth Amendment issues in civil context could make up for the rights-deforming effects of litigating in the suppression context and vice versa).

148 *See* Coenen, *supra* note 136, at 1219–20.

149 *See id.* at 1218–19.

might thus see it as good for criminal defendants if there was more civil police litigation.[150]

The problem is that migration is not one way. Restrictive readings of substantive rights will migrate out of their remedial context of origin just as the expansive readings will migrate out of theirs.[151] Scholars and courts have noticed the muddiness this creates. Norm content and signal strength will vary depending on whether the source is criminal or civil.[152] Such migrations will loop in ceaseless recursion, refracted through new remedial contexts, yielding unpredictable results, some of which police may pay more attention to than others.[153]

A hypothetical suggests how muddy these interpretive relationships might be. Ostensibly regressive remedial features in the civil context, like qualified immunity, might indirectly induce positive effects for criminal defendants in unrelated criminal proceedings. A robust articulation of a substantive right in a civil case—underwritten by the knowledge that qualified immunity will shield officers from damages—might later be invoked in unrelated suppression hearings to criminal defendants' advantage. This is reason to worry that eliminating qualified immunity (or other procedural and remedial barriers) may over time be worse for criminal defendants.

Commentators who have noticed the complicated interplay between rights, remedies, and procedural rules tend not to offer cogent reform proposals.[154] This is for good reason. Introducing new layers of rules that purport to ensure that substantive rights are anchored to specific remedial contexts seems quixotic. It would be adding doctrinal complexity to problems born of doctrinal complexity.[155]

The more compelling conclusion is that systemic indeterminacy is endemic to constitutional police regulation. There is no solution to complexity's paradox. The skein suggests the existence of "an overarching and integrated system of remedies" for police misconduct while creating the opposite.[156]

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150 *See* Leong, *supra* note 145, at 462–65.

151 *See id.*

152 *See* Laurin, *supra* note 136, at 1032–34 (discussing qualified immunity in the context of *Brady* disclosures and speculating that strength of civil litigation's signal is stronger).

153 *See id.*

154 *See* Levinson, *supra* note 12, at 939 (noting project's largely descriptive motivation); *see also* Coenen, *supra* note 136, at 1269 (observing that neither rights nor remedies can be held constant vis-à-vis one another and generate systemic fairness).

155 *See* Litman, *supra* note 6, at 1526; Coenen, *supra* note 136, at 1223 (emphasizing that proposal does not entail "a dramatic restructuring of doctrinal rules"); Levinson, *supra* note 12, at 939.

156 *See* Litman, *supra* note 6, at 1528.

3. Amplifying Police Power

Constitutional criminal procedure's individualized frame and internal complexity reproduce relations of social dominance by amplifying police power. First, the availability of multiple remedial contexts for adjudicating claims has allowed courts to decline claims in one context on the premise that a remedy is better sought in another. They do this without regard for the formal and practical barriers that foreclose the alternative remedy.

Second, the complexity of constitutional police regulation creates multiple, redundant opportunities for courts to credit police officers' crime-control mission. Judicial concern about deterring crime control has diluted substantive Fourth Amendment standards. The same overdeterrence worries also reappear in remedial and procedural decisions, further arcing results in the police's favor.

a. A Remedy Deferred Is a Remedy Denied

The availability of alternative remedies for violations of constitutional rights has ironically normalized the denial of any remedy at all. The Court often justifies restrictions on a remedy by pointing to the theoretical availability of another remedy.[157] In practice, the alternative remedy might also be unavailable. This has the quality of a cynical "shell game."[158] As discussed, the Supreme Court has eliminated exclusion as a remedy for many Fourth Amendment violations.[159] This is in part on the premise that a civil remedy is available for those violations, which ignores the procedural and other barriers that prevent criminal defendants from bringing civil challenge to a state's criminal process.[160]

Leah Litman recently described how the Supreme Court has tried to create consistent rules for obtaining constitutional remedies in civil, criminal, and postconviction contexts.[161] Litman uses the metaphor of "convergence" to describe the doctrinal phenomenon. For example,

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157 *See id.* at 1482 (calling this "a pattern of disingenuous substitution"); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 111, 113 (1983) (no reason to afford injunctive relief based on past harm when a remedy is, theoretically at least, available in legal action for damages).

158 Litman, *supra* note 6, at 1528 (arguing that "convergence" of criminal procedure remedies for different kinds of legal claims ends up meaning no remedy is available for claims that are supposed to alternate for one another); *see also* Steiker, *supra* note 1, at 2534–38 (arguing that lack of "acoustic separation" between courts and police allows the former to symbolically uphold substantive constitutional rights while enabling the latter to violate them in practice).

159 *See supra* notes 111–19 and accompanying text.

160 *See supra* notes 119–22 and accompanying text.

161 *See* Litman, *supra* note 6, at 1481–82.

qualified immunity, municipal liability, and the exclusionary rule have all increasingly come to require showing that the police or municipality deliberately ignored constitutional rules set down in a judicial opinion involving nearly identical facts to those at bar.[162] This is an onerous standard that few can meet.[163] Convergence's consequences are unjust, but not doctrinally incorrect.[164] The dilemma is similar with regard to judicial concerns about overdeterrence in police regulation.

b. Specters of Overdeterrence

Constitutional police regulation creates multiple, redundant opportunities for courts to credit the police's crime-control mission. This bends legal results in the police's favor. The central tension in constitutional criminal procedure is traditionally cast in terms of balancing crime-control exigencies against civil liberties.[165] Substantive Fourth Amendment doctrine is the product of courts' efforts to strike this balance. The Court worries that burdensome constitutional rules that penalize every mistake and misapprehension will deter officers from spontaneous, quick thinking that quells crimes. Substantive constitutional rights, in other words, reflect courts' crime-control anxiety. But the same overdeterrence concerns also animate the remedial and procedural rules that interact with substantive rights.[166]

Fourth Amendment doctrine permits police considerable latitude to make mistakes in the interest of controlling crime. For a search or seizure to be reasonable does not require that police be correct in suspecting crime.[167] Probable cause exists when the observable facts suggest "a fair probability that . . . evidence of a crime will be found."[168] In *Terry v. Ohio* and subsequent cases, the Court authorized stop and frisk based on even less than probable cause.[169] "Reasonable suspicion," a rougher, more lenient standard, suffices for street stops.[170] This was a compromise designed to keep street

162 *See id.* at 1484–85, 1514, 1518–19.

163 *See id.* at 1482.

164 *See id.* at 1526 (noting that "whether all of the [convergence] decisions are correct or not" is "beyond the scope of this Article").

165 The frame has long asked what the appropriate tradeoff is between crime control and civil rights. *See* Sekhon, *supra* note 31, at 1726–27 (discussing Herbert Packer's "'crime control'-'due process' dualism").

166 *See* discussion *supra* Section I.B.2.

167 *See* Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65, 101–02 (2017).

168 Illinois v. Gates, 462 U.S. 213, 214 (1983).

169 *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

170 *See* Florida v. J.L., 529 U.S. 266, 269 (2000); Alabama v. White, 496 U.S. 325, 330 (1990).

policing within the ambit of constitutional review by making it easier for police to satisfy the constitutional standard.[171]

The same jurisprudential move is at play in Fourth Amendment "consent" jurisprudence. It allows police to justify searches without individualized suspicion.[172] This is supposed to allow police latitude to quickly test hunches.[173] Police need only identify facts suggesting that a civilian was willing to permit the search.[174] The validity of such consent is assessed on the "totality of all the . . . circumstances,"[175] but it does not require that police explain to civilians that they may deny consent.[176] This counterintuitive conception of "consent" is unconcerned with a suspect's actual consent; rather, the standard asks whether a reasonable *innocent* person would have consented under the circumstances.[177] The Court has gone on to equate the "good citizen" with one willing to submit to the police.[178] Reasonable, innocent people are strongly inclined to comply with police because they are cloaked in the mystical aura of state power.[179] The Fourth Amendment "consent" standard encourages the police to use that power to their advantage.[180] And again, the premise is that this is necessary if police officers are to control crime.

Despite having deep tracks in substantive doctrine, overdeterrence concerns get repeat play in remedial and procedural opinions. This is clearest with qualified immunity and exceptions to the Fourth Amendment exclusionary rule.

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171 *See* Miller, *supra* note 29, at 63–64 (casting *Terry v. Ohio* in positive light as an expansion of constitutional police regulation).

172 *See* United States v. Drayton, 536 U.S. 194, 202 (2002).

173 *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); Ohio v. Robinette, 519 U.S. 33, 39–40 (1996).

174 *Drayton*, 536 U.S. at 202.

175 The Court borrowed this test from the Fifth Amendment context. *See Bustamonte*, 412 U.S. at 225–26. Until the Court's decision in *Miranda*, a confession was deemed to have been "compelled" if the totality of the circumstances indicated that it was involuntary. *See id.*

176 *See Drayton*, 536 U.S. at 203.

177 *See id.* at 201–02.

178 *See id.* at 205; I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 662–70 (2018).

179 *See* MANNING, *supra* note 41, at 5 ("[T]he police role conveys a sense of *sacredness* or awesome power that lies at the root of . . . the claims a state makes upon its people for deference . . . .").

180 *See Drayton*, 536 U.S. at 204–05 (stating that indications of police authority like badge and gun are never enough to vitiate "consent" under Fourth Amendment).

Qualified immunity is supposed to afford police leeway to control crime.[181] It requires that constitutional rules have been clearly established such that an objectively reasonable officer would know them.[182] This creates allowance for police mistakes. The allowance echoes that permitted under the substantive Fourth Amendment's individualized suspicion standard.[183]

The echo is underscored by the appearance of "reasonableness" in the qualified immunity and substantive Fourth Amendment standards. Commentators have criticized the redundancy, arguing that it is incoherent for courts to ask if officers were reasonable in their understanding of the Fourth Amendment's reasonableness standard.[184] Whether incoherent or just awkward,[185] the point is clear: courts repeatedly ask whether the alleged police misconduct can plausibly be understood as a forgivable mistake made in the service of crime control.[186]

In criminal cases, the Supreme Court has deployed similar logic to deny the exclusionary remedy for Fourth Amendment violations.[187] In cases where the Court concludes that the deterrent effect of exclusion is sufficiently low to justify the crime-control tradeoff, it leaves the defendant to seek a civil remedy, however improbable.[188]

Federalism concerns account for the remaining rules described in Part I: municipal liability,[189] abstention, and standing.[190] All three are designed to protect state prerogatives related to crime control from federal interference. While federalism implicates much beyond crime control, that power is a (if not the most) salient aspect of states' sovereign prerogative.[191]

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181 *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("[F]ear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." (citing Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))); Schwartz, *supra* note 125, at 22 ("almost half" of qualified immunity cases to make it to the Supreme Court involve police).

182 *Anderson*, 483 U.S. at 640; *see supra* notes 125–30 and accompanying text.

183 *See supra* notes 168–71 and accompanying text.

184 *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124–27 (2009); Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61, 67 (1989).

185 *See* Jeffries, *supra* note 127, at 861.

186 *See* Law Professors' Letter, *supra* note 5.

187 *See supra* notes 108–17 and accompanying text.

188 *See* Hudson v. Michigan, 547 U.S. 586, 598 (2006); Litman, *supra* note 6, at 1511–12.

189 *See* Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 415 (1997).

190 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111–13 (1983).

191 *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

C. *Summary*

Constitutional police regulation has equated police with individual officers, and courts have spun a complex skein of rights, remedies, and procedures that ostensibly govern those officers. The former excludes institutional-level analysis of policing while the latter creates indeterminacy. Together, these features of constitutional police regulation reproduce relations of social dominance by amplifying police power. This is exemplified by the redundant opportunities that constitutional police regulation creates for courts to promote the police's crime-control function at the expense of civil rights.

This seems paradoxical. The rules' volume and complexity create the appearance that police are enmeshed in law, but the appearance is just that.

II. COURTS, POLICE, AND SYMBOLIC CAPITAL

This Part offers a sociolegal explanation for the landscape described in Part I, contending that constitutional police regulation mediates the relationship between courts and police, sustaining both institutions' "symbolic capital."[192] Courts' and police's legitimacy depend on the appearance of an integrated, judicially supervised criminal justice system. That appearance legitimates the State's use of coercive power. But the appearance is imperiled by the sociological chasm that separates courts from police.

Drawing on the work of Pierre Bourdieu, Sections II.A through II.C describe how courts and police operate in different "fields" that are substantially autonomous from one another. The police do not have the same status in the juridical field as lawyers. Nor does street policing involve application of law to facts in the way that legality presupposes. Street policing is intuition driven, relying on roughly hewn occupational norms that bear little relation to law.[193] The role of race in suspicion formation and the use of force in controlling street encounters are illustrative.

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192 *See* BOURDIEU, *supra* note 37, at 120–21. Elsewhere, Bourdieu uses the expression "symbolic power" to mean the same thing. *See* BOURDIEU, *supra* note 33, at 75–76.

193 *See* MOSKOS, *supra* note 41, at 25–26; John Van Maanen, *The Asshole*, *in* POLICING: A VIEW FROM THE STREET 221 (Peter K. Manning & John Van Maanen eds., 1978), *reprinted in* THE POLICE & SOCIETY: TOUCHSTONE READINGS 330, 344 (Victor E. Kappeler & Brian P. Schaefer eds., 4th ed. 2019) (what appears as "capricious, random, or unnecessary" is actually reflection of pervasive working rules among cops).

Section II.D puts the analyses of the juridical and police fields in dialogue with Part I, synthesizing how constitutional police regulation legitimates both courts and police. Constitutional police regulation symbolically reinscribes the courts' supervisory authority over the police. Judicial signaling is weak to nonexistent in the police field. The police are thus able to claim the legitimacy of being law bound while retaining ample latitude to rely on their own occupational norms while on duty. In the other direction, formal law functions as a narrative resource police can use to reconstruct and justify their actions for a juridical audience. Constitutional police regulation's mediative role is suggested by police-report writing conventions.

A. *Fields and Games*

The appearance of an unbroken chain of authority connecting courts to police in the street mythologizes the relationships between courts, police, and law.[194] This inures to the benefit of both courts and police in different ways.

Despite emphasizing sociology's significance, cls offered little analysis in that vein.[195] For example, cls did not take law's indeterminacy to mean that lawyers and judges are unable to predict case outcomes.[196] They often can. But cls explained that this is on account of their professional "situation sense," not law's determinacy.[197] cls did not develop this sociolegal observation. For a fuller understanding of what situation sense means and its implications for the police, this Section turns to the work of sociologist Pierre Bourdieu.

Bourdieu posited situation sense as the often-ineffable intuitions or "'feel' . . . for the game" that insiders have.[198] That feel is not reducible to simple knowledge of rules (or blackletter law, as it were).[199] Bourdieu's framework deciphered practice from both outsider and insider perspectives. It is the detached, outside observer—typified by the academic—who can identify the objective structures within which individual practitioners operate.[200] Such objective accounts drift toward

194 *See* Bourdieu, *supra* note 36, at 824.

195 *See* Tushnet, *supra* note 18, at 1526–27; Singer, *supra* note 60, at 21.

196 *See* Singer, *supra* note 60, at 21–22.

197 *See id.*

198 *See* BOURDIEU, *supra* note 37, at 82. Bourdieu refers to this as a "practical sense." *See id.* at 66.

199 *See id.* at 34, 81 (critiquing objectivism).

200 *See id.* at 30–31.

formalism,[201] purporting to explain human behavior as if it were simply enacting precodified rules.[202] This reduces insiders' practice to false consciousness, unconsciousness, or some other diminished epiphenomenon.[203]

In contrast, the insider's perspective reveals practice's layered norms and uncertainties. An outcome cannot be taken for granted in practice. Practice requires choices in response to the unfolding possibilities of different outcomes. This, Bourdieu pithily summarized in a word: "urgency."[204] Practitioners' expertise lies in their ability to manage urgency. The insider's perspective reveals the granular richness and drama of a practitioner's experience in a lived context. But it offers an anemic account of the broader forces that constitute the context.[205]

Bourdieu leveled his critique at the discipline of cultural anthropology, underscoring the space separating anthropologists from those they studied.[206] Anthropologists' abstracted, synoptic view of kinship structures could not account for the experience, art, and perilous uncertainties of the studied group's ritual practices.[207] For an example closer to home, one might contrast the perspective of a skilled civil rights litigator with that of a legal theorist. The former will offer a nuanced account of litigating police cases in court,[208] viewing "the problem" as the various legal hurdles, intransigent judges, reluctant witnesses, and a host of other impediments to obtaining favorable outcomes for clients.[209] In contrast, the critical theorist sees patterned arguments and endemic indeterminacy.[210]

Bourdieu believed that both outsiders' and insiders' perspectives must be brought to bear on sociological analysis. Observers must identify with human activity in the world, while maintaining enough distance to identify its structural terms of possibility.[211] The observer should be able to make sense of both skilled players' ineffable "feel for

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201 *See* Tushnet, *supra* note 18, at 1527. In this regard, cls echoed Bourdieu. *See* BOURDIEU, *supra* note 37, at 33–35 (critiquing structural anthropology).

202 *See* BOURDIEU, *supra* note 37, at 39, 41 (describing "legalism" and "fetishism of social laws").

203 *See id.* at 39–41.

204 *Id.* at 82.

205 *See id.* at 47, 49–50.

206 *See id.* at 112.

207 *See id.*

208 *See id.*

209 *See id.*

210 *See supra* Section I.A.

211 *See* BOURDIEU, *supra* note 37, at 52–53.

the game" and the game's autonomous existence separate and apart from the player.[212]

Bourdieu used the terms "game" and "field" interchangeably.[213] A "field" is an enclosure in which participants share a language, values, rites, rules, and so on.[214] Fields develop over extended periods of time through social, political, and economic relations. Once constituted, fields are able to generate meaning with substantial (though not complete) autonomy from the forces that created them.[215] Fields thus have their own sense-making conventions and vocabularies.[216] Professions, political institutions, and cultural formations, among others, are all examples of fields.[217] Contestation within a field is often stylized and constrained, playing out within predictable ranges of options that insiders can assess for plausibility and quality.[218] Again, this is the definition of "practical" or "situation sense."[219]

Equally important in Bourdieu's account was the concept of a "*habitus*." [220] The *habitus* was at the center of Bourdieu's account of how an objective structure (the field) perpetuates itself.[221] Bourdieu emphasized that fields are sustained through the inculcation of "durable dispositions" that inhabit practitioners' bodies.[222] These are not discrete ideas or packages of skills presented to preconstituted subjects for acceptance or rejection. Rather, they are creative faculties that constitute subjectivities: for example, a "mother tongue."[223] The *habitus* refers to the process and space within which such durable dispositions are cultivated.[224] For a mother tongue, this could be the home or school. For professions, it could be specialized academies or apprenticeships. The *habitus* underscores the way in which fields simultaneously inhabit

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212 *See id.* at 66–67.

213 Thompson, *supra* note 34, at 14, 25. Bourdieu's objective was "to bring out the ways in which [fields] are structured and linked while rigorously avoiding the tendency to reduce one field to another, or to treat everything as if it were a mere epiphenomenon of the economy." *Id.*

214 *See id.* at 14.

215 *See* BOURDIEU, *supra* note 37, at 67–68; *see also* Bourdieu, *supra* note 36, at 815–16, 845 (regarding relative autonomy of the juridical field and "jurisprudence"). This is a difficult needle to thread. Bourdieu's project requires that he resist characterizing this ostensible autonomy (and the related features of "neutrality, and universality") as a "simple ideological mask," *id.* at 820, without slipping into an aestheticized formalism of his own.

216 *See* BOURDIEU, *supra* note 33, at 185.

217 *See* Thompson, *supra* note 34, at 25–26.

218 *See* BOURDIEU, *supra* note 33, at 185.

219 *See supra* notes 197–99 and accompanying text.

220 *See* BOURDIEU, *supra* note 37, at 56–57.

221 *See id.*

222 *See id.* at 58.

223 *See id.* at 67.

224 *See id.* at 54–55.

and are inhabited by practitioners.[225] Practitioners do not so much apply rules to facts as rely on their durable dispositions to feel their way through situations.

What follows is a microanalysis in brushstroke,[226] evaluating how constitutional police regulation mediates the disconnect between the juridical field and police field.

B. *The Police's Place in the Juridical Field*

Lawyers and judges are the main players in the juridical field.[227] The notion that there is a judicially supervised criminal justice system[228] casts the police as within the juridical field.[229] The police are supposed to be legality's tether, connecting the streets to courts. That tether legitimates the State's use of coercive power against those in the street.[230] But the idea that courts and police are tightly linked is belied by how the police are perceived and treated within the juridical field. Judges and lawyers do not credit the police as professional equals,[231] relegating them to low-status participants in the juridical field, if insiders at all.

Section II.B.1 describes the juridical field. Section II.B.2 identifies the police's ambiguous relation to it.

1. The Juridical Field

For the outsider, courtroom process smacks of insularity and opacity. The judicial machinery is propelled by occult invocations. Law's secret language binds lawyers and judges in a division of labor that conspicuously excludes outsiders. The division of labor and secret

225 *See id.* at 67, 72–73.

226 *See* Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1425 (1996) (defining "microanalysis" and suggesting its role in synthesizing different groups of legal thinkers).

227 *See* Bourdieu, *supra* note 36, at 816.

228 *See* Sara Mayeux, *The Idea of "the Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 59 (2018); *see also* Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421–22 (2018) (tracing the history of and critiquing mid-century thinking about "systems" and cost-benefit analysis).

229 *See* Mayeux, *supra* note 228, at 56–57.

230 *See* Bourdieu, *supra* note 36, at 824. The legitimizing effect may explain why the public is, as Paul Chevigny observed, often disinclined to change the police. *See* PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 248 (1969).

231 *See infra* Section II.B.2.

language are hallmarks of the juridical field's autonomy.[232] But unlike with other fields, the juridical field's integrity and status depend on the appearance of tangible efficacy in the world outside itself; law must somehow resolve disputes, prevent bad behavior, compel good behavior, and so much more. The juridical field's autonomy simultaneously underwrites and undermines its ability to produce such effects.

Developing fluency in law's formal, expressive conventions is part of "thinking like a lawyer," legal training's central mission.[233] Legal training and subsequent practice cultivate a professional identity that affords bearing within the juridical field.[234] Bearing includes the ineffable intuitions that are bundled together under the label "professional judgment"—a feel for the game that reflects role and situational possibility within a case, courtroom, negotiation, or some other context.[235]

Legal professionals are situated in the juridical field's division of labor, which reflects both functional differentiation and status hierarchy.[236] Judges, for example, have special status in the juridical field.[237] Beyond just the title, judges' status is influenced by the court on which they sit, attorneys' esteem for them, the frequency with which their opinions are cited, among other factors. Comparable distinctions exist among lawyers. The list of interrelated status markers is vast: role (e.g., prosecutor versus defender),[238] years of experience, firm, reputation among those with status in the juridical field, law school attended, and so on.[239]

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232 *See* Bourdieu, *supra* note 36, at 817, 820, 827 (legal institutions and discourse appear to be "*totally independent*" and the unique province of those trained to engage in the "symbolic struggle[s]" that produce meaning in the juridical field); *see also* Thompson, *supra* note 34, at 25 (describing how fields possess "a certain autonomy").

233 *See* Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems*," 61 RUTGERS L. REV. 867, 891 (2009).

234 *See* Bourdieu, *supra* note 36, at 823–24.

235 *See id.* at 821, 823–24.

236 *See* Thompson, *supra* note 34, at 14. Bourdieu uses the word "capital" and other economic verbiage to describe the position and authority of different speakers within a field. *See id.* at 14–15.

237 *See* Bourdieu, *supra* note 36, at 822–24 (noting special significance of judges in the Anglo-American tradition).

238 *See* ROY B. FLEMMING, PETER F. NARDULLI & JAMES EISENSTEIN, THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES 135 (1992) (stating that defenders were lower status in criminal courts that were studied); Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 518–19 (2021) (same).

239 *See* Terdiman, *supra* note 36, at 808.

Legal training and practice cultivate and consolidate the "ascetic and . . . aristocratic attitudes" that animate the juridical field.[240] The elasticity and open texture of legal texts create the theoretical possibility of outcomes that cannot be practically countenanced by courts.[241] What distinguishes a good from a bad argument is sensitivity to the institutional limits that permit some but not other possible results. Lawyers calibrate their advocacy to these practical limits. Public defenders, for example, may reflexively forgo making every conceivable constitutional argument on behalf of a client because of resource scarcity and defenders' internalized apprehension about taxing the patience of the judges and prosecutors they work with.[242]

Law's formal qualities conspicuously mark it as the domain of trained professionals and imbue it with what Bourdieu called "social magic."[243] Law's power lies in its ostensible ability to "bring[] into existence that which it utters."[244] That magic helps underwrite the liberal State's legitimacy.[245] The idea that the State operates through law and is itself subject to law ensures collective faith in projects undertaken in the State's name. The formal, ritualized qualities of legal speech and practice promote that legitimation.[246] The juridical field's autonomy is, in other words, bound with law's perceived efficacy beyond the juridical field.[247] There is peril here.

The juridical field's autonomy depends on those outside it viewing the juridical field as capable of resolving disputes, preventing harms, redirecting behavior, and so much else. This need for a relation to the outside world creates a guardrail against legal texts being broadly interpreted in ways that formal logic supports, but that stand little practical chance of being accepted or enforced.[248] There is peril in

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240 Bourdieu, *supra* note 36, at 830.

241 *See id.* at 827 (noting "the extraordinary elasticity of [legal] texts" and the range of "rhetorical devices" that "judges have at their disposal"). Here, Bourdieu's account dovetails with cls. *See* Unger, *supra* note 7, at 578–79.

242 *See* Nir & Liu, *supra* note 238, at 527–29. This is, again, the notion of situation sense. *See supra* notes 197–99 and accompanying text.

243 *See* BOURDIEU, *supra* note 33, at 111.

244 *See id.* at 42; Bourdieu, *supra* note 36, at 838 (courts' judgments "are magical acts which succeed because they have the power to make themselves universally recognized").

245 *See* Bourdieu, *supra* note 36, at 824, 838–39 (noting that being part of juridical division of labor is to be part of "a chain of legitimation that removes . . . acts from the category of arbitrary violence" (emphasis omitted)).

246 *See* BOURDIEU, *supra* note 33, at 42, 111 (criticizing Max Weber's opposition between "charismatic law" and "rational law").

247 *See* Bourdieu, *supra* note 36, at 816–17; *see also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 535–36 (1988) (noting that formalism cannot be completely self-contained).

248 *See* Bourdieu, *supra* note 36, at 827 (noting "the extraordinary elasticity of [legal] texts" and the range of "rhetorical devices" that "judges have at their disposal").

rendering legal decisions that cannot produce the results promised in the world, however firmly grounded those results may be in legal text. Law's authority and prestige—and by extension, that of the juridical field[249]—suffer if it is conspicuously unable to *do* by *saying*.[250]

The police's relation to the juridical field underscores this vulnerability.

2. The Police's Ambiguous Relation to the Juridical Field

The police are ambiguously positioned in relation to the juridical field. The notion of an unbroken "chain of legitimation" connecting the courts to the police normalizes the State's use of coercion in the streets.[251] Constitutional police regulation presupposes such a line. This presupposition casts the police as if squarely within the juridical field. That casting is, however, belied by how law-trained actors perceive and treat the police in day-to-day operation of criminal justice machineries—as low-status participants if not outsiders.

Constitutional police regulation formally marks the police as existing within the juridical division of labor. Constitutional police regulation attributes juridical hue to police work.[252] The Supreme Court has understood the police to contemporaneously apply law to facts when deciding whether to deploy coercive action.[253] The police are cast as the juridical field's street agents—generating the encounters that become criminal cases, convictions, sentences, and so on.[254] The idea that there is such a thing as a "criminal justice system" hinges on the premise that there is bureaucratic integration between courts and police.[255]

The Supreme Court has crafted constitutional police regulation on the premise that courts speak authoritatively to the police.[256] The premise is often implicit. Fourth Amendment jurisprudence, for example, presupposes that police evaluate facts through a juridical lens. Police are taken to weigh evidence of guilt and use coercive power

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249 *See id.* at 834; *see also* Terdiman, *supra* note 36, at 809.

250 *See* Terdiman, *supra* note 36, at 809; Bourdieu, *supra* note 36, at 838 (courts' judgments "are magical acts which succeed because they have the power to make themselves universally recognized").

251 Bourdieu, *supra* note 36, at 824 (emphasis omitted).

252 *See infra* notes 261–63 and accompanying text.

253 *See infra* notes 261–63 and accompanying text.

254 *See* Bourdieu, *supra* note 36, at 824.

255 *See supra* note 228 and accompanying text.

256 *See* Utah v. Strieff, 136 S. Ct. 2056, 2062–63 (2016) (characterizing arrest warrants as a judicial directive that police have no discretion to disregard).

incrementally in relation to whatever legal conclusion they reach.[257] The judicial function is a corrective for the zealous police officer's teetering too far in the direction of crime control.[258] On this view, courts act as a corrective for juridical errors in police judgment. Police are trusted to internalize judicial pronouncement and adjust their future behavior.[259]

Even when the Court has acknowledged the limits of judicial authority over the police, it has, ironically, reemphasized the juridical framing of the police function.[260] In the wake of *Terry v. Ohio*, the Court lowered the legal threshold for stop-and-frisk encounters.[261] In *Terry*, the Court had noted that judicial authority over the police is thin in street encounters. Fearing that courts could not prevent police from patting down individuals during stop and frisks, the Court approved the practice. It ultimately made clear that only reasonable suspicion is required for stop and frisks as opposed to probable cause.[262] The Court assumed that police would understand the subtle distinction between "probable cause" and "reasonable suspicion" and apply it contemporaneously in the street.[263]

The Supreme Court's willingness to credit the police's legal acumen on the streets is belied by their lack of capital in the juridical field.[264] Driving the police's low status are class-welded notions of intellectual competence, professional discretion, and belonging.

Lawyers tend to view police officers as less legally competent than themselves. This claim is necessarily brushstroke. There has been little empirical research on attorney perceptions of police and variation is to be expected by jurisdiction and officer type.[265] But there is little to suggest that lawyers view municipal police as possessing a lawyer's legal

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257 *See id.* at 2063.

258 *See id.*

259 The Fourth Amendment exclusionary rule is premised on this idea. *See, e.g.*, Davis v. United States, 564 U.S. 229, 236–38 (2011); Herring v. United States, 555 U.S. 135, 148 (2009) (Ginsburg, J., dissenting); Hudson v. Michigan, 547 U.S. 586, 591 (2006).

260 *See* Terry v. Ohio, 392 U.S. 1, 12 (1968). And criminal cases end up representing a rather thin sliver of what patrol officers spend their time doing in the field. *See* Friedman, *supra* note 49, at 949–50; Van Maanen, *supra* note 32, at 42–43.

261 *See* Michigan v. Summers, 452 U.S. 692, 698 & n.7 (1981); Miller, *supra* note 29, at 26, 41–43, 47.

262 *See Summers*, 452 U.S. at 698 & n.7.

263 *See id.*

264 *See* Bourdieu, *supra* note 36, at 828.

265 *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 786 (2003) (discussing the unique circumstances in federal criminal bureaucracies that prevent prosecutors and law enforcement from being "pushed apart by their membership in distinct, even antagonistic, professional cultures").

competence.[266] Prosecutors work closely with the police and are likely inclined to view them favorably, but not as professional equals whose legal judgments deserve deference.[267] Prosecutors function as gatekeepers for the criminal justice machinery and thus have some supervisory power over the police, for example by preventing untrustworthy officers from appearing in court.[268]

It is revealing that partiality marks the police's tenuous relation with the juridical field. Partiality is a celebrated value within the juridical field (at least in the United States). Legal argumentation consists of patterned competitions around bonded pairs of opposed values,[269] and it demands assiduous partiality.[270] But partiality is the attorney's province, not the police's.

The stigma attached to police partiality flows from "their inability to accomplish the conversion of mental space" and assume the kinds of "linguistic stance[s]" that qualify one for full membership in the juridical field.[271] Among the requirements for becoming a lawyer is understanding the boundary between vaunted partiality and unethical misrepresentation.[272] This is the kind of distinction that does not lend itself to a precise formulation but is the essence of professional judgment. Legal professionals' dim view of police prosecution of misdemeanors is suggestive.[273] This practice is received with broad disapproval by law-trained professionals.[274] Police officers, it is thought, should serve as fact witnesses, important ones at best.[275]

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266 *See* LESLIE SEAWRIGHT, GENRE OF POWER: POLICE REPORT WRITERS AND READERS IN THE JUSTICE SYSTEM 43–44, 68, 76 (2017).

267 *See id.*

268 *See* Joseph Goldstein, *Brooklyn D.A. Names 7 Blacklisted Officers*, N.Y. TIMES, Nov. 8, 2019, at A24.

269 *See* Balkin, *supra* note 59, at 39, 62–68.

270 *See* Bourdieu, *supra* note 36, at 827.

271 *Id.* at 828 (noting "those who, though they may find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of mental space" required to be admitted to juridical field).

272 *See* Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1308 (1998) (noting absence of ethical training and obligations on part of police as opposed to prosecutors); *see also* Bourdieu, *supra* note 36, at 834–35 ("The constitution of the juridical field is inseparable from the institution of a professional monopoly over the production and sale of . . . legal services.").

273 *See* Julia Rock & Harry August, *Rhode Island Police Don't Just Make Arrests. Some Also Act as Prosecutors.*, APPEAL (Oct. 10, 2019), https://theappeal.org/rhode-island-police-prosecutors [https://perma.cc/A2EC-THVP] (noting states that permit police prosecutions and noting criticisms thereof).

274 *See id.*; *see also* Horwitz, *supra* note 272, at 1306–07 (arguing that it should be illegal for police to prosecute criminal cases).

275 *See* United States v. Davis, 793 F.3d 712, 720 (7th Cir. 2015) (reasoning that police honesty must be ascertained through testimony in court).

The marks of distinction that define status in the juridical field overlap with class markers outside the juridical field. Municipal street policing is a working-class job that places its ranks in propinquity to society's lowest rungs.[276] That, coupled with the police's conspicuous authority to use physical force, makes policing, in Egon Bittner's words, a "tainted occupation."[277] Police are ritually stained by their work.[278] These features of street policing give rise to a professional insularity marked by a high degree of suspiciousness toward outsiders, including those in the juridical field.[279] Police suspicion is further amplified by the sense that the juridical field produces results at odds with the police's sense of street justice.[280]

The police's attitude toward the juridical field underscores the extent to which they are not part of it, but instead inhabit a field entirely their own.

C. *Law's Place in the Police Field*

Street policing's operational realities separate it from the juridical field. But the police have an interest in distinguishing the coercive power they wield from "arbitrary violence" by casting themselves as bound by law and courts.[281] Modern police agencies and officers have embraced the notion of being law bound.[282]

That law matters to the police self-conception does not mean that their understanding comports with constitutional police regulation's legality-based gloss on policing.[283] Judges and lawyers take legal concepts like probable cause and reasonable suspicion to contemporaneously structure police choices in the street.[284] Bourdieu critiqued this brand of observer bias.[285]

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276 *See* BITTNER, *supra* note 40, at 8.

277 *See id.* at 6.

278 *See id.* at 6–7; *see also* Van Maanen, *supra* note 32, at 38–40.

279 *See* Van Maanen, *supra* note 32, at 39–40.

280 *See* BITTNER, *supra* note 40, at 42.

281 *See* Bourdieu, *supra* note 36, at 824.

282 *See* Sekhon, *supra* note 31, at 1733–34. Police agencies were not initially conceived as law-bound crime fighters. *See id.* at 1732–33. That notion was self-consciously and successfully advanced by police reformers following World War II. *See id.* at 1733–34. For a fuller recitation of this history, see *id.* at 1730–35.

283 *See id.* at 1737–38, 1748–49; BITTNER, *supra* note 40, at 42; Van Maanen, *supra* note 32, at 21, 42–43.

284 *See* Michigan v. Summers, 452 U.S. 692, 698 & n.7 (1981).

285 *See* BOURDIEU, *supra* note 37, at 34, 81.

Judges and lawyers project juridical logic onto the police, creating what Bourdieu referred to as a "synchronizing effect."[286] The juridical framing detemporalizes and synthesizes police practice from a juridical observer's perspective.[287] A court's analysis of whether there was probable cause for a search or arrest, for example, collapses the results (criminal evidence or arrest) into the police's earliest observation and engagement with the defendant.[288] But the defendant was not inevitably such. Juridical analysis does not capture the unfolding, contemporaneous uncertainties that officers respond to in deciding whether to make an arrest and set someone on the path to becoming a defendant.

The juridical framing of policing "sweep[s] away the urgency, the appeals, the threats, the steps to be taken, which make up the real, really lived-in, world."[289] Getting "a collar" is lauded in the police field,[290] but it is a rare occurrence for patrol and may not be primarily determined by the satisfaction of individualized suspicion or some other legal standard.[291] Juridical actors project the juridical rationale for a specific result back onto the police's operational sensibility. In the streets, however, police focus attention, initiate encounters, and use coercion (or withhold it) based on shared, workaday intuitions that are not juridical.[292]

Bourdieu referred to such intuitions as "practical logic" or illogical logic.[293] Unlike the objective logic of law, practical logic does not present itself as a pregiven rule to be applied. Rather it is a practitioner's ineffable intuition for how things are likely to go in a situational context: the "feel for the game" that marks one's belonging to a field.[294] In the street, whether the police stare, stop, strike, or leave someone alone is a

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286 *See id.* at 82. Juridical logic is a species of what, in this passage, Bourdieu refers to as a "scientific account of practice." *Id.* Its "efficacy" owes "to the synchronizing effect it produces (after much labour and time) by giving an instantaneous view of facts which only exist in succession and so bringing to light relationships (including contradictions) that would otherwise go unnoticed." *Id.* (emphasis omitted).

287 *See id.*

288 *See id.*

289 *See id.*

290 *See* EDWARD CONLON, BLUE BLOOD 14 (1st trade paperback ed. 2005).

291 *See* William F. Walsh, *Patrol Officer Arrest Rates: A Study of the Social Organization of Police Work*, 2 JUST. Q. 271, 284 (1985) (describing patrol officers' career aspirations as determinative of propensity to make arrests).

292 *See infra* notes 295–97 and accompanying text.

293 *See* BOURDIEU, *supra* note 37, at 92.

294 *See id.* at 91–92 ("In contrast to logic . . . practice excludes all formal concerns. . . . [Practice] is unaware of the principles that govern it and the possibilities they contain; it can only discover them by enacting them, unfolding them in time.").

developing reaction to an unfolding exigency, little of which is governed by juridically prespecified rules.

Criminologists have noted the existence of informal "working rules" among police officers.[295] These are what Bourdieu would have described as practical logics. As Bourdieu might have predicted, officers must be prodded to verbalize the thoughts and feelings that arouse suspicion.[296] The label "rule" is deceptive because these are not codified conduct rules that officers self-consciously apply in the streets. Rather, they are uncodified occupational intuitions developed in response to reoccurring problems: a situational common sense reflecting the accreted experiences of officers over time.[297]

Section II.C.1 describes two examples of such common sense in the police field: reliance on race and class cues in suspicion formation and the use of harshness to control street encounters.

Police working rules, like all practical logics, are constrained and shaped by objective relations of power.[298] But even here, constitutional police regulation is less relevant than police agencies' institutional choices and the race and class composition of space. Section II.C.2 takes up this point.

1. The Practical Logic of Street Policing

The practical logic of street policing exists at considerable remove from the constitutional conduct rules that putatively govern the police. Two examples follow: suspicion formation and controlling street encounters.

Suspicion formation. Patrol officers do not typically move through the world evaluating whether the legal definition of individualized suspicion is satisfied. Rather, they feel suspicion in accordance with experience-hewn intuitions about what is "normal" for a specific place

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295 *See* Meghan Stroshine, Geoffrey Alpert & Roger Dunham, *The Influence of "Working Rules" on Police Suspicion and Discretionary Decision Making*, 11 POLICE Q. 315, 316 (2008).

296 *See* Geoffrey P. Alpert, John M. MacDonald & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407, 418 (2005) (describing research protocol for getting officers to "think out loud" in study of race and suspicion formation); Roger G. Dunham, Geoffrey P. Alpert, Meghan S. Stroshine & Katherine Bennett, *Transforming Citizens into Suspects: Factors that Influence the Formation of Police Suspicion*, 8 POLICE Q. 366, 373 (2005); *see also* BOURDIEU, *supra* note 37, at 91.

297 *See* David A. Klinger, *Negotiating Order in Patrol Work: An Ecological Theory of Police Response to Deviance*, 35 CRIMINOLOGY 277, 286 (1997) (noting how officers developed shared norms and ways of viewing occupational realities).

298 *See* BOURDIEU, *supra* note 37, at 97.

and time.[299] Criminologists sometimes use "incongruity" to describe this form of suspicion formation.[300]

Intimate familiarity with space is the cornerstone of patrol; new officers quickly develop common sense about which sections of their territory are "good" and "bad."[301] Intuitions about what is normal in the good and bad sections become references for what is "out of place" at any given time.[302] Incongruity is often not attributable to observable illegality.[303] Rather, incongruity combines empirical and moral intuitions.[304] Race and class cues are salient to both.[305]

Race and class saliently inform officers' feelings about what does not fit in a particular setting.[306] The limited survey data that exists supports this proposition.[307] Racial incongruity is empirical in the sense that when an officer's territory is populated by one race, someone of a different race draws attention by virtue of the visual contrast.[308] Similarly, it might be unusual to find disheveled-looking people driving expensive cars or walking in upscale neighborhoods.[309] But ostensibly empirical intuitions betray moral hue—what, for instance, does it mean for someone to look "disheveled"?

It is not just that police notice objective differences; it is the attribution of nefarious purposes to such incongruity. These may not be separate analytical moments for police (or anyone else). It might be impossible to disentangle empirical and moral incongruity where race

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299 *See* BROWN, *supra* note 40, at 170; Van Maanen, *supra* note 32, at 57; Richard R. Johnson & Mark A. Morgan, *Suspicion Formation Among Police Officers: An International Literature Review*, 26 CRIM. JUST. STUD. 99, 104–06 (2013) (reviewing literature on incongruity).

300 *See* Johnson & Morgan, *supra* note 299, at 106.

301 *See* Van Maanen, *supra* note 32, at 57–59.

302 *See* Johnson & Morgan, *supra* note 299, at 106.

303 *See* Alpert, MacDonald & Dunham, *supra* note 296, at 425–26 (where suspicion was triggered by nonbehavioral cues).

304 *See* Dunham, Alpert, Stroshine & Bennett, *supra* note 296, at 380; *see also* Alpert, MacDonald & Dunham, *supra* note 296, at 418.

305 *See* Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 431–32 (2021); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 251 (1983) (asking whether or when race may be used to tip the scales from not-quite-probable cause to probable cause); Johnson & Morgan, *supra* note 299, at 100–01 (citing "symbolic assailant" concept developed in JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 41–45 (Quid Pro Books 4th ed. 2011) (1966)).

306 *See* Leo Carroll & M. Lilliana Gonzalez, *Out of Place: Racial Stereotypes and the Ecology of Frisks and Searches Following Traffic Stops*, 51 J. RSCH. CRIME & DELINQ. 559, 563–64 (2014) (reviewing literature); Alpert, MacDonald & Dunham, *supra* note 296, at 426.

307 *See* Stroshine, Alpert & Dunham, *supra* note 295, at 322; Dunham, Alpert, Stroshine & Bennett, *supra* note 296, at 375–77.

308 *See* Carroll & Gonzalez, *supra* note 306, at 563–64; *see also* Johnson, *supra* note 305, at 244–45 (arguing that racial incongruity violates Equal Protection Clause).

309 *See* Johnson & Morgan, *supra* note 299, at 105–06.

and class are concerned. Jerome Skolnick noted that police socialization entails the inculcation of a perceptual schema of the kind of person that is dangerous: the "symbolic assailant."[310] Race and class markers define the "symbolic assailant."[311] The significance of these markers is likely reaffirmed over time in the police field. The inclination to look twice at people who are out of place by virtue of race or class will, over time, result in disproportionate encounters with those who initially seemed out of place. Sometimes the officer will have been right. This in turn will tend to ratify the suspicion heuristics that drove the initial encounter. Contemporary accounts of unconscious bias support this account.[312]

Controlling Street Encounters. Policing's practical logic accepts if not encourages harshness toward those who challenge police authority in street encounters.[313] There are "few findings that are as consistently replicated and as widely accepted" among criminologists.[314] This is true irrespective of whether the target violated any criminal laws.[315] Harshness here refers to the full range of police coercion from verbal disrespect to physical violence, with arrest lying between those two poles.[316] Civilian disrespect also encompasses a range of behaviors including disregarding officer directions and verbally disrespecting the police.[317]

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310 SKOLNICK, *supra* note 305, at 43–45.

311 *See id.* at 45; *see also* Jeannine Bell, *Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited*, 34 GA. ST. U. L. REV. 513, 516–17 (2018) (noting centrality of race to symbolic assailant concept and its utility in understanding contemporary police violence).

312 *See* Bell, *supra* note 311, at 557–58; Johnson & Morgan, *supra* note 299, at 109.

313 *See* Van Maanen, *supra* note 193, at 332, 336, 339–40.

314 *See* Robert E. Worden & Robin L. Shepard, *Demeanor, Crime, and Police Behavior: A Reexamination of the Police Services Study Data*, 34 CRIMINOLOGY 83, 83–84 (1996) (reviewing "three decades of research on police behavior" and considering then-recent criticism of conclusions).

315 *See* Van Maanen, *supra* note 193, at 330–33 (defining the "asshole").

316 *See* Stephanie L. Kent & Wendy C. Regoeczi, *The Importance of "Working Rules" in the Determination of Traffic Stop Outcomes*, JUST. POL'Y J., Spring 2015, at 1, 11–12, 19, http://www.cjcj.org/uploads/cjcj/documents/jpj_kent_spring_2015.pdf [https://perma.cc/4DFS-6PVV] (disrespectful statements and demeanor increase likelihood of officer issuing a traffic ticket); Stephen D. Mastrofski, Michael D. Reisig & John D. McCluskey, *Police Disrespect Toward the Public: An Encounter-Based Analysis*, 40 CRIMINOLOGY 519, 539–40 (2002) (likelihood of police disrespect for suspect increases if suspect disrespectful toward police); Worden & Shepard, *supra* note 314, at 96–97 (likelihood of arrest and police use of force increase in response to suspect disrespect); John Kavanagh, *The Occurrence of Resisting Arrest in Arrest Encounters: A Study of Police-Citizen Violence*, 22 CRIM. JUST. REV. 16, 25–26 (1997) (resisting arrest charge more likely if suspect was disrespectful).

317 *See* Michael D. Reisig, John D. McCluskey, Stephen D. Mastrofski & William Terrill, *Suspect Disrespect Toward the Police*, 21 JUST. Q. 241, 250 (2004) (distinguishing between "passive and active" disrespect with the former "largely restricted to the suspect ignoring an officer's request or command"); Worden & Shepard, *supra* note 314, at 86; Kavanagh, *supra* note 316, at 25; Van Maanen, *supra* note 193, at 337–38.

Policing's practical logic reflects functional and identity-driven impulses for using harshness to control street encounters.[318] These impulses are tightly braided.[319] Officers' functional explanations emphasize their own safety.[320] It is common sense among police that failures to respond aggressively to civilian disrespect can "make future interactions much more difficult and dangerous."[321] Today's disrespectful civilian, if emboldened, can become tomorrow's assailant. Even in the absence of such a threat, disrespectful civilians affront police authority and might also make encounters more stressful, unpleasant, and slow.[322] The police thus tend to view disrespectful individuals as lacking social standing.[323] This begins to suggest the relationship between police identity and harshness.

Police are deeply irked by disrespectful civilians. John Van Maanen noted that police working rules regarding disrespect are motivated by symbolic exigency that threatens police officers' sense of occupational self, separate and apart from any instrumental value.[324] The police's status on the street flows from the symbolic prestige associated with enforcing criminal laws and the attendant authority to use violence in the State's name.[325] That status is at the core of the police's sense of occupational self. To fail to respond to verbal challenge or other disrespect is to lose face and thus incur a status injury.[326] Together, these features of policing impel vigilance about perceived attacks on police authority.[327]

The imperative for police to maintain status is not racially neutral. The occupational pressure to "maintain an edge"[328] is pulled especially tight in places that police view as criminogenic—these are often minority neighborhoods.[329] Police may well be quicker to perceive

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318 *See* Van Maanen, *supra* note 193, at 331–33 (defining the "asshole").

319 *See id.* at 345–46.

320 *See* CONLON, *supra* note 290, at 80; Van Maanen, *supra* note 32, at 63–64.

321 MOSKOS, *supra* note 41, at 104–05; *see also* CONLON, *supra* note 320, at 80–81.

322 *See* Van Maanen, *supra* note 193, at 339–40.

323 *See id.* The "asshole" in Van Maanen's typology does not track any particular demographic group, although a civilian's demographic characteristics may inform the police interpretation of someone as an "asshole." *See id.* at 338. Understood in the most abstract sense, an asshole is a "reified other, representing all those persons who would question, limit, or otherwise attempt to control the police." *Id.* at 346.

324 *See id.* at 312, 322–23.

325 S*ee, e.g.*, BROWN, *supra* note 40, at 135–36; BITTNER, *supra* note 40, at 41–42.

326 *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 138 (2017).

327 *See* Van Maanen, *supra* note 193, at 345.

328 *See id.* at 339–41.

329 *See* Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCH. Q. 319, 323 (2004); CONLON, *supra* note 320, at 79–80; Van Maanen, *supra* note 32, at 63.

disrespect and respond harshly in these contexts. For some officers, these may not be regrettable instances. Van Maanen observed that some officers enjoy meting out harsh treatment in response to street exigencies,[330] underscoring the deep, identity-driven impulses for suppressing disrespect.[331]

2. Objective Constraints

Practical logics do not operate in a vacuum. They are contained by structural forces that invite objective analysis.[332] But even here, legality-based constraints have less bearing than those in the juridical field might think. Rather, it is institutional choices by police agencies that shape the contexts within which practical logics play out.

Police working rules take shape in a context defined by territory and mandate.[333] Departmental choices play a significant role in determining those contextual facts. The juridical field conceptualizes police officers as part of "a chain of legitimation" linking crimes to convictions rather than agents of detached and insulated bureaucracies whose interests may substantially diverge from courts'.[334]

Forrest Stuart's recent work on Skid Row illustrates institutional choice's role in distributing suspicion, harshness, and their consequences. Stuart details how the Los Angeles Police Department came to embrace a new coercive-rehabilitation paradigm for policing Skid Row.[335] In conjunction with private and public interests, the police department came to view the entire neighborhood as a transitional site for delivering social services to the most down and out.[336] This marked a shift from the earlier approach to the neighborhood that emphasized containing it—that is, preventing its stigmatized residents from entering the adjoining central business district.[337]

The shift in departmental policy generated corresponding shifts in patrol officers' working rules for Skid Row.[338] Officers reoriented their suspicion heuristics and intuitions about who deserved harsh treatment

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330 *See* Van Maanen, *supra* note 193, at 340.

331 *See* JAMES T. TEDESCHI & RICHARD B. FELSON, VIOLENCE, AGGRESSION, & COERCIVE ACTIONS 249–50 (1994).

332 *See* BOURDIEU, *supra* note 37, at 30–31.

333 *See* Van Maanen, *supra* note 32, at 57–59.

334 *See* Bourdieu, *supra* note 36, at 824 (emphasis omitted).

335 *See* FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 70–71 (2016).

336 *See id.* at 81, 109–11.

337 *See id.* at 82–83.

338 *See id.* at 97.

in accordance with the police department's new emphasis on providing social services. Officers tended to be lenient with those whom they understood to be making good-faith efforts to obtain services and transition out of the neighborhood.[339] Officers' suspicion and harshness were directed to people who, in the officers' impression, were not making good-faith efforts to improve themselves.[340]

More generally, the interaction between institutional choices and practical logic helps explain the race and class distribution of harshness. Intensively deploying younger, aggressive officers in poor minority neighborhoods, coupled with police common sense that a neighborhood is criminogenic, will generate systemic disparity.[341] These institutional choices generate more opportunities for adversarial street encounters with civilians. Departmental directives that patrol conduct frequent street stops,[342] or that authorize the use of arrest-intensive plainclothes officers,[343] will also have this effect. The higher number of encounters also means that there will be more instances of civilian disrespect and more instances of police violence.[344]

The interaction between officers' working rules and departmental policy choice has the capacity to generate race and class feedback loops. More stops and arrests generate a host of negative criminal justice consequences for targets: convictions, bench warrants for failures to appear, suspended licenses, and so on.[345] The accumulation of these effects of interacting with the criminal justice machinery, coupled with officers' repeat interactions with minority suspects who have accumulated such effects, likely bolsters officers' perceptions of minority criminality.[346]

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339 *See id.* at 104, 109–11.

340 *See id.*

341 *See* Sekhon, *supra* note 31, at 1753–54.

342 *See* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2398 (2017). *But see* Klinger, *supra* note 297, at 293–94 (theorizing that police will behave with less vigor in areas they perceive to be high crime).

343 *Cf.* Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 229–30 (2017) (noting harms associated with plainclothes policing in minority neighborhoods).

344 *See id.*

345 *See* Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 1003 (2018).

346 *See* Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation*, 34 CRIM. JUST. & BEHAV. 1262, 1269–70, 1273–74 (2007) (describing this as "illusory correlation").

D. *Symbolic Capital and Mediation*

Constitutional police regulation is less about courts regulating police than it is mediating the disjuncture between the juridical and police fields. Both fields' legitimacy requires the appearance of "a chain of legitimation" connecting street encounters to courts.[347] This chain legitimates the State's use of coercive power by creating the notion that there is a criminal justice system subject to judicial oversight.[348]

Courts' and police's symbolic capital depends on the appearance of a unified criminal justice system.[349] "Symbolic capital" is the power to affect material relations through words or ritual acts.[350] Courts ostensibly *bind* and the police are ostensibly *bound*. Sustaining this relation (or, at least its appearance) requires mediation because of the chasm separating the juridical and police fields. Constitutional police regulation serves that mediating role.

The mediative relation is delicate, requiring differential opportunities for submission. Were courts too demanding of police, courts' lack of bureaucratic control over the police would quickly show. The police might conspicuously ignore courts' orders. For the police, there is peril in appearing to be outside of judicial control; it undermines the police's status and legitimacy as agents of law.[351]

Section II.D.1 below suggests that constitutional police regulation's indeterminacy reflects a sociolegal equilibrium that sustains courts' and police's symbolic capital. Even when a court finds that the police violated a constitutional right, that message's delivery to the police is buffered, creating relatively little interference in the police field. In the other direction, the police do their own communicative buffering, translating their practical logics into concepts recognizable in the juridical field. As described in Section II.D.2, that buffering is reflected in the art of police report writing.

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347 Bourdieu, *supra* note 36, at 824 (emphasis omitted).

348 *See supra* note 228 and accompanying text.

349 Judges will feel the weight of this symbolic capital more acutely than lawyers because they are responsible for preserving the juridical field's integrity. *See* Bourdieu, *supra* note 36, at 822–24 (noting the salience of judges in Anglo-American tradition and their role in ensuring "the permanence of a systematic set of principles and rules").

350 *See* BOURDIEU, *supra* note 37, at 120–21. Elsewhere, Bourdieu uses the expression "symbolic power" to mean the same thing. *See* BOURDIEU, *supra* note 33, at 75–76.

351 *See, e.g.*, BROWN, *supra* note 40, at 135–36; BITTNER, *supra* note 40, at 42.

1. Buffering Juridical Signals

Part I suggested that the existence of robust substantive rights against the police is ironically dependent upon there being significant hurdles to obtaining a remedy for violations. The law is vast and complex, ostensibly requiring lawyers and courts to scrutinize the granular details of police-civilian interactions.[352] But systemic change is forestalled by the juridical field's capacity for interminably generating limiting principles.[353] This suggests that the most significant consequences of constitutional police regulation are realized within the juridical field itself. The activity serves to underscore legal principles' applicability without compelling far-ranging material effects. Sometimes, though, courts do generate dispositions that are unfavorable to the police.

The juridical field's mechanisms for signaling negative dispositions to the police are weak. Courts do not directly supervise police officers, nor do they have power over police personnel decisions.[354] Most patrol work is not designed to generate criminal cases.[355]

Police practices are most commonly challenged in criminal suppression motions; the effect of that remedy on police officers and agencies is minimal to none.[356] The Supreme Court has repeatedly noted that the point of exclusion is not to punish police, but rather to deter future violations.[357] The Court has not specifically explained how this is supposed to work.[358] Presumably, suppression is supposed to generate expressive power that gets transmitted to officers, leading them to change their future behavior.[359] This expectation is fanciful for street policing.[360]

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352 *See supra* Section I.B.2.b.

353 *See supra* Sections I.B–I.C.

354 Modern police agencies are typically insulated from other government actors. *See* ROBERT M. FOGELSON, BIG-CITY POLICE 175–76 (1977); *see also* Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 541 (2015) (noting that police agencies are not accountable to other government agencies or the public as is true for administrative agencies); Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 988–89 (1965).

355 *See* Friedman, *supra* note 49, at 949–51; Van Maanen, *supra* note 32, at 42–43.

356 *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 369–72 (reviewing literature).

357 *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006).

358 *See* Stone v. Powell, 428 U.S. 465, 493–94 (1976).

359 *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 277–78 (1988).

360 *See* Slobogin, *supra* note 356, at 369–72.

Officers are not generally obliged to be present in court for judges' determinations regarding Fourth Amendment violations. Nor are officers expected to remain apprised of the latest developments in criminal law and procedure as practicing lawyers would. Rather, officers depend on word of mouth among police and episodic training for legal knowledge.[361] Neither source is robust.[362] Police officers understand less of criminal law and procedure than one might hope.[363]

Civil judgments against individual officers for damages might send stronger signals to officers than exclusion does.[364] But civil judgments are rarer than exclusion.[365] And the police field's distance from the juridical field makes civil signals weak as well. In her survey of American police departments, Joanna Schwartz discovered that most police departments indemnify officers for damages awards.[366] Nor do adverse civil judgments necessarily trigger personnel action against officers.[367] It may well be to the contrary.

Police departments' personnel policies may drown out judicial signaling. Promotion and commendations for performance, for example, are more likely to be tethered to arrests rather than convictions.[368] It may even be that adverse judgments correlate with a brand of aggressiveness for which officers receive departmental commendation.[369]

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361 *See* Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 19–20 (2018) (noting the cursory nature of such training).

362 *See id.* at 19–21.

363 *See, e.g.*, Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 319 (2004); Helen Eigenberg & Laura Moriarty, *Domestic Violence and Local Law Enforcement in Texas: Examining Police Officers' Awareness of State Legislation*, 6 J. INTERPERSONAL VIOLENCE 102, 108 (1991).

364 That is qualified immunity's premise. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014).

365 *See* Starr & Maness, *supra* note 92, at 375.

366 *See* Schwartz, *supra* note 364, at 912–15.

367 *See* Tana Ganeva, *NYPD's Culture of Impunity Sees an Officer Repeatedly Accused of Physical and Sexual Abuse Rising Through the Ranks*, INTERCEPT (July 6, 2020, 7:00 AM), https://theintercept.com/2020/07/06/nypd-culture-of-impunity [https://perma.cc/MVP2-AQW4] (describing one officer's professional successes despite numerous civil lawsuits and citizen complaints).

368 *See* Walsh, *supra* note 291, at 287.

369 *See* BERNARD D. ROSTKER ET AL., EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 54 (2008).

2. Buffering Police Signals

Communication is also buffered in the other direction. Police sometimes document their experiences in the street for review in the juridical field.[370] This usually occurs in the form of a police report drafted after an encounter. Here, law serves as a narrative resource for "sensemaking," a motivated retelling for specific institutional ends.[371] The point is to justify the police's behavior. Police sensemaking should not be understood in the simple binary terms of truth and lie,[372] although that is the tendency in the juridical field.[373]

Street policing's intuitive nature, coupled with the often jumbled and chaotic situations police confront in the street, defies the linearity and coherence that juridical (and other) readers expect.[374] Linearity and coherence come later.[375]

A police report is a narrative reconstruction justifying the police action.[376] It is constructed for consumption by readers outside and inside the police department,[377] not least of whom are readers in the juridical field.[378] Officer-writers tend to, with editorial assistance,[379] cast

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370 *See* SEAWRIGHT, *supra* note 266, at 20 (ethnographic account of police report writer and readers); JOHN G. NELSON, PRELIMINARY INVESTIGATION AND POLICE REPORTING: A COMPLETE GUIDE TO POLICE WRITTEN COMMUNICATION 45–48 (1970); FRANK M. PATTERSON & PATRICK D. SMITH, A MANUAL OF POLICE REPORT WRITING 3 (1968) (defining what a police report is); Han Yu & Natalie Monas, *Recreating the Scene: An Investigation of Police Report Writing*, 50 J. TECH. WRITING & COMMC'N 35, 43–44 (2020). *But see* MOSKOS, *supra* note 41, at 50–51 (officer being informed by supervisor of distinction between shading facts and lying).

371 Yu & Monas, *supra* note 370, at 42–43, 48–49, 51 (describing results from interviews with officers regarding police report writing).

372 *See* MANNING, *supra* note 41, at 229.

373 *See* David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 459, 470–80 (1999) (reviewing scholarly literature on "testilying").

374 *See* SEAWRIGHT, *supra* note 266, at 25; Yu & Monas, *supra* note 370, at 42; Elizabeth W. McNulty, *Generating Common Sense Knowledge Among Police Officers*, 17 SYMBOLIC INTERACTION 281, 286–87 (1994).

375 *See* WEICK, *supra* note 46, at 14–15 ("To engage in sensemaking is to construct, filter, frame, create facticity, and render the subjective into something more tangible." (citation omitted)).

376 *See* SEAWRIGHT, *supra* note 266, at 20–21, 25, 66; Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 4–5 (1993).

377 They may inform crime rate calculations, enable supervision, or demonstrate police responsiveness to political and community actors, among other purposes. *See* Myron Miller & Paula Pomerenke, *Police Reports Must Be Reader Based*, LAW & ORD., Sept. 1989, at 66, 66–68.

378 *See* PATTERSON & SMITH, *supra* note 370, at 4–5.

379 *See* SEAWRIGHT, *supra* note 266, at 29 (noting police supervisor's role in review and revision of police report); MOSKOS, *supra* note 41, at 52–53 (same); Yu & Monas, *supra* note 370, at 43 (same).

themselves as having behaved in the manner that legality presupposes.[380] The street's chaotic jumble becomes a linear narrative hitting the plot points readers expect—for example, when the legally required quantum of suspicion that a chargeable crime occurred was reached.[381] This, like all sensemaking,[382] requires including some facts and excluding others.[383]

In a revealing echo of legal formalism,[384] police report genre conventions favor an objective style that bolsters the inevitability of police decisions.[385] Reports typically exclude suggestions of subjectivity and contingency—they are written in the third person, use passive voice, and excise the officer questions that prompted witness accounts.[386] These conventions are designed to resonate with juridical readers and produce effects in the juridical field.[387] While police reports are not usually admissible at trial, they still play a role;[388] they can also influence bail determinations, plea bargaining, and sentencing.[389]

The juridical reader's binary fixation on distinguishing truth from lie leaves lots of room for narrative shading by police. The distinction between shading and outright fabrication will often be difficult for a reader to detect.[390] For example, in arrests where officers used violence, shading might cast an arrestee as more decisively threatening: "holding" might be described as "aggressively grabbing." This kind of shading could easily slip into a "cover

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380 *See* SEAWRIGHT, *supra* note 266, at 29, 36; Yu & Monas, *supra* note 370, at 47–49; Fisher, *supra* note 376, at 4.

381 *See* SEAWRIGHT, *supra* note 266, at 25 (officer described it "as 'painting a picture'" of what happened); Yu & Monas, *supra* note 370, at 44; *see also* WEICK, *supra* note 46, at 12–15.

382 *See* WEICK, *supra* note 46, at 14, 27–28.

383 *See* SEAWRIGHT, *supra* note 266, at 20 (genre demands that mistakes like failing to Mirandize be excised); Amy Hyman Gregory, Nadja Schreiber Compo, Leeann Vertefeuille & Gavin Zambruski, *A Comparison of US Police Interviewers' Notes with Their Subsequent Reports*, 8 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 203, 210–11 (2011) (officers favor inclusion of material from field reports that suggests criminality); Fisher, *supra* note 376, at 8, 27–28 (officers deliberately exclude exculpatory material).

384 *See supra* notes 52–56 and accompanying text.

385 *See* Fisher, *supra* note 376, at 4–5 (arguing that police reports are advocacy).

386 *See* SEAWRIGHT, *supra* note 266, at 12–15; Gregory, Compo, Vertefeuille & Zambruski, *supra* note 383, at 212–14 (cannot tell from report whether officer asked leading questions).

387 It is perhaps unsurprising that officers cut and paste rote expressions between reports. *See* Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 86 (2015) (officers relied on cookie-cutter scripts to describe reasonable suspicion in official reports).

388 *See* SEAWRIGHT, *supra* note 266, at 18–20.

389 *See* Fisher, *supra* note 376, at 33–40.

390 *See* Van Maanen, *supra* note 32, at 31, 51; *cf.* MOSKOS, *supra* note 41, at 52–53 (supervisors may encourage shading to satisfy institutional pressure).

charge[]," an outright fabrication designed to shield officers from scrutiny for having arrested (or used violence upon) a disrespectful citizen.[391]

Legal standards may invite shading. For example, whether a civilian consented to a police inquiry or search turns on whether their choice seemed voluntary.[392] The inquiry focuses on words exchanged by the officer and civilian, whether the officer was polite or had a weapon drawn, and so on.[393] What a civilian experienced as a gruffly barked command might be cast as a genuine question in a police report by exclusively focusing on the words uttered by the officer, followed by question marks where genre conventions require. Punctuation marks are, of course, not expressly articulated in speech. They are communicated through tone and context. Leaving that information out of a report may not be calculated deception. Police's practical logic places a high premium on controlling civilian encounters.[394] Using an authoritative tone and bearing are occupational staples, unconscious reflexes that are part of officers' "durable dispositions."[395] A police report will not typically reveal the content of such practical logics expressly.

III. REMAKING THE POLICE

The analysis in Parts I and II suggests that a conventional, juridically-focused law reform program will not systemically change policing. Even successful law reform is likely to trigger counteracting interpretive shifts, without bridging the chasm that separates the juridical and police fields. Section III.A summarizes these points.

If American policing is to meaningfully change, state and local legislatures will have to engage in root-and-branch reform. This will require political courage and technocratic innovation that cannot be easily captured by a slogan.[396] Reformers need not start from scratch. Guiding principles for structural change are embedded in constitutional principle. That police focus on crime control, apply juridical logic to problems, and are judicially supervised does not

391 *See* CHEVIGNY, *supra* note 230, at 25–26.

392 *See supra* notes 172–80 and accompanying text.

393 *See supra* notes 172–80 and accompanying text.

394 *See supra* Section II.C.1.

395 *See* BOURDIEU, *supra* note 37, at 58.

396 *See* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 134 (2021) (noting malleability of the expression "defund" and the importance of social and historical context in making sense of its use).

describe current arrangements, but contains the normative seeds of what policing should be. Section III.B develops this idea and possible reform implications.

A. *Strengthening the Juridical Signal?*

The discussion in Parts I and II suggests that incremental legal reforms focused on isolated doctrinal defects and/or improving juridical signal strength are likely to be ineffective. Proposals to eliminate qualified immunity are illustrative.[397] Qualified immunity is a basis for denying relief, so eliminating it would seem to benefit defendants. It would also seem to increase juridical signal strength by exposing more individual officers to civil damages. These two points would only be true holding all else constant. But, as Parts I and II showed, all else is not constant.

Qualified immunity operates in conjunction with a skein of other substantive, procedural, and remedial rules.[398] Reformers' goals could be subverted by shifts in how courts understand the other rules with which qualified immunity formerly interacted.[399] Courts might, for example, interpret substantive constitutional rights more restrictively if aware that officers were more likely to be personally liable for damages.[400] Moreover, the structural buffering that currently shields police would remain in place, not least of which are departmental indemnification practices.[401]

Systemic indeterminacy suggests a similar conclusion for any piecemeal, doctrinal reform. Increasing a constitutional right's remedial bite could lead judges to pull their substantive punches and vice versa.[402] Compounding this, the systemic effects of piecemeal reform are hard to gauge, given constitutional police regulation's dependence on individual claimants.[403] Incremental reform, by definition, does not reduce the chasm separating the juridical from the police fields or alter the mediative role that constitutional police regulation plays.[404]

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397 *See* Fuchs, *supra* note 5; Law Professors' Letter, *supra* note 5.

398 *See supra* Section I.B.2.b.

399 *See supra* Section I.B.2.b.

400 *See supra* Section I.B.2.b.

401 *See supra* notes 364–67 and accompanying text.

402 *See supra* notes 142–44 and accompanying text.

403 More than a generation ago, Anthony Amsterdam warned of the profound limitations of an individualistic approach to the Fourth Amendment. *See* Amsterdam, *supra* note 91, at 432.

404 *See supra* Section II.D.1.

B. *Law and Normative Vision*

The analysis in Part II suggests that if courts are to meaningfully regulate the police, reform must speak to the chasm separating the juridical field from the police field. Policymakers—mainly state and local legislative bodies—will have to rethink the relationship from the ground up. There is no blueprint for this. But, guiding values are embedded, among other places, in constitutional principle.

Legal theorists, cls proponents among them,[405] have noted that law is a source of ideals.[406] We go wrong when we confuse those normative ideals for a description of extant reality. Constitutional police regulation's premise that police apply law subject to judicial supervision should be a guiding star for remaking the police.[407]

Constitutional police regulation suggests a simple, liberal ideal for remaking the police: the police should be authorized to use coercion only to control crime, subject to judicial approval.[408] This was not the understanding of municipal police as conceived in the United States in the nineteenth century.[409] Subsequent shifts in the police mandate and function have generally occurred without legislatures having meaningfully considered the institution. All this is to say that legislatures are long overdue in globally addressing the "problem of policing."[410]

Remaking the police consistently with the liberal ideal noted above requires specific, legislative contemplation of police form and function. This is in turn intimately linked to the style of judicial review to which police should be subject. Sketching two different approaches, one individualistic and one institutionalist, illustrates why establishing the terms of judicial review must be central to the legislative task of remaking the police.

An individualist approach favors judicial review of individual officers' crime-control activities akin to constitutional criminal procedure in its current form. Municipal police would have to be more focused on crime control to ensure that a significant portion of officers'

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405 *See* Unger, *supra* note 7, at 578–80 (describing "deviationist doctrine").

406 *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 9–10 (1983) (arguing that constitutional law expresses collective aspirations); *cf.* Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995) (incompletely specified understanding of legal principle's import in specific cases allows the principle to function as a source of "general aspiration").

407 *See* Unger, *supra* note 7, at 586, 602 (arguing that cls can hasten a superliberalism).

408 *See supra* Section II.B.2; *see also* Sekhon, *supra* note 167, at 116–18.

409 *See* Sekhon, *supra* note 31, at 1730.

410 *See* Harmon, *supra* note 1, at 792.

civilian contacts are subject to judicial review.[411] This is a call to abandon American policing's catchall tradition. That tradition has meant that police contend with all manner of social problems, most of which are not per se criminal or readily subject to judicial review.[412] Municipal police currently provide services like animal control, health and welfare checks, informal dispute resolution, accident report, and nuisance abatement.[413]

Police's sprawling mandate engenders sprawling police-civilian contacts. Traffic enforcement is a good example. Most traffic enforcement does not involve serious crime, nor is it particularly dangerous. It does, however, create millions of adversarial police-civilian interactions. It also creates much-criticized opportunities for race-based pretextual stops that engender fear and animosity among minority communities.[414]

These are reasons to cleave traffic enforcement from the police mandate and reassign it to a less coercive agency.[415] Technological innovation permitting passive, electronic identification of violators might help make that more likely.[416] This also suggests the extent to which remaking the police in narrow crime-control terms will leave a range of municipal services unprovided. Remaking the police will necessarily entail remaking municipal government more generally.

Meaningful judicial review of individual officers does not just suggest *what* police should focus on, but *who* should be permitted to serve as sworn officers. Liberal ideals of judicial review will only influence officers who are sufficiently tethered to the juridical field.[417] This implicates questions of professional socialization and disposition that will require far more than just improving police training.[418] Police officers should *experience themselves* as part of the juridical field's division of labor. This might take the form of a specialized degree or

411 The current norm is the opposite. *See* BITTNER, *supra* note 40, at 46.

412 *See id.* at 108.

413 *See* Friedman, *supra* note, at 949–50; Van Maanen, *supra* note 32, at 42–43.

414 *See* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 916–23 (2015) (arguing that *Whren v. United States* was incorrectly decided and that some Justices may be prepared to revisit it).

415 This is also a proposal with historical pedigree. *See* FOGELSON, *supra* note 354, at 85.

416 *See* Elizabeth E. Joh, *Automated Policing*, 15 OHIO ST. J. CRIM. L. 559, 560 (2018) (discussing automation of policing functions).

417 Technology might allow police to literally carry judges into the police field. *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1615–16 (2012) (explaining how technology could permit judicial review in the street).

418 *See* Linetsky, *supra* note 361, at 19–20.

other comparable credential requiring legal education.[419] There is a limited model of this in federal enforcement bureaucracies.[420] Professional licensing standards and requirements could be systematized and strengthened using attorney credentialing processes as a guide. This would require the creation of new academic programs, licensing authorities, and compliance mechanisms.[421]

A second approach to police regulation might accept that policing constitutes a separate field not amenable to direct, judicial supervision. Reform might take a more institutionalist approach, empowering courts to review police agencies' regulation of officers. Courts are rarely called upon to evaluate police departments' policy choices for constitutionality, let alone bureaucratic rationality.[422] That is peculiar given departments' control over the distribution of harshness.[423] Scholars in the 1970s like Anthony Amsterdam and Kenneth Culp Davis argued in favor of treating police agencies like administrative agencies.[424] They believed police departments ought to enact rules subject to public comment and enforce those rules against their officers subject to judicial review.[425] They correctly worried that direct judicial review of individual officer behavior would be too scattershot and irregular to be meaningful.[426]

But the view that police departments ought to be treated as administrative agencies presupposes that police departments are analogous to administrative agencies. The analogy was (and remains) thin.[427] Police departments' sprawling mandates bundle functions that require coercive power with ones that do not.[428] If police departments are to be regulated like administrative agencies, they will first have to be remade in that mold.

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419 Proposals like this have historical precedent. *See* FOGELSON, *supra* note 354, at 160–61. But the financial and other impediments to implementing them are serious. *See id.*

420 *See* Richman, *supra* note 265, at 786–87 (describing tradition of law-trained federal agents and implications for relationships with prosecutors).

421 *See* FOGELSON, *supra* note 354, at 160, 199.

422 *See id.*

423 *See id.*

424 *See* KENNETH CULP DAVIS, POLICE DISCRETION 100–01, 106, 113–20 (1975); Amsterdam, *supra* note 91, at 423–29, 432; *see also* GEORGE E. BERKLEY, THE DEMOCRATIC POLICEMAN 29, 135–36 (1969) (arguing for internal rules with public comment).

425 *See* Amsterdam, *supra* note 91, at 423–29.

426 *See id.*

427 *See* Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 97 (1976); *see also* Van Maanen, *supra* note 193, at 346–47 ("[T]he police officer is anything but a Weberian bureaucrat . . . .").

428 *See* Sekhon, *supra* note 167, at 124–26.

Remaking the police in this way would require functional differentiation between different police services. As in the individualist approach, legislators must first identify the range of public services that police departments provide (and should provide). Only after having done so could a policymaker assess what kind of professional should be providing the different categories of service, the level of coercive power (if any) required for doing so, and the administrative structure that should govern those professionals. For a jurisdiction that seeks to retain a tight relationship between policing and coercive power, it might be rational to remove public service functions not requiring coercive power from police authority. Judicial review would be designed to guarantee the bureaucracies' transparency and fidelity to their own operating principles.[429]

The individualist and institutionalist approaches need not be mutually exclusive. There could (and probably should) be a wide variety of approaches to policing depending on local need and constraint. Generating political momentum for the kind of reform sketched here will be challenging,[430] but might become less so with the advent of even a small number of exemplars.[431]

CONCLUSION

Constitutional police regulation paints a fictional portrait of police as law-bound crime fighters subject to regular judicial review. Theoretically, constitutional police regulation makes a panoply of substantive and procedural tools available to challenge police officers' behavior in court. It might thus appear that the architecture of "an overarching and integrated system of remedies" already exists.[432] But this is ironically belied by constitutional police regulation's individualistic framing and its indeterminacy. This Article has shown that constitutional police regulation's animating

429 *See* sources cited *supra* note 424.

430 *See* Liz Navratil, *Working Group Recommends Keeping Minneapolis Police Charter Change off November Ballot*, STARTRIBUNE (July 29, 2020, 2:30 PM), https://www.startribune.com/working-group-recommends-keeping-minneapolis-police-charter-change-off-november-ballot/571938762 [https://perma.cc/6N8R-2K32] (reporting that efforts to recreate Minneapolis Police Department likely to be delayed).

431 The swell of political interest in police reform inspires hope that such an exemplar will emerge somewhere, even if someplace surprising. *See* Wesley Lowery, *The Most Ambitious Effort Yet to Reform Policing May Be Happening in Ithaca, New York*, GQ (Feb. 22, 2021), https://www.gq.com/story/ithaca-mayor-svante-myrick-police-reform [https://perma.cc/ZFT2-Y62F].

432 *See* Litman, *supra* note 6, at 1528.

purpose is not creating a comprehensive system of remedies, but rather creating the *appearance* of such. This bolsters courts' and police's symbolic capital, legitimating the State's use of coercive power in the name of criminal enforcement.

Constitutional police regulation embeds liberal ideals of what police should be—law-bound crime fighters subject to judicial review—but state and local legislatures have much work to do if that ideal is to be realized.