THE AMERICAN LAW INSTITUTE | 100

Principles of the Law Policing

Combined Revised Tentative Drafts

(January 2023)

SUBJECTS COVERED

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1626 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

The Tentative Drafts of the material in this document were approved by the membership of The American Law Institute at Annual Meetings and have been revised in response to the discussions at those Meetings. This material represents the position of the Institute on the issues with which it deals. This material has not been edited for final publication, including for ALI style, grammar, and updated citations.

The American Law Institute

ANTHONY J. SCIRICA, U.S. Court of Appeals, Third Circuit, Philadelphia, PA
VIRGINIA A. SEITZ, Sidley Austin, Washington, DC
MARSHA E. SIMMS, Weil, Gotshal & Manges (retired), New York, NY
ROBERT H. SITKOFF, Harvard Law School, Cambridge, MA
LAURA STEIN, Mondelēz International, Chicago, IL
LAURA DENVIR STITH, Missouri Supreme Court, Jefferson City, MO
ELIZABETH S. STONG, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
CATHERINE T. STRUVE, University of Pennsylvania Carey Law School, Philadelphia, PA
JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
LARRY D. THOMPSON, Finch McCranie, Atlanta, GA
SARAH S. VANCE, U.S. District Court, Eastern District of Louisiana, New Orleans, LA
SETH P. WAXMAN, WilmerHale, Washington, DC
STEVEN O. WEISE, Proskauer Rose LLP, Los Angeles, CA

COUNCIL EMERITI

KENNETH S. ABRAHAM, University of Virginia School of Law, Charlottesville, VA
PHILIP S. ANDERSON, Williams & Anderson (retired), Little Rock, AR
SUSAN FRELICH APPLETON, Washington University School of Law, St. Louis, MO
KIM J. ASKEW, DLA Piper US LLP, Dallas, TX
JOSÉ I. ASTIGARRAGA, Reed Smith, Miami, FL
SHEILA L. BIRNBAUM, Dechert LLP, New York, NY
ALLEN D. BLACK, Fine, Kaplan and Black, Philadelphia, PA
AMELIA H. BOSS, Drexel University Thomas R. Kline School of Law, Philadelphia, PA
MICHAEL BOUDIN, U.S. Court of Appeals, First Circuit (retired), Boston, MA
WILLIAM M. BURKE, Costa Mesa, CA
ELIZABETH J. CABRASER, Lieff Cabraser Heimann & Bernstein, San Francisco, CA
GERHARD CASPER, Stanford University, Stanford, CA
EDWARD H. COOPER, University of Michigan Law School, Ann Arbor, MI
N. LEE COOPER, Maynard, Cooper & Gale, Birmingham, AL
GEORGE H. T. DUDLEY, Dudley Newman Feuerzeig, St. Thomas, U.S. VI
CHRISTINE M. DURHAM, Wilson Sonsini Goodrich & Rosati, Salt Lake City, UT
KENNETH C. FRAZIER, Merck & Co., Inc., Kenilworth, NJ
PAUL L. FRIEDMAN, U.S. District Court, District of Columbia, Washington, DC
CONRAD K. HARPER, New York, NY
D. BROCK HORNBY, U.S. District Court, District of Maine, Portland, ME
WILLIAM C. HUBBARD, University of South Carolina School of Law, Columbia, SC
CAROLYN DINEEN KING, U.S. Court of Appeals, Fifth Circuit, Houston, TX
CAROLYN B. LAMM, White & Case, Washington, DC
DOUGLAS LAYCOCK, University of Virginia School of Law, Charlottesville, VA
PIERRE N. LEVAL, U.S. Court of Appeals, Second Circuit, New York, NY
BETSY LEVIN, Washington, DC
MARTIN LIPTON, Wachtell, Lipton, Rosen & Katz, New York, NY
MYLES V. LYNK, University of South Carolina School of Law, Columbia, SC
MARGARET H. MARSHALL, Choate Hall & Stewart, Cambridge, MA
JOHN J. "MIKE" MCKETTA III, Graves, Dougherty, Hearon & Moody, Austin, TX
ROBERT H. MUNDHEIM, Shearman & Sterling, Tucson, AZ
KATHRYN A. OBERLY, District of Columbia Court of Appeals (retired), Palm Beach, FL
HARVEY S. PERLMAN, University of Nebraska College of Law, Lincoln, NE
ELLEN ASH PETERS, Connecticut Supreme Court (retired), Hartford, CT
ROBERTA COOPER RAMO*, Modrall Sperling, Albuquerque, NM
MARY M. SCHROEDER, U.S. Court of Appeals, Ninth Circuit, Phoenix, AZ
JANE STAPLETON, Christ's College, University of Cambridge, Cambridge, England
ROBERT A. STEIN, University of Minnesota Law School, Minneapolis, MN
LARRY S. STEWART, Stewart Tilghman Fox Bianchi & Cain (retired), West Palm Beach, FL
MICHAEL TRAYNOR*, Cobalt LLP, Berkeley, CA
FREDERICK WILLIAM (BILL) WAGNER, Wagner McLaughlin (retired), Tampa, FL
WILLIAM H. WEBSTER, Milbank LLP (retired), Washington, DC
HERBERT P. WILKINS, Concord, MA
DIANE P. WOOD, U.S. Court of Appeals, Seventh Circuit, Chicago, IL

**President Emeritus and Chair of the Council Emeritus*

Principles of the Law, Policing

(as of February 22, 2022)

REPORTER

BARRY FRIEDMAN, New York University School of Law, New York, NY

ASSOCIATE REPORTERS

BRANDON L. GARRETT, Duke University School of Law, Durham, NC
RACHEL A. HARMON, University of Virginia School of Law, Charlottesville, VA
TRACEY L. MEARES, Yale Law School, New Haven, CT
MARIA PONOMARENKO, University of Minnesota Law School, Minneapolis, MN [from 2019]
CHRISTOPHER SLOBOGIN, Vanderbilt University Law School, Nashville, TN

PROJECT FELLOW

CHRISTY E. LOPEZ, Georgetown Law Center, Washington, DC [from 2019]

ADVISERS

ART ACEVEDO, City of Miami Police Department, Miami, FL
HASSAN ADEN, The Aden Group, Alexandria, VA
SCOTT BALES, Arizona Supreme Court (Retired) Phoenix, AZ
MICHAEL BOSWORTH, Latham & Watkins, New York, NY
RICHARD F. BOULWARE, II, U.S. District Court, District of Nevada, Las Vegas, NV
MICHAEL R. BROMWICH, The Bromwich Group, Washington, DC
BRIAN BUCHNER, National Association for Civilian Oversight of Law Enforcement, Tucson, AZ
DAVID COLE, American Civil Liberties Union, New York, NY
GREGG COSTA, U.S. Court of Appeals, Fifth Circuit, Houston, TX
MARIANO-FLORENTINO CUÉLLAR, Carnegie Endowment for International Peace, Menlo Park, CA
MICHAEL A. DAVIS, Northeastern University, Boston, MA
BRANDON DEL POZO, Miriam Hospital, Infectious Diseases Department, Providence, RI
ADRIAN DIAZ, Seattle Police Department, Seattle, WA
JAMES M. DOYLE, Bassil & Budreau, Boston, MA
ZACHARY T. FARDON, U.S. Attorney's Office, Northern District of Illinois, Chicago, IL
ANDREW G. FERGUSON, American University, Washington College of Law, Washington, DC
KENNETH C. FRAZIER, Merck & Co., Inc., Kenilworth, NJ
GEORGE GASCÓN, Los Angeles County District Attorney's Office, Los Angeles, CA
MITCHELL S. GOLDBERG, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA
ROBERT C. HAAS, City of Cambridge Police Department (Retired), Dover, MA
WILLIAM C. HUBBARD, University of South Carolina School of Law, Columbia, SC
SHERRILYN IFILL, NAACP Legal Defense and Educational Fund, New York, NY
CRAIG ISCOE, Superior Court of the District of Columbia, Washington, DC
ADALBERTO J. JORDAN, U.S. Court of Appeals, Eleventh Circuit, Miami, FL
NOLA JOYCE, Philadelphia Police Department (retired), Rehoboth Beach, DE
ORIN S. KERR, University of California, Berkeley, School of Law, Berkeley, CA
MIRIAM A. KRINSKY, Fair and Just Prosecution, Studio City, CA
DAVID KRIS, Culper Partners, Mercer Island, WA
RAYMOND J. LOHIER, JR., U.S. Court of Appeals, Second Circuit, New York, NY
CYNTHIA LUM, George Mason University, Fairfax, VA
JOHN G. MALCOLM, The Heritage Foundation, Washington, DC
ANNE M. MILGRAM, New York University School of Law, New York, NY
SYLVIA M. MOIR, Marin County Sheriff's Office, Queen Creek, AZ
ALEXANDRA NATAPOFF, Harvard Law School, Cambridge, MA
CLARK M. NEILY, Cato Institute, Washington, DC

BRITTANY PACKNETT, Campaign Zero, Florissant, MO
SAMANTHA PAILCA, Microsoft, Redmond, WA
SUE RAHR, Washington State Criminal Justice Training Commission (retired), Bellevue, WA
CHARLES H. RAMSEY, Philadelphia Police Department (retired), Philadelphia, PA
HENRY R. REEVE, Denver District Attorney's Office (retired), Denver, CO
NORMAN L. REIMER, National Association of Criminal Defense Lawyers, Washington, DC
GARY L. SASSO, Carlton Fields, Tampa, FL
S. ANDREW SCHAFFER, New York University School of Law, New York, NY [to 2021]
JOANNA C. SCHWARTZ, University of California, Los Angeles School of Law, Los Angeles, CA
DARPANA SHETH, Foundation for Individual Rights in Education (FIRE), Philadelphia, PA
SAMUEL SINYANGWE, Campaign Zero, New York, NY
STEPHEN WM. SMITH, Stanford Law School, Center for Internet and Society, Palo Alto, CA
SEAN SMOOT, Illinois Police Benevolent and Protective Association, Springfield, IL
CHRISTOPHER SOGHOIAN, Office of Senator Ron Wyden, Washington, DC
DARREL STEPHENS, Major Cities Chiefs Police Association, Charlotte, NC
GEOFFREY R. STONE, University of Chicago Law School, Chicago, IL
SETH W. STOUGHTON, University of South Carolina School of Law, Columbia, SC
FRANK SULLIVAN, JR., Indiana University, Robert H. McKinney School of Law, Indianapolis, IN
J. SCOTT THOMSON, Camden County Police Department (retired), Sewell, NJ
NINA VINIK, The Joyce Foundation, Gun Violence Prevention Program, Chicago, IL
SAMUEL WALKER, University of Nebraska at Omaha, Omaha, NE
ROBERT WASSERMAN, Jensen Hughes, West Tisbury, MA
ANDREW WEISSMANN, New York University School of Law, New York, NY
HARLAN YU, Upturn, Inc., Washington, DC

LIAISON

For the Police Foundation
JIM BURCH, Police Foundation, Washington, DC

MEMBERS CONSULTATIVE GROUP

Principles of the Law, Policing
(as of March 30, 2022)

RAHEEMAH F. ABDULALEEM, Washington, DC
RAQUEL E. ALDANA, Davis, CA
RONALD J. ALLEN, Chicago, IL
ELIZABETH A. ANDERSEN, Washington, DC
JAMES M. ANDERSON, Pittsburgh, PA
JOSÉ F. ANDERSON, Baltimore, MD
DAVID J. ARONOFSKY, Missoula, MT
DONALD B. AYER, McLean, VA
MICHAEL F. AYLWARD, Boston, MA
MIRIAM H. BAER, Brooklyn, NY
NANNETTE A. BAKER, Saint Louis, MO
SUSAN A. BANDES, Chicago, IL
WILLIAM W. BARRETT, Greenwood, IN
DEBRA LYN BASSETT, Hooksett, NH
MIRA BAYLSON, Philadelphia, PA
STEPHANOS BIBAS, Philadelphia, PA
RONALD G. BLUM, New York, NY
ANDREW S. BOUTROS, Chicago, IL
STEVEN M. BRADFORD, Muscatine, IA
PETER BRAY, Houston, TX
DAVID M. BRODSKY, Wainscott, NY
JOHN K. BUSH, Louisville, KY
JEAN-JACQUES CABOU, Phoenix, AZ
J. WILLIAM CALLISON, Denver, CO
ELENA A. CAPPELLA, Philadelphia, PA
CATHERINE L. CARPENTER, Los Angeles, CA
W. TUCKER CARRINGTON, Oxford, MS
JENNY E. CARROLL, Tuscaloosa, AL
NICOLE B. CASAREZ, Houston, TX
JENNIFER MARIE CHACÓN, Berkeley, CA
HENRY L. CHAMBERS JR., Richmond, VA
STEVEN L. CHANENSON, Villanova, PA
EDMOND E. CHANG, Chicago, IL
KAMI CHAVIS, Winston-Salem, NC
GABRIEL J. CHIN, Davis, CA
COLM F. CONNOLLY, Wilmington, DE
THOMAS L. CUBBAGE III, Plano, TX
BEVERLY WINSLOW CUTLER, Palmer, AK
KELLY DERMODY, San Francisco, CA
ALBERT DIAZ, Charlotte, NC
BERNICE BOUIE DONALD, Memphis, TN
MICHAEL R. DREEBEN, Washington, DC
JOSHUA DRESSLER, Columbus, OH
KRISTI K. DUBOSE, Mobile, AL
RONALD EISENBERG, Philadelphia, PA
ILANA H. EISENSTEIN, Philadelphia, PA
J. WILLIAM ELWIN JR., Chicago, IL
ANNE S. EMANUEL, Atlanta, GA
ANTHONY C. EPSTEIN, Washington, DC
KATIE R. EYER, Camden, NJ
ROGER A. FAIRFAX JR., Washington, DC
MARY D. FAN, Seattle, WA
KIMBERLY KESSLER FERZAN, Philadelphia, PA
DANIEL M. FILLER, Philadelphia, PA
GERALD M. FINKEL, Charleston, SC
MATTHEW L.M. FLETCHER, East Lansing, MI
MARY ANNE FRANKS, Miami, FL
ERIC M. FREEDMAN, Hempstead, NY
PAUL L. FRIEDMAN, Washington, DC
KENNETH S. GALLANT, Sequim, WA
RICHARD W. GARNETT, Notre Dame, IN
NICHOLAS L. GEORGAKOPOULOS, Indianapolis, IN
DANIEL C. GIRARD, San Francisco, CA
DOROTHY J. GLANCY, Santa Clara, CA
CHRISTOPHER S. GONTARZ, Newport, RI
HERVÉ GOURAIGE, Newark, NJ
DAVID C. GRAY, Baltimore, MD
MICHAEL Z. GREEN, Fort Worth, TX
I. MICHAEL GREENBERGER, Baltimore, MD
LINDA SHERYL GREENE, East Lansing, MI
MICHAEL GREENWALD, Philadelphia, PA
CHARLES E. GRIFFIN, Ridgeland, MS
LISA KERN GRIFFIN, Durham, NC
JOHN J. GROGAN, Philadelphia, PA
AYA GRUBER, Boulder, CO
JOHN O. HALEY, Tucson, AZ
RONALD J. HEDGES, Hackensack, NJ
RONALD K. HENRY, Washington, DC
CHRISTINA MICHELLE HOUSTON, Wilmington, DE
WESLEY LIU HSU, El Monte, CA
EDWIN E. HUDDLESON, Washington, DC
HERMAN N. JOHNSON JR., Huntsville, AL
RICHARD GIBBS JOHNSON, Cleveland, OH
PETER A. JOY, Saint Louis, MO
ANDREW W. JURS, Des Moines, IA
JOSHUA KARSH, Chicago, IL
ROBERT R. KEATINGE, Denver, CO
ORIN S. KERR, Berkeley, CA
CECELIA M. KLINGELE, Madison, WI
JOSEPH P. KLOCK JR., Coral Gables, FL
MICHAEL J. KRAMER, Albion, IN
CHERYL A. KRAUSE, Philadelphia, PA
ERIN C. LAGESEN, Salem, OR
MÁXIMO LANGER, Los Angeles, CA
PETER F. LANGROCK, Middlebury, VT
WILLIAM J. LEAHY, Albany, NY
PETER E. LECKMAN, Philadelphia, PA
BILL LANN LEE, Berkeley, CA
CYNTHIA K. LEE, Washington, DC
ANDREW D. LEIPOLD, Champaign, IL
BENJAMIN LERNER, Philadelphia, PA
WAYNE A. LOGAN, Tallahassee, FL
MARGARET COLGATE LOVE, Washington, DC
HOUSTON PUTNAM LOWRY, Hartford, CT
ERIK LUNA, Phoenix, AZ
C. SCOTT MARAVILLA, Washington, DC
JUSTIN F. MARCEAU, Denver, CO
PAUL MARCUS, Williamsburg, VA
DAVID CHARLES MASON, Saint Louis, MO
MARY MASSARON, Bloomfield Hills, MI

ALFRED D. MATHEWSON, Albuquerque, NM
JAMES R. MAXEINER, Baltimore, MD
JASON MAZZONE, Champaign, IL
DAVID MCCORD, Des Moines, IA
BARBARA A. MCDERMOTT, Philadelphia, PA
MICHAEL H. MCGINLEY, Philadelphia, PA
JAMES C. MCKAY JR., Washington, DC
THEODORE A. MCKEE, Philadelphia, PA
JOSEPH MCLAUGHLIN, New York, NY
BENJAMIN C. MCMURRAY, Salt Lake City, UT
MARJORIE A. MEYERS, Houston, TX
DARRELL A.H. MILLER, Durham, NC
NATASHA MINSKER, Sacramento, CA
S. DAVID MITCHELL, Columbia, MO
JENNIFER L. MNOOKIN, Los Angeles, CA
PAUL MOGIN, Washington, DC
PAUL W. MOLLICA, Chicago, IL
KIMBERLY J. MUELLER, Sacramento, CA
RICHARD L. NEUMEIER, Boston, MA
MICHAEL M. O'HEAR, Milwaukee, WI
WENDY L. PATRICK, San Diego, CA
DAVID E. PATTON, New York, NY
BRIAN J. PAUL, Indianapolis, IN
MARY MARGARET PENROSE, Fort Worth, TX
LUCIAN T. PERA, Memphis, TN
KRISTINA PICKERING, Las Vegas, NV
W. MICHEL PIERSON, Baltimore, MD
ELLEN S. PODGOR, Gulfport, FL
GERALD S. REAMEY, San Antonio, TX
NOELLE M. REED, Houston, TX
JUDITH RESNIK, New Haven, CT
L. SONG RICHARDSON, Colorado Springs, CO
SARAH E. RICKS, Camden, NJ
ALICE RISTROPH, Brooklyn, NY
IRA P. ROBBINS, Bethesda, MD
JAMES L. ROBERTSON, Jackson, MS
JULIE A. ROBINSON, Kansas City, KS
PAUL H. ROBINSON, Philadelphia, PA
ROD J. ROSENSTEIN, Washington, DC
JACK M. SABATINO, Trenton, NJ
JANET L. SANDERS, Boston, MA
JON M. SANDS, Phoenix, AZ
LYNN HECHT SCHAFRAN, New York, NY
RICHARD HENRY SEAMON, Moscow, ID
MATTHEW R. SEGAL, Boston, MA
SUDHA NARAYANA SETTY, Springfield, MA
MORRIS SILBERMAN, Tampa, FL
KENNETH W. SIMONS, Irvine, CA
WENONA T. SINGEL, East Lansing, MI
DAVID ALAN SKLANSKY, Stanford, CA
DUSTON J. SLINKARD, Topeka, KS
VIRGINIA E. SLOAN, Washington, DC
JONATHAN M. SMITH, Washington, DC
CARL L. SOLOMON, Columbia, SC
DAVID A. SONENSHEIN, Philadelphia, PA
ARTHUR B. SPITZER, Washington, DC
AMY J. ST. EVE, Chicago, IL
JEFFREY W. STEMPEL, Las Vegas, NV
KAREN L. STEVENSON, Los Angeles, CA
H. MARK STICHEL, Baltimore, MD
ELIZABETH S. STONG, Brooklyn, NY
DEAN A. STRANG, Chicago, IL
GUY MILLER STRUVE, New York, NY
JEANNIE SUK GERSEN, Cambridge, MA
FRANK SULLIVAN JR., Indianapolis, IN
JOHN S. SUMMERS, Philadelphia, PA
MARY ELLEN TABOR, Des Moines, IA
JEROME T. TAO, Las Vegas, NV
ETHAN V. TORREY, Washington, DC
MICHAEL TRONCOSO, Atlanta, GA
PAUL J. VAN DE GRAAF, Burlington, VT
MICHAEL VITIELLO, Sacramento, CA
FREDERICK WILLIAM (BILL) WAGNER, Tampa, FL
HOWARD M. WASSERMAN, Miami, FL
SARAH N. WELLING, Lexington, KY
NANCY A. WELSH, Fort Worth, TX
KEN WISE, Houston, TX
ROBIN E. WOSJE, Arlington, VA
BENJAMIN C. ZIPURSKY, New York, NY

The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council."

Each portion of an Institute project is submitted initially for review to the project's Advisers and Members Consultative Group as a Preliminary Draft. As revised, it is then submitted to the Council as a Council Draft. After review by the Council, it is submitted as a Tentative Draft or Discussion Draft for consideration by the membership at an Annual Meeting.

Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute's position on the subject and may be cited in opinions or briefs in accordance with Bluebook rule 12.9.4, e.g., Restatement (Second) of Torts § 847A (AM. L. INST., Tentative Draft No. 17, 1974), until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.

The drafting cycle continues in this manner until each segment of the project has been approved by both the Council and the membership. When extensive changes are required, the Reporter may be asked to prepare a Proposed Final Draft of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of this draft is not de novo, and ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and the membership, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

Principles (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called "Principles of Corporate Governance and Structure: Restatement and Recommendations," but in the course of development the title was changed to "Principles of Corporate Governance: Analysis and Recommendations" and "Restatement" was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable "Principles" project.

The "Principles" approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of "rules of statewide application," as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family Dissolution: Analysis and Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family Dissolution: Analysis and Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

"Principles" may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute's Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

TABLE OF CONTENTS

Section *Page*

CHAPTER 1
GENERAL PRINCIPLES OF SOUND POLICING

CHAPTER 2
GENERAL PRINCIPLES OF SEARCHES, SEIZURES, AND INFORMATION GATHERING

Section *Page*

CHAPTER 6

POLICING DATABASES

CHAPTER 7

USE OF FORCE

CHAPTER 8

GENERAL PRINCIPLES FOR COLLECTING AND PRESERVING RELIABLE EVIDENCE FOR THE ADJUDICATIVE PROCESS

Section *Page*

CHAPTER 9

FORENSIC-EVIDENCE GATHERING

CHAPTER 10

EYEWITNESS IDENTIFICATIONS

CHAPTER 11

POLICE QUESTIONING

Section *Page*

CHAPTER 12

INFORMANTS AND UNDERCOVER AGENTS

CHAPTER 13

AGENCY AND OFFICER ROLE IN PROMOTING SOUND POLICING

CHAPTER 14

ROLE OF OTHER ACTORS IN PROMOTING SOUND POLICING

CHAPTER 1
GENERAL PRINCIPLES OF SOUND POLICING

§ 1.01. Scope and Applicability of Principles

(a) These Principles are intended to guide the conduct of all government entities whenever they search or seize persons or property, use or threaten to use force, conduct surveillance, gather and analyze evidence, or question potential witnesses or suspects. Entities that perform these functions are referred to as "agencies" throughout these Principles.

(b) A subset of these Principles is intended primarily to guide the conduct of traditional law-enforcement agencies, such as police departments, sheriffs' offices, and federal and state investigative agencies. Entities that perform these functions are referred to as "law-enforcement agencies" throughout these Principles.

(c) These Principles are intended for consideration by an informed citizenry, and adoption as deemed appropriate by legislative bodies, courts, and agencies. They are not intended to create or impose any legal obligations absent such formal adoption, and they are not intended to be a restatement of governing law, including state or federal constitutional law.

Comment:

a. Functional definition of "agencies." These Principles are intended to apply to the exercise of particular state functions, no matter which agency performs them. For this reason, subsection (a) adopts a functional approach. It makes clear that the Principles apply to all agencies—at the federal, state, regional, and local levels—if and when they exercise state power to engage in the various practices addressed herein. This includes government agencies not traditionally understood as law-enforcement agencies, such as welfare agencies authorized to conduct home inspections, as well as national security agencies to the extent that they engage in domestic policing or surveillance activities. (We quite obviously exclude the military in operations abroad, so long as they are not directed at U.S. persons.) Any time agencies search or seize persons or property, use or threaten to use force, investigate criminal activity, conduct surveillance, gather evidence, or question potential witnesses or suspects, they should do so in accordance with these Principles.

The emphasis in subsection (a) on these specific practices is not meant to downplay the many other important functions that law-enforcement officers perform—from acting as first responders to working collaboratively with community members on areas of concern. These tasks are essential—and often are more effective at promoting the goals of policing, see § 1.02, than are more coercive methods. But the functions enumerated here—and which are the focus of many of these Principles—are ones that, if not regulated carefully, risk undermining the very goals and values that policing agencies are sworn to uphold.

Finally, although these Principles are directed at government agencies, many of these same Principles ought to apply with equal force to private entities—such as private-university police departments or private security agencies—whose agents are authorized by law to perform the functions enumerated in this Section. And of course to the extent that government agencies direct private entities to act on their behalf, they should ensure that whatever actions they take are consistent with these Principles as well.

b. Limitations on applicability. Although these Principles generally adopt a functional approach, there nevertheless are important differences between traditional law-enforcement agencies—such as police departments and sheriffs' offices—and other entities that may from time to time exercise some of the functions enumerated in subsection (a). Traditional law-enforcement agencies often are the primary agencies of government to which community members look to promote public safety, maintain order, and address other issues of community concern. These differences require additional guidance beyond the general principles applicable to all agencies. For this reason, a subset of these Principles—such as the Principle on community policing, see § 1.08—addresses approaches and practices that are of particular importance to traditional law-enforcement agencies, and may not apply to other agencies—such as welfare agencies or health-inspection agencies—that also are authorized to conduct searches or seizures.

c. Nature of Principles and attendant liability of covered agencies and actors. Three things follow from the fact that these are "Principles." First, they are stated at a high level of generality, and may need to be made more specific through legislation or agency policy. Second, standing alone they are not intended to create liability in agencies or their employees. They contain none of the appropriate limits on liability, such as fault or causation standards. Rather, they are intended to inform the principled development of policies and rules by governmental actors, including legislative bodies, administrative bodies (including public-safety agencies themselves), and courts.

Adoption of such rules, including liability rules, is a necessary predicate to imposing liability. Chapters 13 and 14 advance Principles for compliance, auditing, accountability, and liability, as well as the respective roles that various government actors can play in ensuring that policing occurs in accordance with the Principles set out throughout this volume. Third, although at present much of the law governing policing is constitutional law, these Principles are not intended merely to replicate those constitutional rules. Constitutional law is a necessary floor that governs policing in certain areas, but many if not most policing leaders believe they can and ought to do better. These Principles at times either go beyond constitutional requirements, or—more commonly—apply in situations in which constitutional limitations have not been developed, and may not in fact be appropriate.

REPORTERS' NOTES

These Principles adopt a functional definition of "policing" that includes all of the practices enumerated in this Section and discussed throughout these Chapters. Whenever any agency or official engages in one of these practices, the Principles apply.

In particular, the applicability of these Principles typically does not hinge on whether government agents possess the power of arrest—which is what has traditionally distinguished peace officers, "sworn" officers, or "law enforcement" officers from other executive agents. See, e.g., ALA. CODE § 36-21-60 (defining a "peace officer" as a person "possessing the powers of arrest . . . who is required by the terms of employment . . . to give full time to the preservation of public order and the protection of life or property or the detection of crime in the state"); 720 ILL. COMP. STAT. 5/2-13 ("Peace officer means . . . any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses.").

The power to effect an arrest—and to use force if necessary in doing so—certainly raises a number of concerns that are unique to traditional law-enforcement agencies, and these concerns are addressed in various places throughout these Principles. But the scope of these Principles is broader, and includes, inter alia, guidance on the use and maintenance of government databases for law-enforcement purposes, programmatic searches and seizures, the use of various surveillance technologies, and evidence gathering. Traditional law-enforcement agencies perform all of these functions—but some also are performed by other agencies, including labor departments, housing bureaus, national-security agencies, and the like. Some state agencies employ sworn officers to perform some or all of these regulatory functions, e.g., CAL. PENAL CODE § 830.3 (2014) (including among its definition of a "peace officer": "[i]nspectors of the food and drug section," "investigators within the Division of Labor Standards Enforcement," and select "[e]mployees of the Department of Housing and Community Development"); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (rules requiring suspicionless drug testing adopted by Federal Railway Administration); Lebron v. Florida Dept. of Children & Families, 772 F.3d 1352 (11th Cir. 2014)

(drug-testing scheme carried out by state social-services agency). In other agencies, however, these functions are performed by civilian employees. The goal in adopting a functional definition of "policing" is to underscore that whenever agencies engage in the various practices enumerated in subsection (a), these Principles apply.

On the other hand, policing agencies—typically traditional law-enforcement agencies—do play a unique role. They engage in functions no other agency performs, such as community policing or the use of deadly force. Some of the Principles here are therefore applicable primarily to them.

It is important to emphasize that these are principles, and are not intended as a restatement of governing law. They would need to be adopted by either legislatures or policing agencies themselves to make them binding. And they are at times stated more broadly than may be appropriate as a liability rule. Subsection (c) makes clear that before liability can attach, a recognized lawmaking body needs to formally adopt a liability rule, as well as an underlying conduct rule.

Finally, it is important to bear in mind that these Principles are not intended to mirror constitutional law, though constitutional law of course governs when it applies. At times, these Principles exceed the requirements of constitutional law, and make clear when that is the case. More frequently, these Principles apply in instances in which there simply is not constitutional law at all. Sometimes that may reflect a failure of constitutional law itself, but far more commonly it reflects the fact that it simply is not the role of constitutional law to regulate all of what policing agencies do. It is, however, the role of law to regulate the conduct of all agencies, policing or otherwise. These Principles provide guidance on what the content of that regulation ought to be.

§ 1.02. Goals of Policing

The goals of policing are to promote a safe and secure society, to preserve the peace, to address crime, and to uphold the law.

Comment:

a. Goals of policing. The fundamental end of policing is to promote the safety and security of all members of society. Safety and security are related goals, but they nonetheless are distinct. To be effective, agencies should strive not only to minimize actual crime and disorder, but also to address residents' fear of crime and to help ensure that residents feel secure in their persons, activities, relationships, and property with respect to both other members of society and the police themselves.

Agencies can and should advance these goals in a variety of ways, including: by detecting and arresting violators of the law; by rendering aid when necessary; by adopting deterrent strategies; and by working cooperatively with the public to develop crime-prevention strategies. Agencies

should ensure that all the communities they serve can depend on them to enforce the law in an impartial manner. See also § 1.12 (Interacting with Vulnerable Populations). In choosing among the many tools at their disposal, policing agencies should—consistent with these Principles—adopt strategies that best advance the goals of policing while respecting the rights of all people, promoting police legitimacy, and minimizing the potential harms that policing itself can impose. See § 1.03 (Constitutional Policing), 1.04 (Reducing Harm), 1.07 (Promoting Police Legitimacy in Individual Interactions).

REPORTERS' NOTES

The goals of policing enumerated in this Section are consistent with how many policing agencies define their missions and responsibilities. For example, the Law Enforcement Code of Ethics—first adopted by the International Association of Chiefs of Police in 1957 and included as part of the oath that many officers take—begins by recognizing that the "fundamental duty" of law-enforcement officers "is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, the peaceful against violence and disorder; and to respect the Constitutional rights of all people to liberty, equality and justice." See also Austin Police Department Policy Manual at 6 ("The Austin Police Department's basic goal is to protect life, property, and to preserve the peace in a manner consistent with the freedom secured by the United States Constitution."); American Bar Association, Standards on Urban Police Function 1.2-4 (1980) ("The highest duties of government, and therefore the police, are to safeguard freedom, to preserve life and property, to protect the constitutional rights of citizens and maintain respect for the rule of law by proper enforcement thereof, and, thereby, to preserve democratic processes.").

A number of law-enforcement organizations likewise have recognized the importance of ensuring not only the physical safety of residents but their sense of security as well. As a former director of the Department of Justice COPS Office emphasized, "people not only need to be safe, but they also need to feel safe. Treating both of these issues as two parts of a greater whole is a critical aspect of community policing." Bernard K. Melekian, *Letter from the Director*, *in* GARY CORDNER, REDUCING FEAR OF CRIME: STRATEGIES FOR POLICE (2010); see also Police Bureau, The City of Portland, Oregon, "Our Mission Statement," https://www.portlandoregon.gov/police/ ("The mission of the Portland Police Bureau is to reduce crime and the fear of crime. We work with all community members to preserve life, maintain human rights, protect property and promote individual responsibility and community commitment.").

§ 1.03. Constitutional Policing

Agencies and officers must respect and protect the constitutional rights of all members of the public, including people suspected of crimes.

Comment:

It is essential to democratic society that government officials respect and adhere to constitutional law. Doing so is necessary to ensure that individuals feel safe and secure from the state as well as from each other. It also is essential to promoting the legitimacy of the law and of the institutions designed to uphold it. Policing plays an especially important role in this regard: Common police practices can infringe on constitutional rights, and some core rights, such as the First Amendment right to assemble, cannot be easily vindicated unless the police work affirmatively to protect them.

Agencies should emphasize that state and federal constitutions are not an obstacle to effective policing, but rather are among the laws that officers are sworn to uphold and protect. In formulating agency rules, policies, and procedures, agencies should consider not only the letter of constitutional law as interpreted by the courts, but also the underlying constitutional norms of equality, non-arbitrariness, autonomy, privacy, security, bodily integrity, and free expression. Indeed, agencies should not wait for the courts to declare that a particular policy or practice is out of bounds. Instead, agencies affirmatively should consider whether new policing practices or technologies potentially run afoul of existing constitutional requirements or values.

Given the unique role that policing plays in protecting and facilitating First Amendment rights to speech, assembly, and petitioning the government for redress of grievances, agencies should take special care in developing policies and practices to guide officers in responding to protests and demonstrations, or interacting with individuals who seek to observe, record, or report on government conduct. Agency policies should make clear that the goal of the police is to facilitate peaceful protest and assembly, not simply to manage or control it when it occurs. Likewise, officers should be trained not to resist or interfere with being recorded, but rather to help individuals do so in a manner that does not unduly interfere with legitimate law-enforcement activity.

REPORTERS' NOTES

As a number of leading law-enforcement officials have recognized, protecting constitutional rights is not "an impediment to the public safety mission. [It] is the mission of police in a democracy." Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NEW PERSPECTIVES IN POLICING BULLETIN 2 (2015); see also Charles H. Ramsey, *The Challenge of Policing in a Democratic Society: A Personal Journey Toward Understanding*, NEW PERSPECTIVES IN POLICING BULLETIN 12 (2014) ("As police weigh conflicting obligations, we need to remind ourselves constantly that our first

priority is the protection of constitutional rights."); HERMAN GOLDSTEIN, POLICING A FREE SOCIETY (1977) (noting that the purposes of policing are to promote individual rights and to safeguard the processes of democracy). For residents to feel secure in their persons and property they must have the assurance that their constitutional rights will be respected by the police.

The unfortunate reality, however, is that policing agencies too often have failed to fulfill this core obligation—or at best have grudgingly adhered to it. Over the years, dozens of policing agencies have been found to have engaged in a pattern or practice of unconstitutional misconduct. See, e.g., DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017) (finding unconstitutional use of force among the Chicago Police Department); DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016) (finding unconstitutional stops, searches, arrests, and use of force among the Baltimore Police Department); DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (2014) (finding unconstitutional use of force among the Cleveland Division of Police). At times, agencies have treated constitutional rulings more like obstacles to work around rather than as guidance as to the appropriate boundaries of police conduct. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1 (2010) (describing efforts to circumvent the U.S. Supreme Court's ruling in Miranda v. Arizona, 384 U.S. 436 (1966)); United States v. Payner, 447 U.S. 727, 743 (1980) (Marshall, J., dissenting) (describing an IRS ploy to get around the Fourth Amendment's prohibition on warrantless searches and seizures by taking advantage of the Court's standing jurisprudence). Some have resisted changing their practices at all, requiring decades of follow-on litigation and investigation. See Handschu v. Police Dep't of New York., 219 F. Supp. 3d 388 (S.D.N.Y. 2016) (describing claims that the New York Police Department repeatedly violated a 20-year settlement agreement when it deployed informants to investigate the city's Muslim community without suspicion of unlawful activity); DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 5 (2014) (finding a pattern of unconstitutional use of force despite a 2004 consent decree); Floyd v. City of New York, 959 F. Supp. 2d 540, 609-610 (S.D.N.Y. 2013) (finding a pattern of unconstitutional stops-and-frisks 10 years after a prior settlement agreement around stop-and-frisk practices).

In adopting new strategies or technologies, agencies routinely have failed to consider the potential constitutional objections to their use. See e.g., Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. 101, 116-117 (2017) (noting that police agencies secretly used stingrays, which simulate cell-site towers, to obtain location information despite open questions about whether the warrantless use of stingrays violated the Fourth Amendment); Andrew G. Ferguson, *Predictive Policing Technology*, 94 WASH. U. L. REV. 1109, 1113-1114, 1149 (2017) (observing "[l]aw enforcement's embrace of predictive technology" despite some "profound questions about the nature of prediction," including, for example, "whether this data-driven focus serves merely to enable, or justify, a high-tech version of racial profiling"); Leslie A. Gordon, *Predictive Policing May Help Bag Burglars—But it May Also Be a Constitutional Problem*, AM. BAR ASS'N J. (Sept. 1, 2013) (describing possible Fourth Amendment and Equal Protection Clause concerns with the growing use of predictive policing technology);

COINTELPRO, FBI, vault.fbi.gov/cointel-pro (last accessed May 15, 2020) (describing a 1960s FBI counterintelligence program that targeted certain domestic groups, such as the Black Panther Party, and was "later rightfully criticized by Congress and the American people for abridging [F]irst [A]mendment rights").

Policing agencies should take seriously their independent obligation to uphold constitutional law and promote constitutional rights—and should reinforce this principle through policy, training, and supervision. Agencies should make clear in their policies or values statements the importance of respecting the constitutional rights of all persons. See, e.g., Los Angeles Police Department, "Management Principles of the LAPD" (listing "reverence for the law" as the first principle and emphasizing that "[a] peace officer's enforcement should not be done in grudging adherence to the legal rights of the accused."), http://www.lapdonline.org/inside_the_lapd/content_basic_view/846. Agencies also should review existing policies and practices proactively to ensure not only that they follow the letter of the law, but also that they are consistent with the agency's "broad constitutional goal of protecting everyone's civil liberties and providing equal protection under the law." POLICE EXECUTIVES RESEARCH FORUM, CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING 3 (2015). Consistent with the principles in Chapter 13, agencies should ensure that there are adequate mechanisms in place both to identify unconstitutional misconduct and to ensure that officers have the training and support they need to perform their duties in a manner that respects and upholds constitutional rights.

Finally, agencies should provide officers with clear guidance and training on protecting and facilitating First Amendment activities. Agency policies should emphasize the central role that officers play in helping individuals to exercise their First Amendment rights to peacefully assemble and to observe, record, and report on government conduct. See, e.g., CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, POST GUIDELINES: PRINCIPLES OF CROWD MGMT. 3 (2012), https://post.ca.gov/Portals/0/post_docs/publications/Crowd_Management.pdf (hereafter CAL POST GUIDELINES) ("A fundamental role of law enforcement is the protection of the rights all people have to peacefully assemble, demonstrate, protest, or rally."); IACP MODEL POLICY ON RECORDING POLICE ACTIVITY (emphasizing that individuals have "an unambiguous First Amendment right to record officers in public places). In responding to protests or demonstrations, agencies should prioritize strategies and tactics designed to de-escalate conflict and minimize to the extent possible the need to take enforcement action or resort to force. See, e.g., EDWARD R. MAGUIRE & MEGAN OAKLEY, POLICING PROTESTS—LESSONS FROM THE OCCUPY MOVEMENT, FERGUSON & BEYOND: A GUIDE FOR POLICE (2020), https://www.hfg.org/Policing%20Protests.pdf ("When police operate from the vantage point of how to facilitate peaceful protests rather than how to control or regulate them, they can . . . reduce the likelihood of conflict and violence."); POLICE EXEC. RESEARCH FORUM, THE POLICE RESPONSE TO MASS DEMONSTRATIONS: PROMISING PRACTICES AND LESSONS LEARNED 4 (2018) (describing Boston's "three tiered approach" which begins with "officers in regular uniforms, trying to engage and talk to people, mingling with the crowd"); OAKLAND POLICE DEP'T, OAKLAND POLICE DEP'T CROWD CONTROL AND MGMT. POLICY § V-H-3-B, at 17 (2013) (instructing commanders to consider "the likelihood

that police action will improve the situation relative to taking no action," and to weigh "the seriousness of the offense(s)" being committed against "the potential for [an] arrest to escalate violence."). Similarly, agencies should train officers not to resist being recorded and help individuals who wish to record police activity to identify a vantage point from which they could do so without undue interference. See, e.g., TUCSON POLICE DEP'T GENERAL ORDER 2200 at 9 (emphasizing that "a person's expression of criticism of the police . . . does not amount to interference," and that if an individual's actions are in fact impeding an investigation, an officer "may direct the person to move to a position that will not interfere," but "not order the person to stop photographing or recording.")

§ 1.04. Reducing Harm

Agencies that exercise policing powers should, to the extent feasible, pursue the goals of policing in a way that reduces attendant or incidental harms. Toward that end, agencies should adopt rules, policies, and procedures that promote the preservation of life, liberty, and property; reduce the risk of injury to both members of the public and officers; avoid unnecessary intrusions on individual privacy, autonomy, and dignity; minimize the discriminatory impact of policing on communities of color and other marginalized groups; minimize collateral harms to both individuals and communities; and promote the well-being of officers and community members alike.

Comment:

a. Reducing harm. This Section reflects the principle that agencies exercising policing powers should strive to the extent feasible to reduce the harms they impose both on the targets of police activity and on the broader community. In the policing context, the potential harms are varied, including loss of life or liberty, risk of injury to officers or members of the public, damage to property, invasion of privacy, emotional distress, and dignitary and racial harms. Reducing those harms is essential to advancing the goals of safety and security outlined in § 1.02.

Although some of these harms are cognizable as a matter of constitutional law, agencies should strive to minimize the overall harms of policing beyond what constitutional law requires. Thus, in addition to fulfilling their constitutional obligation to avoid engaging in arbitrary and discriminatory policing, see § 1.03, agencies also should strive to the extent possible to reduce the overall discriminatory *impact* that policing can have on communities of color and other marginalized groups, and to minimize unnecessary invasions of privacy, including intrusions that

may not rise to the level of a constitutional "search" or "seizure" within the meaning of the Fourth Amendment. Agencies also should take into consideration the individual and aggregate harms of police actions, including lawful intrusions such as stops and arrests, in evaluating agency strategy and practices. For instance, the fines and fees that follow from citations and arrests can impose significant hardships, particularly on indigent individuals who are unable to pay, trapping them in cycles of debt and leading to a variety of collateral consequences, such as the loss of a drivers' license. See § 1.10 (discouraging policing actions for the purpose of revenue generation.) (While some intrusions are justified to protect individuals and promote public safety and order, agencies should further the goals of policing in ways that limit these harms. In choosing among means of achieving policing goals, both agencies and officers should select less harmful means, when they are available.

Importantly, reducing harm sometimes requires taking action as opposed to refraining from doing so. For example, in order to uphold the public's rights to free expression and assembly, police officials may need to take steps to protect protesters from physical harm by those who hold opposing views. Similarly, in order for individuals genuinely to feel secure in their persons and effects, they require not only the state's forbearance but also its protection. Historically, some of the same communities that have born the costs of over-policing also have felt under-protected from serious crime. Certain categories of offenses, such as sexual assault, also have at times been under-enforced. In addition to adopting strategies that minimize the collateral harms of policing, agencies should work diligently to investigate crime, protect witnesses who step forward, and partner with other agencies to ensure crime victims get the resources and support they need.

Many of the Principles included in the Chapters that follow are intended to promote the goal of reducing harm. For instance, the Principles on the use of force are guided by a "sanctity of life" philosophy that recognizes the preservation of all life as a core principle of policing. See §§ 7.01-7.06. Likewise, the Principles in Chapter 4 encourage agencies to minimize the intrusiveness and collateral costs of police–citizen encounters—for example by issuing warnings or citations in lieu of arrest when doing so is consistent with promoting public safety and preserving order. See § 4.05 (discussing use of warnings and citations in lieu of arrest). The Principles in Chapter 8 outline the steps that agencies should take to ensure the accuracy and reliability of their investigations, and to fulfill their obligation to not only to identify wrongdoers but also to rule out innocent suspects. And the Principles in Chapter 13 address the internal policies

and practices that agencies should develop to promote officer safety and well-being—which are essential not only for the benefit of officers but also for community members who depend on their officers to provide effective, caring, and respectful service.

REPORTERS' NOTES

In recognition of their important function, policing officials are entrusted with wide-ranging powers—to utilize force, engage in surveillance, seize persons and property, and question suspects. Policing officials should ensure that the use of these powers is limited to the minimum amount necessary to achieve the goals of policing. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3106-3110 (2015); see also § 1.01. Accordingly, agencies and their constituent communities should work together to define those powers and monitor their use so as to ensure that they are exercised in a way that protects officers and the public and reduces or eliminates unnecessary harms.

The values expressed in this Section reflect the idea that policing should "impose[] harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms." Harmon, *The Problem of Policing*, at 792. The principle of harm-minimization already informs a variety of specific policing policies and practices. The National Institute of Justice, for instance, calls on police to "use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm." Nat'l Inst. of Justice, *Police Use of Force*, http://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx (last visited Dec. 1, 2015). See also LOS ANGELES POLICE DEP'T MANUAL, Vol. 1 § 115; U.S. Gov't Accountability Office, Report No. GAO-05-464, *Taser Weapons: Use of Tasers by Selected Enforcement Agencies* 7-8 (2005). This principle is part of standard police officer training. UNITED STATES DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA vii (1999).

Agencies that engage in policing should consider harm minimization on a macro scale as well. Those agencies should weigh carefully both the short- and long-term costs and benefits of policing tactics, procedures, and technologies—including both tangible measures like crime rates and budgetary expenditures, as well as intangibles like community trust. See Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015); VERA INSTITUTE OF JUSTICE, ADVANCING THE QUALITY OF COST-BENEFIT ANALYSIS FOR JUSTICE PROGRAMS.

1. Preserving life, liberty, and property; avoiding physical injuries. One of the core goals of policing is to preserve human life. The sanctity of all life—including the lives of officers, suspects, and community members whose safety may be threatened by criminal activity—is central to policing. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 19 (2015) ("[A] clearly stated 'sanctity of life' philosophy must also be in the forefront of every officer's mind."). Policing agencies should incorporate the "sanctity of life" principle into their use-of-force policies both for the safety of officers and the safety of the public. See POLICE EXECUTIVE

RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 34 (2016) ("Agency mission statements, policies, and training curricula should emphasize the sanctity of all human life—the general public, police officers, and criminal suspects—and the importance of treating all persons with dignity and respect."); see also Albuquerque Police Department, *Our Mission*, http://apdonline.com/our-mission.aspx (last visited Jan. 4, 2016) ("We respect the sanctity of life, the dignity of all people, and use only that force necessary to accomplish our lawful duty."); Philadelphia Police Department, Directive 10.1 "Use of Force—Involving Discharge of Firearms" (emphasizing that officers should "hold the highest regard for the sanctity of human life, dignity, and liberty of all persons"). Policing agencies also should take steps to minimize the risk of physical injury to officers, suspects, and bystanders; to avoid unnecessary damage to property; and to minimize the infliction of emotional or psychological distress.

Agencies also should minimize undue restrictions on liberty, including arrests as well as lesser intrusions, such as investigative stops. As discussed in greater detail in Chapter 4, although stops and arrests further a number of important law-enforcement purposes, they also can have significant consequences both for the individuals and officers involved and for police–community relations more broadly. See §§ 4.03 to 4.05 (Sections on investigative stops and arrests). For individuals, the costs of an arrest potentially may include fines and fees, loss of public housing, loss of a job, deportation, and child-custody consequences, in addition to intangible consequences such as embarrassment and resentment. See Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313-319 (2017). Arrests also carry a risk of injury for officers, suspects, and the community. See CYNTHIA LUM & GEORGE FACHNER, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM: THE IACP POLICE PURSUIT DATABASE 7 (2008) (reporting that 14.9 percent of police officer deaths were caused by "arrest situations"). Individuals who are stopped by the police—particularly if they are not in fact involved in any wrongdoing—may perceive that they are being unfairly targeted, which can undermine agency legitimacy. See, e.g., Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization* (Columbia Law School Public Law & Legal Theory Working Paper Group Paper No. 14-380, Apr. 2014).

2. Protecting privacy interests. Agencies that engage in policing should strive to minimize invasions of privacy. Privacy is fundamental in a democratic society. As the President's Commission on Law Enforcement and Observance recognized in 1965, "privacy of communication is essential if citizens are to think and act creatively and constructively." CHALLENGE OF CRIME 202. It "is crucial to democracy in providing the opportunity for parties to work out their political positions, and to compromise with opposing factions, before subjecting their positions to public scrutiny." Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 456 (1980).

The need for agencies to take care to protect privacy interests is particularly acute in light of new technologies that have expanded the potential scope and pervasiveness of government surveillance. This includes both law enforcement use of technology—such as GPS tracking, bulk data collection, license-plate tracking, and closed-circuit television (CCTV) cameras—as well as the public's use of technologies like cell phones, computers, and social media that are vulnerable

to surveillance. As the U.S. Supreme Court recognized in Riley v. California, 134 S. Ct. 2473, 2491 (2014), "a cell phone search [today] would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." Policing agencies therefore should, consistent with the Principles that follow, develop rules, policies, and procedures to address the use and surveillance of new technologies—and should involve the public in the process to ensure that these decisions are consistent with community values. See PRESIDENT'S TASK FORCE, supra, at 35. See Chapters 2, 3, and 5.

3. Reducing disparities. Policing agencies should strive to minimize the overall discriminatory impact that policing can have on communities of color or other marginalized groups. Various studies have shown that certain policing strategies—such as the proactive use of traffic and pedestrian stops—can produce substantial racial disparities. See § 4.03, Reporters' Notes. Agencies should, consistent with this Section and the Principles in Chapter 4, consider limiting the use of these tactics in order to minimize these effects. Policing that is *perceived* to be arbitrary and discriminatory risks undermining police effectiveness by eroding community trust. See PRESIDENT'S TASK FORCE, supra, at 9-18; Tracey Meares, *The Legitimacy of Policing Among Young African-American Men*, 92 MARQ. L. REV. 651, 655-660 (2009). As the International Association of Chiefs of Police (IACP) recognized in a 2015 report on police–community relations, even well-intentioned policies can have the unintended consequences of "reduction in perceptions of police fairness, legitimacy, and effectiveness." IACP National Policy Summit on Community-Police Relations: Advancing a Culture of Cohesion and Community Trust 7 (2015). This erosion in trust has long-term implications for policing, particularly given reliance on cooperation and participation in the criminal-justice system.

4. Minimizing collateral harms. Agencies also should consider—and strive to minimize—the collateral harms to both individuals and communities that may result from agency enforcement practices. As discussed above, individuals who are arrested may experience a variety of collateral harms—including the loss of housing, employment, or child custody—that go beyond the intrusiveness of the arrest itself. The same is true when it comes to the fines, fees, and other legal-financial obligations that follow citation and arrest. As discussed in greater detail in § 1.10, individuals who are unable to pay the fines and fees that result from discretionary enforcement decisions—such as traffic citations—may face additional fines, lose their drivers' licenses, or even imprisonment. Brandon L. Garrett, Sara Greene and Marin Levy, *Fees, Fines, Bail, and the Destitution Pipeline*, 69 Duke L.J. 1463-1472 (2020). This can significantly impact not only the individuals who are directly affected, but also the communities in which they live. Agencies should consider both these individual and aggregate harms in formulating enforcement strategies, and consider whether less intrusive or costly mechanisms might be available to address public safety concerns.

5. Ensuring the accuracy of police investigations. Policing agencies have an obligation to seek the truth and to work diligently both to identify potential wrongdoers and to clear the innocent.

Consistent with these obligations, a number of major law-enforcement organizations have incorporated a commitment to accuracy and reliability both as part of their organizational value statement and as a basis for specific department rules, policies, and procedures. For example, the IACP Canons of Police Ethics state that "The law enforcement officer shall be concerned equally in the prosecution of the wrong-doer and the defense of the innocent." Likewise, the Austin Police Department's policies on eyewitness identification emphasize the importance of complying with the outlined procedures to "maximiz[e] the reliability of identifications, exonerate innocent persons, and establish[] evidence that is reliable and conforms to established legal procedure." Austin Police Department Manual at 243. See also Chapter 10.

6. Promoting officer well-being. Ensuring the well-being of officers is critical to achieving the other goals of policing. Their well-being affects not only officers themselves, but also public safety: an officer burdened by physical or mental illness can be a danger to himself or herself, his or her fellow officers, and the larger community. See PRESIDENT'S TASK FORCE, supra, at 61. Policing is by its nature a high-stress profession. Stephen M. Soltys, *Officer Wellness: A Focus on Mental Health*, 40 S. ILL. U. L.J. 439 (2016). Undiagnosed mental illnesses can hamper an officer's ability to maintain calm in high-stress situations or to engage with the public in a positive way. See Mora L. Fiedler, *Officer Safety and Wellness: An Overview of the Issues* 4, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE (2012).

Protecting officer well-being requires taking an expansive view of the risks faced by officers. Police face direct threats in the form of physical violence: 135 officers were killed in the line of duty in 2016. NAT'L LAW ENF'T OFFICERS MEMORIAL FUND, PRELIMINARY 2016 LAW ENFORCEMENT OFFICER FATALITIES REPORT 1, http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf. But they also face myriad indirect threats, including heightened rates of suicide, sleep disorders, alcoholism, and post-traumatic stress disorder. See Fiedler, supra, at 9; see also JOHN M. VIOLANTI, DYING FOR THE JOB: POLICE WORK EXPOSURE AND HEALTH (2014). Police departments must consider officer safety holistically in order to protect their officers and the public.

Policing agencies should take steps to further this broad understanding of officer well-being, by providing for adequate training, safety standards, and up-to-date equipment, and by prioritizing officer safety and well-being at all levels of the department. See Letter from Jane Castor, Chief of Police, City of Tampa, to the President's Task Force on 21st Century Policing, Feb. 23, 2015. Toward this end, police departments should work to transform department culture so as to ensure that officers "feel respected by their supervisors" and to "overturn the tradition of silence on psychological problems." PRESIDENT'S TASK FORCE, supra, at 61. Consistent with the notion of procedural justice, departments also should implement "internal procedural justice" reforms to ensure that officers are treated fairly in internal department proceedings. See Ron Safer & James O'Keefe, *Preventing and Disciplining Police Misconduct: An Independent Review and Recommendations Concerning Chicago's Police Disciplinary System* (2014).

§ 1.05. Transparency and Accountability

Agencies should, consistent with the need for confidentiality, be transparent and accountable, both internally within the agency and externally with the public.

Comment:

a. Transparency. Agencies should be transparent both internally and externally. Internal transparency—which refers to the culture and practices within an organization—is important for building officer morale and promoting effective management. Agencies can improve internal transparency by establishing clear and comprehensive rules, policies, and procedures and by ensuring that agency decisionmaking processes are open and straightforward. External transparency is essential to building trust and legitimacy between policing agencies and the general public. To promote external transparency, agencies should, consistent with § 1.06, make department rules, policies, and procedures available to the public, and should maintain and make public data on various aspects of department practice and procedure. Many jurisdictions already collect and make public data on police–citizen encounters, including arrests, summonses, stops, searches, and uses of force. Governments at the federal, state, or local levels can support these efforts by investing in tools to simplify data collection and reporting.

b. Accountability. Accountability likewise has both internal and external components. Internal accountability requires that officers be accountable to their departments through the chain of command—but also that police executives and agency heads hold themselves accountable to line officers and to the agency as a whole. Agencies in turn must be accountable to the public both directly and through various channels, including oversight bodies or inspectors general, executive officials, legislatures, and courts. Importantly, there must be both front-end and back-end accountability for agency actions. Back-end accountability addresses misconduct once it has already happened, through mechanisms such as officer discipline, civilian review boards, inspectors general, and judicial review. See Chapters 13 and 14. Front-end accountability requires that initial policymaking decisions be made in an open and transparent manner, with the input of the community. See § 1.06. These two forms of accountability work in tandem: for there to be effective back-end accountability, there must be clear rules enacted in advance, against which officer and agency conduct may be judged.

REPORTERS' NOTES

Transparency—the disclosure of, and public access to, government information—is a foundational value of democracy. Transparency ensures that citizen participation is effective and informed. See Executive Office of the President, *Transparency and Open Government*, 74 FED. REG. 4685 (2009). And it promotes trust in government by assuring the public that its agents are in fact acting in pursuit of the public good.

Transparency also is essential to effective policing. See generally PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 9-18 (2015); BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 29-50 (2015); Eric Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1828-1829 (2005). Agencies that are transparent about their goals and methods gain the trust of the communities they work in, which improves public safety through effective information sharing and greater willingness on the part of the public to cooperate with the police. See Testimony of Charlie Beck, Chief of Police, Los Angeles Police Department, before the President's Task Force on 21st Century Policing, January 31, 2015; Robert Wasserman, *Guidance for Building Communities of Trust* 27, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE (2012).

Agencies should be transparent both internally within the agency and externally with the public. Internal transparency refers to the culture *within* a police organization. It ensures that "frontline" officers believe that department leadership follows the stated rules, policies, and procedures of the department. Officers who trust their supervisors are more likely to report incidents or dissatisfactions to their supervisors, promoting effective management and reform. See JOSEPH A. SCHAFER ET AL., THE FUTURE OF POLICING: A PRACTICAL GUIDE FOR POLICE MANAGERS AND LEADERS 128 (2011). To improve internal transparency, agencies should have a distinct internal-affairs office; require training in ethics, integrity, and discretion; and implement consistent officer evaluations. See International Association of Chiefs of Police, *Guidance for Building Communities of Trust*, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE 8-13 (2009).

External transparency is a prerequisite to public confidence and trust in the police: an ill-informed community is unlikely to participate in and engage with law enforcement. See Letter from Chief Jim Bueermann, President, Police Foundation, to President's Task Force on 21st Century Policing, January 6, 2015. External transparency requires that—to the extent possible given needs of confidentiality, see § 1.06—agencies make their rules, policies, and procedures available for public review. Agencies also should collect public data on policing operations, including data on searches, stops, frisks, summonses, citations, and uses of force. See PRESIDENT'S TASK FORCE, supra, at 14-15 (recommending robust data collection). A number of states already require policing agencies to collect such data. See, e.g., CAL. GOV'T CODE § 12525.2 (use of force); COLO. REV. STAT. ANN. § 24-33.5-517 (officer-involved shootings); N.C. GEN. STAT. § 143B-904 (use of force resulting in death); 625 ILL. COMP. STAT. ANN. 5/11-212 (pedestrian and traffic stops); CAL. GOV'T CODE § 12525.5 (traffic stops, frisks, searches, summons, and arrests); CONN. GEN. STAT. ANN. § 54-1m (traffic stops); N.C. GEN. STAT. § 143B-903 (same). A growing number of agencies collect such data voluntarily. See, e.g., POLICE FOUNDATION, PUBLIC SAFETY OPEN

DATA PORTAL, https://publicsafetydataportal.org/stops-citations-and-arrests-data/ (last visited: Oct. 26, 2016) (collecting publicly available data on stops, citations, and arrests). New technologies, such as body-worn cameras, also can help facilitate more robust data collection and promote external transparency—though countervailing privacy concerns may limit at least to some extent the information that can be made public.

Accountability is an important, and related, value. Because one of the functions of policing in safeguarding democracy is enforcing the law, see § 1.02, agencies themselves must be accountable to the law and not consider themselves above or outside it. Accountability in this context requires multiple channels of responsibility—again, both internal and external. Individual officers must be held accountable by the chain of command. Agency executives, in turn, must hold themselves accountable to frontline officers and, when applicable, their union representatives. See Christopher Stone & Jeremy Travis, *Toward a New Professionalism in Policing* 14, Harvard Kennedy School's Executive Session on Policing and Public Safety (2011).

Agencies also must be accountable to external structures, including community advisory boards, inspectors general, city councils, and courts. See Christopher Stone & Heather H. Ward, *Democratic Policing: A Framework for Action* 5, VERA INST. (1999) (describing layers of accountability in the Los Angeles Police Department); Testimony of Charlie Beck, Chief of Police, Los Angeles Police Department, before the President's Task Force on 21st Century Policing, January 31, 2015 (same). But above and beyond all this, policing agencies must be accountable to democratic forces, including legislative bodies and the body politic. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).

Although the concept of "accountability" typically is associated with "back-end" or "after-the-fact" accountability—through mechanisms such as officer discipline or judicial proceedings—it is essential that there be accountability at the "front end" as well. Front-end accountability refers to the process by which critical policy decisions are made. It requires that agencies have rules and policies in place before officials act, and that the policies be available to the public and to the extent possible formulated with public input. Maria Ponomarenko & Barry Friedman, *Democratic Accountability in Policing*, *in* REFORMING CRIMINAL JUSTICE vol. 1 (Eric Luna, ed. 2017). The two forms of accountability work together: front-end accountability sets the rules of the road, and back-end accountability ensures that those rules are followed. Even when there is misconduct—or simply an undesired outcome—principles of front-end accountability can play a critical role by encouraging agencies to reexamine existing policies and identify changes that could be made to avoid similar incidents in the future. See, e.g., JAMES M. DOYLE, IDEAS IN AMERICAN POLICING: LEARNING ABOUT LEARNING FROM ERROR (2012) (describing the principle of "forward-looking" accountability which plays a key role in fields such as medicine and aviation).

§ 1.06. Written Rules, Policies, and Procedures

(a) Agencies should operate subject to clear and accessible written rules, policies, and procedures. At a minimum, agencies should have rules, policies, or procedures on all aspects

of policing that meaningfully affect the rights of members of the public or implicate the public interest.

(b) Agency rules, policies, and procedures should—to the extent feasible and consistent with concern for public safety—be made available to the public, be formulated through a process that allows for officer and public input, and be subject to periodic review. The presumption is that these materials will be available to the public.

Comment:

a. The benefits of written policies. Agencies should pursue their objectives according to preexisting written rules, policies, and procedures, particularly when their activities meaningfully affect the rights of members of the public or implicate the public interest. Written policies help to constrain discretion and ensure that officers act in accordance with agency values. Before-the-fact policymaking can improve the quality of agency decisionmaking by ensuring that key policy choices are made through a deliberative process with the input of responsible decisionmakers and the public. In order for policymaking to achieve these objectives, however, the policies themselves must be clear, comprehensive, and internally consistent. Policies that are scattered across multiple documents, or are vague or confusing, are just as likely to undermine accountability as they are to promote it. Agencies also should ensure that policies actually are disseminated to officers and employees, and that there are mechanisms in place to ensure that they are followed. Agency accountability and compliance mechanisms—through training, supervision, and external review—are discussed separately in Chapter 13.

b. Public access. Policy transparency promotes accountability, builds trust between agencies and their communities, and helps to ensure that agency policies are consistent with the needs, priorities, and concerns of the community. In view of these important interests, subsection (b) adopts a strong presumption in favor of making agency policies available for public review, preferably on the agency's website to ensure ease of access. At a minimum, agencies should make publicly available their policies on arrests, investigative stops, consent searches, suspicionless searches and seizures, handling of mass demonstrations, and the use of force.

At the same time, subsection (b) recognizes that there are certain aspects of police investigations that cannot be open for public inspection. This Section thus provides for an exception for policies that, if revealed, could either substantially undermine ongoing investigations

or put officers or members of the public at risk. This exception should generally be limited to policies that reveal operational details or investigative tactics, and should not apply to policies that set out in general terms the circumstances under which a particular practice or technology may be deployed. For sensitive law-enforcement matters—for example the use of confidential informants or the deployment of SWAT teams—agencies should make an effort to release those portions of the policy that can safely be made public, with sensitive portions redacted.

c. Stakeholder input. Agencies should make an effort to seek input on agency policies and practices from affected stakeholders, including officers and members of the public.

Involving officers in the policymaking process is an important component of internal procedural justice. Officers and other agency officials are more likely to view agency policies as legitimate and to comply with them if they are given an opportunity to participate in their drafting. Officer input can also improve the quality of agency policies by providing valuable information about how a policy is likely to work in the field.

Agencies also should, to the extent possible, solicit feedback on their policies and practices from members of the public, particularly from residents of communities that will be subjected to the practices. Although policing agencies have traditionally not involved community members in the policymaking process, it is increasingly recognized that doing so can help build trust and legitimacy, and ensure that policies and practices are consistent with community values and priorities. This is particularly true for many of the practices discussed throughout this volume that have been, and are likely to continue to be, of significant public interest or concern.

Involving community members in the policymaking process poses a number of challenges, from finding ways to educate the public about the often complicated mix of legal and policy considerations that influence a particular policy, to ensuring that agencies get input from all of the various stakeholders, to finding the resources to devote to the task. In view of these difficulties, agencies may need to experiment with a range of approaches to seeking community input so as to identify the processes that best meet the needs of their communities. National law-enforcement organizations, academic institutions, and the Department of Justice Office of Community Oriented Policing Services (COPS) can assist in these efforts by disseminating information about approaches that have worked in other jurisdictions.

d. Periodic review. Policing agencies should establish a process for conducting periodic review of all policies. Periodic review helps to ensure that agency policies comply with statutory

and constitutional law, that they continue to reflect best practices within the profession, and that they effectively address the needs of the agency and the community it serves.

Agencies can take a variety of approaches to conducting periodic review. For example, a number of larger agencies have dedicated risk-management units tasked with ensuring that policies are up to date. Some also have auditors or inspectors general whose duties include reviewing existing policies and making recommendations. Smaller departments may wish to appoint a policy-review committee to oversee the policymaking process on a part-time basis in addition to fulfilling their other responsibilities.

As part of the review process, agencies should engage with their communities to identify potential areas of concern. They also should review citizen complaints and look for patterns that may indicate that specific policies are in need of revision.

REPORTERS' NOTES

1. Need for written rules, policies, and procedures. To the extent possible, agencies should operate subject to written policies. See BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION, intro. & pt. I (2015). Written policies improve performance in several ways. They help channel discretion to ensure that officer and employee actions are consistent with department values. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 658-659 (1997). They also help to facilitate both internal and external accountability by creating standards against which to judge officer and employee behavior. See Laura Kunard & Charlene Moe, *Procedural Justice for Law Enforcement: An Overview* 4, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE (2015). The policymaking process itself improves the quality of policing by ensuring that practices receive careful consideration, and by placing decisionmaking authority in responsible hands. See KENNETH CULP DAVIS, POLICE DISCRETION 98-120 (1975); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416-428 (1974); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations*, 89 MICH. L. REV. 442, 451 (1990); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972). Finally, written policies can help reduce the influence of bias and provide a consistent training tool. See LaFave, supra.

Yet, all too often, agencies lack policies on critical aspects of policing. For example, a 2013 Police Executive Research Forum (PERF) survey showed that 64 percent of law-enforcement agencies lacked policies on the use of photo lineups, despite the fact that 94 percent of responding agencies reported using the procedure, and the fact that the National Academy of Sciences has made clear that there is a risk of erroneous convictions when inappropriate procedures are used. POLICE EXECUTIVE RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES (2013); NATIONAL RESEARCH COUNCIL REPORT, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 1 (2014). Another PERF

survey similarly found that nearly one-third of departments using body-worn cameras did not yet have policies in place to govern their use. POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM 2 (2014). The same is true in many other areas of policing. See, e.g., ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 26 (2009) (citing lack of policies on use of confidential informants).

Consistent with this Section, agencies should work to develop policies on all aspects of policing that substantially affect the rights of the public or implicate the public interest. At a minimum, that includes policies on the various practices addressed throughout these Principles, including the use of force; the conduct of searches, seizures, and surveillance; and the gathering of evidence. See PRESIDENT'S TASK FORCE, supra, at 20, 23 (urging departments to develop policies on use of force and identification procedures). A number of states already require that agencies develop written policies to govern various aspects of policing. See, e.g., 25 ME. REV. STAT. § 2803-B ("All law enforcement agencies shall adopt written policies regarding procedures to deal with . . . use of physical force . . .; hostage situations . . .; domestic violence . . .; police pursuits . . . : criminal conduct engaged in by law enforcement . . .; recording of law enforcement interviews of suspects."); 50 ILL. COMP. STAT. 706/10-20 (2016) (requiring rules for body-worn cameras). Legislatures at both the state and local levels should consider enacting similar statutes to ensure that policing is governed by written policies while leaving individual agencies free to develop policies that reflect department values and community needs. Academic institutions, national law-enforcement organizations like the International Association of Chiefs of Police or PERF, civil-liberties organizations, and other government and private entities also can encourage agency policymaking by conducting and disseminating research on model policies and best practices. Agencies should disseminate policies to officers and agency employees, and provide training as necessary. Furthermore, policies should be subject to periodic review to ensure that they adapt to changing legal requirements, best practices, and community preferences.

2. Public access. As the Presidential Task Force on 21st Century Policing made clear in its final report, agency policies should, to the extent possible, be "clearly articulated to the community and implemented transparently so police will have credibility with residents and the people can have faith that their guardians are always acting in their best interests." PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 15 (2015). Secrecy around matters of policy or practice can undermine public trust and lead to fear or speculation among members of the public.

One of the potential obstacles to policy transparency is the fact that the need for confidentiality is more acute in policing than in other areas of government. There is a legitimate concern among policing agencies that releasing information about certain policies could make it easier for suspects to avoid detection, or could put officers or members of the public at risk. To the extent this is the case, ordinary mechanisms of transparency may need to give way.

Insofar as possible, however, the need for confidentiality in policing ought not to stand in the way of policy transparency. For many aspects of policing—such as the use of consent searches and investigative stops, the handling of mass demonstrations, the adoption of surveillance technologies, or the use of force—department policies can be made public and publicly debated

without endangering public safety. A number of police departments have made their policy manuals on these issues available to the public without any apparent detriment to public safety. See, e.g., Metropolitan Police Department: Directives for Public Release, available at http://mpdc.dc.gov/page/directives-public-release; Seattle Police Department Manual, available at http://www.seattle.gov/police-manual.

Even for more sensitive aspects of policing, such as the use of confidential informants or special weapons and tactics (SWAT), a number of policing agencies have made their policies available for public review. See, e.g., Boston Police Department, *Rule 333: Confidential Informant Procedures* (2006); Charlotte-Mecklenburg Police Dep't, *Directive 900-001: Special Weapons and Tactics (SWAT) Team* (2015); Fairfax County Police Dep't, *SWAT Team SOP: Tactical Response Levels* (2015); Greenville Police Dep't, *Use of Informants and Sources of Information* (2014). At the federal level, the U.S. Department of Justice has also made public its formal guidelines concerning the Federal Bureau of Investigation, the Drug Enforcement Administration, and other federal agencies' use of confidential informants. See Department of Justice, *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* (2006); Department of Justice, *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002).

One useful distinction for agencies to consider in deciding what can safely be made public is between policies that describe specific tactics or operational details, and those that articulate overarching rules or norms. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1884-1885 (2015). Operational details regarding specific SWAT deployments or the department's tactical approaches to serving high-risk warrants should typically be kept secret. But general guidelines about the use of SWAT—the guiding philosophy, the requirements of supervisor approval, the need for after-action review—can often be made public without putting officers at risk. For example, the Charlotte-Mecklenburg Police Department's publicly available SWAT policy describes the procedures by which department officers can request SWAT assistance, the kinds of situations that may warrant SWAT deployment, and the process for completing after-action review. Charlotte-Mecklenburg Police Dep't, *Directive 900-001*, available at http://charmeck.org/city/charlotte/CMPD/resources/DepartmentDirectives/Documents/CMPDDirectives.pdf. The difference between general guidelines and specific tactics is sometimes captured in the distinction between "policies" and "standard operating procedures," though many agencies use these terms differently. See, e.g., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, BEST PRACTICES GUIDE: DEVELOPING A POLICE DEPARTMENT POLICY-PROCEDURE MANUAL 2, available at http://www.theiacp.org/portals/0/documents/pdfs/BP-PolicyProcedures.pdf. Two federal statutes—both of which endeavor to balance the goal of transparency against the need to keep certain investigative details confidential—draw similar distinctions. The Stored Communications Act, which typically requires that individuals be notified when law-enforcement agencies obtain records of their communications from third parties via subpoena, permits delayed notification when disclosure would "endanger[] the life or physical safety of an individual" or create other adverse consequences for an investigation. 18 U.S.C. § 2705. Likewise, the Freedom of Information Act permits agencies to withhold records and documents "compiled for law

enforcement purposes" from public disclosure if disclosing them would allow individuals to evade the law by using information about specific law-enforcement procedures and techniques. 5 U.S.C. § 552(b)(7)(E).

Even with this distinction in mind, there will undoubtedly be difficult questions regarding disclosure that individual departments and their communities will need to resolve. But on matters of policy, it is essential that the presumption be in favor of transparency so that the public can be sure that agency policies are consistent with community values and needs.

3. Public and officer input. A growing number of agencies and professionals recognize that public engagement around policy and practice is essential to promoting trust and legitimacy. This sort of engagement was one of the core recommendations made by the Presidential Task Force on 21st Century Policing, and has since been embraced by a number of other law-enforcement organizations. PRESIDENT'S TASK FORCE, supra, at 19; see also INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, COMMUNITY-POLICE RELATIONS SUMMIT REPORT at 16 (2015) (urging agencies to pursue "true partnership," which involves "institutionalized inclusion of citizens in the business of the police department"); MAJOR CITY CHIEFS ET AL., ENGAGEMENT-BASED POLICING at 47 (2015) (describing steps the Las Vegas Metropolitan Police Department has taken to involve community members in discussions about department policies and practices).

Although it is an important goal for agencies to pursue, public engagement around matters of policy raises a number of difficult questions, each of which is discussed in turn. One obstacle to policy engagement is that members of the public may lack the expertise necessary to participate meaningfully in formulating department policies. Agency policies often reflect a mix of legal and tactical considerations with which the public may not be familiar. For example, agency policies on body-worn cameras may be influenced by state wiretap and privacy laws, collective-bargaining agreements, and various technological constraints. In a number of states, specific provisions in body-worn-camera policies are fixed either by state law or by attorney general guidelines. See, e.g., 50 ILL. COMP. STAT. ANN. 706/10-20 (2016) (empowering a state Board to set minimum requirements for body-worn camera policies); New Jersey Division of Criminal Justice, AG Directive 2015-1 (2015) (establishing minimum standards for all body-worn-camera policies in the state).

If agencies are to get meaningful input on these policies, they will need to find ways to educate the public on these issues. They may also need to simplify their policies, avoid legal jargon when possible, and explain clearly key terms. National law-enforcement organizations, academic institutions, and advocacy organizations can support these efforts by preparing toolkits to inform community members of the key policy issues and the tradeoffs at stake. For example, the Bureau of Justice Assistance—working in partnership with criminal-justice practitioners, civil-liberties groups and advocacy organizations, and community members—has developed a body-worn camera toolkit for agencies and communities to use in formulating their own policies. See "National Body-Worn Camera Toolkit," available at https://www.bja.gov/bwc/. Organizations should work to develop similar toolkits on other topics to encourage police–community engagement on all policy areas of public concern.

Agencies also may need to experiment with a range of approaches to obtain public input so as to ensure that they are hearing from all of the relevant stakeholders in their communities. It is especially important that agencies find ways to engage residents in more heavily policed communities, as well as members of historically marginalized groups, including communities of color, immigrant communities, and LGBT populations.

Although each agency ultimately will need to tailor its approach to the needs of its various communities, there are a number of models that agencies may wish to consider. Many policing agencies already hold regular community meetings or have established neighborhood councils. Although these forums have not traditionally been used to solicit input on specific policies, departments should consider using them for this purpose. A small number of jurisdictions have established community police commissions with authority to review department policies. These commissions exercise varying degrees of control over those policies. For instance, in Los Angeles, the commission sets policy for the police department. See Los Angeles Police Department, "Police Commission," http://www.lapdonline.org/police_commission. In Seattle, the commission acts in an advisory capacity. See Seattle Police Department, "Community Police Commission," http://www.seattle.gov/community-police-commission. Finally, some agencies have begun to experiment with online surveys, virtual town halls, and various social-media platforms to solicit community input, particularly from groups that may not regularly attend community meetings. See, e.g., Colorado Springs Police Department, "Body Worn Camera Information," https://cspd.coloradosprings.gov/public-safety/police/public-information/body-worn-camera-information; Camden County Police Department and the Policing Project at New York University School of Law.

§ 1.07. Promoting Police Legitimacy in Individual Interactions

(a) Agencies should ensure that individuals both outside and inside the agencies are treated in a fair and impartial manner, and are given voice in the decisions that affect them.

(b) Agencies and officers should be truthful in their interactions with the public, with other government officials, and with the courts.

Comment:

a. Promoting legitimacy, generally. As discussed throughout this Chapter, agencies and officers can promote police legitimacy in various ways: by upholding the law and bringing violators to justice (§ 1.02), by respecting constitutional rights (§ 1.03), by reducing the harm that policing can impose (§ 1.04), by being transparent and accountable to their communities (§ 1.05), by strengthening community partnerships (§ 1.08), and by involving community members in decisions around policing policies and practices (§ 1.06). The principles in this Section outline additional steps that agencies and individual officers can take in their interactions with members

of the public, as well as internally with one another, to ensure that individuals perceive the law, as well as those who enforce it, to be fair and just.

b. Promoting legitimacy through interactions with the public. Studies of procedural justice have shown that individuals are more likely to comply with the law and cooperate with legal authorities such as police when they perceive the law and authorities to be fair and just. This research demonstrates that the public generally cares more about whether they are treated in a way they perceive to be fair than whether the ultimate outcome of a decision or interaction favors them. Thus, treating individuals in ways that are consistent with procedural justice—that people consider to be fair and impartial—can build trust and legitimacy, encourage community members to cooperate with policing officials, and increase public compliance with the law.

Policing officials should treat members of the public with courtesy and respect and carry out their duties in an unbiased manner. When conducting a traffic or a pedestrian stop, officers generally should explain the reason for the stop, and give individuals an opportunity to explain their conduct before taking further enforcement action. Even small adjustments to officer behavior can have a large impact on the way members of the public perceive the police.

c. Promoting internal legitimacy. Agencies should apply these same principles to the officers who work inside the agencies. Agencies should ensure that internal procedures around performance evaluation, promotion, and discipline are transparent and fair. Agency officials also should take the time to explain the reasons behind various agency policies, and ensure that officers and their representatives are given an opportunity to participate in decisions that affect them. Internal procedural justice can increase compliance with agency rules, policies, and procedures, and encourages officials to practice procedural justice in their interactions with the public.

d. Truthfulness. Policing agencies should be truthful in all of their interactions with the public and with other government agencies, and should develop policies and procedures to ensure that officers do the same. Agencies should take special care to ensure that officers are truthful in their testimony in court or in the course of disciplinary proceedings, and hold officers accountable whenever it becomes apparent that they have not been. There unfortunately have been countless examples of officers giving misleading or false testimony in court—so common that officers themselves coined the term “testilying” to describe the phenomenon. A lack of truthfulness, particularly in the course of legal proceedings, poses a threat not only to agency legitimacy but also to the rule of law, and must be actively discouraged.

REPORTERS' NOTES

1. Internal and external legitimacy. Agencies should incorporate principles of procedural justice both internally within the department and externally with the communities they serve. Procedural justice is based on the notion that individuals are more likely to comply with the law when they perceive it to be just. See Tracey L. Meares & Peter Neyroud, *Rightful Policing* 5, NAT'L INST. OF JUSTICE (2015); see also Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 344-345 (2011); LORRAINE MAZEROLLE ET AL., LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW (2013). Obtaining this legitimacy requires more than simply adhering to the law. Meares & Neyroud, *Rightful Policing*, supra, at 6. Extensive research demonstrates that when members of the public evaluate their interactions with police officers—for example in the context of a traffic stop or other enforcement action—their perceptions depend at least as much on whether they believe they were treated *fairly* as on the *outcome* of the interaction. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE LAW 53 (2002); Schulhofer et al., supra, at 346 & n.51 (citing studies); Meares & Neyroud, *Rightful Policing*, supra, at 5-6; Tracey Meares et al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. LAW & CRIMINOLOGY 297 (2015).

There are four key principles behind procedural justice: fairness, voice, transparency, and trustworthiness. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 10 (2015). In applying these principles to their dealings with community members, policing officials should strive to treat individuals courteously and respectfully, to give individuals an opportunity to explain their situations before taking action, and to carry out their duties in an unbiased and consistent fashion. Schulhofer et al., supra, at 346. Procedural justice requires not only that officials abide by these principles during their encounters with individuals, but that they strive to act fairly when making the initial decision of whether or not to engage with a particular person. Meares & Neyroud, *Rightful Policing*, supra, at 5. Officials should recognize the existence of human biases—both explicit and implicit—and work to mitigate their influence. PRESIDENT'S TASK FORCE, supra, at 10. An increasing number of policing agencies have incorporated principles of external procedural justice into officer training and evaluation. For example, the Washington State Criminal Justice Training Commission has developed a new training curriculum around the "L.E.E.D. Model" (which stands for "Listen and Explain with Equity and Dignity"), which teaches officers to integrate the four pillars of procedural justice into all citizen encounters.

Internal procedural justice requires that agencies involve employees, officers, and civilians alike in formulating organizational values and disciplinary procedures, promotional decisions, and performance management. See Community Oriented Policing Services, U.S. Dep't of Justice, *Comprehensive Law Enforcement Review: Procedural Justice and Legitimacy Summary* 2 (2014). It also requires that agency rules, policies, and procedures be clear, transparent, grounded in organizational values, and developed in partnership with officers. PRESIDENT'S TASK FORCE, supra, at 14. By practicing the principles of procedural justice within the department, supervisors can increase officer compliance with agency rules, policies, and procedures and encourage officers to

adopt the values of procedural justice in their interactions with the public. Research suggests that officers who feel like their supervisors treat them fairly are more likely to abide by policy and voluntarily comply. See Nicole Haas et al., *Explaining Officer Compliance: The Importance of Procedural Justice and Trust Inside a Police Organization*, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE (2015). Research also has demonstrated that employees who themselves feel respected by their supervisors are more likely to support external procedural-justice programs. See WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE (1999); Ben Bradford & Paul Quinton, *Self-Legitimacy, Police Culture and Support for Democratic Policing in an English Constabulary*, 54 BRIT. J. OF CRIMINOLOGY 1023 (2014).

Many police departments already demonstrate commitment to internal procedural-justice principles. For example, the Kansas City Police Department has an established process for conducting internal audits, and shares those audits publicly. See Kansas City Police Dep't, *Internal Audit Unit*, http://kcmo.gov/police/audit/. Further, the Minneapolis Police Department's "goals and metrics" program requires formal monthly conversations between supervisors and officers to review both the officers' and the supervisors' performance. See SHANNON BRANLY ET AL., IMPLEMENTING A COMPREHENSIVE PERFORMANCE MANAGEMENT APPROACH IN COMMUNITY POLICING ORGANIZATIONS: AN EXECUTIVE GUIDEBOOK 39-40 (2015).

2. Truthfulness. Agencies also should ensure that they and their officers are truthful in all of their interactions, both internally within the agency, and externally with the public and the courts. Doing so is important for preserving not only the agency's legitimacy, but also the legitimacy of the criminal-justice system as a whole. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 870-871 (2008).

Over the years, studies and reports have pointed to a variety of practices that threaten agency credibility and undermine public trust. Many, for example, have expressed concern about the prevalence of "testilying"—giving false or misleading testimony in court in order to avoid the suppression of evidence or civil liability. Capers, supra at 868-869; Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (surveying judges and prosecutors in Chicago criminal court and estimating that officers gave false testimony about 20 percent of the time). Others have pointed to the "code of silence" that encourages officers to cover up for colleagues who engage in misconduct. See, e.g., Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence*, 2016 U. CHICAGO LEGAL FORUM 213 (describing the phenomenon); U.S. Department of Justice, Investigation of the Chicago Police Department 75 (2017) (citing numerous instances of officers lying in official reports, and concluding that "a code of silence exists, and . . . is apparently strong enough to incite officers to lie even when they have little to lose by telling the truth."). Still others have noted lack of candor on the part of agencies themselves—particularly around the use of surveillance technologies. See, e.g., U.S. House Committee on Oversight and Reform, *Law Enforcement Use of Cell-Site Simulation Technologies* (2016) (criticizing the Federal Bureau of Investigation's use of nondisclosure agreements to prohibit local law-enforcement agencies from disclosing to courts or defense attorneys when a cell-site simulator—or "Stingray"—was used to

locate a suspect in the course of a criminal investigation); Kim Zetter, "Emails Show Feds Asking Florida Cops to Deceive Judges," WIRED (June 19, 2014) (quoting emails between two Florida law-enforcement agencies discussing instructions from the U.S. Marshals Service to describe location information acquired using a Stingray as having been obtained from "a confidential source").

Agencies can promote truthfulness in various ways. For example, as discussed in greater detail in Chapter 13, agencies should make clear that officers have a duty of candor and should hold officers accountable for any false or misleading statements provided in official reports or in the course of internal investigations. See § 13.07 (Responding to Allegations of Misconduct). Most department policy manuals already make clear that officers and employees "shall be truthful in all matters relating to their duties." SAN DIEGO POLICE DEPARTMENT POLICY MANUAL § 9.29. Agencies also should keep track of instances in which an officer's testimony has been deemed non-credible by prosecutors or courts. See also Chapter 14 on external agency accountability.

§ 1.08. Community Policing

Policing agencies should work in partnership with their communities to jointly promote public safety and community well-being. Agencies should adopt a comprehensive organizational strategy that promotes and facilitates police−community partnerships through officer training, patrol assignments, metrics and performance evaluation, and department programs and initiatives.

Comment:

a. Community policing. This Section adopts the view—shared by many within the law-enforcement community—that policing agencies and their communities jointly share in the responsibility for promoting public safety and community well-being, and should work in partnership to identify and address community problems and concerns. Although community policing has come to mean many things to many people, most definitions of community policing embrace several core, overarching ideals, each of which is discussed in the following Comments.

b. Community policing as an organizational strategy. The principles of community policing should inform policing-agency decisionmaking at all levels of the organization—including decisions about hiring, deployment, and evaluation—and should not simply be seen as an adjunct of the primary law-enforcement mission. As many law-enforcement professionals have recognized, some of the core aspects of community policing are incompatible with more traditional approaches to agency management and organization. For example, so long as officers are evaluated primarily on the basis of metrics like stops and arrests, they are unlikely to invest time and energy

into working with residents or developing alternative strategies for dealing with public-safety concerns. Likewise, few of the problems that community members identify can be addressed effectively by patrol officers alone—most require cooperation from others in the department or from other units and departments in a municipality.

c. Patrol. Officers who spend their days responding to calls for service in different parts of the city will not have time to become familiar with local neighborhood conditions or to follow up on persistent neighborhood concerns. One alternative is to assign officers to specific neighborhoods and to structure patrol assignments in ways that give officers an opportunity to get to know residents and to become familiar with local problems and concerns. Doing so encourages officers to take responsibility for problems within their communities, and can make community members more comfortable reporting crimes or bringing public-safety issues to the attention of police.

The form these assignments take ultimately will have to be left to each department and its community to decide, and will be informed by each jurisdiction's resources, geography, and needs. There are any number of approaches that agencies can take. A number of agencies, particularly in larger jurisdictions, have introduced more compact patrol sectors that match existing neighborhood boundaries. Others have experimented with a variety of alternatives to motorized patrol, from substations to bicycle or foot patrols. Agencies also have adjusted their staffing models in various ways to ensure that officers have time in the day to engage with residents in a non-enforcement capacity and to follow up on the problems they identify. Many jurisdictions now use non-sworn civilian officers to take complaints of minor crimes such as burglary, to prepare accident reports, and to assist in other enforcement activities. Others have developed alternative mechanisms for dealing with nonemergency calls for service—including dedicated nonemergency complaint systems like 311, as well as other delayed-response protocols.

d. Collaborative decisionmaking. If policing agencies and community members are to work together to "co-produce" public safety, it is essential that residents have meaningful input into the priorities, strategies, and practices that shape how their communities are policed. Members of the public know best the difficulties and challenges they face. They can provide valuable insight into which practices are likely to be successful in their communities, and can alert agencies to the unintended consequences of rules, policies, and procedures they wish to adopt. Policing a community without involving its residents may lead to mismatched priorities, a loss of trust, and, ultimately, a loss of legitimacy. For these and many other reasons, agencies should engage

residents in an ongoing dialogue over all aspects of agency practice, including officer training, hiring, and evaluation; use of new technologies; crime-reduction strategies; and new community-policing programs and initiatives. See also § 1.05. Agencies should consider using a variety of mechanisms to engage the community—including forums, questionnaires, small-group meetings, conversations with various stakeholders, and the agencies' social-media presence—and should tailor their approaches to the needs of the various communities they serve. In particular, agencies should consider establishing more formal organizational structures—such as police commissions or citizen advisory boards—that ensure that members of the public have a clear and consistent role in articulating the needs of communities and in identifying strategies to address them.

e. Community partnerships. To facilitate collaborative decisionmaking and implementation, agencies should establish and maintain partnerships with a variety of community organizations and other government agencies—including faith-based organizations, local businesses, and social-service organizations—as well as with individual members of the community. In identifying partners, agencies should not rely solely on established stakeholders, but should look for individuals and organizations who may not have a history of working with the police but who can offer valuable guidance and assistance. Agencies also should be open to overtures from community organizations that approach them. City officials should encourage and support these efforts by assisting policing agencies in identifying and forming partnerships with both private and public entities, and by ensuring that there are structures in place to facilitate collaboration among different agencies all working toward a related set of goals.

f. Opportunities for positive interaction between officers and community members. To facilitate meaningful partnerships and improve police–community relations, agencies also should ensure that there are opportunities for positive interaction between officers and community members. Interacting with one another in a setting outside of official duties gives officers and community members an opportunity to get to know one another as individuals and as people with whom they have something in common. Thus, although athletic leagues, block parties, and community police academies should not be the sum total of an agency's community policing plan, they can be an important component of a broader engagement strategy. In choosing among various initiatives, policing agencies should consult with community members about the programs they would most wish to see in their neighborhoods. Agencies also should look for opportunities to partner with community organizations in sponsoring programs and events—which can both help

to ensure broader turnout and create a foundation for more meaningful collaboration on matters of substance.

g. Equity. In pursuing the goals of community partnership and responsiveness, it is essential that police officials not lose sight of another important value: equity. The unfortunate reality—one that affects not just policing but all government—is that some groups are better organized than are others to ensure that their voices are heard. In looking to the community to identify problems and participate in implementing solutions, policing agencies should ensure that they do not simply advance the interests of some community members at the expense of others, but that they engage with and address the needs of *all* members of their communities. See also § 1.12 (Interacting with Vulnerable Populations).

REPORTERS' NOTES

There is wide acknowledgement, both in and out of law enforcement, that effective policing requires close collaboration between the community and the police. The need for something like "community policing" was recognized as early as the 1960s, when national commissions studying the violence and rioting in American cities recognized that police departments had grown aloof and estranged from the communities they were charged with keeping safe. The concept was given full voice in a widely acclaimed Harvard Executive Session on policing in 1989, particularly by Houston's Police Chief, Lee P. Brown. In 1994, President Bill Clinton established the Office of Community Oriented Policing Services (COPS) in the Department of Justice and committed 8.4 billion federal dollars to assist departments in adopting a more community-focused approach. And although "community policing" has come to mean many things and have many elements, there has been wide agreement on the importance of its core ideals.

Nonetheless, in the aftermath of racial tensions around policing in Ferguson, Missouri, in the summer of 2014, it became clear that in too many jurisdictions community policing had been given lip service, while the reality on the ground was quite different. Studies showed that "many police departments [had] not embrac[ed] these approaches with fidelity to the original ideas" and that "community policing has been unevenly implemented" at best. Anthony A. Braga, *Crime and Policing Revisited*, NEW PERSPECTIVES IN POLICING 17 (2015). See also MALCOLM SPARROW, HANDCUFFED 18 (2006). And it is easy to see why. It can be resource intensive. It requires collaboration, both between the police and their communities and between the police and other social-service organizations. It is painstaking.

Still, the consensus of many well-respected policing leaders is that the legitimacy of law enforcement ultimately depends on forging close ties between the community and the police. The President's Task Force on 21st Century Policing called for police and communities to "co-produce" public safety. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 3 (2015). The International Association of Chiefs of Police likewise urged departments to

"reevaluate, reinvigorate, renew, re-instate, rebuild, and restart department efforts to build meaningful police-community relationships." IACP NATIONAL POLICY SUMMIT ON COMMUNITY-POLICE RELATIONS: ADVANCING A CULTURE OF COHESION AND COMMUNITY TRUST 13 (2015). The task is not an easy one—but it is essential.

1. Background. Although "community policing" entered the law-enforcement lexicon in the 1980s, the idea itself goes back to the founding of modern policing—and to its founder, Sir Robert Peel. In his 1829 *Principles of Law Enforcement*, Peel declared that "Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police." The police, he stressed, are "only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence."

In the United States, however, the structure of municipal governments in the late 1880s and early 1900s led to an unhealthy relationship between police and their communities. Many cities, particularly in the north, were governed by political machines. The police became tools of those machines, beset by patronage and—in the words of police reformer August Vollmer—"ignorance, brutality, and graft." August Vollmer & Albert Schneider, *The School for Police as Planned at Berkeley*, 7 J. CRIM. L. & CRIMINOLOGY 877 (1917). In 1931, the National Commission on Law Observance and Enforcement commented on the "loss of public confidence in the police of our country," which it attributed to the "control which politicians have" over the nation's police. Wickersham Commission, *Wickersham Report on Police*, 2 AM. J. OF POLICE SCIENCE 337 (1931).

As a result, the objective in the early-middle 1900s was to "professionalize" the police and make them autonomous from politics. SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977); Stephen J. Schulhofer et al., *American Policing at the Crossroads: Unsustainable Policies and the Procedural Justice Alternative,* 101 J. CRIM. L. & CRIMINOLOGY 335, 339 (2011). Officers received civil-service protection and the only clear tether to politics was the appointment of the chief of police by the mayor or other city officials. Nothing quite captured that notion of the professional and autonomous model of policing so much as radio-dispatched police cars racing around the city to answer calls.

By the 1960s, however, it had become clear to the nation that the move to autonomy had created a rift between the community and the police. In its 1967 Report—in words that undoubtedly will sound familiar today—the President's Commission on Law Enforcement and Observance lamented that in "the very neighborhoods that need and want effective policing the most . . . there is much distrust of the police, especially among boys and young men." THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 99 (1967). The Commission noted that "too many policemen . . . misunderstand or are indifferent to minority-group aspirations, attitudes, and customs, and that incidents involving physical or verbal mistreatment of minority-group citizens do occur and do contribute to the resentment against police." Id. at 100. It described the hostility and mistrust between police and communities of color as "as serious as any problem the police

have today." Id. at 99; see also THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (noting same).

The President's Commission called upon policing agencies to invest in what it termed "police–community relations"—to endeavor "to acquaint the police and the community with each other's problems, and to stimulate action aimed at solving those problems." PRESIDENT'S COMMISSION, supra, at 100. It encouraged agencies to make community relations "the business of the department from the chief on down" and to ensure they "play a part in the selection, training, deployment, and promotion of personnel." Id. And it urged police officials to involve neighborhood advisory committees and other citizens' groups in setting policing practices and priorities.

It took another decade for these ideas to catch on, but by the mid-1980s, law-enforcement leaders had come to embrace a new model of "community" or "neighborhood oriented" policing. In a 1988 study, David Bayley and Jerome Skolnick cited the "growing and extraordinary consensus [that] has arisen among selected police executives around the globe that the movement toward community policing is a positive development." Jerome H. Skolnick & David H. Bayley, *Theme and Variation in Community Policing*, 10 CRIME & JUST. 1-2 (1988). Houston Police Chief Lee Brown declared community policing to be "the most appropriate means of using police resources to improve the quality of life in neighborhoods throughout the country." Lee P. Brown, *Community Policing: A Practical Guide for Police Officials*, PERSPECTIVES ON POLICING 10 (1989). By 1997, more than 85 percent of law-enforcement agencies claimed to have implemented "community policing" or to be in the process of doing so. Lorie Fridell, *The Results of Three National Surveys on Community Policing*, COMMUNITY POLICING: THE PAST, PRESENT, AND FUTURE 39, 42 (2004).

Yet, in 2015, a new presidential task force made many of the very same observations as the ones made almost 50 years earlier. It highlighted the profound mistrust between police and community. PRESIDENT'S TASK FORCE, supra, at 5. And it urged policing agencies to embrace community policing as organizational strategy, to work collaboratively with the public to "co-produce public safety," and to give community members a real voice in how their communities are policed. Id. at 3.

As it turned out, although many agencies purported to engage in "community policing," the reality was that most had adopted only "a relatively modest version of community policing." Gary Cordner, *The Survey Data: What They Say and Don't Say about Community Policing*, COMMUNITY POLICING: THE PAST, PRESENT, AND FUTURE 59, 65 (2004). In many police departments, community policing had been "relegated to specialized units composed of a small number of officers rather than spread across police departments." Braga, supra, at 17. Agencies were quicker to embrace the related principle of "problem-oriented" policing which emphasized the need to address underlying community problems as opposed to focusing narrowly on criminal enforcement. But what was largely absent from the initial rush to community policing was what Lee Brown described as "'power sharing'—the idea that "responsibility for making decisions is shared by the police and the community." Brown, supra at 5.

There are a variety of explanations for the failure of community policing to take hold. Community policing is resource-intensive, and there is a perception, at least in some communities,

that it diverts attention away from responding to calls for service. Wesley G. Skogan, *Community Policing: Common Impediments to Success*, COMMUNITY POLICING: THE PAST, PRESENT, AND FUTURE 159, 165 (2004). Community policing also has encountered resistance from officers who may see it as "social work" that is divorced from real policing. Michael L. Benson & Kent R. Kerley, *Does Community-Orientated Policing Help Build Stronger Communities?*, 3 POLICE QUARTERLY 46*,* 62 (2000). Finally, community policing asks a lot of the community. Absent genuine power sharing and a sense of collective ownership of policing decisions, it may be difficult to sustain. Schulhofer, supra, at 343; Skogan, *Community Policing*, supra, at 166; Benson, supra, at 63.

In addition, this notion of close collaboration often conflicted with other pressing items on the agenda. As crime rates continued to climb through the 1980s and early 1990s, a more assertive vision of policing took hold. In a number of jurisdictions, agencies turned toward "order maintenance policing" or "broken windows" policing—which likewise "made it a priority for police to address local problems," but typically "assigned to the police themselves the responsibility for identifying" what those problems were. Schulhofer, supra, at 340. These trends were fueled and amplified by the national "war on drugs" and later the "war on terror," both of which shifted emphasis and resources away from a community-oriented approach. See, e.g., Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals,* NEW PERSPECTIVES IN POLICING BULLETIN 2 (2015); DAVID C. COOPER, ARRESTED DEVELOPMENT: A VETERAN POLICE CHIEF SOUNDS OFF ABOUT PROTEST, RACISM, AND THE SEVEN STEPS NECESSARY TO IMPROVE OUR NATION'S POLICE 2 (2011).

Today, there is growing consensus that effective policing requires a renewed commitment to community policing and its core ideals. And, commendably, some departments across the country have begun to take tangible steps toward giving communities a greater say in how they are policed.

2. Elements of community policing. Over time, community policing has come to be seen as a catch-all term for a variety of programs and strategies, from foot patrols and collaborative problem-solving to youth programs and citizen−police academies to a variety of enforcement tactics, including hot-spots policing, order-maintenance policing, and focused deterrence. Braga, supra, at 17; Cordner, supra, at 61; IMPLEMENTING COMMUNITY POLICING: LESSONS FROM 12 AGENCIES at xv (2009).

The emphasis in this Section on close partnership and collaboration between police and the communities they serve reflects what many have identified as the defining feature of community policing. See, e.g., BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING at vii (1994) ("Community policing is, in essence, a collaboration between the police and the community that identifies and solves community problems."); PRESIDENT'S TASK FORCE, supra, at 41 ("Community policing is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues."); Wesley G. Skogan, *Community Participation and Community Policing*, *in* HOW TO RECOGNIZE GOOD POLICING at 88 (Jean-Paul Brodeur ed.,

1998) ("Every definition of community policing shares the idea that the police and the community must work together to define and develop solutions to problems."). This Section recognizes that partnering with the community often means partnering with community organizations and other government entities, which requires agencies to both proactively seek out those relationships and to be open to overtures by other groups. Often, addressing community problems will require a coordinated response by both governmental and nongovernmental actors. See, e.g., *Developing Coordinated Community Response Teams*, UN WOMEN, http://www.endvawnow.org/en/articles/319-developing-coordinated-community-responses-.html (last visited May 22, 2017). This Section also is consistent with research on procedural justice, which underscores the importance of transparency and voice, not only in the context of individual encounters but also for the agency's relationship with its community. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND COURTS (2002); Tracey L. Meares & Peter Neyroud, *Rightful Policing* 5, NAT'L INST. OF JUSTICE 11-12 (2015).

Likewise, many of the core components of community policing identified here—including organizational transformation, collaborative problem-solving, community participation, and police–community interaction in social and other nonenforcement settings—are consistent with what law-enforcement professionals have long emphasized as essential components of the community-policing approach. See, e.g., COMMUNITY ORIENTATED POLICE SERVICES, COMMUNITY POLICING DEFINED (2012) (identifying the three components of community policing as "community partnerships," "organizational transformation," and "problem-solving"); Wesley G. Skogan, *The Promise of Community Policing*, *in* POLICE INNOVATION: CONTRASTING PERSPECTIVES 27, 28 (David Weisburd & Anthony A. Braga eds., 2006) (noting that community policing has "three core elements: citizen involvement, problem solving, and decentralization").

However, more so than some of the earlier resources on community policing, e.g., BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING (1994); COMMUNITY ORIENTATED POLICE SERVICES, COMMUNITY POLICING DEFINED (2012), these Principles underscore the importance not only of partnering with the community to identify and address public-safety problems, but also of giving community members a meaningful voice in the discussions and debates that determine how their communities are policed. This element of community policing—what Lee Brown called "power sharing"—was one of the central recommendations made by the President's Task Force throughout its Final Report. PRESIDENT'S TASK FORCE, supra, at 3, 45, 93. In order to achieve the sort of cultural transformation and trust-building that community policing promises, this last component is essential.

§ 1.09. Furthering Legitimate Policing Objectives

All investigative and enforcement activity by officers or agencies should be based on, and should further, a legitimate policing objective.

Comment:

Agency officials undertake a variety of investigative and enforcement activities—including making stops and arrests, interviewing witnesses and suspects, conducting surveillance, gathering forensic evidence, and reviewing publicly available information on social media. In addition to the more specific protections set out in the Chapters that follow, these activities should be based on and should further a legitimate policing objective, including: preventing, deterring, or investigating unlawful conduct; promoting traffic or pedestrian safety; ensuring officer safety; rendering aid; and facilitating the exercise of constitutional rights. See also §§ 1.02 (Goals of Policing); 1.03 (Constitutional Policing).

Conversely, agency officials should not undertake these sorts of activities to pursue illegitimate ends. Officers should not, for example, initiate investigative or enforcement activities out of personal animus or political disagreement, or for personal gain. Nor should they undertake these activities in order to intimidate or harass. Just as important, enforcement activities should not be motivated in whole or in part by a desire to meet an official or unofficial quota—and agencies should avoid structuring their promotion and evaluation systems in a manner that encourages this sort of activity. Enforcement quotas, which a number of states prohibit as a matter of state law, can lead to both over-enforcement and racially disparate enforcement, and are inconsistent with the principles on harm-minimization and procedural justice enumerated in §§ 1.04 and 1.07. Finally, both officer and agency activities should be consistent with the principles on policing for the purposes of revenue generation, § 1.10, and policing on the basis of protected characteristics and First Amendment activity, § 1.11.

REPORTERS' NOTES

Agencies should ensure that officers exercise their authority only in pursuit of legitimate ends, such as investigating or deterring unlawful conduct, promoting public safety, or rendering aid. See also § 1.02 (Goals of Policing). Although many departments have policies that prohibit officers from undertaking investigative activities for impermissible purposes—such as personal animus, political disagreement, or financial gain—often these prohibitions are contained in specific policies having to do with accessing department databases or using specific surveillance technologies. See, e.g., The Los Angeles County Sheriff's Department's Automated License Plate Recognition (ALPR) Privacy Policy § I (listing authorized purposes for which ALPR technology may be used); http://shq.lasdnews.net/content/uoa/epc/alprprivacypolicy.pdf; GA. CODE ANN. § 35-1-22(d)(1) (making it a misdemeanor to use ALPR technology "under false pretenses or for any purpose other than for a law enforcement purpose"); Detroit Police Department Manual 307.5 (listing prohibited

and allowable uses of facial-recognition technology), https://detroitmi.gov/sites/detroitmi.localhost/files/2019-04/FACIAL%20RECOGNITION%20Directive%20307.5.pdf; U.S. DEP'T OF JUST., CRIMINAL JUSTICE INFORMATION SERVICES (CJIS) NATIONAL DATA EXCHANGE (N-DEX) SYSTEM POLICY AND OPERATING MANUAL § 1.3.4 (listing the acceptable uses of the National Data Exchange system). Agencies should make clear that *all* investigative activities, however minor, should have a legitimate basis. See, e.g., Anaheim Police Department Policy § 322.5.2 (prohibiting "[t]he wrongful or unlawful exercise of authority on the part of any member for malicious purpose, personal gain, willful deceit or any other improper purpose") https://www.anaheim.net/DocumentCenter/View/29459/APD-Policy-Manual; THE JUSTICE COLLABORATORY AT YALE LAW SCHOOL, PRINCIPLES OF PROCEDURALLY JUST POLICING 37-39 (2018) (proposing that investigatory stops be "limited to circumstances in which they promote public safety and do not unnecessarily harm police-community relations"). Just as it would be inappropriate for an officer to access a license-plate-reader database to track the whereabouts of an intimate partner, it also would be inappropriate for an officer on duty to tail an individual for reasons unrelated to an investigation or public-safety concern.

Agencies also should avoid the use of quotas and performance incentives that encourage officers to take enforcement actions in order to satisfy evaluation criteria or improve their standing within the department. Experience in various jurisdictions makes clear that quotas—both formal and informal—encourage officers to take enforcement action in circumstances in which they otherwise would not. And they often can exacerbate racial disparities by prompting officers to look for what they may perceive to be "easier" targets in low-income communities and in communities of color. See, e.g., Guy Padula, Utah v. Strief: *Lemonade Stands and Dragnet Policing*, 120 W. VA. L. REV. 469, 524 (2017) (quoting NYPD officers explaining that the way they met the department's alleged enforcement quotas was by going "to the well", meaning the lobbies of public-housing buildings). For this reason, a number of states already prohibit agencies from using quotas for stops, citations, or arrests. See, e.g., ARK. CODE ANN. § 12-6-302 (prohibiting the use of arrest quotas); CAL. VEHICLE CODE § 41602 (West) (prohibiting use of arrest quotas); MONT. CODE ANN. § 46-6-420 (prohibiting quotas for arrests, citations, or investigative stops); CONN. GEN. STAT. ANN. § 7-282d (prohibiting quotas for traffic citations); MD. CODE ANN., PUB. SAFETY § 3-504(a)–(b) (prohibiting quotas for arrests and citations, and prohibiting agencies from using the number of arrests and citations as a "primary" criterion for promotion); 71 PA. STAT. ANN. § 2001 (prohibiting agencies from requiring—or even suggesting—that officers issue a specific number of traffic citations); UTAH CODE ANN. § 77-7-27 (prohibiting the use of quotas for arrests or citations). Agencies further should ensure that their evaluation schemes do not inadvertently create the same enforcement incentives as would a more formal quota system.

§ 1.10. Policing for the Purposes of Revenue Generation

Agencies may not engage in policing actions in order to generate revenue, and municipalities and states should not incentivize such actions.

Comment:

The imposition of fines as a response to unlawful conduct is a legitimate approach to public safety. Fines, like incarceration, can be a deterrent to conduct society wishes to prohibit. And, in at least some circumstances, fines may further policing objectives in ways that are less costly—both to individuals and to society as a whole—than arrest and incarceration. Likewise, asset forfeitures aimed at removing the profit from various forms of criminal enterprise can serve important law-enforcement goals. However, the arrests and citations that ultimately lead to the imposition of fines, or the seizure of assets, should be conducted only in order to further the legitimate goals of policing outlined in § 1.02, and should not be motivated in whole or in part by the goal of generating revenue. There is a significant difference between a parking ticket for a vehicle that is blocking an entrance to a building and a quota incentivizing officers to give larger numbers of parking tickets in order to meet budgetary shortfalls.

The unfortunate reality, however, is that policing agencies often have engaged in policing actions for revenue-driven reasons—and that other government actors often have incentivized policing agencies to do so. Some municipalities have imposed informal or formal quotas, or utilized other incentives, to encourage officers to conduct stops, issue citations, and even make arrests, with the primary goal of obtaining money for the public fisc. Officials at all levels of government also have incentivized these activities through budget decisions, as well as through statutory mechanisms that reward revenue-generating activity. In some jurisdictions, for example, agencies are permitted to keep all or some of the proceeds from seized assets; this encourages aggressive pursuit of asset forfeiture, even in cases in which it would not be warranted on public-safety grounds.

The harms that result from revenue-driven policing can be substantial—to individuals, to communities, and to law enforcement itself. For some individuals, particularly indigent persons and families, paying fines and fees may make the difference between the ability to pay rent or not, or the ability to feed a family adequately. Forfeitures deprive individuals of their property, including vehicles needed for transportation to employment, family, health care, and school. Individuals who find themselves unable to pay their fines and fees may face a variety of direct and collateral consequences of nonpayment, including additional fines and fees, deprivation of driving privileges, deprivation of voting privileges, probation revocations, enhanced punishment in future criminal cases, as well as arrest for noncompliance. The financial obligations themselves and their

accompanying consequences can increase poverty and crime by trapping people in a cycle of debt. In some states, hundreds of thousands or even millions of individuals have suspended drivers' licenses and, as a result, experience mounting court debt and accompanying deprivations of personal liberty. Even when some people can bear such financial consequences individually, these financial and collateral consequences may have a negative impact on communities as a whole. Finally, the perception that enforcement activity is geared toward revenue generation as opposed to public safety can be extremely damaging to the legitimacy of law enforcement. Revenue-driven policing also can distort officer and agency incentives in ways that result in the misallocation of policing resources, and ultimately, in reduced public safety.

Policing agencies and their officers should take steps to ensure that enforcement activities are conducted solely to further legitimate policing objectives. Municipalities should not encourage or incentivize policing agencies to undertake enforcement activities for the purposes of generating revenue. And municipalities and states should provide policing agencies with the resources they need to fulfill their objectives without engaging in revenue-generating activities. Finally, both state and local legislatures should review existing statutory schemes to avoid providing incentives to agencies to make enforcement decisions in order to raise revenue.

REPORTERS' NOTES

Legal financial obligations—such as fines, fees, or asset forfeiture—can play an appropriate role in criminal-justice policy. They are a milder form of enforcement than an arrest. Further, some crimes are economic in nature, and the payment of a fine or of restitution can serve important remedial purposes in addition to being a deterrent. For larger criminal enterprises, forfeiture can be an important tool to deprive organized crime of proceeds and return funds to victims. A range of policy reasons, therefore, supports the sound use of tickets, citations, and forfeitures for the appropriate reasons and in the appropriate circumstances. Revenue generation, however, is not among these legitimate policy aims. See, e.g., PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 26 (2015) (emphasizing that agencies should not incentivize officers to take enforcement action "for reasons not directly related to improving public safety, such as generating revenue."); Marshall v. Jerrico, 446 U.S. 238, 242 (1980) (recognizing that "injecting a personal interest, financial or otherwise, into the [law] enforcement process" raises serious due-process concerns).

Careful tailoring around financial obligations has not been the norm in the United States. Rather, in response to budgetary shortfalls, law-enforcement agencies, courts, municipalities, and states have turned to fines and fees as a revenue source. See, e.g., Michael W. Sances, Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*,

79 J. OF POLITICS 1090 (2017) (noting that in 2012, about 80 percent of American cities with policing agencies derived revenue from fees, fines, and forfeitures, with about six percent of cities collecting over 10 percent of revenues); ROADMAP TO EQUITABLE FINE AND FEE REFORM (2020), at https://www.policylink.org/resources-tools/equitable-fine-fee-reform (describing how "[t]he 2008 recession was a catalyst for many cities and counties to turn to fines and fees to try to balance their budgets, further harming residents who were already struggling to make ends meet."). Municipalities have exerted both formal and informal pressure on agencies to generate revenue. See, e.g., U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) (describing efforts by municipal officials to encourage the Ferguson, Missouri police department to issue more citations). State legislatures also have incentivized revenue-raising activities in various ways. In some states, for example, funds collected from criminal defendants are earmarked for state or local law enforcement, increasing the direct incentives for enforcement to generate revenue in order to supply their own budget. See, e.g., TENN. CODE. ANN. 39-17-428 (providing that half of the mandatory minimum fines for certain drug offenses "shall be paid to the general fund of the governing body of the law enforcement agency responsible for the investigation and arrest which resulted in the drug conviction."). Similar revenue-sharing provisions incentivize asset forfeiture as well. See, e.g., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 14 (2010) (noting that policing agencies in all but a handful of states receive either all or most of the proceeds from any assets seized).

The consequences of fines and fees enforcement can be substantial. Even small fines may be beyond the reach of many indigent people. Nonpayment can result in additional fines, as well as a variety of collateral consequences including the loss of employment, housing, public assistance, drivers' licenses, and voting rights. Brandon L. Garrett, Sara Greene and Marin Levy, *Fees, Fines, Bail, and the Destitution Pipeline*, 69 DUKE L.J. 1463-1472 (2020); ALEXES HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 14 (Apr. 28, 2017), http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf. Vanita Gupta & Lisa Foster, Off. of Justice Programs, Civil Rights Div., U.S. Dep't of Justice, Dear Colleague Letter: Fines and Fees in State and Local Courts 7 n.9 (Mar. 14, 2016) ("Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape"), https://www.justice.gov/opa/file/832541/download. Forty-one U.S. states, for example, still require suspension of driver's licenses for non-driving-related reasons, including non-payment of court debt. Will Crozier and Brandon Garrett, *Driven to Failure: Analyzing Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585 (2020); MARIO SALAS & ANGELA CIOLFI, LEGAL AID JUSTICE CTR., DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 7-9 (2017); see also, ALAN M. VOORHEES TRANSP. CTR. & N.J. MOTOR VEHICLE COMM'N, MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE: FINAL REPORT xii (2006), https://www.state.nj.us/mvc/pdf/about/AFTF_final_02.pdf (finding that 42 percent of people lost their jobs as a result of the suspension of their driver's licenses, and that 45 percent could not find another job). The scale

of these legal financial obligations is particularly sweeping for low-level offenses, for which law enforcement do retain enormous discretion as to whether to engage in policing activity, and the enforcement of which may be less essential to promoting public safety. See, e.g., WILLIAM CROZIER, BRANDON GARRETT &THOMAS MAHER, DUKE LAW, CTR. FOR SCIENCE & JUSTICE, THE EXPLOSION OF UNPAID FINES AND FEES IN NORTH CAROLINA (2020) (finding that the bulk of uncollected criminal debt in North Carolina occurs in traffic cases and infractions), https://sites.law.duke.edu/csj-blog/2020/04/22/our-new-report-the-explosion-of-unpaid-criminal-fines-and-fees-in-nc/.

The effects of these policies fall disproportionately on racial minorities. Analysis of driver's-license-suspension data has found that racial minorities are more likely to have their licenses suspended. See Crozier & Garrett, *Driven to Failure*, supra, at 1606–1607; JOANNA WEISS & CLAUDIA WILNER, DRIVEN BY JUST. COAL, OPPORTUNITY SUSPENDED: HOW NEW YORK'S TRAFFIC DEBT SUSPENSION LAWS DISPROPORTIONATELY HARM LOW-INCOME COMMUNITIES AND COMMUNITIES OF COLOR, https://www.drivenbyjustice.org. An analysis of fines and forfeitures in California city governments found that the racial composition of the resident population—as opposed to budgetary considerations or public-safety factors—predicted a jurisdiction's reliance on fines and fees enforcement. Akheil Singla, Charlotte Kirschner & Samuel B. Stone, *Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments*, 56 URB. AFFS. REV. 1132 (2020); see also, Nat'l Task Force on Fines, Fees, and Bail Practices, Nat'l Ctr. for State Courts, Principles on Fines, Fees, and Bail Practices (December 2017) (urging courts to "acknowledge that their fines, fees, and bail practices may have a disparate impact on the poor and on racial and ethnic minorities and their communities."), https://www.ncsc.org/__data/assets/pdf_file/0020/14195/principles-1-17-19.pdf.

Finally, in addition to its evident harms, enforcement of legal financial obligations can come at the expense of public safety by drawing police resources from actions geared toward the public interest. As emphasized consistently throughout these Principles, public safety and security is the paramount goal of policing, and revenue generation is not a legitimate goal of law enforcement. Indeed, it may come at a cost to public safety. A recent study found that a one percent increase in the share of revenues from fees, fines, and forfeitures collected by a municipality was associated with a 6.1 percent decrease in the violent crime clearance rate. Rebecca Goldstein, Michael W. Sances, Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, URBAN AFFAIRS REV. 1 (2018).

In view of these concerns, a number of jurisdictions have moved to curb reliance on fines and fees. For example, San Francisco, California, created a Financial Justice Project, tasked with assessing the use of fines and fees in the city. See https://sfgov.org/financialjustice/. Some states also have imposed limits on the use of asset forfeiture, including by reducing the direct financial incentives to law-enforcement agencies to engage in the practice. See, e.g., Institute for Justice, "Civil Forfeiture Reforms on the State Level," (last visited: July 25, 2020), https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/. A small number of jurisdictions also have required that data on fines and fees enforcement be made public, including by requiring local

reporting to a state auditor. See, e.g., South Dakota Legislative Research Council, Issue Memorandum 2016-4, Asset Forfeiture (2016), at https://mylrc.sdlegislature.gov/api/Documents/Issue%20Memo/124655.pdf (noting reporting process in Minnesota and reforms in five states to civil forfeiture practices).

§ 1.11. Policing on the Basis of Protected Characteristics or First Amendment Activity

Investigative activities should not be based on a person's:

(a) race, ethnicity, national origin, gender, sexual orientation, religion, or other protected characteristic, unless these characteristics are part of a sufficiently specific suspect description; or

(b) expressed or perceived belief, absent a plausible basis to conclude that the person is advocating conduct that poses a threat to public safety.

Comment:

a. Use of protected characteristics. It is imperative that governmental activities, especially those involving law enforcement, not be contaminated by any sort of animus or bias. Many agencies have adopted the phrase "bias-based policing" to describe policing activities undertaken in whole or in part on the basis of a person's race, gender, ethnicity, or other protected characteristic such as a person's sexual orientation, gender expression, religion, disability, homelessness, or economic status. Investigative activity on the basis of a protected characteristic typically is prohibited unless the characteristic is part of a specific suspect description, in connection with an investigation of a specific crime or violation. Absent a specific suspect description, bias-based policing occurs if a person's status or group identity is a factor in an investigatory decision, even if other factors are present. For example, if an officer pulls a driver over because the driver is speeding *and* because the driver is Latinx, it still is an example of biased policing, even though there is some other legitimate basis for the stop. Officers may rely on a person's protected status when they are looking for a suspect matching a particular description—but even in these circumstances, officers should not take action based on that characteristic alone and should have specific evidence to identify a specific suspect rather than engaging in a dragnet of a wide range of individuals.

b. Belief and expression. Law-enforcement investigations based on individuals' expressed or perceived political, religious, or other expressions pose a distinct set of concerns. On the one hand, any investigative activity has the potential to chill protected speech or association—and can

create the perception that law enforcement is targeting individuals impermissibly for expressing unpopular views. At the same time, political, religious, or other *expression*—unlike race, ethnicity, or religious *identity*—sometimes may be tied together with, or be the stated basis for, advocating violent or criminal activity, and therefore may itself provide legitimate grounds for investigative follow-up. For example, if in the course of religious expression, or for religious motives, an individual announces an intent to commit a crime or to support another individual's criminal activity, it may be reasonable for officers to conduct a preliminary inquiry to determine whether there is in fact any reason to think that the individual poses a credible threat that should be pursued further.

A number of agencies have developed policies that attempt to balance these two concerns by making clear that the proper focus of any investigation is on the potential for *unlawful activity* as opposed to mere expression, by limiting the sorts of investigative techniques that officers may use before they have reasonable suspicion or probable cause to believe that an actual offense has been or is about to be committed, and by limiting what data may be retained from any preliminary inquiry that officers undertake. In New York City, for example, officers are not permitted to undertake any sort of investigative activity based "solely on activities protected by the First Amendment," but they may initiate a preliminary inquiry when "statements advocate unlawful activity, or indicate an apparent intent to engage in unlawful conduct . . . unless it is apparent, from the circumstances or the context in which statements are made, that there is no prospect of harm."

REPORTERS' NOTES

1. Avoiding bias. As law-enforcement leaders themselves increasingly have recognized, it is essential that policing be conducted in an impartial manner—and that individuals and communities not be singled out on the basis of race, ethnicity, gender, sexual orientation, religion, or other protected characteristic. See International Association of Chiefs of Police, *Bias-Free Policing* (Nov. 1, 2003) ("[B]ias-free policing is a critical cornerstone for upholding professional ethics in law enforcement, is vitally important to strengthening public trust and confidence in our actions and responsibilities, and is an essential element in maintaining community support for tolerance and understanding of our actions as we perform our responsibilities as law enforcement officials."), https://www.theiacp.org/resources/resolution/bias-free-policing-0; Al Baker, *Confronting Implicit Bias in the New York Police Department*, N.Y. TIMES, (July 15, 2018), https://www.nytimes.com/2018/07/15/nyregion/bias-training-police.html (noting that "elected leaders and chiefs of police have increasingly focused on [ ] implicit bias" and that "[i]f officers rely on stereotypes instead of facts, routine encounters can escalate or turn deadly"). Most major departments now have policies in place to prohibit "bias-based" policing—and some states have

adopted laws requiring the same. See, e.g., LOS ANGELES POLICE DEP'T LOS ANGELES POLICE DEPARTMENT MANUAL § 345 ("Policy Prohibiting Biased Policing"); Chicago Police Department, General Order G02-04 Prohibition Regarding Racial Profiling and Other Bias Based Policing (2017); SEATTLE POLICE DEP'T, SEATTLE POLICE DEPARTMENT MANUAL Policy 5.140 (2019); San Francisco Police Department, *General Order: Policy Prohibiting Biased Policing* (May 4, 2011), https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO5.17%20Policy%20Prohibiting%20Biased%20Policing.pdf; N.J. STAT. ANN. § 2C:30-6 (making it a crime for a public servant to "intimidate or discriminate against an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity"); ARK. STAT. ANN. § 12-12-1402 (prohibiting racial profiling in policing); KAN. STAT. ANN. § 22-4609 (making it unlawful to use "racial or other biased-based policing" in policing decisions).

At the same time, policing agencies, courts, and commentators alike have struggled at times to articulate precisely what constitutes "bias"—and the circumstances in which race or other protected characteristics may be used in police decisionmaking. Some, for example, have argued that race may legitimately be used as part of a "profile." And courts have at times suggested that race may be used to justify a stop or arrest so long as it is not the "sole" or "primary" factor motivating the decision. See United States v. Avery, 137 F.3d 343, 355 (7th Cir. 2001); Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 1999); United States v. Travis, 62 F.3d 170 (6th Cir. 1995); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1416 (2002) (noting that some courts continue to follow the rule that a police practice is not racial profiling unless the police are relying solely on the basis of race); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1077-1078 (2001) ("No court has treated law enforcement reliance on a race-based suspect description as a racial classification warranting strict scrutiny under the Equal Protection Clause."). This approach, however, is inconsistent with traditional equal protection jurisprudence, which requires that any use of race in government decisionmaking be "narrowly tailored" to a compelling government interest. See Fisher v. Univ. of Texas, 570 U.S. 297, 307-308 (2013) (applying strict scrutiny to a university's admission process that took the applicant's race into account); Regents of Univ. of California v. Bakke, 438 U.S. 265, 299 (1978) (same); see also Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. Rev. 1, 48 (2010) ("The Court's insistence that there is no equal protection issue unless police or border profiling is based solely on race makes this area an extreme outlier in the field of equal protection."). A profile is, almost by definition, both over- and under-inclusive, given that the vast majority of individuals of any race or generalized description are going to be innocent of any criminal activity. See Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 215 (2002). Profiling disproportionately burdens these individuals by subjecting them to additional law-enforcement scrutiny for no other reason other than their race or ethnicity. This is unacceptable.

For this reason, many departments have revised their policies to make clear that race—as well as other protected characteristics—only may be used if they are part of a specific suspect

description. See, e.g., SEATTLE POLICE DEP'T, SEATTLE POLICE DEPARTMENT MANUAL 5.140.3-POL (2019) ("Officers may take into account the discernible personal characteristics of an individual in establishing reasonable suspicion or probable cause, only when the characteristic is part of a specific suspect description based on trustworthy and relevant information that links a specific person to a particular unlawful incident."); LOS ANGELES POLICE DEP'T, LOS ANGELES POLICE DEPARTMENT MANUAL § 345 (2020) ("Department personnel seeking one or more specific persons who have been identified or described in part by their race [or other protected characteristic] may rely in part on the specified identifier . . . only in combination with other appropriate identifying factors and may not give [it] undue weight."), https://www.lapdonline.org/lapd_manual/new_page_1.htm. In addition to the specific characteristics listed here—including race, ethnicity, gender, sexual orientation, and religion—some agency policies list a variety of other characteristics as well, including age, disability, economic status, and veteran status. See, e.g., SEATTLE POLICE DEP'T MANUAL Policy 5.140 (2019) (age, disability status, economic status, familial status, gender, gender identity, homelessness, mental illness, national origin, political ideology, race, ethnicity, color, religion, sexual orientation, use of a motorcycle or motorcycle-related paraphernalia, veteran status), https://www.seattle.gov/police-manual/title-5---employee-conduct/5140---bias-free-policing; Chicago Police Department, Prohibition Regarding Racial Profiling and Other Bias Based Policing General Order G02-04 (race, ethnicity, color, national origin, ancestry, religion, disability, gender, gender identity, sexual orientation, marital status, parental status, military discharge status, financial status, lawful source of income); LAPD MANUAL § 345 (race, religion, color, ethnicity, national origin, age, gender, gender identity, gender expression, sexual orientation, disability); ADMIN. CODE OF THE CITY OF NEW YORK § 14-151, Bias Based Profiling (actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status), https://www1.nyc.gov/site/cchr/law/biased-based-profiling.page.

Agencies also have encouraged officers to focus on *behavior* that is indicative of criminal activity, as opposed to an individual's identity or self-presentation. See id. (defining bias-based policing as officer relying on personal characteristics, rather than behavior, of suspect); SEATTLE POLICE DEP'T MANUAL Policy 5.140 (2019) ("Law enforcement and investigative decisions must be based upon observable behavior or specific intelligence."). Studies suggest that focusing on observable behavior can both reduce racial or other disparities, and also improve hit rates, thereby reducing unwarranted intrusions and making better use of police resources. See Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 381-387 (2016) (finding that a focus on observable behavior leads to higher hit rates and decreased racial disparities); Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43 (2016) (finding a deterrent effect on criminal activity when police focus on observable behaviors such as "casing," actions indicative of engaging in a drug transaction, or actions indicative of violent crimes).

2. Avoiding reliance on expressed religious or political belief. It is a fundamental principle—enshrined in the First Amendment—that individuals may not be singled out by the

government on the basis of their political or religious views. See Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is [] blatant."). Democracy requires ample space for political disagreement and dissent, which would be undermined if majorities could leverage the power of the state to stamp out minority views. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254 (1961); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996).

At the same time, the words people use and the ideas they express can themselves pose a threat to public safety when used to incite violence or otherwise create a serious risk of harm. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (explaining that government may target speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."). For this reason, political or religious *expression*—unlike racial, ethnic, or religious *identity*—sometimes may be used to justify investigation or enforcement. See, e.g., Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 35 (2011) ("Politically motivated terrorism provides a particularly vivid example of the case for intelligence-gathering investigations predicated upon expression that is protected by the First Amendment."); Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175 (2000) (using an anti-abortion group's implicit threats of violence against abortion providers as an example of when political speech crosses the line and loses First Amendment protection). On the other hand, the mere fact that an individual belongs to a particular organization or espouses a specific ideology is not itself sufficient. See United States v. Robel, 389 U.S. 258, 265 (1967) (holding that a statute forbidding members of a Communist organization from working in a defense facility unconstitutional as it "establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it."); Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984) (applying strict scrutiny when FBI's investigation of Library of Congress employee was based solely on that employee's membership in socialist group).

Agencies have adopted a variety of measures to ensure that investigations steer clear of protected First Amendment activity while at the same time enabling officers to take the steps necessary to protect the public from harm. Many agencies now have specific policies for handing investigations predicated on First Amendment activities that make clear that any investigative activity—however limited—must be predicated on a plausible threat of *unlawful conduct*. See, e.g., New York Police Department, Patrol Guide Procedure No. 212-72 Appendix B (2018) ("When, however, statements advocate unlawful activity, or indicate an apparent intent to engage in unlawful conduct, particularly acts of violence, an investigation under these guidelines may be warranted, unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm."); Los Angeles Police Dep't, LOS ANGELES POLICE

DEPARTMENT MANUAL § 271.45 (2019) (instructing officers that "activities that are generally protected by the First Amendment should not be reported as a [Suspicious Activity Report] unless additional facts and circumstances can be clearly articulated [to show] that the behavior observed is reasonably indicative of criminal activity"). Many agencies also require supervisor approval either to initiate an investigation, or to use more intrusive techniques, such as undercover officers or informants. See, e.g., Chicago Police Department, Investigations Directed at First Amendment-Related Information General Order G02-02-01 § VI (2012) (noting that certain methods of First Amendment information-gathering require supervisor approval as provided for in Special Order S02-02-01); BERKELEY POLICE DEP'T, LAW ENFORCEMENT SERVICES MANUAL Policy 430.9 (2018) (requiring that, when practicable, officers must obtain approval from the chief of police before conducting investigations "into individuals or groups exercising Constitutionally protected First Amendment activities"). Finally, agencies have used a variety of mechanisms to track the status of all investigative activities, and to periodically assess their continued necessity. D.C. CODE § 5-333.12 (requiring panel of at least three commanding officers to review continued necessity of investigations involving First Amendment activity every 90 days and mandating a yearly outside audit of compliance with rule for First Amendment investigations); SAN FRANCISCO POLICE DEP'T, GENERAL ORDER: GUIDELINES FOR FIRST AMENDMENT ACTIVITIES § 8.10.VI (mandating designation of member of police commission to ensure compliance with department policies regarding First Amendment investigations and requiring annual audit of the Department's compliance); SANTA CRUZ POLICE DEP'T, POLICY MANUAL 606.4 (requiring police chief's re-approval of First Amendment investigations every 30 days).

§ 1.12. Interacting with Vulnerable Populations

(a) The term "vulnerable populations" refers to individuals or groups who, by virtue of their age, identity, status, disability, or circumstance, may be particularly susceptible to criminal victimization and may face special challenges in their interactions with the police.

(b) Officers should treat all members of the public, including those who are in vulnerable populations, with sensitivity and respect.

(c) Agencies should ensure, through policies, training, and supervision, that officers are prepared to recognize potential vulnerabilities on the part of individuals with whom they are likely to come in contact, to interact safely and respectfully with different vulnerable populations, and to respond to individuals in crisis in ways that minimize the risk of harm.

(d) Agencies should engage proactively with vulnerable populations—as well as with the organizations and advocates who work with them—in order to build trusting relationships, identify issues of concern, and take care that policing occurs in a manner that addresses the unique needs of different vulnerable populations.

(e) Agencies should work with partners outside law enforcement—including criminal-justice system professionals, social-services providers, health practitioners, and courts—to identify and address the challenges facing different vulnerable populations, create alternatives to police interaction with these populations, and reduce their involvement in the criminal-justice system.

Comment:

a. Definition and animating concerns. The term "vulnerable populations" describes the many individuals and communities who, by virtue of their age, identity, status, ability, or circumstance, may be at greater risk of criminal victimization and may face a unique set of challenges in interacting with the police. Vulnerable populations include, but are not limited to: people experiencing mental illness or psychiatric crisis; people with developmental disabilities; people who are deaf or hard of hearing, blind or visually impaired, or have other physical impairments; people experiencing addiction or substance-related impairment; minors and the elderly; people who are unhoused; people with limited English proficiency; people who are lesbian, gay, bisexual, transgender, or queer (LGBTQ); and recent immigrants and undocumented persons. A vulnerability may derive from a person's temporary or permanent condition or from an inherent characteristic of the person. And individuals may be members of more than one vulnerable group.

Although each vulnerable population has its own characteristics and challenges, what unites them is the fact that ordinary police protocols and practices often will fall short of meeting their needs—and may put vulnerable individuals at serious risk of harm. Handcuffing, for example, might impose special hardships on deaf individuals who have no way to communicate other than using their hands. Issuing verbal commands in a loud or aggressive manner may be especially frightening for persons with autism spectrum disorder or individuals who are in a mental crisis, and it may cause them to react in a manner that further escalates an encounter. Placing transgender or gender-nonconforming individuals in a holding cell with other detainees can potentially expose them to a heightened risk of physical harm.

The challenges that vulnerable individuals face in their interactions with the police are exacerbated by the fact that, historically, police officials have at times failed to accommodate the needs of vulnerable communities, and indeed sometimes have targeted vulnerable groups for enforcement or treated them in biased or harmful ways. Police officials have conducted undercover

stings of gay men, and they have profiled and stopped transgender women as prostitutes. Officers have at times treated unhoused individuals with derision and disrespect. And they have not always taken seriously allegations of harm and abuse brought by various vulnerable groups. As a result, members of vulnerable communities may be reluctant to interact with the police or to turn to the police for help.

In this latter regard, there are of course notable parallels between vulnerable communities and communities of color, which also are disproportionately likely to experience aggressive or biased policing. Many of the Principles in this volume are aimed at reducing harmful practices, ensuring that officers treat all members of the public in a fair and impartial manner, and overcoming a history of past abuse. See §§ 1.04 (Reducing Harm), 1.07 (Promoting Police Legitimacy in Individual Interactions), 1.08 (Community Policing), 1.11 (Policing on the Basis of Protected Characteristics or First Amendment Activity), and 4.03 (Ensuring the Legitimacy of Police Encounters). The specific focus on vulnerable communities in this Section reflects the additional need for special accommodation that goes beyond the baseline imperative of impartial treatment, or the need to take affirmative steps to remedy past harms.

b. Respectful and unbiased treatment. Agencies should take steps to ensure—through policy, training, supervision, and, when appropriate, discipline—that officers interact safely and respectfully with members of vulnerable groups, and that they provide the same quality of services and police protection to vulnerable individuals as they do to others. Agencies should reevaluate existing policies, practices, and enforcement strategies to ensure that they are not imposing any unnecessary or disproportionate harms on members of vulnerable groups. Agencies also should implement training programs that are focused on building empathy and understanding and on giving officers the tools and strategies they need to engage positively with various vulnerable groups. Officers should be trained to recognize potential vulnerabilities, particularly those that may not be immediately apparent or may be mistakenly perceived by officers as threatening or noncompliant. Officers also should be trained on crisis intervention, as well as general strategies for de-escalating potentially violent encounters. And they should be made aware of the resources available to support them in their interactions with vulnerable individuals (e.g., language interpreters or behavioral specialists), as well as the resources to which they may be able to refer individuals in need. Finally, training should emphasize the importance of using appropriate, inclusive, and respectful language when interacting with and referring to vulnerable community members.

c. Community partnership and proactive engagement. These Principles adopt the view that policing agencies operate most effectively when they partner with their communities to co-produce public safety and minimize harm. See § 1.08 (Community Policing). The need for proactive engagement may be particularly acute when it comes to vulnerable groups. The organizations that work with and represent various vulnerable communities can help agencies to identify shortfalls in agency policies and practices and to develop and implement appropriate training to prepare officers to interact safely and respectfully with vulnerable groups. Direct engagement with members of vulnerable communities also can help build understanding and restore trust where it has been lost. Officers and agencies can use a variety of strategies to facilitate this sort of engagement, including by scheduling regular face-to-face meetings, designating liaison officers, and attending community activities and events.

Partnerships with community-based organizations and other government-service providers also can promote a more holistic response to the needs of vulnerable populations—such as persons experiencing mental illness, addiction, or homelessness—who face a series of challenges that cannot be addressed by the police acting alone. See § 14.09 (Promoting a Holistic Approach to Public Safety). Policing agencies should develop relationships with other governmental and community actors, including mental-health practitioners and social-services providers, and should work with them to meet the needs of vulnerable groups. Agencies also should work with other government actors to develop alternatives to enforcement and incarceration in order to reduce the involvement of vulnerable populations in the criminal-justice system and limit the role of police as first responders. These may include pre-arrest diversionary strategies, such as crisis drop-off centers, detox centers, and temporary housing shelters, as well as post-arrest alternatives to incarceration, such as substance-abuse treatment or hospitalization. See also § 4.05 (discussing the use of citations in lieu of arrest).

REPORTERS' NOTES

1. Background and animating purpose. Police officers have an obligation to treat all members of the public in a fair, respectful, and unbiased manner. But often, it is not enough simply to treat everyone the same. Vulnerable populations have a unique set of challenges that may require special accommodations in order to ensure equitable and safe treatment on the part of the police. Int'l Ass'n of Chiefs of Police, *Policing in Vulnerable Populations: Practices in Modern Policing* (2018); see also Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021) (noting that the Americans with Disabilities Act may in some circumstances impose an obligation

on policing agencies to provide reasonable accommodations to persons with disabilities during police encounters and arrests).

Routine police protocols often fall short of serving vulnerable populations. For example, individuals with limited or no English proficiency simply may be unable to communicate with officers who do not speak their primary language. Susan Shah et al., *Overcoming Language Barriers: Solutions for Law Enforcement*, VERA INST. OF JUST. (2007), https://www.lep.gov/sites/lep/files/resources/vera_translating_justice_final.pdf. Handcuffing deaf persons with their hands behind their back removes their ability to communicate. U.S. Dep't of Just., C.R. Div., *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement* (Dec. 1, 2008), https://www.ada.gov/q&a_law.htm; Jonathan Dollhopf, *Police Interaction with the Deaf*, CTR. FOR DISABILITY RTS., https://cdrnys.org/blog/advocacy/police-interaction-with-the-deaf/. Because unhoused persons carry all of their belongings with them, officers may need to take special care to properly secure these items after an arrest to ensure that they are not stolen or lost. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 40 (Dec. 2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf. Recent immigrants and undocumented persons may be particularly reluctant to turn to the police for help. Matthew Lysakowski et al., *Policing in New Immigrant Communities*, VERA INST. OF JUST. (2009), https://www.vera.org/downloads/Publications/policing-in-new-immigrant-communities/legacy_downloads/e060924209-NewImmigrantCommunities.pdf.

These challenges are exacerbated by the fact that members of vulnerable groups have been disproportionately likely to experience police mistreatment and abuse—and may therefore be legitimately wary of interacting with the police. Scholars have documented a long history of police stings and raids within the LGBTQ community. See, e.g. ANNA LVOVSKY, VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL (2021). And in many jurisdictions, LGBTQ individuals continue to report disrespectful or biased treatment. Christy Mallory, Amira Hasenbush & Brad Sears, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community* THE WILLIAMS INST. (Mar. 2015). https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf. Officers have taken advantage of young people's reduced cognitive ability and susceptibility to manipulation in getting them to waive their *Miranda* rights during police questioning. Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395 (2013), available at https://scholarship.law.umn.edu/faculty_articles/286. Unhoused individuals have routinely been subjected to harassment and disrespect. See, e.g., Alex Horton, *Two Officers Posed with 'Homeless Quilt' Made from Confiscated Signs. Their Chief Apologized*, WASH. POST, Dec. 31, 2019. People experiencing mental illness are disproportionately likely to have excessive force used against them. See, e.g. U.S. DEP'T OF JUST., INVESTIGATION OF THE PORTLAND POLICE BUREAU (Sept. 12, 2012) (alleging a pattern of excessive force by Portland, Oregon, police officers against individuals with mental illness). And the risk of being subjected to police abuse and excessive force increases as disability intersects with race, class, gender, and LGBTQ status. See, e.g., Erin J. McCauley, *The Cumulative Probability of Arrest by Age 28 Years*

in the United States by Disability Status, Race/Ethnicity, and Gender, AM. J. OF PUB. HEALTH 107, no. 12, at 1977-1981 (Dec. 1, 2017) https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304095.

2. Policymaking, training, and supervision. Agencies can promote safe and respectful interactions between officers and members of vulnerable communities through policies, training, and supervision. One of the challenges that officers face is simply learning to recognize signs of potential impairments or vulnerabilities and to adjust their behavior accordingly. Individuals with special needs, for example, may engage in behaviors that can easily be misperceived as threatening or noncompliant—such as avoiding eye contact, repeating words, or running from authorities. See, e.g., Meghan Keneally, *Body Cam Footage Shows a 19-Year-Old with Autism being Shocked with a Taser*, ABC NEWS (July 13, 2018) (describing an incident in which police tased and handcuffed a 19-year-old autistic man after mistakenly concluding that he was intoxicated).

Training should prepare officers to recognize potential vulnerabilities and to be aware of the potential differences in behaviors and triggers both within and among different vulnerable groups. For example, a majority of states now require officers to receive at least some training on interacting with people experiencing mental illness or substance-abuse issues. Nat'l Conf. of State Legislatures, *State Trends in Law Enforcement Legislation: 2014-2017* (Sept. 24, 2018), https://www.ncsl.org/research/civil-and-criminal-justice/state-trends-in-law-enforcement-legislation-2014-2017.aspx. But these trainings may not prepare officers fully to interact with individuals with Down syndrome or autism spectrum disorder. Meg Anderson, *How One Mother's Battle is Changing Police Training on Disabilities*, NPR (Apr. 13, 2019) https://www.npr.org/2019/04/13/705887493/how-one-mothers-battle-is-changing-police-training-on-disabilities. Similarly, only a small number of states train officers on teen development and psychology, or on interacting with older adults who may suffer from dementia or cognitive decline. Rhonda McKitten & Lisa Thurau, *Where's the State?: Creating and Implementing State Standards for Law Enforcement Interactions with Youth*, STRATEGIES FOR YOUTH (May 2017), https://strategiesforyouth.org/sitefiles/wp-content/uploads/2019/10/SFY-Wheres-the-State-Report-May2017.pdf; Rebecca T. Brown et al., *Good Cop, Better Cop: Evaluation of a Geriatrics Training Program for Police*, 65 J. AM. GERIATRICS SOC'Y 1842-1847 (Aug. 2017), https://doi.org/10.1111/jgs.14899.

Agencies have developed a variety of programs and initiatives to train officers in interacting with vulnerable individuals. For example, the International Association of Chiefs of Police is leading a campaign to encourage agencies to address the law-enforcement response to those with mental-health conditions. Over 600 agencies have signed on. INT'L ASS'N OF CHIEFS OF POLICE, ONE MIND CAMPAIGN, https://www.theiacp.org/projects/one-mind-campaign (last visited: Nov. 20, 2021). Similarly, agencies, including the Metropolitan Nashville Police Department and the Tulsa Police Department provide diversity training for interactions with immigrant communities. VERA INST. OF JUST., ENGAGING POLICE IN IMMIGRANT COMMUNITIES, https://www.vera.org/projects/engaging-police-in-immigrant-communities-epic/toolkit. Some of the best training models are led by individuals from vulnerable populations. For example, crisis-intervention training would ideally include people who have personally experienced a mental-health crisis. U.S. DEP'T OF JUST.,

BUREAU OF JUST. ASSISTANCE, TRAINING FOR POLICE-MENTAL HEALTH COLLABORATION PROGRAMS, OFFICE OF JUSTICE PROGRAMS, https://bja.ojp.gov/program/pmhc/training.

Beyond training, agencies should consider promulgating concrete policies to guide encounters with vulnerable individuals. For example, in California, officers must make sure youth speak with an attorney before deciding whether to waive their rights and submit to interrogation—a policy recognizing the immaturity and vulnerability of young people. CAL. WELF. & INST. § 625.6(a). Many agencies now provide officers with specific guidance on interacting with LGBTQ individuals, including clear rules about the use of preferred names and pronouns. See, e.g., Newark Police Division, *General Order 2019-03* (Apr. 29, 2021), https://public.powerdms.com/NewarkPD/documents/1357212. Agencies also have adopted detailed protocols for interacting with deaf individuals, including adopting specific procedures for establishing effective communication, bringing in qualified interpreters, and using restraints in a manner that permits continued communication. See, e.g., San Francisco Police Dep't, *Department General Order 5.23 "Interactions with Deaf and Hard of Hearing Individuals"* (Sept. 28, 2020), https://www.sanfranciscopolice.org/sites/default/files/2020-10/SFPD.Notice20-13630301009.pdf. These types of policies can ensure that officers engage in just and unbiased policing, and preserve the dignity and well-being of vulnerable individuals.

3. Community partnerships. Finally, when it comes to addressing the needs of vulnerable communities, police cannot do it alone. Partnerships with other organizations, including community-based groups, are critical in identifying unmet needs, building trust with different vulnerable communities, and developing trainings and programs to improve police−citizen encounters. U.S. Dep't of Just., Off. of Cmty. Oriented Policing Servs., Community Partnerships, *The Office of Community Oriented Policing Services* (COPS Office), https://cops.usdoj.gov/communitypartnerships; Ashely Krider et al., *Responding to Individuals in Behavioral Health Crisis via Co-Responder Models* (Jan. 2020) https://www.theiacp.org/sites/default/files/SJCResponding%20to%20Individuals.pdf. And as discussed in greater detail in § 14.09, community-based organizations and service providers can help address the many overlapping needs faced by some members of vulnerable groups—including homelessness, drug addition, mental illness, and poverty—that are not capable of being resolved through enforcement, or by the police acting alone. See § 14.09 (Promoting a Holistic Approach to Public Safety).

§ 1.13. Interacting with and Supporting Victims of Crime

(a) Officers should treat all victims or potential victims of crime with respect, empathy, and compassion.

(b) Officers should conduct interviews with victims using trauma-informed techniques, and they should implement a streamlined reporting process in order to minimize re-traumatization.

(c) Officers should accurately record and appropriately classify all reported crimes. Officers should treat all crime reports fairly and without bias, and they should avoid engaging in premature credibility assessments or relying on stereotypes in evaluating victim reports.

(d) Agencies should maintain open and active lines of communication with victims during the course of an investigation in order to keep them informed about the status of the investigation and to follow up on their welfare.

(e) Agencies should form collaborative partnerships with those individuals who provide victim assistance and advocacy, and should facilitate the involvement of such individuals from the beginning of an investigation to see that victims receive the support they require.

Comment:

a. Animating objectives. For individuals who are victimized by crime, police officers often are their first point of contact. Every interaction between a police officer and a crime victim—from the moment an officer first arrives at the scene of a possible crime, through initial interviews and follow-up conversations—has the potential to shape not only the outcome of a criminal investigation but also the victim's ability to recover from any physical or psychological harm. When officers are insufficiently attentive to the needs of crime victims, or when they discount victims' reports due to bias or stereotype, they can significantly compound the trauma that victims experience—while also undermining the important criminal-justice system goals of identifying perpetrators and preventing additional crime and victimization. Officers cannot possibly meet all of the complex needs that crime victims have. But they can ensure that they treat all victims with respect, empathy, and compassion, and connect them to the various services they require.

b. Trauma-informed questioning. The goal of conducting initial interviews and subsequent interactions with crime victims should be to obtain accurate and reliable evidence without causing undue re-traumatization and distress. Victims may be reluctant to report crimes due to the belief that they will be shamed or disbelieved. Effective and empathetic interviewing can increase the willingness of victims to cooperate with criminal-justice authorities, improve the quality of crime reports, and mitigate secondary trauma.

When eliciting a victim's recollections of a criminal incident, officers can reduce undue distress and re-traumatization by maintaining a respectful, compassionate, and empathetic demeanor and by utilizing trauma-informed questioning techniques. Research suggests that even small changes in how officers conduct interviews can impact significantly how victims perceive their experience with law enforcement, and improve the quantity and quality of information obtained. For example, questions that begin with "why did you" or "why didn't you" may be perceived as assigning blame to the victim for what happened. Similarly, given the impact of trauma on how memory is stored, crime victims may find it difficult to recount what happened in chronological fashion. By starting with open-ended questions that invite victims to share their experience in their own words, in whatever order feels most comfortable, officers can make it much easier for them to recount and relay what occurred.

Agencies should implement policies and training, in collaboration with mental-health professionals and victim advocates, to assist officers in developing appropriate strategies for gathering information from victims. In addition, although some repetition of questioning may be necessary during the investigation and prosecution of a crime, agencies should collaborate with other criminal-justice system entities to develop more streamlined reporting processes to minimize the number of times victims have to recount traumatic events.

c. Accurate classification and unbiased treatment. Agencies and officers also have a duty to accurately classify all reported crimes, to treat all victims fairly, and to avoid discounting or downplaying victims' reports based on stereotype, bias, or premature credibility assessments. Although officers and agencies generally respond to and investigate reported crimes, there is a long and troubling history of their failing to do so for certain classes of victims or offenses. These include, for example, allegations of sexual assault, as well as crimes committed against various vulnerable groups, including sex workers, LGBTQ individuals, and those experiencing homelessness or mental illness. Agencies also have at times misclassified crime reports in order to create the perception of falling crime rates or to reduce their investigative burden. These practices undermine agency legitimacy, impose further harms on crime victims, and interfere with an agency's public-safety mission. The failure by agencies or officers to treat all victims fairly also may constitute unlawful discrimination. Agencies should implement policies, procedures, and training to ensure that officers accurately and thoroughly document all victim reports, and that all reports are evaluated in an unbiased manner.

d. Ongoing communication. Criminal investigations can often be lengthy and, in the absence of communication or responsiveness from investigating officers, victims may experience uncertainty and frustration. Agencies should implement procedures for keeping victims informed on an ongoing basis about the status of their investigations, including the anticipated next steps in the criminal process, as well as any decision not to bring charges against the accused.

e. Victim support. Crime victims may have a variety of resulting physical, emotional, or economic needs—many of which law-enforcement officials are not in the best position to address. Agencies should work collaboratively with organizations and individuals that provide victims with support as they navigate the criminal-justice process and connect them to appropriate resources for recovery and rehabilitation. Agencies also should ensure that crime victims are informed of any rights or benefits to which they may be entitled as a matter of state or federal law, including the opportunity to adjust the immigration status for victims of certain crimes who cooperate with the police.

REPORTERS' NOTES

1. Identifying victims. Traditionally, police have taken seriously their role in investigating serious crime. However, they have not always recognized or addressed the much broader set of needs of victims—or who is a "victim" worthy of government protection. For example, a 2015 study of the policing of sexual violence found that victims of non-stranger rape, as well as adolescent victims and victims suspected of prostitution, were not deemed credible or worthy of investigation, and their rape kits were never tested. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 34 (2017). This Section recognizes the importance of thoughtfully identifying and engaging with victims, and it ensures that officers do not jump to conclusions about who qualifies as a victim.

2. Trauma-informed questioning. By neglecting complaints, or even actively discouraging victims who are seeking redress, officers have at times exacerbated the trauma faced by victims. Officers also have re-traumatized individuals by casting doubt on their accounts of what occurred. It is common for victims of serious trauma to be unable to recall an attack fully, to confuse the sequence of events, or to remember certain facts but not others. Sammy Caiola, *How Rape Affects Memory and The Brain, And Why More Police Need To Know About This*, NAT'L PUB. RADIO (Aug. 22, 2021, 7:00 AM), https://www.npr.org/sections/health-shots/2021/08/22/1028236197/how-rape-affects-memory-and-the-brain-and-why-more-police-need-to-know-about-this. However, when officers question why victims don't recall the details right away, it can cause secondary trauma. Id. Other negative social reactions include victim-blaming (victims being told they were not responsible or cautious enough), or attempting to minimize or distract from the assault. Christopher DeCou et al., *Assault-Related Shame Mediates the Association between Negative*

Social Reactions to Disclosure of Sexual Assault and Psychological Distress, 9 PSYCHOLOGICAL TRAUMA: THEORY, RSCH., PRAC. & POL'Y 166 (2017), https://pubmed.ncbi.nlm.nih.gov/27607768/. Depending on these negative responses, victims may regret their initial decision to disclose, and face a higher chance of developing further trauma. Sarah E. Ullman & Liana Peter-Hagene, *Social Reactions to Sexual Assault Disclosure, Coping, Perceived Control and PTSD Symptoms in Sexual Assault Victims*, 42 J. TRAUMA STRESS 495 (2014), https://pubmed.ncbi.nlm.nih.gov/24910478/.

Many studies have demonstrated the importance of using trauma-informed techniques. Relationship-building is key: victims need an empathetic and nonjudgmental response from law-enforcement officers. Debra Patterson, *The Impact of Detectives' Manner of Questioning on Rape Victims' Disclosure*, 17 VIOLENCE AGAINST WOMEN 1349 (2011), https://journals.sagepub.com/doi/10.1177/1077801211434725. Officers can take steps to build rapport and ensure that victims can answer questions at their own pace, with their needs and overall well-being tended to. Megan R. Greeson, Rebecca Campbell & Giannina Fehler-Cabral, *Cold or Caring? Adolescent Sexual Assault Victims' Perceptions of their Interactions with the Police*, 29 VIOLENCE & VICTIMS 636 (2014). https://pubmed.ncbi.nlm.nih.gov/25199391/.

3. Training and policies. Agencies can take concrete steps to train officers in using trauma-informed techniques and create policies that are victim-centered. For example, the New York Police Department has completed expanded training for their Special Victims Division, ensuring all detectives are trained in Forensic Experiential Trauma Interviewing, an evidence-based technique that supports survivors while increasing the information collected. Zolan Kanno-Youngs, *The NYPD's Real SVU is Changing Its Approach to Sex Crimes*, WALL STREET J. (Dec. 10, 2017), https://www.wsj.com/articles/questioning-sex-assault-victims-using-a-new-approach-gets-results-1512934428.

Much of the focus of agency efforts has been on interactions between police and victims during the initial questioning. But as this Principle makes clear, government responsibilities go much further. Officers must use trauma-informed practices from the first point of contact. For example, the Salt Lake City Police Department has included a statement in its rape and sexual-assault policy instructing first responders and early responding officers to be primarily concerned with the well-being and safety of the victim and to perform the in-depth interview at a later time. Chuck Wexler et al., *Executive Guidebook: Practical Approaches for Strengthening Law Enforcement's Response to Sexual Assault*, POLICE EXEC. RSCH. F. (May 2018), https://www.policeforum.org/assets/SexualAssaultResponseExecutiveGuidebook.pdf.

Police should be careful not to engage in undue credibility determinations too early in the investigative process, particularly because victims may experience short-term memory impairments after a traumatic event. Id. One way agencies can combat this is by establishing a clear policy that detectives should not conclude an investigation prematurely or dismiss a victim's credibility based on: (1) any difficulty recalling the events of the assault; (2) any prior relationship with the suspect; (3) the victim's affect after the incident; (4) a lack of physical injury; and (5) any

decision not to report immediately. Id. Additionally, agencies should prohibit any sort of truth-verification exam, such as a polygraph, which can undermine trust in law enforcement. Id.

4. Victim services. Police also have an obligation to keep victims updated about next steps in the investigation. Tangible steps agencies can take include returning victims' calls and emails right away and carefully explaining decisions not to arrest the suspect or further pursue the case. Id. Victims who are kept updated are more likely to participate later in the criminal-justice process. Id. Agencies also might partner with victims' services or support organizations to provide services to victims.

Some of victims' needs cannot be met by police—but police can develop strong ties with other social-service providers, both in and outside of government. Victims may have various needs, including housing, transportation, childcare, mental-health counseling, medical treatment, and wage loss, if they were unable to work as a result of the crime. Monica McLaughlin, *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence and Stalking*, NAT'L LOW INCOME HOUS. COAL. (2014), http://nlihc.org/sites/default/files/2014AG-107.pdf (stating victims sometimes remain with their abusers due to difficulty accessing housing, transportation, and childcare). Many jurisdictions have victim advocates (sometimes connected to the district attorney's office or police department) to help victims navigate the justice system, assist victims in applying for benefits, provide ongoing emotional support, and refer individuals to other agencies and community services. See, e.g., City of Denver, Victim Services, https://www.denvergov.org/Government/Agencies-Departments-Offices/Police-Department/Programs-Services/Victim-Services.

CHAPTER 2
GENERAL PRINCIPLES OF SEARCHES, SEIZURES, AND INFORMATION GATHERING

§ 2.01. Suspicion-Based and Suspicionless Policing Activity

(a) A policing activity is "suspicion-based" when it is conducted with any cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety, or that an individual is in need of aid.

(b) A policing activity is suspicionless when it is conducted in the absence of cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety, or that an individual is in need of aid.

Comment:

a. Distinguishing between suspicion-based and suspicionless policing. These Principles distinguish between policing that is based on some modicum of individualized suspicion (suspicion-based) and that which is not (suspicionless). Governmental activity is suspicion-based when it is directed at a specific individual, location, or item that is believed to be involved in prohibited conduct or to pose a threat to public safety, or at an individual who is in need of aid. An agency action is suspicion-based even if an agency official is operating on little more than a hunch. What matters is that the official has focused his or her attention on a particular individual, location, or item based on the belief—however speculative—that the individual, location, or item in question is involved in wrongdoing, is a threat to public safety, or is in need of aid. The Principles that apply to suspicion-based policing are set out in Chapters 3 and 4. Among the various regulatory tools employed in Chapters 3 and 4 are the traditional tools of probable cause (or reasonable suspicion) and warrants.

By contrast, policing is suspicionless when it is conducted in the absence of cause to believe that any particular individual, location, or item is involved in prohibited conduct or poses a threat to public safety, or that an individual is in need of aid. For example, when officers stop drivers at a sobriety checkpoint, they have no reason to suspect any particular person of driving under the influence (even if, in the aggregate, there is a reasonable probability of stopping at least one person who is intoxicated). These sorts of suspicionless searches and seizures are becoming increasingly ubiquitous and ought to be subject to careful regulation. Because they are conducted in the absence

of individualized suspicion, the traditional requirements of warrants or probable cause are inapt, and a different set of protections is in order. These are set out in Chapter 5.

Although most policing activities are relatively easy to categorize as either suspicion-based or suspicionless, some arguably could fall on either side of the line. One increasingly common investigative tool that resists easy classification is the "cell phone tower dump," which involves obtaining the phone number for every cell phone in a particular vicinity at a specific point in time. Tower dumps are particularly useful for pinpointing suspects in a string of robberies or other crimes by identifying which cell phones were in the vicinity at the time each of them occurred. At the time that the data are obtained, there is no reason to suspect any particular cell phone user of any wrongdoing; in this regard, the investigative activity is therefore "suspicionless." On the other hand, the *reason* for the request is that the police are investigating a specific crime that occurred at a particular location. Instead of collecting data on all cell-phone users in a particular jurisdiction, they are focusing their attention on a narrow subset or group. They are not, in short, engaging in the sorts of regulatory activities that typically constitute "suspicionless" policing.

In application, however, it does not matter much whether tower dumps are analyzed under Chapter 3 or Chapter 5 because, although the protections outlined in the two Chapters differ in important ways, they largely converge when it comes to these sorts of cases. Both Chapters would require that the request be made pursuant to either legislative authorization or an agency policy. See § 3.02 (requiring a written policy), § 5.02 (requiring either a written policy or legislative authorization). And importantly, both would require the agency to provide some level of justification for obtaining cell-phone records from a *specific* tower or location. See § 3.02(a)(3) (requirement of a predicate), § 5.05(b)(3) (requiring a factual basis for targeting a subset of a particular group). Both also require documentation and reporting and impose limitations on scope.

REPORTERS' NOTES

This Section—and the Principles in the Chapters that follow—mirrors a longstanding distinction in the U.S. Supreme Court's Fourth Amendment jurisprudence between suspicion-based and suspicionless searches and seizures. See, e.g., Delaware v. Prouse, 440 U.S. 648, 657 (1979) (distinguishing between suspicionless checkpoints and roving police stops); United States v. Ortiz, 422 U.S. 891, 894-895 (1975) (same). The core intuition that drives this distinction is that there is a fundamental difference between investigative activities aimed at a specific person or persons (suspicion-based) and those aimed more broadly at categories of people or groups

(suspicionless). Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 286-287 (2016).

For both suspicion-based and suspicionless searches and seizures, the goal of legal regulation is the same: it is to ensure that all government intrusions into our lives are justified, and that individuals are not singled out arbitrarily or on the basis of impermissible characteristics such as race or ethnicity. See, e.g., City of Los Angeles v. Patel, 576 U.S. 409, 421 (2015) (noting that the suspicionless hotel-registry inspection regime "creates an intolerable risk that searches . . . will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests"); *Prouse*, 440 U.S. at 661 ("The essential purpose of the . . . Fourth Amendment is to . . . 'to safeguard the privacy and security of individuals against arbitrary invasions.'"); United States v. Brignoni-Prince, 422 U.S. 873, 882 (1975) (noting that allowing suspicionless roving stops "would subject the residents . . . to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers."). What differs are the protections that are necessary to achieve these objectives.

When the government targets a particular individual, the traditional protection against arbitrary or unjustified intrusions is the requirement of individualized suspicion, typically either reasonable suspicion or probable cause. Chandler v. Miller, 520 U.S. 305, 308 (1997) ("[The Fourth Amendment] restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion.").The requirement ensures that an officer has a *reason* for focusing on that particular person, as opposed to someone else—namely, that there are specific, articulable facts to suggest that the individual is either involved in criminal activity or is in need of aid. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 485 (1994) (arguing that "particularized suspicion . . . serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion."). It also ensures a rough proportionality between the justification and the policing activity by imposing a greater burden of justification for more serious intrusions. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 79 (1991).

Individualized suspicion, however, makes little sense in the context of "suspicionless" or regulatory policing. When it comes to airport security, bulk data collection, drunk-driving checkpoints, or factory inspections, police officials have no reason to suspect that any particular individual or business is breaking the law. Friedman & Benin Stein, supra, at 286; Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1727 (2014); Eve Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255–57 (2011); Richard Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 96 (2007). The goal of these programs is to deter potential wrongdoing and to proactively identify potential violations before they result in harm. Friedman & Benin Stein, supra, at 286-287 ("[Suspicionless searches] are not aimed at a suspect but at a broad body of the people—perhaps all of us—to prevent even the contemplation of offending.").

As the U.S. Supreme Court itself has made clear under its "special needs" jurisprudence, alternative safeguards are necessary for suspicionless searching. New York v. Burger, 482 U.S. 691, 703 (1987) ("[T]he regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."). In order to justify the use of suspicionless policing tactics, government officials must be able to explain why the particular *category* of persons or businesses ought to be the focus of policing activity. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (emphasizing "the magnitude of the drunken driving problem" and "the State's interest in eradicating it"); Donovan v. Dewey, 452 U.S. 594, 602 (1981) (emphasizing the danger of mining activity); United States v. Biswell, 406 U.S. 311, 315 (1972) (explaining that suspicionless, unannounced inspections under the Gun Control Act are necessary to deter unlawful gun sales); see also §§ 5.03 and 5.04 (on justifying suspicionless searches and seizures, and defining the targeted group). And because there is no reason to suspect any particular person of wrongdoing, an agency must have procedures in place to ensure that the policy or program is applied even-handedly (i.e., that everyone is, in fact, treated the same). *Biswell*, 406 U.S. at 316 (noting that the government must have a "reasonable" inspection plan, one that does not leave the target "to wonder about the purposes of the inspector or the limits of his task"); Brown v. Texas, 443 U.S. 47, 51 (1979) (emphasizing that suspicionless searches and seizures "must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers"); see also § 5.05 (on ensuring evenhanded application of suspicionless searches and seizures). Finally, because the vast majority of people stopped or searched are going to be innocent of any wrongdoing, it is particularly important to ensure that there has been sufficient democratic deliberation at the front end to ensure that this is indeed the sort of burden that individuals are willing to bear. See, e.g., *Sitz*, 496 U.S. at 453-454 (emphasizing the importance of approval by "politically accountable officials" in determining the constitutionally of a highway sobriety checkpoint); Sims v. State Tax Comm'n, 841 P.2d 6, 9 (Utah 1992) (requiring specific statutory authorization for sobriety checkpoints); Nelson v. Lane Cnty., 743 P.2d 692, 696 (Or. 1987) (requiring that automobile checkpoints be authorized by "a law or ordinance providing sufficient indications of the purposes and limits of executive authority."); see also, § 5.02 (requiring legislative authorization or publicly adopted agency policy).

§ 2.02. Information Gathering

For the purposes of these Principles, "information gathering" is any governmental action designed to acquire evidence of, or to deter, prohibited conduct that involves:

(a) taking action that constitutes a "search" within the meaning of the Fourth Amendment;

(b) using technology that enhances the natural senses to detect or to record information;

(c) obtaining personally identifiable information or records from a nongovernmental entity through purchase or compulsory process;

(d) accessing a database controlled by another government agency to obtain personally identifiable information;

(e) using an undercover agent or informant to obtain information; or

(f) engaging in behavior that would be unlawful if carried out by a member of the public.

Comment:

a. Information gathering, generally. In order to maintain public safety and enforce the law, governmental agencies—primarily but not exclusively policing agencies—must gather information. Some of the means of doing so, like entering a home or reading private communications, are extremely intrusive. Others, such as recording a number on a license plate, observing who is entering a given address, or using closed-circuit television (CCTV) cameras in a public space, may be somewhat less so. Whatever the level of intrusion, however, activities like these ought to be regulated, to a greater or lesser degree. The tendency has been to look to the Fourth Amendment, which refers to "searches and seizures," as a primary regulator of such conduct—although of course there are state constitutions, various relevant statutes, and the policies of individual agencies as well.

If the goal is to ensure sound regulation of various policing practices, the Fourth Amendment is a poor fit. That is because the Fourth Amendment covers a much smaller range of governmental activity than that which calls for regulation, and because the Fourth Amendment offers a relatively blunt and narrow set of regulatory tools. The two points are related.

First, the constitutional framework excludes a wide range of governmental information-gathering activities that call out for some regulation, even if not through the "warrant and probable cause" regime enforced by the courts. Among them is the acquisition of data from third parties, as well as the use of various surveillance technologies, such as license-plate readers and drone surveillance. Although these activities fall short of a Fourth Amendment "search," they nevertheless can be used to gather a great deal of information about individuals' whereabouts and day-to-day habits. If left entirely unregulated, they have the potential to be overused, or to be deployed in arbitrary or discriminatory ways. For this reason, many law-enforcement agencies have policies in

place to regulate the use of technologies and tactics that fall outside the definition of a Fourth Amendment search. And as discussed in greater detail in § 2.05, both the federal government and the states have adopted comprehensive statutes to regulate the use of some of these technologies.

Second, regulating these information-gathering techniques by way of constitutional law may be both over- and under-protective of the interests at stake. The traditional tools of Fourth Amendment regulation are individualized suspicion (either reasonable suspicion or probable cause) and judicial process (either by obtaining a warrant in advance of action or judicial review afterward, or both). Many of the information-gathering activities discussed here, however, are used early in the course of an investigation—well before police officials could meet the requirements of either reasonable suspicion or probable cause. Requiring officials to satisfy the Fourth Amendment's suspicion thresholds could significantly hamper investigative efforts or lead courts to significantly lower the standards to accommodate law-enforcement needs. At the same time, many of these information-gathering techniques are used in contexts that may never trigger ex post judicial review but still may be used in ways that raise a host of concerns about the legitimacy of government conduct, be they intrusions on privacy or chilling of First Amendment activity, questions of disparate impact on various populations, or even something as mundane yet essential as weakening data security. Unlike courts, which must rely on the constitutional blunderbuss, agencies and legislatures can operate with a scalpel. Moreover, they have a much broader set of tools at their disposal—from training and supervisory approval, to auditing and public reporting—all of which can be used to reach the broader set of concerns. Even when it comes to the issue of "cause," legislatures and agencies can utilize a broader range of possible predicates, ranging from the baseline requirement of a legitimate law-enforcement purpose to a showing that exceeds the constitutional requirements of probable cause.

The goal of these Principles is to provide concrete guidance to both legislatures and agencies in crafting an appropriate set of protections to regulate the various investigative activities in which police officials may engage, regardless of whether they fall within the scope of the Fourth Amendment. To that end, the Principles in the Chapters that follow apply not only to traditional searches and seizures, but to "information gathering"—a category of activities that necessarily is broader than that set out in the U.S. Constitution. At the same time, because the Principles are aimed at legislatures and agencies as opposed to courts, the regulatory consequences of deeming something "information gathering" can be more tailored to address both the needs of law

enforcement and the unique concerns that various policing tools pose. The Principles in the Chapters that follow draw on a broad array of regulatory measures to ensure that the various tactics not addressed by constitutional regulation are used in a sound manner.

b. Investigating or deterring prohibited conduct. An important limitation on the definition of "information gathering" is that it only covers activities designed to uncover evidence of, or to deter, prohibited conduct. Government agencies routinely gather information for other purposes as well, i.e., to administer government programs, enroll children in schools, grant licenses, and the like. These activities would not be considered "information gathering" subject to the requirements of Chapters 3 and 5.

On the other hand, the definition would apply to more traditional administrative agencies when they gather information in order to identify potential violations of laws or rules. For example, when social-welfare agencies compel beneficiaries to submit to drug testing, or when government officials inspect factories or workplaces for health-and-safety violations, they must do so in compliance with the Principles set forth in the following Chapters. Similarly, these Principles would apply when agencies gather information to uncover violations of their own rules. School officials, for example, may search a student's purse or locker to enforce school discipline. Agency supervisors may review an employee's e-mails, or look through an employee's desk, in order to monitor compliance with workplace rules. These activities raise many of the same concerns regarding intrusiveness, arbitrariness, and the potential for discrimination discussed throughout these Principles. For this reason, agencies should conduct these activities in a manner that is, to the extent feasible, consistent with the Principles set forth in the Chapters that follow.

c. Technologically enhanced surveillance. Observation is an inherent part of law enforcement. Officers routinely are on the lookout for suspicious activity that warrants further investigation, and these activities are typically not regulated in any way. As the U.S. Supreme Court increasingly is beginning to recognize, however, technology transforms the nature of observation in ways that require supervision, even when it is deployed in public spaces in which individuals typically do not have an expectation of privacy. For example, tailing an individual over a period of days would be extremely difficult and require a team of officers, whereas GPS devices can be used to easily track multiple suspects for months at a time. A CCTV camera similarly is fundamentally different from an officer standing on a corner: it is considerably cheaper to deploy, it is more difficult for members of the public to detect, and it can capture images or video that may be stored

for years. An officer can observe the license plate of the car in front of him and check for outstanding warrants; an automated license-plate reader (ALPR) can scan thousands of plates in any given day and record the precise location of each plate it sees. Tools such as CCTVs and ALPRs can save valuable law-enforcement resources and make policing agencies considerably more effective, but they also have the potential to be considerably more invasive. It therefore is essential that high-level agency officials—and the broader public—take responsibility for how technologically enhanced observation is used by adopting the sorts of policies described in Chapters 3 and 5.

d. Accessing or acquiring personally identifiable information from third-party record-holders. Government agencies, especially law-enforcement agencies, routinely acquire data and documents from third parties such as banks, cellular-phone companies, and commercial vendors. Sometimes third parties turn over such data or records of their own volition in response to a specific police request. These requests are governed by § 2.05. In many instances, however, government officials compel the production of information, either through a court order or through a subpoena issued by a grand jury, a prosecutor, or by the government agency itself. Government officials also acquire data through purchase, including call records, credit-card information, purchasing history, payroll records, location data from license-plate readers or cellular phones, and social-media use. The information contained in third-party databases is an important resource for policing agencies and can provide crucial leads, particularly in the early stages of a criminal investigation. At the same time, agency access to such information—particularly when used to investigate unlawful conduct—raises a variety of concerns, from its potential to chill lawful activity to the possibility that the information will be abused or used to disproportionately target marginalized groups.

Under the U.S. Supreme Court's "third-party-doctrine", if a person voluntarily shares information with a third party, such as a phone company or a bank, the government may access the third party's records without obtaining a warrant because doing so would not constitute a Fourth Amendment search. For the purposes of these Principles, however, any acquisition of data or information through purchase or compulsory process is considered "information gathering," unless the records are "de-identified," meaning they cannot be linked to a particular individual. As discussed above, and in the Chapters that follow, this does not mean that anytime the government wishes to acquire information it must first obtain a warrant supported by probable cause. Rather, it means that the acquisition must take place according to the Principles for either suspicion-based or suspicionless policing set out in Chapters 3 and 5.

e. Accessing government databases. In addition to obtaining information and records from nongovernmental third parties, agencies also gather information by accessing data that *other* government agencies have collected. Local policing agencies pull criminal records from state and federal law-enforcement databases, access driving records from motor-vehicle-agency databases, and at times draw on personal information collected by other administrative and social-welfare agencies. Because these data already are in government hands, accessing these records typically would not be considered a "search" for Fourth Amendment purposes. At the same time, few would argue that every government official should have unfettered access to every single record that government agencies collect. Both legislatures and agencies themselves have recognized the importance of imposing limits on agency access to various databases to ensure that the information is used properly, and to minimize the privacy concerns that arise when information about individuals is aggregated across multiple databases and policy domains. Thus, agency acquisition of information from other government agencies also is "information gathering" governed by the Principles set forth in Chapters 3 and 5. For the same reasons, even law-enforcement access to its own databases requires some restrictions, as are set out in Chapter 6.

f. Use of undercover agents and informants. Policing agencies also at times rely on undercover agents and informants in order to obtain information about unlawful conduct that would not otherwise come to light. Informants play a particularly vital role in investigations of criminal conspiracies, as well as certain forms of public corruption, which are difficult to pursue in the absence of inside information. However, the use of informants can be highly intrusive and can potentially impede the right to free association by engendering suspicion within groups that their activities are being surreptitiously monitored by the state. Under the U.S. Supreme Court's "reasonable expectation of privacy" framework, the use of informants and agents does not amount to a Fourth Amendment search on the theory that when individuals interact with others, they "assume the risk" that any information they share may be passed along to the government. But this does not mean that the use of informants and agents should not be carefully regulated—as is evident by the many agencies at the local, state, and federal level that have adopted policies to carefully circumscribe their use.

These Principles address the use of informants in two ways. First, they make clear that whenever officials affirmatively use either undercover agents or informants to obtain nonpublic information (as opposed to passively accepting information from informants or witnesses), they

are engaging in "information gathering" and should ensure that they do so in accordance with the Principles set forth in Chapters 3 and 5. Second, these Principles also deal separately in Chapter 12 with the broader range of concerns that are implicated by the use of informants, including informant safety and the reliability of their testimony, that go beyond the scope of the information-gathering principles in the Chapters that follow. These two sets of Principles are intended to work in tandem. Chapter 12 provides agencies with more specific guidance on how to operationalize the various safeguards described in Chapters 3 and 5. But it also outlines a variety of additional measures that agencies may need to take to address concerns that are unique to informants.

g. State and local positive law. Although government officials sometimes are exempt from prohibitions that apply to the general public, when officials engage in activities that would be unlawful if carried out by a member of the public they should take particular care to ensure that they exercise their authority in responsible ways. Although courts, in interpreting the Fourth Amendment, traditionally have resisted looking to positive law to define the scope of its protections, there are signs in recent U.S. Supreme Court decisions that this approach may be changing, and for good reason: positive law is a particularly apt source of guidance for agencies and legislatures in distinguishing between those activities that may be left entirely to officer discretion and those that ought to have some degree of agency supervision. For example, most states have laws that prohibit trespassing onto private property, going through someone's trash, or releasing certain kinds of data without the user's permission. These laws are an important indication of societal expectations and suggest that the activity in question is sufficiently intrusive that agencies at the very least should provide guidance to officers and other officials about the manner in which the activity should be used. See Chapters 3 and 5.

h. Line-drawing difficulties and the need to err in favor of complying with Chapters 3 and 5. The five categories of information-gathering activities described here are intended to provide guidance to agencies and legislatures in identifying the sorts of tactics that ought to be subject to regulation. The list is not exhaustive, nor—as courts and commentators have discovered—is line-drawing easy. Inevitably, there will be activities that arguably do not fall within the definition of "information gathering" but raise a similar set of concerns. To take an easy case, an officer who is watching passersby while patrolling public streets unavoidably is "gathering information," but that simple act does not fall within these Principles, nor should it. On the other hand, if an officer uses a camera to document evidence at a crime scene, such conduct arguably falls within the definition

of "information gathering," but it is not clear it requires regulatory guidance along the lines prescribed in Chapters 3 and 5, as opposed to the Principles on evidence-gathering set forth in Chapter 8. Aerial surveillance from a helicopter sometimes may be conducted by a government official without the benefit of any technological enhancement, and depending on the height at which the helicopter is flown, could fall outside the positive-law limitation in subsection (e). At the same time, aerial surveillance of any sort raises a variety of concerns, including privacy, safety, and noise; and it is precisely the sort of activity that an agency may wish to regulate at least to some degree. Although line-drawing can be difficult, when in doubt, agencies should err in favor of adhering to the Principles set out in Chapters 3 through 5, and, in particular, in having a policy in place to provide guidance to low-level officials in deciding when and how a specific technique ought to be used. Regulatory guidance should become the norm for police information-gathering.

REPORTERS' NOTES

The question of whether a practice ought to be regulated differs in important ways from the question of whether something ought to be deemed a search for Fourth Amendment purposes. In deciding whether to regulate, legislatures and agencies are not bound—as are courts—by the text of the Fourth Amendment, its history, or the various principles of constitutional interpretation that have informed the U.S. Supreme Court's jurisprudence. See United States v. Jones, 565 U.S. 400, 410-411 (2012) (relying on text of Fourth Amendment to explain why "open fields" are not protected); Payton v. New York, 445 U.S. 573, 583-585 (1980) (relying on history of Fourth Amendment to explain why statute authorizing police officers to enter a residence without a warrant to make a felony arrest is unconstitutional); see also Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1159 (2017) ("The possibility of statutory privacy offers several substantial advantages over the Fourth Amendment alone. Legislatures are not bound by text, history, or precedent."). And they are not limited to the fairly blunt set of tools that courts have at their disposal to implement the Fourth Amendment's commands. Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 597 (2009) (pointing out that legislation often can "strike a middle ground not possible under the Fourth Amendment."). Regulation does not mean prohibition, and, importantly, it does not mean that a particular tactic can only be deployed if police officials satisfy the requirements of reasonable suspicion or probable cause. What it means is that democratically accountable legislators—or at the very least, high-level officials within an agency—have taken responsibility for how the tactic is deployed. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015).

In deciding whether to regulate, then, the question is whether a particular investigative strategy implicates a set of values that ought not be balanced anew by each individual officer in the field. Framed that way, the justification for including each of the categories above under the definition of "information gathering" becomes readily apparent. Consider, for example, the last

item on the list: "behavior that would be unlawful if carried out by a member of the public." The U.S. Supreme Court has held that positive law is not determinative of Fourth Amendment rights, and, as a result, officers who trespass on private property or dig through people's trash, in violation of state or local ordinances, are not necessarily conducting a "search" within the meaning of the Fourth Amendment. Oliver v. United States, 466 U.S. 170, 183-184 (1984) (noting that the law of trespass is not dispositive of whether an intrusion on land violates the Fourth Amendment); California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that looking through trash is not a "search"); but see Providence, Rhode Island Code of Ordinances § 12-87 (prohibiting any person from "scaveng[ing] household rubbish, garbage or recyclables"). But surely it does not follow that individual officers ought to decide for themselves which broadly applicable statutes they ought to comply with—and which they should feel free to ignore.

Indeed, all of the investigative activities listed here are ones that many agencies and legislatures *have* subjected to some degree of regulation. Thus, a number of states have adopted statutes to regulate the use of various technologies such as drones, license-plate readers, and facial-recognition software. See, e.g., VT. STAT. ANN. tit. 20, § 4622(a) (prohibiting law-enforcement agencies from using a drone to "investigat[e], detect[], or prosecut[e] crime"); Md. Public Safety Code Ann. § 3-509(b) (limiting law enforcement use of automated captured plate data to "legitimate" purposes); OAKLAND, CAL. MUN. CODE § 9.64.045(A) (forbidding the city of Oakland from "obtain[ing], retain[ing], request[ing], access[ing], or us[ing] face recognition technology."). And many departments have adopted policies to regulate still other technologies. Los Angeles Police Department Manual 568.55, L.A. POLICE DEP'T, http://www.lapdonline.org/lapd_manual/ (last visited June 23, 2020) (requiring a warrant, unless in the case of an emergency, for use of cellular-communications-interception technology); Operations Order 3.27(8), PHX. POLICE DEP'T, https://www.phoenix.gov/policesite/Documents/operations_orders.pdf (last visited June 23, 2020) (requiring supervisor approval for use of social media by investigators). Both the federal government and the states regulate law-enforcement access to various third-party databases—from medical records to video-store-rental histories. See Erin Murphy*, The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions,* 111 MICH. L. REV. 485, 546 (2013) (listing major federal privacy statutes); see, e.g., Video Privacy Protection Act, 18 U.S.C. § 2710, et seq. (protecting information held by "video tape service providers"); Internal Revenue Code (Tax Reform Act of 1976), 26 U.S.C. § 6103 (protecting tax information); Family Educational Rights and Privacy Act, 34 C.F.R. § 99.31(a)(9)(i) (protecting personal information held by educational institutions); Bank Records Act, 12 U.S.C. § 1952 (protecting bank records). They also regulate how information may be shared among government agencies. See, e.g., 13 U.S.C. § 9 (limiting inter-agency access to census data); 5 U.S.C. § 522a (regulating inter-agency sharing of personally identifiable information). Both agencies and legislatures have imposed various restrictions on the use of informants. See, e.g., Fla. Stat. § 914.28(5)(a)–(h) (listing various factors a law enforcement agency should factor in "assess[ing] the suitability of using a person as a confidential informant"); Los Angeles Police Department Manual 544.30, L.A. POLICE DEP'T, http://www.lapdonline.org/lapd_manual/ (last

visited June 23, 2020) (requiring officers to keep supervisors informed "of their relations and activities involving informants").

Yet, as is often the case given that there are 50 states and some 18,000 law-enforcement agencies, there are many notable gaps. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 214 (2015) (highlighting that 84 percent of law-enforcement agencies have no lineup procedures in place); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 17 (2003) (noting that "the use of informants, other undercover tactics, deployment of the canine unit, etc." remain unregulated). The goal of the Principles that follow is to provide an overarching framework to guide policymakers in providing guidance to officers and agencies where it is presently lacking.

§ 2.03. Establishing Prior Justification for Government Action through Warrants and Recordings

(a) The use of any information-gathering technique, as defined in § 2.02, which rises to the level of a constitutional "search" or "seizure" should be conducted pursuant to a judicially issued warrant, absent the ability to obtain one in a timely fashion.

(b) When conducting a stop, search, frisk, or arrest, or engaging in other information-gathering activity (as defined in § 2.02) in the absence of a warrant, officers should, insofar as is practicable and consistent with the safety of officers and others, document in advance the grounds for their action.

(c) Legislative, executive, and judicial actors should work to simplify and streamline the warrant-acquisition process without reducing any jurisdiction's substantive legal threshold for acquiring warrants.

Comment:

a. Generally. In the course of pursuing legitimate policing objectives, see § 1.02, officers possess the authority to intrude—sometimes substantially—on individual liberty and autonomy. They are authorized to stop individuals, to take them into custody, to search their bodies and through their belongings, to conduct surveillance, and even to resort to the use of force. Although these actions are at times necessary, they interfere with individuals' freedom of movement, implicate property and privacy interests, and risk serious injury to person and property.

Under both our national and state constitutions, there is a two-fold check on the state's ability to intrude into individual's lives in these ways. First, officers must have an adequate

predicate for their actions. Second, whenever possible, officers engaging in these intrusions are to obtain warrants from neutral magistrates. The warrant process allows for judicial scrutiny before the fact of the reasons offered by the state for intruding into individuals' lives. The warrant requirement also may encourage officers to scrutinize their own actions more carefully in anticipation of having to justify their request to a third party.

Obtaining a warrant often is not feasible, however, even for very substantial intrusions. Officers often must act in the moment. And when they do, it is left to the parties, supervisors, external reviewers, and the courts to determine after the fact what transpired and why. Whether they occur before or after the fact, inquiries into the basis for government intrusions are essential, because whenever the government deprives individuals of life, liberty, or property, adequate justifications are required.

Yet, there often are substantial problems with recreating events after the fact. Memories fade. Cases often turn on a factual dispute about what an officer did or did not see. Because most challenges to searches and seizures are raised in criminal cases in the context of a motion to suppress, judges see only the cases in which inculpatory evidence in fact was found. Consequently, there is a natural tendency on the part of courts to credit the officer's conclusion that there was sufficient cause to justify the intrusion—not to mention a reluctance to throw out probative evidence after the fact. In addition, there is, unfortunately, a body of evidence that indicates officers sometimes stretch the truth to justify ex post the actions they have taken.

This Section addresses these competing concerns in three ways. First, to the extent "searches" and "seizures" are involved (as defined by federal or state law), it sets out a strong presumption in favor of obtaining warrants whenever feasible. Second, in circumstances in which it is not feasible to do so, it encourages officers nevertheless to document their reasons for acting before the fact in order to facilitate ex post review. Third, it encourages legislatures to streamline and simplify the warrant process so that warrants can in fact be obtained in as many cases as possible.

b. Preference for warrants. For the reasons stated above, officers ordinarily should obtain a warrant any time they engage in activity that constitutes a seizure, search, or arrest under the national or state constitutions, or any other time mandated by state or local law. Although the U.S. Supreme Court repeatedly has expressed just such a warrant preference, it nonetheless has sanctioned a number of categorical exceptions to the warrant requirement, including for arrests,

automobile searches, and certain administrative searches. Often, in the interest of preserving bright-line rules, courts have extended these exceptions to circumstances in which it would have been entirely feasible to obtain a warrant before the fact. Given the weighty rationale for warrants, these exceptions cannot be justified to the extent obtaining a warrant is practicable. The advance of technology has served to make obtaining warrants—whether telephonically or by using other tools such as video conferencing—more expeditious. The Court itself has recognized the availability of these tools and insisted upon warrants in recent cases such as Riley v. California, 573 U.S. 373 (2014) (requiring a warrant before searching a cell phone), and Missouri v. McNeely, 569 U.S. 141 (2013) (requiring a warrant for a blood draw in a situation involving concerns about driving under the influence, so long as one can be obtained expeditiously). Agencies should adopt policies making clear that warrant exceptions should not be relied upon when it is possible to obtain a warrant.

The primary use of warrants occurs around suspicion-based policing activity, as described in Chapter 3, but there also is a place for warrants regarding some suspicionless policing activity, as described in Chapter 5. The Supreme Court has required such warrants in connection with certain administrative searches, and some states have done the same with regard to police roadblocks. Although the warrants in these instances are not based on cause to believe any individual has engaged in prohibited activity, such warrants nonetheless ensure that enforcement officials are proceeding according to a lawful and neutral plan.

c. Recording in advance. It is not always possible to obtain a warrant in a timely fashion, and the law rightly excuses warrants in situations involving "exigent circumstances." However, the advent of body-worn cameras (BWCs) and other contemporaneous recording devices makes it possible to record in advance an officer's justification for conducting a search or seizure. When activating their BWCs, officers can make a simple statement of what they are about to do and the grounds for doing it. Given the increasing availability of this technology, when obtaining a warrant is not possible, officers should document the rationales for their actions either via BWC or other time-stamped technology in order to facilitate more accurate and informed ex post review by supervisors and courts. If unable to make such record in advance, officers should record the grounds for conducting a search or seizure as soon as possible after the action.

d. Facilitating obtaining warrants. One reason the warrant requirement is honored more in the breach is because the process of obtaining warrants can be laborious and time-consuming. But because the law rightfully expresses a preference for warrants, the warrant process should be

simplified whenever possible. Technology can serve to facilitate the warrant process. Many jurisdictions have, for several decades, allowed for telephonic warrants. Video-conferencing software can make it easier for magistrates to speak quickly and directly to officials requesting warrants and to ask them questions. Technology also can speed the receipt of warrant applications and the delivery of warrants, and it could simplify greatly the application process itself. For example, voice-recognition software and artificial intelligence could help officers to complete applications quickly without having to sit down at a computer. All system actors should collaborate to find new and innovative ways to make the warrant process simpler, faster, and more effective. Nothing in this Section is meant to lower the substantive standard for obtaining a warrant or to encourage magistrates to "rubber stamp" warrant applications. The process itself, however, could be simplified to make available the careful scrutiny by a neutral magistrate that the law favors. See § 14.04 (Judicial Responsibilities with Regard to the Policing Function).

REPORTERS' NOTES

This Section adopts the U.S. Supreme Court's long-stated preference in favor of obtaining warrants in all cases in which it is possible for policing officials to do so. When obtaining a warrant is not possible, it urges officers nevertheless to document their justification for intrusions in advance, so long as it is safe and practicable to do so. The reason for these preferences is to ensure both that government action with a consequential impact on individuals is justified and that the decision to permit such action is made as often as possible in advance by a judicial officer.

1. Ex ante v. ex post justifications and the constitutional warrant preference. A central requirement of the Fourth Amendment is that all searches and seizures must be justified. See, e.g., Katz v. United States, 389 U.S. 347, 357 (1967) (holding that searches without warrants based upon probable cause are, with few exceptions, per se unreasonable); Terry v. Ohio, 392 U.S. 1 (1968) (disallowing stops and frisks on something less than "reasonable suspicion"); Brown v. Texas, 443 U.S. 47 (1979) (requiring that searches conducted in the absence of reasonable suspicion be justified on the basis of government necessity, balanced against nature of intrusion on individual). Requiring justification for government action that has adverse effects on individuals is the *sine qua non* of the rule of law. Adverse government action in the absence of justification is arbitrary, and thus impermissible. See Camara v. Municipal Court, 387 U.S. 523 (1967) (explaining that the "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals from arbitrary invasions by government officials.")

Officials may be required to justify a particular intrusion before it takes place (ex ante), or after the fact (ex post). For reasons of efficiency, the law generally relies upon ex post review. See, e.g., Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271, 271-272 (1984); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 885-886 (1991).

When it comes to policing, however, there are a number of reasons why the law prefers ex ante reason-giving. First, the standards against which courts ultimately judge individual officers' conduct—like "reasonableness" or "probable cause"—are "not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559 (1979); accord, Illinois v. Gates, 462 U.S. 213, 232 (1983). Officers, acting on their own, may evaluate circumstances very differently than a judge. See William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J. L. REFORM 311, 339 (1991) ("The rules of search and seizure . . . are sufficiently vague that even the best-informed officers are routinely mistaken about what they may and may not do."). For this reason, ex ante review by a judicial decisionmaker is preferred. Christopher Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. REV. 1, 14 (1991) ("U]nless search and seizure law can be put in a form that police . . . can grasp, we would have to require that *ex ante* review be undertaken by a legally trained decisionmaker in every case[.]").

Second, a requirement of ex ante reason-giving will cause officers to stop and consider their actions critically. Research in cognitive psychology demonstrates that individuals make more deliberate and rational decisions when they are forced to justify their decisions to others and to confront opposing arguments. See Asher Koriat, Sarah Lichtenstein & Baruch Fischhoff, *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 113-114 (1980); Jennifer S. Lerner & Philip E. Tetlock, *Accountability and Social Cognition*, 1 ENCYCLOPEDIA OF HUM. BEHAV. 1, 1-10 (1994); see generally Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1641-1647 (2012) (reviewing the psychology literature). Indeed, the mere fact of having to ask for permission—and to explain their basis for suspicion—can induce officers to make better decisions as to whom to search or seize. By some estimates, police find contraband or evidence in as many as 90 percent of searches conducted pursuant to a warrant, as compared to just 10–20 percent of consent searches, and roughly 50 percent of searches supported by probable cause. Bar-Gill & Friedman, supra, at 1655-1657; RICHARD VAN DUIZEND ET. AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 40 (1985); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 674 (2002). The comparatively high hit rate for warranted searches suggests that even if magistrates approve warrants liberally, the warrant process prompts officers to self-edit and refrain from seeking warrants in cases in which the facts fail to establish sufficient cause to justify the intrusion. Third, ex ante evaluation of reasons is necessary in the policing context because, as discussed in § 14.03 (Statutory Remedies for Violations), ex post remedial alternatives often are ineffective, both depriving individuals of any remedy to which they might be entitled and limiting systemic deterrence. Exclusion often fails as a remedy because judges are reluctant to release guilty defendants even if evidence is seized unlawfully. And individuals seeking money damages face a host of barriers, from immunity doctrines to harms that are not easily remedied by monetary relief.

For all of these reasons, there is a preference for articulating reasons and getting approval prior to police action that implicates individual rights. Traditionally, that ex ante review has occurred through the issuance of warrants.

The U.S. Supreme Court has said time and again that warrantless searches and seizures are, with some exceptions, "*per se* unreasonable under the Fourth Amendment," *Katz*, 389 U.S. at 357; see also Riley v. California, 573 U.S. 373, 381-382 (2014) ("Where a search is undertaken by law enforcement officials . . . reasonableness generally requires the obtaining of a judicial warrant.") (internal citations omitted). Warrants are necessary to guard against arbitrary and unjustified searches and seizures by ensuring that the decision to intrude on individual liberty is made by a neutral magistrate and not by an "officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948); Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978) ("The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search. A warrant, by contrast, would provide assurances . . . that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan[.]"). As the citation to the *Marshall* case makes clear, warrants are not only required when a search occurs based on cause to believe someone had engaged in prohibited conduct. Even with regard to suspicionless police activity described in Chapter 5, warrants can play an important role in ensuring that the enforcement agency is acting in a way that is according to law and a neutral plan, rather than engaging in arbitrary or discriminatory activity. Accord, Camara v. Municipal Court, 387 U.S. 523 (1967) (requiring area or other sorts of warrants for housing inspections to ensure searches are justified and non-arbitrary); N.H. REV. STAT. ANN. § 265:1-a (2020) (requiring a warrant to authorize sobriety checkpoints); UTAH CODE ANN. § 77-23-104 (West 2020) (outlining the process for magistrate approval of administrative traffic checkpoints).

2. The failure to require warrants and consequences. Despite the commendable purposes of the warrant requirement, in reality it largely has "been honored in the breach." Bar-Gill & Friedman, supra, at 1652. This failure to require warrants is prevalent both with regard to suspicion-based (Chapters 3 and 4) and suspicionless (Chapter 5) searches and seizures.

The U.S. Supreme Court has created a bevy of exceptions to the warrant requirement. See, e.g., *Warrantless Searches and Seizures*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 48 (2015) (identifying at least 13 exceptions); California v. Acevedo, 500 U.S. 565, 582-583 (1991) (Scalia, J., concurring) (suggesting there are 22 exceptions). To name but a few categorical exceptions, police are permitted to conduct warrantless searches of people whom they lawfully arrest; of vehicles they stop; of vehicles, people, and packages that cross the border; and of "heavily regulated industries" such as liquor stores and automobile junkyards. See Chimel v. California, 395 U.S. 752 (1969); California v. Carney, 471 U.S. 386 (1985); United States v. Flores-Montano, 541 U.S. 149 (2004); United States v. Montoya de Hernandez, 472 U.S. 531 (1985); United States v. Ramsey, 431 U.S. 606 (1977); City of Los Angeles v. Patel, 135 S. Ct. 2443, 2454 (2015).

The difficulty is that these exceptions often bear no relationship to the purpose of the warrant requirement or reasons for not adhering to it. The need for a warrant obviously must be excused

when exigency makes obtaining a warrant impossible. See Stuntz, supra, at 920 (explaining how many traditional exceptions to the warrant requirement, such as for arrests and searches incident to lawful arrest, are grounded in exigency). But other exceptions, like the automobile exception, excuse the need for warrants even when exigency is not present and officers would have had ample opportunity to obtain a warrant. See BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017); see, e.g., United States v. Chadwick, 433 U.S. 1 (1977). This failure to require warrants extends to suspicionless searches as well. The Court has permitted warrantless searches in many cases of suspicionless searching, including drunk-driving and immigration checkpoints; inspections of regulated businesses; drug testing of students and employees; and collection of DNA samples from felony arrestees. See Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1727 (2014) (citing cases).

As a result, warrants have become the exception rather than the rule. By some estimates, less than one percent of all searches today are conducted pursuant to a warrant—fewer still in the case of arrests. Bar-Gill & Friedman, supra, at 1666. See also Groh v. Ramirez, 540 U.S. 551, 573-574 (2004) (Thomas, J., dissenting) ("[O]ur cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not."); Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 601 (2014) ("By the early 2000s, the requirement of a warrant had become a requirement in name only."). Many of the ills identified elsewhere in these Principles—from racial profiling to overreliance on pretextual searches to the sheer number of unproductive searches—have some basis in a failure to take a warrant requirement seriously. See, e.g., Gross & Barnes, supra at 671-672 (describing how police have used traffic stops as a pretext to conduct warrantless searches for drugs).

3. Using technology to facilitate acquiring warrants. Modern technology makes it possible to obtain warrants in a variety of circumstances in which exigency once would have justified a departure from the warrant requirement. Although warrant innovation is hardly a recent phenomenon—telephonic warrants made their debut as early as the 1970s—the U.S. Supreme Court has indicated that recent advances in wireless internet technology have made it easier than ever for enforcement officials to obtain a warrant on short notice, and that such advances should be used. See *Riley*, 573 U.S. at 401; Missouri v. McNeely, 569 U.S. 141, 154-155 (2013).

At present, a majority of states permit officers to apply for warrants remotely. *McNeely*, 569 U.S. at 154. In a number of jurisdictions, officers can submit warrant applications via secure electronic-document systems, thereby saving officers the time and effort of driving to court (or to a judge's house at night). See, e.g., IND. CODE § 35-33-5-8 (2018); MO. REV. STAT. § 542.276 (2010). In Butte County, California, for example, officials estimate that doing so has saved an average of "three to four hours of combined officer, judge, and district attorney time for each signed warrant." Jessica Hughes, *Butte County, Calif., Streamlines Search Warrant Approvals*, GOVTECH, Jan. 19, 2015, http://www.govtech.com/public-safety/Butte-County-Calif-Streamlines-Search-Warrant-Approvals.html.

Other jurisdictions have cut down further the time it takes to get a warrant by equipping officers with wireless tablets that permit officers to fill out an electronic probable-cause form, upload it to a magistrate judge, video conference with the magistrate, and receive a signed, electronic warrant. See David Smith, *An iPad for Every Agency*, The Prosecutor (Nov.–Dec. 2013); see also Jenni Bergal, *Police are now taking roadside blood samples to catch impaired drivers*, PBS NEWSHOUR, Apr. 19, 2019, https://www.pbs.org/newshour/nation/police-are-now-taking-roadside-blood-samples-to-catch-impaired-drivers (describing a similar system). In one Texas county, a judge swears in officers and approves warrant applications using a video chat program, reducing the wait time for warrants from two to three hours to "10 minutes." Chacour Koop, *Texas video chat program aims to bust more drunken drivers*, STATESMAN, Sept. 24, 2016, https://www.statesman.com/NEWS/20160924/Texas-video-chat-program-aims-to-bust-more-drunken-drivers.

Jurisdictions should encourage greater use of warrants by taking advantage of these new technologies and adopting more streamlined warrant-application systems. In doing so, jurisdictions can mitigate any reliability and security concerns through careful regulation. To best replicate the reliability benefits of in-person warrant hearings, jurisdictions should adopt procedures that include requiring the warrant issuer to administer an oath to the warrant requester and requiring the sworn testimony to be recorded and transcribed. See, e.g., S.D. CODIFIED LAWS § 23A-35-5 (1978). Jurisdictions also might consider making greater use of video-conferencing technology, which more closely resembles in-person proceedings by allowing a magistrate to assess an officer's credibility "face to face."

Admittedly, utilizing the warrant procedure more frequently likely will require that there be more magistrates available to render warrant decisions. That, however, is the cost of adhering to the oft-stated warrant requirement. And the costs incurred in providing magistrates will be offset, one surmises, by the benefits of greater adherence to constitutional rights. In addition, the Supreme Court has held that greater deference is warranted in review of warranted searches than unwarranted searches, meaning that there simply may be a redistribution of judicial time. Compare Illinois v. Gates, 462 U.S. 213, 236-237 (1982) (reaffirming that "great deference" should be given to the probable cause determinations of magistrates issuing warrants), with Ornelas v. United States, 517 U.S. 690, 699-700 (1996) (holding that probable cause determinations for warrantless searches should be reviewed de novo).

4. Prior justification in the absence of warrants. Even in the absence of a warrant, officers should whenever possible detail their reasons for taking enforcement action prior to doing so. The fact that exigency excuses obtaining a warrant does not mean an ex ante justification is any less important. Having that justification would make it much easier for courts, after the fact, to assess the reasons an officer actually had ex ante and their validity.

Today, technology provides an easy way for officers to record their justifications before they act. Increasingly, officers are wearing body cameras. They are typically required to activate those cameras prior to engaging in enforcement activities of the sort that require legal justification. See, e.g., N.Y.C. POLICE DEP'T, PROCEDURE NO. 212-123 (2018) (requiring officers to turn on body-worn cameras prior to conducting searches, stopping vehicles, using force, or making

arrests); L.A. POLICE DEP'T, SPECIAL ORDER NO. 12 (2015) (requiring activation prior to vehicle and pedestrian stops, searches, arrests, uses of force, in-custody transports, and "other investigative or enforcement activities where, in the officer's judgment, a video recording would assist in the investigation or prosecution of a crime[.]"); CHI. POLICE DEP'T, SPECIAL ORDER S03-14 (2018) (requiring activation in similar circumstances, as well as during seizures of evidence, interrogations, and requests for consent to search).

With the camera (which includes both audio and video recordings) engaged, it is a simple matter for officers to state aloud why they are about to take the action they are. In some jurisdictions, officers already are required to state certain information on their body camera, establishing the ability to take this step. See, e.g., PHILA. POLICE DEP'T, DIRECTIVE 4.21 (2018) (requiring officers who deactivate their cameras during an encounter to "state aloud, while the device is still activated, why the device is being deactivated.").

Of course, officers should not be required to provide ex ante justifications in situations in which doing so either is impossible for some reason or would endanger the well-being of officers or others. Officers should not delay in emergent circumstances to fulfill this obligation. But in many instances in which officers take action without warrants—such as when they approach an automobile fully expecting to request consent to search, or when they walk up to people on the street intending to conduct a *Terry* stop or frisk—there is time to state briefly the grounds for taking these actions. If there is time to narrate those circumstances on body cameras they should do so, even (or especially) if there not time to obtain a warrant.

§ 2.04. Use of Pretextual Policing

(a) Officers engage in pretextual policing when they take action for which they lack authority or justification by relying instead on another reason for which they do have authority or justification, even though they would not have taken the action but for the primary motivation.

(b) Agencies and officers should not use pretextual policing as a general strategy to address unlawful or undesirable conduct.

(c) Officers should not engage in pretextual policing except when they are investigating a specific serious offense, and even then only when they are able to articulate specific facts to support the belief that the target of the pretextual action may have been involved in such offense.

Comment:

a. Pretext defined. Under the definition in § 2.04(a), an officer acts pretextually when the officer would not have conducted the stop or search in question for the stated reason (which was

legally justified) were it not for the actual reason (for which the officer lacked legal justification). For example, an officer might stop an individual for a low-level traffic violation, such as failing to signal a turn, in order to create an opportunity to ask the driver about more serious criminal activity or search the car for narcotics. But for this other purpose, the officer would not have made the stop. And importantly, the officer *could not* have stopped the car solely to look for drugs or other criminal activity because the officer lacked the requisite cause to do so. If the officer had sufficient cause, the officer would not have had to act pretextually.

b. Need for addressing pretext. Given the breadth of misdemeanor and municipal codes, particularly around the regulation of automobiles, police officers have enormous discretion to stop individuals and to engage in other activities such as removing them from cars, conducting questioning, conducting limited or full searches of people and their effects, and even arresting them. Although such intrusions are constitutionally permissible, they raise a number of serious concerns. The requirements of reasonable suspicion or probable cause are designed precisely to justify intrusions on individual liberty, thereby ensuring that a significant percentage of intrusions will yield some evidence of criminal activity. When officers act pretextually, they typically act on hunches that fall short of these cause thresholds. Evidence suggests that pretextual stops and searches are much less likely to uncover evidence of unlawful conduct. In addition, adhering to constitutional standards helps guard against discriminatory policing by requiring that officers have some articulable, factual basis for singling a person out. There is all-too-plentiful evidence that pretextual enforcement efforts can lead to substantial racial disparities, which can in turn have degraded trust between communities and police. Much is gained and little lost by prohibiting pretextual policing in most circumstances.

c. Pretextual policing as a general strategy to address crime or undesirable conduct disallowed. Many agencies, and the officers they employ, have utilized pretextual policing as a strategy of proactive policing designed to address crime. For example, police officers may stop drivers for minor traffic offenses in the hope of interdicting drugs or simply to ask their consent to search vehicles to uncover some evidence of wrongdoing. See § 4.06 (documenting concerns raised by consensual searches). This sort of pretextual activity is what gives rise to many of the harms identified in Comment *b* and that should be minimized pursuant to § 1.04 (Reducing Harm). As a general rule, pretextual reasons should play no role in a decision to stop an individual, except in the limited situations outlined in Comment *d*. That is, pretextual policing never should be used

as a strategy to further a generalized interest in crime detection or as a broader tool to maintain social order.

d. Permissible uses of pretextual policing. This Principle is intended to curtail the current widespread use of pretextual policing given its many harms. Nonetheless, it recognizes that there may be rare instances in which pretextual policing is acceptable. Police, for example, may have clear evidence that an automobile of a certain description was involved in a string of major robberies and so decide that when they see a driver of a car of that type commit a traffic offense they will stop the driver and investigate the car for evidence of its involvement in those robberies. Or officers may receive a report of uncertain reliability about someone forcibly being placed in a van and so might follow the van and stop it if a traffic offense provides an opportunity to investigate further. What distinguishes these cases from the systemic use of pretextual policing is that the pretextual activity is being conducted in furtherance of an investigation into a specific serious crime. Agencies and the communities they serve should determine in advance what crimes are sufficiently serious so as to justify the use of pretext, thereby providing guidance to individual officers. See § 1.06 (recommending agencies adopt written rules, policies, and procedures). Pretextual policing never should occur in the absence of articulable facts pointing to a specific serious offense that is being investigated.

REPORTERS' NOTES

Were it not for history and practice, a principle limiting the use of pretext in policing might seem an odd thing indeed. People act pretextually for many reasons in life, and the police are not an exception. People are not always conscious of their precise motives, and again police are no different. What is a pretextual action and what is the primary motivator for an action often can be difficult to disentangle.

But here, history and practice play a large role. To be sure, there are instances in which police acting on pretext might make sense, for example, an officer stopping a motorist for an evident traffic violation to investigate a specific serious or dire crime for which the requisite cause for a stop is lacking, but for which there is some reason to believe the motorist was involved in that specific crime. However, many departments, and many officers, have made a regular practice of pretextual policing simply to further a generalized interest in crime detection, regularly taking minor enforcement actions that they would not otherwise take in furtherance of the vague possibility of uncovering wrongdoing of an entirely different sort, for which they do not have anything approaching a sufficient justification (i.e., level of cause). The primary, though not sole, motivators of pretextual policing are the hope of interdicting drugs and weapons. See Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RES. L.

REV. 931, 942 (2016) ("[W]hatever putative utility investigatory stops provide is concentrated heavily [around] fighting the War on Drugs."); DEBORAH RAMIREZ, ET AL., DEP'T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS 9 (2000) (police "often use traffic-stops as a means of ferreting out illicit drugs and weapons"). To that end, countless intrusions into personal liberty have occurred, often with deeply disparate impacts on people of color and people living in poverty.

The problem with pretext arises out of the enormous discretion officers possess, which permits them, with very little factual basis or supervision, to require compliance from individuals. Officers can make traffic stops or pedestrian stops on the basis of one of countless state or municipal code provisions. See Samuel R. Gross and Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 670 (2002) ("The laws regulating driving are so elaborate, so detailed, and so unrealistic that virtually every driver violates one or another almost all the time—or at least there is probable cause to believe she might be, which is all that's required to justify a stop."); DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015) (detailing pedestrian stops for conduct such as "walking unsafely in the street"). Officers can make traffic stops for actions they believe are illegal, even if they turn out to be mistaken about the law. See Heien v. North Carolina, 574 U.S. 54 (2014). After conducting a traffic stop, officers may order the driver and the passengers out of the car. See Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997). And they may question the driver about conduct that is unrelated to the ostensible reason for the stop, or request consent to search. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); but see Oregon v. Arreola-Botello, 365 Or. 695 (2019) (holding that, under the state constitution, "an officer is limited to investigatory inquiries that are reasonably related to the purpose of the traffic stop or that have an independent constitutional justification."). In many instances the officers even may arrest the driver for low-level traffic offenses. See Atwater v. Lago Vista, 532 U.S. 318 (2001). Once arrested, the individual may be searched incident to arrest. United States v. Robinson, 414 U.S. 218 (1973). And so on.

Although this sort of policing may happen at the discretion of individual officers, it often has been driven by agency policy. *See* Charles R. Epp, Steven Maynard-Moody, and Donald Haider-Marker, *Beyond Profiling: The Institutional Sources of Racial Disparities in Policing,* 77 PUB. ADMIN. REV. 168, 171 (2016) (describing institutional drivers of "investigatory" traffic stops and detailing extensive evidence of their use). Indeed, the U.S. Department of Justice encouraged the use of pretextual traffic stops as part of both Operation Pipeline and Data-Driven Approaches to Crime and Traffic Safety. See Gross & Barnes at 671; Epp, et al. *Institutional Sources*, at 171. These sorts of programs have encouraged officers and departments to make enormous numbers of traffic stops and to seek consent to search from countless people.

Two problems permeate this sort of pretextual policing. First, it imposes notable costs on individual liberty, racial justice, and the legitimacy of law enforcement in the eyes of the community. Scholars have criticized the courts for upholding pretextual stops as constitutional, with some characterizing it as an "effective legitimation of racial profiling in the United States."

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, 884 (2015). Research indicates that when police are permitted to use pretext to justify a stop, minority drivers are stopped at higher rates relative to when police are not allowed to act pretextually. See Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling* (Sept. 2019 Draft). For example, at least one police department "routinely targeted Latino drivers and passengers for pretextual traffic stops aimed at detecting violations of federal immigration law." United States v. Cnty. of Maricopa, 889 F.3d 648, 649 (9th Cir. 2018). And studies show that Black drivers are "far more likely to be stopped for investigatory stops or given no reason at all for being pulled over." Blanks at 934 (citing CHARLES R. EPP, ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 143 (2014)); Epp, et al., *Institutional Sources* at 173-174 (Blacks far more likely to be pulled over for "de minimis" reasons or given no reason at all). Once stopped, members of racial minorities are searched at a higher rate than Whites. See Chris L. Gibson, Samuel Walker, Wesley G. Jennings, J. Mitchell Miller, *The Impact of Traffic Stops on Calling the Police for Help*, 21 CRIM. JUST. POL'Y REV. 139, 142 (2010) (citing multiple studies showing that "Blacks are often more likely to be searched than Whites"). Yet, data repeatedly show that following such stops, minority drivers are far less likely to be found in possession of contraband. EPP, ET AL., PULLED OVER at 105; Police Accountability Task Force at 9 ("black and Hispanic drivers were searched approximately four times as often as white drivers" yet contraband was found on white drivers "twice as often"). Understandably then, communities of color may view traffic stops "very differently than those in white communities due to disparities in the basis for police stops in those communities," especially when a stop for a minor infraction leads to police requesting authority to search the vehicle or asking invasive questions. IACP National Policy Summit on Community–Police Relations: Advancing a Culture of Cohesion and Community Trust at 6 (2015) (citing EPP, ET AL., PULLED OVER); Blanks at 934 (citing the same). Recognizing the racial disparities and attendant social harms in the use of pretextual policing, the district attorney of one jurisdiction has recently directed prosecutors to no longer file possession-of-contraband charges when contraband is found in a pretextual stop. San Francisco District Attorney, *District Attorney Boudin Pioneers First in the Nation Policy Directives* (Feb. 28, 2020).

Second, pretextual policing has not proven itself a particularly effective strategy. The same difficulties that persist in classifying whether a particular stop is pretextual in the first instance make it inherently challenging to collect data on the effectiveness of such a strategy, particularly when police are not required to document the reasons for their stops or even their stops at all. Epp, et al., *Institutional Sources* at 169; accord DEPT. OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 26-27 (2016) (explaining difficulties with investigatory stops conducted without adequate recordkeeping). The data that do exist, however, indicate that both traffic stops and stops made without the requisite suspicion of criminal wrongdoing are particularly ineffective. See Epp, et al., *Institutional Sources* at 175 ("The evidence that investigatory stops help fight crime is surprisingly weak"; citing sources); Alex Chohlas-Wood, Sharad Goel, Amy Shoemaker, and Ravi Shroff, *An Analysis of the Metropolitan Nashville Police Department's*

Traffic Stop Practices, Stanford Computational Pol'y Lab (Nov. 19, 2018) ("[T]raffic stops—including stops for non-moving violations—had no discernible effect on serious crime rates, and only infrequently resulted in the recovery of contraband or a custodial arrest"). At the same time, they undermine effective policing by discouraging people from contacting the police for assistance. See Gibson et al. at 147 (finding that "citizens experiencing one or more than one motor vehicle traffic stop in the past 12 months were less likely to ask for assistance/information from the police than those who did not experience a traffic stop or more than one stop.").

In Whren v. United States, 517 U.S. 806 (1996), the U.S. Supreme Court declined to impose any limits on pretextual policing under the Fourth Amendment. But *Whren* itself offers no judgment about whether pretextual policing is good or bad. *Whren* was predicated substantially upon the difficulty the justices saw in identifying a workable test that would separate out policing that was pretextual from policing that was not. Commentators themselves have struggled with this puzzle and with how to circumscribe pretextual policing in this framework. See, e.g., Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1080 (2007) (offering alternative test to confront the practicality rationale of the *Whren* rule); Chin & Vernon at 917-918 (criticizing the objective approach of *Whren* as unprotective of certain constitutional rights). Moreover, the Court in *Whren* was addressing the question of pretext surrounding one individual enforcement action as opposed to its programmatic use.

Agencies, however, do not face the same difficulty of fashioning a workable test for individual stops. Rather, consistent with this Principle, agencies simply should refrain from using pretextual policing as a general crime-control strategy. And they should make clear in policy and practice that pretextual stops should be used sparingly, and only for the most serious of offenses. Agencies can and should promote compliance with this policy through training and supervision. And they can collect data on traffic stops, including both demographic information and the justification of the stop, in order to identify patterns of inappropriate or ineffective use of pretext. See § 14.10 (discussing collection of data on police stops).

§ 2.05. Acquiring or Accessing Data, Records, or Physical Evidence Held by Third Parties

(a) Absent federal, state, or local law to the contrary, agencies may request that a third party (an individual or an entity) turn over, or provide access to, data, records, or physical evidence that either belong to, or contain personally identifiable information about, an individual who is the target of an investigation. When making such a request, agency officials should provide written or oral notice to the third party that makes clear whether there is any legal obligation to comply and, if not, that the third party will face no negative consequences for declining the request.

(b) Legislatures should adopt statutes regulating agency access to personally identifiable data, records, or physical evidence held by nongovernmental entities, as well as to data gathered by government agencies for purposes other than the investigation of unlawful conduct. In doing so, legislatures should consider:

(1) whether the entity or agency that holds the data should be permitted to disclose the information to law-enforcement officials in the absence of a court order, a warrant, or a written request;

(2) the predicate or level of cause that an agency must have in order to request data or records;

(3) the process, if any, with which the agency must comply to obtain the information, including whether a warrant, subpoena, or other order is required;

(4) the circumstances pursuant to which the entity or agency that holds the data should be permitted or required to notify the individual whose personally identifiable information is contained in the data or records at issue regarding the order or request; and

(5) whether to impose any limitations on how any data that are acquired may be used or retained.

(c) Orders prohibiting third parties from disclosing to the target of an investigation that a government agency has requested or demanded the target's personally identifiable information should be issued only by a court of law, should be subject to challenge by the entity that holds the records, should be used sparingly, and should be limited to a set period of time. Such orders should be based on a showing that disclosure would significantly impair a specific and ongoing investigation and, absent extraordinary circumstances, should be used only to delay notification rather than to prohibit it entirely.

Comment:

a. Animating concerns. The acquisition of information from third parties implicates two sets of interests: the interests of the third party from whom the government seeks the information, and the interests of the individual or entity about whom the government seeks information. Although present law conflates them at times, these two sets of interests are distinct.

With regard to the entity or individual who is subject to the order or request, there are a number of related concerns. When the government seeks access to data, records, or physical evidence held by a third party, a chief concern is that the third party may feel obligated to comply even if law enforcement lacks the authority to require compliance. A storeowner, for example, may fear that denying a request for information would lead police officials to conclude that the storeowner himself or herself has something to hide—and therefore might comply even though he or she would strongly prefer not to do so. Although individuals and entities should of course feel free to share information with law enforcement, it is essential to ensure that they do so understanding whether they in fact have the right to refuse the request. A related concern, which applies both to requests and compulsory orders, is that repeated requests for information may impose significant burdens on the individual or entities subject to the requests, including the time it takes to respond to them. Requests also potentially implicate the relationship between the entity and its customers. Companies may lose business after it becomes publicly known that they have shared data and records with law-enforcement agencies.

With regard to the individuals about whom the information is sought, the concern is that third parties hold a great deal of sensitive information that individuals may not wish to have disclosed to the government. As discussed above, banks hold our financial records and credit-card purchase histories; cellular-phone providers know our location and communication history; e-mail providers and cloud-storage providers store our e-mails, documents, and photographs. Courts have recognized that the acquisition of certain kinds of information from third parties—including e-mails and long-term location-tracking information—may in fact constitute a search within the meaning of the Fourth Amendment. But even if the acquisition is not considered a search, it nevertheless may implicate important interests that warrant at least some regulation. And in fact, legislatures have long recognized this to be the case. A panoply of federal laws regulate law-enforcement access to a variety of records held by third parties—from health records to video-store-rental histories. But, as commentators have pointed out, there are notable gaps. The goal of this Section is to encourage comprehensive regulation of access to third-party records and provide some guidance to legislatures in deciding what sort of regulation may be warranted.

b. Scope. This Section applies to any government acquisition of data, records, or physical evidence from a third party, i.e., from someone other than the individual who either owns the data, records, or property, or whose personally identifiable information is contained in the data or

records. This includes, for example, bank records and credit-card receipts, metadata from e-mails or text messages, location information from cellular phones or GPS devices, hotel registries, and video footage from pawnshops and convenience stores. Acquisition of these data, either through purchase or compulsory process, is considered "information gathering" for the purposes of these Principles, and also must comply with the requirements of either Chapter 3 or Chapter 5.

Subsection (b) of this Section, which urges legislative regulation of police access to personally identifiable data and records, applies not only to requests for information from private parties, but from other government agencies as well, to the extent that the information at issue was obtained originally for purposes other than the investigation of unlawful conduct. What both private and public databases have in common is that they contain vast stores of personal information about the day-to-day lives of individuals, the vast majority of whom are innocent of any prohibited conduct. Government agencies, like private companies, provide a variety of public-service functions, from housing to medical care; in doing so, they gather a great deal of sensitive information about the individuals who rely on those agencies for services. The individuals who look to the government to provide essential services should not necessarily lose any expectation of privacy in the information that they provide.

Legislatures should, consistent with this Section, give careful consideration to whether, and under what circumstances, data gathered by government agencies for non-law enforcement purposes should be made available to policing agencies for the purpose of investigating unlawful conduct. And even in the absence of legislative action, Chapters 3 and 5 make clear that the agencies themselves should have policies in place to regulate when and how data and records kept by other agencies may be accessed and used. Chapter 6 performs the same function with respect to databases maintained by law-enforcement agencies themselves.

c. Minimizing coercion. Agencies should inform third parties in writing or orally whether they have a legal obligation to comply with a request for information and, in the absence of such an obligation, should inform them that they will face no negative consequences for declining the request. This Section strikes a balance between the government's need to obtain information from third parties, who often are willing to cooperate with law enforcement, and the interest in ensuring that those who wish for whatever reason to withhold their cooperation and insist on legal process understand whether they are within their rights to do so. A familiar and oft-used strategy for

balancing these competing goals is for agencies to provide express notice to third parties of their rights and obligations.

Importantly, unlike the Principle on first-party consent searches set forth in § 4.06, this Section does not require that officers have reasonable suspicion of unlawful conduct before requesting data, records, or physical evidence from a third party; nor does it require that officers obtain written consent. The difference in approach reflects a number of important distinctions between first-party and third-party consent searches. As discussed in greater detail in § 4.06, when an officer asks someone for permission to search his or her own person or property, the request itself communicates some degree of suspicion of wrongdoing. As such, it is inherently more coercive and also can undermine police legitimacy if it is perceived to be arbitrary, unfounded, or racially biased. The decision to consent to a search of one's own property, particularly if there is in fact evidence of wrongdoing to be found, is often more consequential for the individual involved. It therefore is imperative to ensure that individual has been apprised of his or her right to refuse. Although these concerns are not entirely absent in the context of third-party searches—a pawnshop owner, for example, may himself or herself become the target of an investigation if it turns out that he or she had not kept proper records—they are nevertheless more limited and, for that reason, the more modest requirement of notice regarding the third party's rights and obligations likely is sufficient to protect the interests involved.

d. Legislative regulation. Although there is a great deal that legislatures can do to regulate the various policing practices discussed throughout these Principles, government access to third-party databases is one area in which legislative action is particularly essential. And, in fact, legislatures generally have played a more active role. Congress has adopted more than a dozen statutes to regulate access to various kinds of personally identifiable information, ranging from bank records to cable-subscriber data. State legislatures have imposed additional restrictions.

Many of these statutes rely on a combination of the five protections described in subsection (b). A number of federal statutes, including the Cable Communications Privacy Act, 47 U.S.C. § 551, prohibit third parties from disclosing certain kinds of information to the government in the absence of a court order or written consent from the individual whose records are sought. Others permit third parties to disclose information in response to a written request from the agency itself but nevertheless impose some constraints, ranging from relevance to probable cause, on when information may be sought. Some of these statutes also require the third party to notify the

individual about the government's request so that the individual may challenge the request in court. Finally, existing statutes impose a variety of constraints on how the information that the government obtains may subsequently be used. For example, the Right to Financial Privacy Act, 12 U.S.C. § 3401 prohibits the requesting agency from transferring data to another government agency unless that agency also complies with certain procedural requirements.

e. Gag orders. In some cases, the government agency requesting the information may not want the target of an investigation to know that a request has been made. Particularly in the early stages of an investigation, notification may permit the target to destroy evidence or coordinate with potential witnesses, thereby thwarting the government's efforts to bring the person to justice. For this very reason, search warrants typically are obtained through ex parte proceedings and are kept under seal until a search is conducted.

At the same time, in the absence of notification, the individual whose records are sought may have no opportunity to challenge the government's request. Indeed, the target may never learn that a request had been made, even after the investigation is complete. This distinguishes third-party searches from more traditional searches and seizures that typically put the target on notice that a search has been conducted. Gag orders also prevent the third parties from exercising any independent interest they may have in disclosing the frequency, nature, and burdens of information requests in order to facilitate legislative regulation and public debate.

For these reasons, "gag orders" prohibiting third parties from disclosing government requests to their customers should be used sparingly and, more importantly, should be carefully regulated by the courts so that there is at least some neutral party from outside the agency to review the request in order to ensure that it complies with applicable law. Gag orders should not be issued by the agency itself. And they generally should be used to delay notification only until the investigation is complete, and not to prohibit it entirely. Any gag order should be limited in time and expire automatically, rather than being indefinite. While a number of federal privacy statutes already require judicial supervision of gag orders, that has not always been the case, particularly in the national-security context. As a result, federal law-enforcement agencies have requested hundreds of thousands of records from third parties without any meaningful judicial or public oversight of whether these requests have in fact been legitimate. National-security investigations may raise a distinct set of concerns, and they may require supervision from a specialized court. But as a number of leading voices, including a 2013 presidential commission, have recognized,

such concerns are insufficient to trump the basic principle regarding the need for external oversight when important privacy rights are at stake.

Subsection (c) does not preclude policing agencies from *requesting* that a third party keep a request for information confidential for a specified period of time. But, consistent with subsection (a), such a request should make clear that the third party is under no obligation to comply and will not in fact be sanctioned in any manner for noncompliance. And, as described in subsection (b)(4), legislatures may decide for certain categories of information to require notification to targets as a matter of course, subject to specific exceptions and overseen by the courts.

REPORTERS' NOTES

1. Animating concerns. Increasingly, the information that government agencies seek to obtain is in the hands of third parties, that is, individuals or entities that are not themselves the target of the investigation. See Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 248 (2008) ("[A] person would have to be a hermit to be able to function in our society without voluntarily disclosing a vast amount of personal information to a vast array of public and private demanders."); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089-1095 (2002) (describing the vast amount of information that third parties hold on their users). Companies like Google, Dropbox, and Facebook maintain a record of all of our e-mails, photos, documents, online search histories, and conversations with friends and acquaintances. Cell-phone providers have a record not only of every number a person has called, but also the phone's location throughout the day. Banks and credit-card companies maintain a detailed log of individuals' purchases and transactions. See, e.g., David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 139 (2013); Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1572-1576 (2004); Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age*, 28 ALB. L.J. SCI. & TECH. 73, 146-148 (2018).

Courts, commentators, and policymakers have long recognized the importance of regulating government access to third-party data. See Carpenter v. United States, 138 S. Ct. 2206 (2018) ("As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' These location records 'hold for many Americans the 'privacies of life.'"); CHRISTOPHER SLOBOGIN, PRIVACY AT RISK 216 (2007) ("Technology has reduced or eliminated the practical and fiscal barriers that used to keep law enforcement officials from peering into our homes, watching us on the streets, and accessing our personal records. So today we must depend on the law to keep those barriers intact."); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 838 (2004) ("Additional privacy protections are needed to fill the gap between the protections that a reasonable

person might want and what the Fourth Amendment actually provides."); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239, 1250-1253 (2009) (discussing possible methods to allow for more protection of information held by third parties); Daniel K. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1151-1167 (2002) (discussing the need for more protection for information held by third parties and suggesting methods to accomplish this).

And yet, the existing regulatory framework is a patchwork quilt—with more than a few holes. Under the "third-party doctrine," government access to third-party records traditionally has been exempt from Fourth Amendment scrutiny on the grounds that it is not a "search." See, e.g., United States v. Miller, 425 U.S. 435, 442-443 (1976) (no Fourth Amendment interest in bank records); Smith v. Maryland, 442 U.S. 735, 743-744 (1979) (phone records). More recently, the Court in *Carpenter* signaled that government access to at least certain kinds of records—such as detailed location histories, or perhaps the content of e-mail communications—would indeed constitute a search for Fourth Amendment purposes, but the Court declined to overturn the third-party doctrine in its entirety, leaving broad swaths of third-party records beyond the Fourth Amendment's reach. *Carpenter*, 138 S. Ct. at 2216-2217 (refusing to extend the third-party doctrine of *Miller* and *Smith* to cell-site location information while affirming the continued validity of the third-party doctrine); ORIN S. KERR, THE DIGITAL FOURTH AMENDMENT (2016) ("*Carpenter* therefore does not disturb the traditional third-party doctrine cases of *Smith* and *Miller*. . . . *Carpenter* only regulates new law enforcement capacities that did not exist or were rare before the digital age."); Alan Z. Rozenshtein, *Fourth Amendment Reasonableness After Carpenter*, 128 YALE L.J.F. 943, 946 (2019) (noting that "[a]lthough the Court did not overrule the third-party doctrine, it substantially limited its scope").

More than a dozen federal statutes regulate government access to various categories of documents and data, from medical records to video-store rental histories. *See* Erin Murphy*, The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions,* 111 MICH. L. REV. 485, 546 app. (2013) (listing major federal privacy statutes); see, e.g., Video Privacy Protection Act, 18 U.S.C. § 2710 et seq. (protecting information held by "video tape service providers"); Internal Revenue Code (Tax Reform Act of 1976), 26 U.S.C. § 6103 (protecting tax information); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (protecting personal information held by educational institutions); Bank Records Act, 12 U.S.C. § 1952 (protecting bank records). But many of these statutes, most notably the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510, were adopted before the explosive growth of the internet and thus are ill-suited to addressing modern regulatory needs. See Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PENN. L. REV. 373, 390-410 (2014) (explaining that key distinctions drawn by ECPA largely do not make sense in the internet age); Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264 (2004) (discussing problems with electronic surveillance law, including "gaps, lapses in protection, inadequate standards for obtaining authorization to engage in surveillance, and weak enforcement devices"). For instance, under the Stored Communication Act,

the government can obtain e-mails that have been stored for more than 180 days with a court order. See 2703 U.S.C. § 2703(a)–(d). In short, this is an area that is ripe for legislative action. See Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1233-1235 (2004) (proposing amending the Stored Communications Act to provide more protection for stored content).

The challenge with developing a set of principles to regulate access to information held by third parties is that the interests at stake vary considerably depending on the information at issue and the expectations surrounding its disclosure and use. There are important differences, for example, between physical goods held by a pawnshop and detailed financial statements held by a bank. And it makes sense to regulate them differently. See ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS 19 (2013) (proposing different classifications for different types of data depending on a variety of factors); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 68-75 (1991) (proposing the "proportionality principle" whereby the level of certainty required to justify a police action depends solely on the level of intrusiveness of the action); cf. General Data Protection Regulation Articles 5, 9 (European Union privacy law establishing greater protection for "special categories" of personal data, including data that reveals an individual's race, sexual orientation, or political views). At the same time, some of the concerns with third-party information-gathering—most notably the interests of third-party record holders—are present whenever police officials seek to obtain evidence or records from third parties.

For this reason, this Section adopts a two-pronged approach. Subsections (a) and (c) set out two core principles that ought to apply to all requests for evidence or records from third parties. Subsection (b) urges legislatures to consider additional safeguards and sets out specific questions that any regulatory scheme ought to address.

2. Minimizing coercion. Subsection (a) recognizes that third parties may often be willing to cooperate with police investigations and that absent federal, state, or local law to the contrary, police officials should be permitted to ask third parties for access to evidence or records without resorting to compulsory process. *See Developments in the Law: More Data, More Problems*, 131 HARV. L. REV. 1714, 1725 (2018) (noting that technology companies "can be persuaded to cooperate with law enforcement by appealing to their patriotism and desire to maintain positive relationships with their regulators—even in the absence of appropriate legal process"); Jon D. Michaels, *All the President's Spies: Private–Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 910-919, 926-927 (2008) (same). At the same time, repeated requests for data or records may impose considerable burdens on third parties. *Requests for User Information*, GOOGLE, https://transparencyreport.google.com/user-data/overview (showing that Google received over 75,000 user-data disclosure requests from the government in the first six months of 2019 and that Google produced data in response to nearly three-quarters of these requests); CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, LOW-HANGING FRUIT: EVIDENCE-BASED SOLUTIONS TO THE DIGITAL EVIDENCE CHALLENGE (2018) (finding that in 2017, U.S. law enforcement made over 650,000 requests for digital evidence from major telecommunications and

social-media companies). And some companies may face considerable pressure from consumers to keep records private. See, e.g., Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 598 (2009) ("Protecting customer privacy is good for business, and third-party record holders often have a considerable incentive to keep the government at bay."). On the other hand, there is an inherent element of coercion in all police–citizen encounters that exists even when it is apparent that the police are investigating someone else. See Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY L.J. 1239, 1251-1252 (2009) (noting that the voluntariness fiction is even more doubtful with regard to third parties, who lack the "clear instincts against complying" that data subjects may have). To balance these competing concerns, subsection (a) encourages police officials to make clear, if the law allows, that third parties have the right to deny any request for information without risking any negative consequences for doing so. Id. at 1253 (2009) (proposing that third parties should be informed of the data subject's Fourth Amendment right to keep the information from the government without a warrant and probable cause).

3. Gag orders. Subsection (c) urges sharp limits on the use of gag orders that are used to prevent third parties from disclosing government requests for information, either to the individual whose information is sought or to the public at large. The need for limits on disclosure, at least in some circumstances, is readily apparent: Gag orders can prevent the data subject from fleeing, destroying evidence, or attempting to intimidate potential witnesses. See Jennifer Daskal, *Notice and Standing in the Fourth Amendment*, 26 WM. & MARY BILL RTS. J. 437, 440 (2017) (listing legitimate reasons for delaying or precluding notice to the data subject); Stephen Wm. Smith, *Gagged, Sealed & Delivered: ECPA's Secret Docket*, 6 HARV. L. & POL'Y REV. 313, 315 (2012) (same). At the same time, their use raises a number of serious concerns. Chief among them is the fact that gag orders can shield government requests for information from any meaningful judicial scrutiny. This is because the third parties who hold the data often have less of an incentive to challenge the request, and in some contexts may in fact lack standing to do so. See, e.g., Daskal at 49 (explaining the standing problem and giving examples of judicial decisions holding that third parties lack standing); *Developments in the Law: More Data, More Problems*, 131 HARV. L. REV. 1714, 1759 (2018) (noting that data subjects are unaware of the surveillance and thus cannot challenge it and that it is within a data-holder's discretion whether to challenge such surveillance). Gag orders also interfere with public accountability by withholding from the public and from legislators the information necessary to evaluate how orders and requests for information are used. Hannah Bloch-Wehba, *Exposing Secret Searches: A First Amendment Right of Access to Electronic Surveillance Orders*, 93 WASH. L. REV. 145 (2018). These concerns are heightened substantially when gag orders are issued by an agency itself, in the absence of judicial review to ensure its necessity and limit its scope. See LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 93 (raising significant concerns about the Federal Bureau of Investigation's authority to issue National Security Letters with gag-order provisions and urging Congress to require judicial oversight).

In view of these competing concerns, various statutes and internal agency regulations have embraced the sorts of limits urged here. A number of statutes, for example, permit delayed notification but make clear that eventually, the target must be told. See Daskal, at 442 (noting that some federal statutes permit delayed notification). The U.S. Department of Justice likewise has instructed attorneys not to seek indefinite gag orders. See Memorandum from Rod. J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Law Enf't Components et al., Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b) (Oct. 19, 2017) (limiting gag orders to one year in duration, with the possibility of extension in limited circumstances) https://www.justice.gov/criminal-ccips/page/file/1005791/download. Similarly, a number of statutes already provide for judicial review, at least in some circumstances. See 18 U.S.C. § 3511 (outlining the court-review process when the government seeks information under certain parts of the Stored Communications Act, Fair Credit Reporting Act, Right to Financial Privacy Act, and National Security Act).

4. Need for legislative regulation. The threshold question is whether third parties should be permitted to disclose information or evidence to police officials on their own volition. A number of federal privacy statutes prohibit record holders from disclosing certain kinds of information to government officials in the absence of a court order, subpoena, or official written request. See e.g., Right to Financial Privacy Act, 12 U.S.C. § 3402 (prohibiting the government from obtaining financial records of a customer from a financial institution absent an administrative subpoena, search warrant, judicial subpoena, or a formal written request); Internal Revenue Code, 26 U.S.C. § 6103 (requiring a written request before the IRS may disclose tax-return information to state or local law enforcement agencies); Video Privacy Protection Act, 18 U.S.C. § 2710 (prohibiting videotape-service providers from disclosing personally identifiable information to law enforcement unless it is pursuant to a warrant, grand jury subpoena, or court order); HIPAA Privacy Rule, 45 C.F.R. § 164.512 (allowing disclosure of protected health information to law enforcement pursuant to a court order, warrant, or subpoena); ARIZ. REV. STAT. § 41-151.22 (prohibiting libraries from releasing its records absent written consent of the user or a court order); CAL. GOV'T CODE § 6267 (same); ME. STAT. tit. 35-A, § 9301 (prohibiting a broadband internet-service provider from "disclos[ing], sell[ing] or permit[ting] access to customer personal information" absent a court order). See generally, Kiel Brennan-Marquez, The Constitutional Limits of Private Surveillance, 66 Kan. L. Rev. 485 (2018) (raising additional concerns about third-party collection of information that is then shared with government agencies).

These sorts of provisions recognize that although an entity may have custody of certain documents or records, the records implicate the privacy interests of the individual whose information they contain and, consequently, a third party should not be able to make the unilateral decision to disclose them to anyone, government officials included. These restrictions also ensure, at a minimum, that there is an official record of all requests for information and that government officials cannot circumvent statutory requirements like warrants or court orders by approaching entities directly. See Christopher Slobogin, *World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 12 (1991) (explaining that requiring ex ante review of proposed investigative actions forces

"investigatory officials to justify their actions before the fact" and curtails possible illegality); Robert S. Litt, *The Fourth Amendment in the Information Age*, 126 YALE L.J.F. 8, 16 (2016) (noting that providing for oversight and accountability for investigations helps "ensure compliance with reasonable restrictions on [data] collection and use").

Legislatures also should determine what predicate or level of cause is necessary to request or compel disclosure of data, records, or physical evidence and the process, if any, with which an agency must comply. As discussed in greater detail in § 2.02, which applies to information gathering more broadly, predicates and process serve a number of important purposes: they limit unnecessary intrusions, guard against arbitrary or discriminatory policing, and ensure that there is some external oversight over government intrusions into private lives. At the same time, a demanding predicate will, almost by definition, preclude access to information in the early stages of an investigation. Existing statutes have balanced these competing interests in various ways. Some statutes, for example, require a relatively high level of cause. See, e.g., ECPA, 18 U.S.C. § 2518 (requiring probable cause to intercept wire, oral, or electronic communications); Cable Communications Policy Act, 47 U.S.C. § 551 (requiring officials to provide "clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity" before obtaining customer data from a cable provider). Other statutes require a lower level of cause but nevertheless provide for judicial supervision. For example, in order to obtain tax information from the IRS for non-tax-related investigations, law-enforcement officials must obtain an order from a federal judge that is based on "reasonable cause" to believe that the return is relevant to an investigation of a specific crime. Internal Revenue Code (Tax Reform Act of 1976), 26 U.S.C. § 6103(i)(1)(B); see also Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1) (court order based on relevance); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(2)(B) (court order based on relevance). On the lowest end of the cause spectrum, the Driver's Privacy Protection Act, 18 U.S.C. § 2721, permits state departments of motor vehicles to disclose personal information it holds on drivers to law enforcement "in carrying out its functions."

Another important question relates to a third party's right—or perhaps even obligation—to disclose any government requests for information to the individual whose personally identifiable information the records contain. See MICROSOFT, SIX PRINCIPLES FOR INTERNATIONAL AGREEMENTS GOVERNING LAW-ENFORCEMENT ACCESS 1 TO DATA, https://blogs.microsoft.com/wp-content/uploads/prod/sites/5/2018/09/SIX-PRINCIPLES-for-Law-enforcement-access-to-data.pdf (proposing a set of principles to govern law-enforcement access to information, including that "[a]bsent narrow circumstances, users have a right to know when the government accesses their data, and cloud providers have a right to tell them"). As discussed above, disclosure facilitates both judicial supervision and public oversight. Although most federal statutes permit disclosure (or at least do not prohibit disclosure), some actually require it. See, e.g., Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff(b)(3)(B) (requiring notification of the data subject when genetic information is disclosed in response to a court order if the court order was obtained without the knowledge of the data subject); Right to Financial Privacy Act, 12 U.S.C. § 3412(b) (requiring the agency to send a notice to the data subject when the data subject's financial records are

transferred from the agency that originally obtained the records to another agency or department); Video Privacy Protection Act, 18 U.S.C. § 2710(b)(3) (requiring prior notice to the customer if a videotape-service provider discloses personally identifiable information to law enforcement). And at least one court has held that notice may in fact be constitutionally required if a target of government surveillance ultimately is prosecuted criminally. United States v. Moalin, Slip. Op. 3:10-cr-04246-JM-3, at 7 (9th Cir. Sept. 2, 2020).

Finally, it is essential that legislatures consider limits on how information gathered from third parties may be used or retained. Although there is a tendency for government agencies to wish to hold onto information indefinitely, doing so can significantly increase the privacy and associational concerns at play. See Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1107 (2002) (arguing that unregulated collection, availability, and retention of data from third parties can significantly interfere with First Amendment rights to free association and expression). Permitting agencies to hold onto third-party records indefinitely—and to access them for any purpose—can facilitate precisely the sorts of "fishing expeditions" that the Framers of the Constitution were concerned about. Id. See also Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. L. Rev. 857, 877 (2006). It also increases the likelihood that the information may be deployed in impermissible ways, or simply put it to uses that the legislators who authorized collection never intended. See, id., at 1109-1112 (noting that retained information could be used to round up disfavored groups or individuals and that "unscrupulous government and law enforcement officials can abuse the availability of personal information databases'); Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 326 (2010) (pointing out that "familial" DNA searches potentially exceed the scope of legislative authorization and thwart public accountability). For these reasons, a number of federal statutes impose at least some limitations on retention and use. See, e.g., DNA Identification Act, 34 U.S.C. § 12592(d) (requiring agencies to purge DNA records if an individual's conviction is overturned or if charges are dismissed); Right to Financial Privacy Act, 12 U.S.C. § 3412(a), (f)(2) (limiting the transfer of personally identifiable financial information between agencies, as well as the purposes for which transferred information may be used); cf., Cable Communications Privacy Act, 47 U.S.C. § 551(e) (2006) (requiring cable providers to themselves destroy information when it is "no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access."); see also Chapter 6 (providing principles governing the retention of and access to police databases, including records obtained from third parties).

§ 2.06. Police Use of Algorithms and Profiles

An agency should not use an algorithm or profile to direct police resources to a particular location, to identify potential targets for further investigation or surveillance, or to assess the risk of harm that individuals may pose to others unless:

(a) the algorithm or profile has been shown to perform with acceptable accuracy, and it is sufficiently transparent that agency officials can explain the factors on which it relies and how they are weighted;

(b) the agency has provided adequate training to all agency officials who are authorized to use the algorithm or profile in interpreting the results and has provided appropriate guidance on the limits on the permissible inferences that may be drawn;

(c) any use of protected characteristics, such as race or ethnicity, is consistent with § 1.11(a) and (b);

(d) the agency avoids the use of inputs, such as police-initiated contacts, or arrests and convictions for low-level offenses, that may reflect prior discriminatory enforcement practices and therefore could exacerbate racial or other disparities; and

(e) the agency routinely audits both the algorithm and the underlying data to minimize inaccuracy and bias, and makes appropriate changes in response to any issues identified by the audits.

Comment:

a. Profiles and algorithms. Algorithms and profiles play an important role in guiding government decisionmaking. Predictive algorithms work by drawing on a variety of data sources—from incident and arrest records, to various socioeconomic indicators, to weather and time of day—to identify patterns associated with a heightened risk of criminal activity. Policing agencies use predictive algorithms to pinpoint areas in which crime is more likely to occur, or to identify individuals who are most likely to become victims or perpetrators. Agencies use this information to guide officer deployment and to develop strategies to mitigate any foreseeable risks. Algorithms also have been used to assign "threat scores" to homes and businesses, so as to inform officers and dispatchers about the potential risks that an officer may face when responding to a call for service at a particular location. Other actors within the criminal-justice system use similar technologies to inform bail determinations and sentencing, as well as decisions about probation or parole. In addition, agencies may rely on algorithms and profiles in retrospective investigations, for example, by using bank or tax records to identify suspicious patterns of activity that may be consistent with various financial crimes.

Agencies and officers also sometimes rely on more informal profiles to guide investigative activities. For example, as part of drug-interdiction efforts, agencies develop profiles of vehicles or persons who are most likely to be involved in drug trafficking, relying on various factors including vehicle descriptions, travel routes, and behavioral cues. And, of course, long before the advent of "predictive policing" technologies, agencies used past crime data to predict future trends. Although less sophisticated than modern algorithmic technologies, the underlying goal of using statistical methods to identify persons or locations that are more likely to be involved in criminal activity is essentially the same.

b. Animating concerns. The use of algorithms and profiles raises a number of very weighty concerns, particularly around reliability and the potential for racial bias. Although many use the phrase "predictive policing," the reality is that algorithms do not "predict" behavior. Rather, they are a risk-forecasting tool. The concern is that officials may attach more significance to the prediction than is in fact warranted. This is particularly the case when algorithms are used not only to guide deployment decisions but also to inform the actions that officers subsequently take. One potential problem with using "threat scores" for particular addresses is that officers may interpret a designation of "medium" or "high" risk to signify a serious risk of harm, and thus be more likely to resort to force, despite the fact that the magnitude of the risk that they face may be quite small.

Another serious concern with predictive algorithms is that, depending on the data that are used, algorithms may rely inappropriately on race or other protected characteristics, or they may exacerbate existing racial disparities within the criminal-justice system. And, importantly, algorithms need not explicitly rely on race in order to have these effects. Arrest data, for example, are shaped in large part by how officers have been deployed and how they have exercised their enforcement discretion. Studies consistently show that although rates of illegal drug use are roughly comparable across demographic groups, Black and Latinx people have been arrested for drug offenses at a disproportionately high rate. The same is true for a variety of other offenses. If arrest data are used as part of a predictive algorithm—either to inform where officers are deployed or which individuals ought to be targeted for greater scrutiny—these disparities will be reinforced.

Compounding these concerns, public officials often lack a sufficient understanding of how a particular algorithm was developed and the various inputs that were used. Some companies that sell predictive-policing software to public agencies consider their algorithms to be proprietary and thus provide only limited information about how they work. In some cases, the algorithm may be

a black box even to the developers themselves. This can occur when an algorithm is developed through certain forms of "machine learning" whereby a software program deploys complex statistical analysis to fit a predictive algorithm to whatever data it is provided. Developers know what data the resulting algorithm has access to but may not know how it uses the data to calculate its predictions. This makes it even more difficult for officials to identify potential sources of bias or, in the absence of rigorous validation and assessment, to assess the algorithm's efficacy.

Finally, algorithms only are as good as the data on which they are built. When databases contain errors, the results are inevitably skewed. Depending on how the outputs are used, the errors can lead to potentially tragic results for members of the public and officers alike.

Similar concerns, of course, have been expressed by courts and commentators about more informal profiles, such as the drug-courier profile. As a number of judges have pointed out, officials have at one time or another cited any number of behaviors to signify drug-trafficking activity. Individuals have been found to be suspicious when traveling alone or as a pair, carrying too much luggage or too little, walking too slowly or too quickly, appearing too nervous or too calm. Even more concerning is that some of these profiles have relied explicitly on race—for example, the fact that a person is Black and traveling from a particular city—despite the fact that there are likely thousands if not hundreds of thousands of people who match that vague description and have nothing to do with the narcotics trade. What little evidence there is suggests that these profiles not only result in racial disparities but also have little predictive value. In some cases, officers have testified to having approached several hundred people for every eventual arrest.

c. Regulating the use of algorithms and profiles. The various safeguards described in this Section are intended to ensure that algorithms and profiles—to the extent that they are used at all—are used in a manner that maximizes any utility of such tools while minimizing or avoiding altogether the risk of harm.

A threshold requirement for using algorithms and profiles is that public officials—including both high-level agency officials who make the decision to acquire a particular tool and the agency officials who are authorized to use it—have at least a basic understanding of the inputs that the algorithm or profile uses and the limits of any inferences that may be drawn. This enables agency heads to take responsibility both for the tools they are using and for the various inputs and inferences on which they rely. This means that agencies generally should avoid the use of algorithms that are developed using machine-learning techniques that render the algorithms

entirely opaque, even to developers themselves. This is particularly important if an algorithm is to be used as a basis for any sort of adverse action against a member of the public. Under these circumstances, it is essential that the government be able to explain the factors on which the algorithm relies and the reason why they are relevant to the determination at issue.

Agencies also should take steps to verify that the algorithm or profile has been evaluated in some manner and has been shown to perform with acceptable accuracy. The rigor with which this assessment occurs may depend in part on the strength of the interests at stake. For example, an algorithm that is used to inform arrest decisions or bail determinations may require much more rigorous testing before it is used than an algorithm that is used to direct patrol.

In addition, agencies should avoid using tools that simply categorize a particular person or location as "low" or "high" risk without specifying what the classification denotes. And they should insist that third-party developers disclose the inputs used to develop an algorithm and provide the agency with enough information to assess on an ongoing basis the efficacy of the predictive tool and any disparate impact it may have. To the extent that an algorithm is used as part of the justification for a search or seizure, or is used to inform a later determination as part of the criminal process, the same information about the reliability of the algorithm, as well as the inputs used, should be made available to the defendant and to the court.

Guarding against the possibility of racial bias or unintended racial disparities in algorithmic or profile-driven policing presents a distinct set of challenges, and the right approach may be context-specific. When it comes to more rudimentary "profiles," the answer is relatively straightforward: consistent with § 1.11, race and other protected characteristics may be used only as part of a specific and relatively detailed suspect description. See § 1.11. When it comes to predictive algorithms, however, there is a risk that by ignoring race entirely, developers may in fact exacerbate existing racial disparities, particularly in the context of so-called "person-based" predictive policing. For example, if Black individuals are disproportionately likely to be arrested because of their race, or because they live in neighborhoods with a higher police presence, then a past history of arrest may be a much weaker predictor of future criminal activity than it would be for a white individual living in another part of town. One approach, advocated in subsection (d) is to avoid using inputs—such as arrests and convictions for low-level offenses—that are highly influenced by discretionary enforcement practices. Even still, it may not be possible to eliminate racial disparities entirely. Given this, agencies should monitor carefully stop, arrest, and use-of-

force data to ensure that the introduction of any predictive policing technology is not exacerbating racial disparities.

Finally, agencies should routinely audit both the algorithm and the underlying data and make all changes that are needed to ensure accuracy and reliability. In particular, agencies should take steps to verify that any databases on which algorithms or profiles rely are up to date. And they should consider avoiding using inputs such as gang affiliations that have been shown to have a high error rate.

REPORTERS' NOTES

1. Algorithms and profiles, generally. For decades, police officials have relied on data (however rudimentary) about past crimes and offenders to try to "predict" where crime is likely to occur or who might be responsible for it. In the 1880s, London police officials assembled one of the first known offender profiles in an attempt to identify the serial killer known as "Jack the Ripper." BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 77 (2004). In the early 1970s, the Drug Enforcement Administration developed its first "drug courier profile" to help identify potential drug traffickers at major airports. See United States v. Mendenhall, 446 U.S. 544, 562 (1980); see also Philip S. Greene & Brian W. Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 SO. TEX. L.J. 261, 269-270 (1982). Similarly, officers and commanders have long relied on their experience and intuition to identify problem areas in the neighborhoods for which they were responsible. See ANTHONY A. BRAGA & DAVID L. WEISBURD, POLICING PROBLEM PLACES: CRIME HOT SPOTS AND EFFECTIVE PREVENTION 35 (2010). And by the 1970s, many policing agencies engaged in at least some basic form of "crime mapping" to identify problem areas and deploy resources. See, e.g., KEITH HARRIES, NATIONAL INSTITUTE OF JUSTICE, MAPPING CRIME: PRINCIPLE AND PRACTICE 4 (1999); BUREAU OF JUSTICE ASSISTANCE, COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES 3-7 (2013). Both profiling and predictive policing are, in at least some respects, about as old as policing itself.

Modern technology, however, has transformed "predictive" policing and profiling in fundamental ways. In place of pushpins on a map, agencies now rely on "place-based" predictive-policing algorithms to analyze large volumes of crime and other data to identify specific times and places where crime is most likely to occur, to assign "threat scores" to particular addresses or locations, and to identify potential crime patterns. See ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT, 81 (2017); WALTER L. PERRY ET AL., RAND CORP., PREDICTIVE POLICING: THE ROLE OF CRIME FORECASTING IN LAW ENFORCEMENT OPERATIONS xiv (2013). "Person-based" predictive-policing systems, in contrast, augment the role traditionally played by suspect profiling by generating "heat lists" of potential victims or offenders and "mapping" social networks to identify potential connections between members of criminal organizations. See DAVID ROBINSON & LOGAN KOEPKE, UPTURN,

STUCK IN A PATTERN: EARLY EVIDENCE ON "PREDICTIVE POLICING" AND CIVIL RIGHTS 18 (2016); Andrew G. Ferguson, *Policing Predictive Policing*, 94 WASH U. L. REV. 1115, 1118 (2017).

Although the underlying technologies and techniques vary, most predictive-policing systems have several features in common. Many predictive-policing algorithms are developed using a technique known as "machine learning" whereby a software system "trains" itself to see patterns in historical data, such as crime or arrest data. See ROBINSON & KOEPKE, supra, at 3; PERRY, supra, at 8. In particular, the system learns which geographical characteristics (in the case of place-based systems) or personal characteristics (in the case of person-based systems)—and which combinations of such characteristics—correlate most closely with criminal activity. The system then can use the patterns gleaned from the past data to make inferences about future likelihoods of criminal activity committed at particular locations or by particular people. Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871 (2016). This "training" process of finding patterns in past data can happen with varying degrees of human involvement, but generally machine-learning systems find patterns without humans instructing them on where to look. Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 Ga. St. U. L. Rev. 1305, 1311-1312 (2019).

Proponents of these new technologies have emphasized their potential to help agencies make better use of their limited resources by identifying the specific people and places that ought to be the focus of police attention. See Albert Meijer & Martijn Wessels, *Predictive Policing: Review of Benefits and Drawbacks*, 42 INT'L J. PUB. ADMIN. 1031, 1033-1034 (2019); see, e.g., Cameron Albert-Deitch, *Predictive Policing Crime Prevention Software Successful for APD*, ATLANTA MAG. (Nov. 10, 2014), https://www.atlantamagazine.com/news-culture-articles/predictive-policing-crime-prevention-software-successful-for-apd/ (reporting the Atlanta Police Department's early hopes in predictive policing after a pilot program showed crime reductions). They also have touted the potential to reduce racial disparities in policing by relying on "objective" algorithms that are less prone to bias than individual officers. See Justin Jouvenal, *Police Are Using Software To Predict Crime. Is It a 'Holy Grail' or Biased Against Minorities?*, WASH. POST (Nov. 17, 2016); see also NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUST., PREDICTIVE POLICING SYMPOSIUMS 3-4 (2010) (noting the potential benefits of predictive policing in reducing crime and in "enhancing police legitimacy in the community").

2. Animating concerns. Despite their purported benefits, existing evidence regarding the accuracy, reliability, and overall utility of predictive-policing systems is mixed at best. Although one study in Los Angeles did indeed find that patrols directed by a predictive-policing algorithm yielded greater reductions in crime than patrols directed by more traditional hotspot mapping, other studies have not found a statistically significant effect on crime. Compare Mohler et al., *Randomized Controlled Field Trials of Predictive Policing*, 110 J. AM. STAT. ASS'N 1399, 1400 (2015) ("In the three divisions in Los Angeles, police patrols using ETAS forecasts led to an average 7.4% reduction in crime volume as a function of patrol time[.]"), with PRISCILLA HUNT ET AL., RAND CORP., EVALUATION OF THE SHREVEPORT PREDICTIVE POLICING EXPERIMENT xiii (2014) (finding that Shreveport, Louisiana's predictive-policing pilot project found "no statistical evidence

that crime was reduced more in the experimental districts than in the control districts"); Jessica Saunders, et al., *Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot*, 12 J. EXPERIMENTAL CRIMINOLOGY 347, 362 (2016) (finding that Chicago Police Department's Strategic Subjects List, used to predict individuals who might be the future victims of gun violence, did not significantly contribute to a reduction in monthly homicides). Doubts and a lack of conclusive evidence about predictive policing's efficacy have led police departments to slow their adoption of the new technology or abandon it altogether. See Ashley Murray & Kate Giammarise, *Pittsburgh Suspends Policing Program That Used Algorithms to Predict Crime 'Hot Spots'*, PITTSBURGH POST-GAZETTE (June 23, 2020) (announcing the suspension of Pittsburgh's predictive-policing program due to "potential racial bias"); Avi Asher-Schapiro, *In a U.S. First, California City Set to Ban Predictive Policing*, REUTERS (June 17, 2020), https://www.reuters.com/article/us-usa-police-tech-trfn/in-a-u-s-first-california-city-set-to-ban-predictive-policing-idUSKBN23O31A (reporting on the Santa Cruz mayor's decision to ban the use of a major predictive-policing technology due to racial bias and efficacy concerns); Leila Miller, *LAPD Will End Controversial Program That Aimed to Predict Where Crimes Would Occur*, L.A. TIMES (Apr. 21, 2020), https://www.latimes.com/california/story/2020-04-21/lapd-ends-predictive-policing-program (reporting the end of LAPD's longtime use of a popular place-based predictive-policing tool due to cost concerns); Jeremy Gorner & Annie Sweeney, *For Years Chicago Police Rated the Risk of Tens of Thousands Being Caught Up in Violence. That Controversial Effort Has Quietly Been Ended.*, CHI. TRIB. (Jan. 24, 2020), https://www.chicagotribune.com/news/criminal-justice/ct-chicago-police-strategic-subject-list-ended-20200125-spn4kjmrxrh4tmktdjckhtox4i-story.html (announcing Chicago's abandonment of its "Strategic Subjects List" program due to efficacy concerns); Mark Puente, *LAPD to Scrap Some Crime Data Programs After Criticism*, L.A. TIMES (Apr. 5, 2019), https://www.latimes.com/local/lanow/la-me-lapd-predictive-policing-big-data-20190405-story.html (reporting the end of LAPD's "chronic offender" list, citing the department's inability to determine its effectiveness and a lack of effective oversight).

Beyond their overall efficacy, these new technologies and programs have the potential to exacerbate some of the problems endemic with more rudimentary practices and generate entirely new ones. A chief concern with both rudimentary profiles and modern predictive algorithms is racial bias. Commentators have long criticized the explicit use of race as part of the so-called "drug-courier profile." See, e.g., United States v. Weaver, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting) ("Use of race as a factor simply reinforces the kind of stereotyping that lies behind drug-courier profiles."); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 243 (1983) (noting that using race as a factor in street-crime detention decisions "disadvantages blacks as a group"). There also is evidence to suggest that officers and agencies are more likely to characterize predominantly Black neighborhoods as "high crime areas" as compared with predominantly white neighborhoods, despite having similar underlying crime rates. See Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 388-389 (2019).

Although algorithms can be programmed to avoid express reliance on race and other protected characteristics, their use nevertheless may exacerbate existing racial disparities. In particular, when algorithms are trained on historical data that itself was the product of biased or unequal policing, the "predictions" that they generate inevitably reflect these past biases. See Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 116 (2017). As Sandra Mayson explains, "if the thing that we undertake to predict—say arrest—happened more frequently to black people than to white people in the past data, then a predictive analysis will project it to happen more frequently to black people than to white people in the future." Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2224 (2019). Studies consistently show that in many jurisdictions, Blacks and Latinx people are stopped, searched, and arrested at disproportionate rates. See, e.g., Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 309 (2015) (noting substantial racial disparities in arrests for drug possession despite comparable rates of use). Algorithms trained on data that reflect these sorts of enforcement practices will "over-predict" Black and Latinx individuals, and the neighborhoods they live in, as crime risks. See Mayson, supra at 224; see also Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. Rev. Online 192, 203-205 (2019) (questioning the predictive value of algorithms trained on historical data from departments that have been found to engage in discriminatory policing). When agencies rely on those predictions to make policing decisions, they risk creating a "feedback loop": officers focus more heavily on minority neighborhoods improperly labeled "high risk" and make more arrests in those neighborhoods, resulting in crime data that reflects an increasingly skewed version of reality. See Andrew G. Ferguson, Policing Predictive Policing, 94 Wash. U. L. Rev. 1115, 1183 (2017); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016).

A related concern is with accuracy and reliability. Though algorithms predict future crime risk by learning from available criminal-justice data, that data often is incomplete and unrepresentative of the true incidence of crime in a community. See LYNN LANGTON ET AL., BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010 1 (2012) (noting that between 2006 and 2010, nearly half of all violent victimizations were not reported to the police). Errors in police databases can skew predictions further. See WALTER L. PERRY ET AL., RAND CORP., PREDICTIVE POLICING: THE ROLE OF CRIME FORECASTING IN LAW ENFORCEMENT OPERATIONS 119-122 (2013) (describing various systematic biases in crime data—for example, the tendency for property owners to report overnight burglaries in the morning, thereby inadvertently creating the perception of an early-morning crime spree); OFFICE OF THE INSPECTOR GENERAL, CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT'S "GANG DATABASE" 44 (Apr. 11, 2019) (expressing serious concern about the accuracy of Chicago's gang database given the absence of any quality-control mechanisms).

Finally, there are concerns that agencies and officers may assign more weight or creditability to the information generated by policing algorithms than is in fact warranted. Because "risk" assessments often are relative, an individual or neighborhood may be labeled as "high" risk

even when the risk of crime is low in absolute terms. See e.g., John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1779 n.223 (2018) ("[T]hough an individual may be assessed as 'high risk,' the rate of reoffense for the 'high risk' group may resemble a probability that is rather *low*, not 'high.'"); Jessica Saunders et al., *Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot*, 12 J. EXPERIMENTAL CRIMINOLOGY 347, 351 (2016) ("[W]hile the models can identify increased risk, the overall risk can still be very low. Indeed, a very high risk person for homicide might have a risk rate of 1% per year."); Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L.J. 1, 22 (2015) (noting that risk labels do not convey the actual probability that an individual is dangerous and may mistakenly lead decisionmakers to believe that "high risk" means "more likely than not"). Officers also may attach undue weight to the apparently "objective" algorithm despite its limitations. See ALEXANDER BABUTA & MARION OSWALD, ROYAL UNITED SERVICES INSTITUTE, DATA ANALYTICS AND ALGORITHMIC BIAS IN POLICING 15 (2019) ("A factor which may arise during deployment [of a predictive algorithm] . . . is the risk of automation bias, the tendency to over-rely on automated outputs and discount other correct and relevant information"); Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J. L. & TECH. 103, 126 (2018) ("When the 'machine says so,' it can be difficult for rushed and over-extended human decision makers to resist the edict.").

All of these problems are exacerbated by the lack of transparency around algorithms provided by third-party vendors, which often prevents agencies from understanding the systems they use. Id. at 152-153 (highlighting many vendors' reluctance to disclose key information about their systems to agencies, including "design choices, data selection, factor weighting, and validation designs," and how this reluctance stands in the way of public oversight); Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 91 N.Y.U. L. REV. ONLINE 101, 119, 124-125 (2017) ("When police departments agree to purchase or contract for big data tools, they typically bargain for the results, but not the proprietary algorithms that produce them."); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1367 (2018) (noting assertions of "trade secrecy" by police departments to avoid disclosing information about predictive policing tools and other law enforcement technology).

3. Appropriate safeguards. The safeguards outlined in subsections (a) through (e) are designed to address the set of concerns outlined here. Subsections (a) and (b) address the problems of reliability and interpretation by ensuring that agencies take steps to understand how a particular algorithm was developed, the basis for its predictions, and the limitations on what it can in fact accomplish. A number of agencies have taken important steps in this direction. For example, the Chicago Police Department worked with researchers from the RAND Institute to evaluate the department's person-based predictive system. The evaluation ultimately prompted the department to abandon the program after the study cast serious doubt on its effectiveness. OFFICE OF INSPECTOR GEN., CITY OF CHI., ADVISORY CONCERNING THE CHICAGO POLICE DEPARTMENT'S

PREDICTIVE RISK MODELS 2, 4 (2020). A number of jurisdictions require police departments to prepare impact statements when adopting new surveillance technologies. A similar framework could be used to encourage agencies to articulate the benefits and potential harms of any predictive tools. See, e.g., Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 173 (2017) (emphasizing the value of an algorithmic impact-statement process in requiring agencies to consider "all reasonable alternatives" before adopting a new process or tool); DILLON REISMAN ET AL., AI NOW INSTITUTE, ALGORITHMIC IMPACT ASSESSMENTS: A PRACTICAL FRAMEWORK FOR PUBLIC AGENCY ACCOUNTABILITY 16 (2018) (same). Finally, jurisdictions that rely on risk assessment in the context of bail or early-release determinations have adopted a variety of approaches to address these sorts of concerns, including training for judges and administrators, as well as efforts to better communicate the significance and limitations of various risk scores. See, e.g., Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 101, 124-125 (2019) (highlighting the federal FIRST STEP Act's requirement, codified at 18 U.S.C. § 3632(f), that Bureau of Prison employees receive initial training and continuing education when using the new recidivism risk-assessment system mandated by the act).

Subsections (c) and (d) are designed to reduce the risk that the use of predictive algorithms will exacerbate existing biases in criminal-justice decisionmaking. Many agencies now have policies in place to prohibit the use of race unless it is part of a specific suspect description; and for more rudimentary "profiling" this approach ensures that agencies do not inappropriately take race into account. See, e.g., SEATTLE POLICE DEPARTMENT MANUAL § 5.140.3 (2019) (prohibiting the use of race and other protected characteristics unless part of a specific suspect description); LOS ANGELES POLICE DEPARTMENT POLICY § 345 (same); see also § 1.11 (citing additional policies). For algorithm-based "predictive" technologies, however, simply avoiding the use of race is not sufficient because, as discussed above, ostensibly "race neutral" variables like stops and arrests may produce racial disparities if they themselves are the product of racially disparate enforcement practices. A number of developers have tried to address this concern by avoiding the use of certain inputs entirely. For example, the developers of PredPol, a place-based predictive-policing system, use reported-crime-incident data to train their prediction systems instead of arrest records, since victim crime reports may be less impacted by discretionary enforcement practices. See P. Jeffrey Brantingham et al., *Does Predictive Policing Lead to Biased Arrests? Results from a Randomized Controlled Trial*, 5 STATISTICS & PUB. POL'Y 1, 2 (2018). Others have cautioned, however, that omitting certain variables may impose accuracy costs that themselves may disproportionately impact communities of color. See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2265 (2019). In response, some have suggested that a better approach might to develop algorithms in a way that affirmatively takes race into account in order to adjust for past disparities. See, e.g., Jon Kleinberg et al., *Algorithmic Fairness*, 108 AEA PAPERS & PROCS. 22-27 (2018) (demonstrating in the context of college admissions that including race as a variable in machine-learning algorithms can both improve the accuracy of predictive models and increase the diversity of entering classes). It is possible, however, that this approach might violate modern equal-protection principles. See Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68

DUKE L.J. 1043, 1133 (2019) (speculating that using race as an explicit factor in algorithmic decisions, even to combat inequities, "runs headlong into the anticlassification rule of equal protection doctrine"); but see Crystal Yang & Will Dobbie, Working Paper, *Equal Protection Under Algorithms: A New Statistical and Legal Framework* (October 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462379 (suggesting there may be ways to incorporate race to adjust for potential biases in ways that are consistent with equal protection principles). It may be that in some circumstances, agencies may need to simply forego efforts to "predict" certain outputs to begin with or to adjust the manner in which predictions are used in order to mitigate the potential for racially disparate harm. Mayson, *Bias in, Bias Out*, supra, at 2225-2226. At the very least, agencies should carefully monitor demographic data on stops and arrests to ensure that the introduction of any predictive technologies does not produce racially disparate effects.

Finally, agencies should conduct periodic audits of any predictive algorithms or technologies that they employ and make the changes indicated by the audit results. In recent years, a number of agencies have conducted comprehensive audits of various algorithm-based programs and concluded that they were considerably less effective than expected. See e.g., Jessica Saunders, *Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot*, 12 J. EXPERIMENTAL CRIMINOLOGY 347 (2016) (finding that Chicago Police Department's "Strategic Subjects List" did not significantly contribute to a reduction in homicides). Several of these audits also pointed to precisely the sorts of concerns with bias or reliability described above. See, e.g., MARK SMITH, LOS ANGELES POLICE COMMISSION, REVIEW OF SELECTED LOS ANGELES POLICE DEPARTMENT DATA-DRIVEN POLICING STRATEGIES 29-30 (2019) (citing various problems with the data collected for the LAPD's PredPol and LASER systems); OFFICE OF THE INSPECTOR GENERAL, CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT'S "GANG DATABASE" 44 (Apr. 11, 2019) (raising serious concerns about the lack of quality controls around the department's gang database). A number of jurisdictions already have ordinances in place requiring the sorts of periodic audits urged here. See, e.g., CAMBRIDGE, MASS., MUNICIPAL CODE ch. 2.128 (2018) (requiring the police to evaluate the effectiveness of surveillance technologies, both prior to adoption and on a continuing basis once a technology is in use); SEATTLE, OR., MUNICIPAL CODE § 14.18.060 (2017) (requiring the Inspector General for Public Safety and City Auditor to conduct annual reviews of all surveillance technologies).

§ 2.07. Heightened Intrusions

(a) A policing action constitutes a heightened intrusion if it raises special privacy or dignitary concerns, poses a substantial risk of serious bodily injury to an individual, or significant damage to property.

(b) A policing action that involves a heightened intrusion only should be used when society's interest in its use clearly outweighs the harm that is reasonably likely to result from the intrusion. Even then, it should be conducted in a manner that minimizes the risk of harm

so that the extent of the intrusion is proportionate to the law-enforcement goal that justifies it.

(c) Agencies should develop clear written policies to limit the use of heightened intrusions and should require officers to minimize the risk of harm that may result from their use.

Comment:

a. Intrusiveness. Courts and legislatures have recognized a variety of investigative tactics as especially intrusive and have imposed limitations on their use. Some of these tactics, such as strip searches, body-cavity searches, wiretaps, and government use of malware and other hacking technologies, raise heightened dignity or privacy concerns. Others tactics, such as the use of special-weapons-and-tactics (SWAT) teams or no-knock entries, involve a substantial risk of danger or unusual show or use of force. Finally, some tactics may be considered intrusive based on the characteristics of the person against whom they are used. For example, handcuffing a young child may be unreasonable in circumstances in which handcuffing an adult would not be.

b. Proportionality. Agencies should limit the use of intrusive tactics to circumstances in which society's need for their use clearly outweighs the risk of harm. This idea is at the heart of the various standards that both courts and legislatures have adopted to regulate the use of more intrusive tactics. For example, in assessing the reasonableness of various bodily intrusions, such as body-cavity searches or searches that involve breaking the skin, courts balance society's interest in uncovering evidence of criminal activity against the privacy and dignitary interests at stake. In doing so, courts consider the likelihood of uncovering probative evidence, the seriousness of the offense that officers are investigating, and the likelihood that the investigation could be furthered using some other means. Similarly, some jurisdictions have limited the use of SWAT teams to investigation of more serious crimes, as well as to circumstances in which an individual could not be apprehended using less intrusive tactics. Still, courts at times have approved the use of these techniques without fully appreciating the extent of the intrusion or risk or scrutinizing closely enough whether a less intrusive approach would have achieved the same ends.

c. Additional safeguards. Agencies also should consider additional safeguards to minimize the risk of harm and ensure that intrusive tactics are used only when they in fact are warranted. Many agencies already require that officers obtain supervisor approval—often from someone high

up in the command structure—before using certain intrusive techniques. Agencies also often require officers to take additional steps to confirm the accuracy of the information that gave rise to their suspicions and demonstrate that they have exhausted available, less intrusive means. Agencies often limit which officers are permitted to use particular tactics to ensure that those who do are properly trained to minimize harm. Finally, when it comes to more intrusive tactics, clear policies are essential, both to encourage politically accountable officials to consider their appropriateness and take responsibility for how they are used, and to provide sufficient guidance to officers on using these techniques in a manner that minimizes harm.

REPORTERS' NOTES

1. Tactics. Courts, legislatures, and agencies have recognized certain tactics as being unusually intrusive. See, e.g., Winston v. Lee, 470 U.S. 753, 759 (noting that some searches are unreasonably intrusive even if conducted upon probable cause); United States v. McMurray, 747 F.2d 1417, 1420 (11th Cir. 1984) (discussing a "hierarchy of intrusiveness of searches," from "minimally intrusive" frisks and luggage inspections to "highly intrusive" body-cavity examinations).

Some tactics are intrusive because they raise special privacy or dignitary concerns. For example, the U.S. Supreme Court has said that searches involving intrusions into the body, such as blood draws or surgeries, implicate the "most personal and deep-rooted expectations of privacy." See Winston v. Lee, 470 U.S. 753, 760 (1985); Kiel Brennan-Marquez & Andrew Tutt, *Offensive Searches: Toward a Two-Tier Theory of Fourth Amendment Protection*, 52 HARV. C.R.-C.L. L. REV. 103, 129 (2017). Likewise, Justice William O. Douglas compared wiretaps to "a dragnet" which "intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate of conversations." Berger v. New York, 388 U.S. 41, 65 (1967) (Douglas, J., concurring).

Tactics involving an unusual show or use of force or heightened risk of danger also are intrusive. Courts have noted, for example, that deployment of a special-weapons-and-tactics (SWAT) team to execute a warrant "necessarily involves the decision to make an overwhelming show of force—force far greater than that normally applied in police encounters with citizens." Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1190 (10th Cir. 2001). Similarly, the use of flash-bang grenades is intrusive because of the substantial risk of physical injury and property damage they pose. See Boyd v. Benton County, 374 F.3d 773, 779 (9th Cir. 2004); Bing ex. rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 570 (6th Cir. 2006). No-knock warrants are intrusive because they involve a heightened risk of danger and raise significant privacy and dignitary concerns. As courts have observed, the knock-and-announce requirement helps to prevent "deadly encounters between police and citizens," People v. Condon, 592 N.E.2d 951, 957 (Ill. 1992), and gives individuals an "opportunity . . . to pull on clothes or get out of bed," Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997).

Intrusive tactics, when used unnecessarily or in the absence of appropriate safeguards, can endanger the safety of member of the public as well as officers, impose dignitary and privacy harms on individuals, and ultimately undermine public trust in law enforcement. To address these concerns, courts, legislatures, and agencies have adopted a variety of rules for when and how these tactics may be used. An effective policy typically should address: (1) the standard for determining when the tactic is appropriate; (2) steps that officers must take to minimize the risk of harm; and (3) procedures for how decisions regarding the use of the tactic should be made.

2. Substantive standard. At the heart of the substantive standards is the idea of proportionality: an intrusive tactic should only be used when society's interest in its use clearly outweighs the resulting risk of harm. See also § 7.05 (Proportional Use of Force). For example, the U.S. Supreme Court has held that searches involving intrusions into the body are only reasonable when "the community's need for evidence outweighs the substantial privacy interests at stake." *Winston*, 470 U.S. at 760. In undertaking this balancing, courts consider the effectiveness of the challenged tactic, the existence of less intrusive alternatives, the potential risks to the suspect's safety, and the extent to which the tactic intrudes upon the suspect's dignitary interests. See *Winston*, 470 U.S. at 762 (recognizing the effectiveness of blood draws in determining whether an individual is under the influence of alcohol); United States v. Booker, 728 F.3d 535, 547 (2013) (noting that there are less intrusive means than a digital rectal exam to determine whether a suspect is hiding contraband); Maryland v. King, 133 S. Ct. 1958, 1979 (2013) (noting that a buccal swab does not involve significant risk, trauma, or pain). Applying these factors, courts have held, for example, that tactics such as forced urethral catheterization and bowel evacuation under anesthesia are unreasonable when less intrusive techniques are available. See Elliot v. Sheriff of Rush Cnty., Indiana, 686 F. Supp. 2d 840, 862 (S.D. Ind. 2010); George v. Edholm, 752 F.3d 1206, 1218-1220 (9th Cir. 2014).

Agencies and legislatures also have incorporated proportionality principles into their regulations. For example, many agencies use risk-assessment matrices to determine whether deployment of a SWAT team is warranted. See INT'L ASSOC. OF CHIEFS OF POLICE & NAT'L TACTICAL OFFICERS ASS'N, NATIONAL SPECIAL WEAPONS AND TACTICS (SWAT) STUDY 9 (2015) (finding that 57.8 percent of surveyed agencies used risk-assessment matrices). Criteria typically include whether the warrant location is fortified against entry, whether a subject at the location is known to illegally carry a firearm, and whether a subject at the location has made verified threats to law enforcement. See, e.g., FAIRFAX CTY. POLICE DEP'T, WARRANT RISK ASSESSMENT MATRIX 1. Legislatures and agencies likewise have prohibited certain techniques altogether. A number of states, for example, prohibit the use of strip searches in the investigation of minor offenses. See, e.g., 725 ILL. COMP. STAT. ANN. 5/103-1(c) (West 2017) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance."). Many agencies also prohibit the use of force to prevent a suspect from swallowing contraband or evidence. See, e.g., SALT LAKE CITY POLICE DEP'T POLICIES AND PROCEDURES MANUAL 176 (2017).

3. Special precautions. Even if use of an intrusive tactic is justified, agencies should ensure that officers take steps to minimize the risk of harm. For example, officers may be required to take certain safety precautions before detonating a flash-bang grenade. See, e.g., Milan v. Bolin, 795 F.3d 726, 730 (7th Cir. 2015) (stating that officers should visually inspect the area and carry a fire extinguisher before deploying a flash-bang grenade). Legislatures and agencies have imposed limits on who may be authorized to perform an intrusive tactic. For example, officers conducting wiretaps in Illinois must be certified by the Department of State Police. See 725 ILL. COMP. STAT. ANN. 5/108B-5(a)(4) (West 2017). In some cases, restrictions on *where* a tactic may be performed are appropriate. For example, searches involving medical procedures should generally be conducted only in a medical environment so as to minimize the "risk of infection and pain." See Schmerber v. California, 384 U.S. 757, 771-772 (1966).

4. Procedural constraints. Agencies and legislatures also impose procedural requirements, which ensure that decisions about the use of intrusive tactics are made in a deliberate fashion, with approval from higher-level agency officials or officials outside of the executive branch. Under Connecticut law, for example, wiretaps require authorization by the unanimous vote of a three-judge panel, with a heightened showing on probable cause. See CONN. GEN. STAT. ANN. § 54-41d (West 2017) (requiring, inter alia, that a three-judge panel find probable cause that material, non-privileged information will be obtained in order to authorize a wiretap). Likewise, some agencies require a supervising officer to request or approve certain intrusive tactics such as strip searches or the deployment of a SWAT team. See, e.g., NEW YORK CITY POLICE DEP'T, PATROL GUIDE, ARRESTS – GENERAL SEARCH GUIDELINES, at 2 (requiring a supervising officer to approve requests for strip searches); CHARLOTTE-MECKLENBURG POLICE DEP'T, INTERACTIVE DIRECTIVES GUIDE, SPECIAL WEAPONS AND TACTICS (SWAT) TEAM, at 1 (requiring that requests for SWAT team deployment be made by the ranking supervisor on the scene or by an on-duty SWAT team member).

§ 2.08. Limiting the Impact of Outstanding Warrants

(a) All government actors, including policing agencies, should take steps to mitigate the harms attendant to unnecessary, inaccurate, or stale warrants.

(b) Legislative bodies and courts should limit the use of arrest warrants as an automatic response to an individual's failure to appear in court, and they should promote the use of alternative strategies to ensure that individuals appear.

(c) Courts, prosecution agencies, and policing agencies should audit existing warrant databases regularly to ensure the databases are accurate and up to date, to dismiss stale or aged warrants, and to dismiss warrants in cases in which it no longer serves the public interest to compel the appearance of an individual or to prosecute an individual for an underlying offense.

(d) Policing agencies should have rigorous procedures to ensure, before taking an individual into custody on an outstanding warrant, that the warrant is still active and that the individual is in fact the person sought.

(e) Officers should not stop an individual for the purpose of checking for outstanding warrants absent reasonable suspicion that a valid warrant exists.

Comment:

a. Scope. This Principle deals with a specific form of warrant, sometimes referred to as a "bench warrant" or "arrest warrant," which orders officers to take a person into custody. See also § 2.03 (expressing a preference for warrants whenever the police conduct searches or seizures). Bench warrants typically are issued after an individual fails to appear in court in response to a summons or for a scheduled court date in the course of a criminal trial. This Principle also applies to "warrants" that are put in place by the police themselves, such as "be on the lookout" or "wanteds" instructions.

b. Animating concerns. Although warrants can be an important tool to compel an individual's appearance in court and facilitate the administration of justice, there is at present an enormous backlog of outstanding warrants in the United States. Many warrants in existing databases either are extremely old or are for minor offenses, such as the failure to appear in court to resolve an outstanding traffic ticket. Warrant databases also are riddled with errors, including misidentified people, erroneous Social Security numbers, and many typographical mistakes. As a result, hundreds of thousands of people are taken into custody each year for very minor offenses—or without any legitimate basis whatsoever. The costs of these arrests, including both the arrest itself and the many collateral consequences that follow, can be substantial. See § 4.05. And importantly, these costs are not distributed evenly across society. Outstanding warrants and arrests based on the same disproportionately affect people of color and poorer individuals.

c. Reducing the number of outstanding warrants. Although warrants sometimes may be necessary to ensure an individual's appearance, there are a variety of alternative measures that may be equally effective, and at much lower cost both to individuals and to criminal-justice entities. For example, several studies have established that the need to issue warrants could be eliminated by taking a number of relatively minor actions that can significantly increase compliance with summonses, such as: sending text-message reminders; redesigning summons forms; or notifying

defendants that they cannot be arrested for nonpayment unless a court finds the nonpayment was willful. Consistent with § 4.05, jurisdictions also should encourage the use of lesser sanctions, including warnings or civil fines in lieu of criminal summonses, in order to reduce further the number of warrants that ultimately are issued.

Jurisdictions also can take steps to clear the backlog of outstanding warrants in order to reduce unnecessary arrests and ensure that police and prosecutors do not waste time on stale or unnecessary warrants. In recent years, system actors have taken a variety of steps to reduce the volume of outstanding warrants. Courts have held warrant-clearance days, and district attorneys and other system actors have dismissed huge numbers of warrants, particularly very old ones or warrants for minor offenses.

d. Ensuring accuracy of warrants. All system actors in each jurisdiction should have procedures in place to audit their warrant databases for accuracy on a regular basis. Although some mistakes perhaps are unavoidable, for the most part it is simply unacceptable to arrest people because of errors in warrant databases. For the same reason, agencies should have regular protocols in place to ensure a warrant is accurate prior to taking someone into custody, such as verifying a warrant's validity prior to arrest. Section 6.03 discusses additional ways to improve the accuracy of warrant databases.

e. Stops to check for outstanding warrants. It is a bedrock principle of Fourth Amendment law that an individual may not be stopped in the absence of reasonable suspicion or probable cause to believe that they have or are about to commit a crime. An officer may not stop someone simply to see if they have an outstanding warrant unless the officer has reasonable suspicion to believe that a warrant has in fact been issued and is still valid. The Court's decision in Utah v. Strieff, 136 S. Ct. 2056 (2016) did nothing to alter this basic requirement. In *Strieff*, the Court declined to impose an exclusionary remedy for evidence discovered during an unlawful stop, concluding that an outstanding warrant attenuated the taint of that stop. But *Strieff* speaks solely to the exclusionary remedy. Nothing in *Strieff* suggests that individuals may be stopped for the purpose of conducting warrant checks absent the requisite cause. And, in fact, reading it that way would put it in tension with United States v. Hensley, 469 U.S. 221 (1985), which requires reasonable suspicion before stopping an individual to check for an outstanding warrant.

REPORTERS' NOTES

At present, there are nearly seven million outstanding warrants in the United States. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT tbl. 5A (2018) ("BJS REPORT"). In some cities, the number of outstanding warrants, relative to the city's population, can be staggering. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 6, 55 (2015) ("FERGUSON REPORT") (documenting more than 16,000 outstanding arrest warrants in Ferguson, Missouri, a city of 21,000). The vast majority of these warrants are for misdemeanors and low-level offenses, including failures to appear in court; failures to pay certain fines or fees, often for traffic infractions; and violations of the municipal housing code. According to a U.S. Department of Justice count for 2016, there were 3.9 million warrants issued for misdemeanors and 1.07 million warrants issued for "other" conduct, such as traffic issues and ordinance infractions, compared to just 850,000 warrants issued for felonies. BJS REPORT; see also Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 619, 640 (2019). A review of New York City records in 2017 found that 1.3 million of the 1.6 million outstanding warrants were for "quality of life" offenses, such as disorderly conduct and littering. Beth Fertig, *City District Attorneys Purge Almost 645,000 Old Warrants*, WNYC (Aug. 9, 2017), https://www.wnyc.org/story/city-district-attorneys-purge-645000-old-warrants/. Some jurisdictions have used a system of "wanteds" as a substitute for arrest warrants. Rather than requiring officers to obtain a probable-cause determination by a detached and neutral magistrate, "wanteds" enable law-enforcement officers to arrest, detain, and question a person without needing to obtain a judicially authorized warrant first. Instead, officers make the probable-cause determination themselves and issue a "wanted" or "stop order" based on that assessment. FERGUSON REPORT 22 (2015). See also Danny Wicentowski, *St. Louis County Police No Longer Arresting on Misdemeanors Without Warrants*, RIVERFRONT TIMES (Oct. 31, 2018), https://www.riverfronttimes.com/newsblog/2018/10/31/st-louis-county-police-no-longer-arresting-on-misdemeanors-without-warrants (reporting also that St. Louis had issued around 15,000 wanteds, leading to 2,500 arrests, from 2011–2016, but had limited their use in response to public outcry.).

The extraordinary number of outstanding warrants creates several problems for the fair administration of justice. First, existing warrant databases are remarkably error-prone, with numerous cases of incorrectly spelled names, illogical birth dates, and inverted Social Security numbers. See Wayne Pitts, *From the Benches and Trenches Dealing with Outstanding Warrants for Deceased Individuals: A Research* Brief, 30 JUST SYS. J. 219 (2009). These errors can result in officers arresting the wrong person or wrongfully arresting someone whose warrant was supposed to be quashed. In Los Angeles, for example, hundreds of people were imprisoned wrongfully due to mistakes in warrant databases. Jack Leonard, *ID errors put hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011), https://www.latimes.com/archives/la-xpm-2011-dec-25-la-me-wrong-id-20111225-story.html (reporting nearly 1,480 instances of wrongful incarceration over the five-year period from 2006–2011); see also Arizona v. Evans, 514 U.S. 1 (1995) (defendant was arrested on a warrant that had already been quashed, but the clerk of the court had negligently failed to record as

such). In New York, one man was arrested so many times based on an erroneously issued warrant that a judge gave him an official document to carry around stating that the warrant had been dismissed. Alan Feuer, *Cleared of a Crime but Hounded by a Warrant*, N.Y. TIMES (Mar. 28, 2016), https://www.nytimes.com/2016/03/29/nyregion/cleared-of-a-crime-but-hounded-by-a-warrant.html; see also Douglas Holt, *Bogus Warrants Lead to False Arrests, Suits*, CHICAGO TRIBUNE (Sept. 26, 1993), https://www.chicagotribune.com/news/ct-xpm-1993-09-26-9309260290-story.html; Rachel Swan, *Alameda County's new software system blamed for wrongful arrests*, S.F. CHRON. (Nov. 30, 2016), https://www.sfchronicle.com/bayarea/article/Alameda-County-s-new-software-system-blamed-for-10643452.php.

Second, whether erroneous or not, arrests on outstanding warrants impose extremely serious costs on individuals—costs that may not be justified by the public-safety goals that warrants are supposed to promote. As documented elsewhere, arrests deny people their liberty, subject them to a host of indignities including strip searches, and can cause individuals to incur many fees and even lose their jobs. See Principle 4.05 (Arrests) (offering extensive citations regarding the costs of arrests). The criminal-justice system also incurs costs in terms of officer and judicial time. See, e.g., AUDIT OF THE SNOHOMISH COUNTY CRIMINAL WARRANT PROCESS 31 (2007) (describing approximately 32 minutes of redundant data entry per warrant, as well as seven different points during the warrant process in which data must be entered by hand).

Third, the existence of outstanding warrants may encourage law-enforcement officers to conduct illegal stops, without suspicion, for the sole purpose of checking for warrants. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 9 (2014) ("NEWARK REPORT") (describing a pattern of warrant checks for people stopped solely for "milling," "loitering", or "being in high-crime areas" without any indication of criminal activity or suspicion); FERGUSON REPORT 17 (2015) ("Many of the unlawful stops we found appear to have been driven, in part, by an officer's desire to check whether the subject had a municipal arrest warrant pending."). Officers may see this as a way to boost their arrest productivity or to garner leave to conduct a warrantless search incident to arrest. This is particularly true after the U.S. Supreme Court's ruling in Utah v. Strieff, which permitted evidence seized pursuant to an unlawful stop to be admitted at trial on the theory that an outstanding arrest warrant for the defendant attenuates the chain of illegality. 136 S. Ct. 2056 (2016).

Fourth, the problems associated with the high number of outstanding warrants disproportionately affect low-income and minority communities. This is because arrest warrants "are not distributed evenly across the population." *Strieff*, 136 S. Ct. at 2073 n.1 (2016) (Kagan, J., dissenting). Both outstanding warrants and police stops are more common in neighborhoods that already experience increased police presence, meaning it is these populations that are most likely to bear the brunt of problems stemming from the vast number of outstanding warrants. Id. at 2073, n.1 (2016) (Kagan, J., dissenting) (noting that warrants "are concentrated in cities, towns, and neighborhoods were stops are most likely to occur." See also Id. at 2070 (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny."). Similarly, errors in warrant databases also disproportionately affect low-income,

minority communities, since it is these members who "often suffer comparative disadvantages in detecting and challenging inaccurate records." Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 540, 569 (2016).

All institutional players in the criminal justice system—legislatures, courts, prosecutors, and policing agencies—have a role to play in mitigating the ill effects of the bloated warrant system. This is evident in a number of approaches currently being taken in jurisdictions across the United States. Some approaches center on reducing the number of warrants issued for minor offenses. For example, lawmakers in New York and Philadelphia designated certain minor offenses as civil infractions that carry only a fine and are off-limits for arrest, such as violations of open-container laws or instances of littering. See Doug Caruso et al., *'Wasted' time on warrants backlog in Massachusetts*, WICKED LOCAL (Jan. 22, 2019), https://marblehead.wickedlocal.com/news/20190122/wasted-time-on-warrants-backlog-in-massachusetts. Others focus on reducing the number of warrants issued for failures to appear in court by improving defendants' attendance at court hearings. For example, local and state agencies can redesign their summons forms to prioritize information about the time, date, and location of hearings, as well as send text-message reminders to defendants ahead of hearings to ensure they appear. See UNIVERSITY OF CHICAGO CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT (2018); BRIAN H. BORNSTEIN ET AL, DEPT. OF JUSTICE, REDUCING COURTS' FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH (2011) ("BORNSTEIN REPORT"). Legislators can amend judicial rules of practice and procedures to give courts alternative ways to compel appearances before issuing a bench warrant, such as administrative restrictions on state services that are not essential to daily living. See OHIO GOVERNOR'S WARRANT TASK FORCE REPORT 15-17 (2019). Administrators also can help reduce warrant backlogs by setting rules of practice and procedure requiring the dismissal of warrants for low-level offenses after a clear failure to prosecute. See Id. at 7. And courts as well as police officers can adopt procedures to notify defendants that they cannot be arrested or jailed for failure to pay a fine unless a court determines the nonpayment is willful. Such notification would improve defendants' response to summons and attendance at hearings, thereby reducing the need for judges to issue warrants for failures to appear. See Daniel Bernal, Note, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547, 549 n.4 (2017) (citing evidence about the "role that fear plays in appearing in court") (citing BORNSTEIN REPORT).

Still other solutions focus on clearing the backlog altogether. Police chiefs and prosecutors can work together to ask courts to purge old citations and low-level warrants, as officials in Los Angeles and New York have done. See Mark Puente & Richard Winton, *L.A. vows to void 2 million court citations and warrants. Homeless people will benefit most.* L.A. TIMES (Oct. 2, 2019), https://www.latimes.com/california/story/2019-10-02/homeless-housing-erase-citation-fine-fees (voiding warrants over 10 years old and for offenses including drinking in public and blocking a sidewalk); Beth Fertig, *City District Attorney Purge Almost 645,000 Old Warrants*, WNYC (Aug. 9, 2017), https://www.wnyc.org/story/city-district-attorneys-purge-645000-old-warrants (vacating warrants that were at least 10 years old). Judges also can clear the backlog themselves. Some have held day-

long warrant-clearing events in which members of the community meet with officials to determine alternative ways to pay outstanding fines and fees or to have their existing warrants canceled. See Shelley Szambelan, Presiding Judge, Spokane County Municipal Court, *How Clearing Outstanding Warrants Can Change Lives and Reduce Jail Populations*, SAFETY AND JUSTICE CHALLENGE (July 6, 2016), http://www.safetyandjusticechallenge.org/2016/07/clearing-outstanding-warrants-can-change-lives-reduce-jail-populations/.

Finally, relevant actors can take a variety of steps to reduce the existence and effects of errors in warrant databases. For example, jurisdictions can consider utilizing employees to monitor warrant databases and verify the validity of a warrant each time someone is stopped. See, e.g., Ryan Broussard, *Amnesty day set, 24/7 warrant verification services proposed to reduce outstanding warrants*, BATON ROUGE BUSINESS REPORT (Nov. 9, 2015), https://www.businessreport.com/article/amnesty-day-set-247-warrant-verification-services-proposed-reduce-outstanding-warrants. Agencies can also modernize their warrant-database systems. See ADMINISTRATIVE OFFICE OF COURTS, REPORT TO THE JUDICIAL COUNCIL (2014). Agencies also can require officers to confirm the existence of a warrant before taking an individual into custody.

In any event, officers never should conduct a stop for the purpose of seeking to learn whether an individual has outstanding warrants absent reasonable suspicion to believe there is in fact an outstanding warrant. See United States v. Hensley, 469 U.S. 221 (1985) (permitting officers to investigate "wanted" status so long as there is reasonable suspicion). Although the Court in *Strieff* failed to impose an exclusionary remedy for the unlawful stop at issue, neither *Strieff* nor any other case actually permits officers to stop individuals without a requisite level of cause to believe the person is engaged in criminal conduct (or other lawful justification) simply to explore whether that individual has warrants outstanding. See *Strieff*, 136 S. Ct. at 2064 (implicitly condemning "suspicionless fishing expedition[s]" and acknowledging that any "dragnet searches" stemming from the prevalence of outstanding arrest warrants would be "wanton conduct" exposing police to civil liability and may affect the constitutional analysis that the Court conducted in *Strieff* itself.). As the result of two extensive investigations, the Department of Justice's Civil Rights Division concluded that stopping people without cause in order to run warrant checks was unconstitutional. NEWARK REPORT at 17; FERGUSON REPORT at 9.

CHAPTER 3
POLICING WITH INDIVIDUALIZED SUSPICION

§ 3.01. Definition and Legality of Suspicion-Based Searches, Seizures, and Information Gathering

(a) For purposes of this Chapter, policing activity includes information gathering, seizures, and encounters, as those terms are used in Chapters 2, 3, and 4 of these Principles.

(b) As stated in § 2.01(a), a policing activity is "suspicion-based" when it is conducted with any cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety, or that an individual is in need of aid.

(c) In addition to any other limitations imposed by the U.S. Constitution, suspicion-based policing activities should occur only if they are conducted pursuant to the Sections in this Chapter and, to the extent applicable, the more specific Sections governing encounters in Chapter 4.

Comment:

a. Regulating suspicion-based policing activities. The Principles in this Chapter, and in Chapter 4 on encounters, provide a framework for regulating investigative activities that are targeted at a particular individual, place, or item based on any cause to believe that the subject is involved in unlawful conduct, is a threat to public safety, or is in need of aid. See § 2.01 (describing the distinction between suspicion-based and suspicionless policing activities). A policing activity is "suspicion-based" for the purposes of this Chapter even if it is based on little more than a hunch. What matters is that a government official has singled out a particular target for further scrutiny based on some belief that further investigation is warranted.

Suspicion-based policing poses a set of concerns that are different from those that arise when the government engages in suspicionless activities. See Chapter 5. For suspicion-based activities, a leading concern is that the individual, location, or item not be singled out inappropriately—either without sufficient justification or based on impermissible criteria. The protections discussed throughout Chapters 3 and 4 are designed to ensure that all targeted law-enforcement activity is conducted in a manner that minimizes unnecessary or arbitrary intrusions and, in doing so, preserves legitimacy and avoids undue harm.

As discussed in greater detail in § 2.01, Comment *a*, the line between suspicion-based and suspicionless activities can at times be murky, particularly when the government seeks to obtain information about all individuals who have some connection to a specific location where a crime has or is expected to occur. For these types of edge cases, the protections in Chapters 3 and 5 turn out to be quite similar, which obviates the need to place them firmly on either side of the line.

REPORTERS' NOTES

Policing is "suspicion-based" whenever a government official singles out a particular individual, location, or item for further scrutiny. An officer who stops a person on the street based on a mere hunch that the individual is involved in criminal activity may lack the constitutionally requisite quantum of "suspicion" to justify the encounter. But that encounter nevertheless is suspicion-based for the purposes of these Principles.

This distinction mirrors the distinction the U.S. Supreme Court first articulated in Delaware v. Prouse, which made clear that "checkpoint-style" stops could be conducted in the absence of individualized suspicion, but that "roving" stops of specific vehicles could not. 440 U.S. 648 (1979); see also United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (prohibiting roving immigration stops near the border in the absence of reasonable suspicion); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (permitting suspicionless checkpoint-style immigration stops). The Court explained that roving stops invite precisely "the kind of standardless and unconstrained discretion" that has animated the Court's Fourth Amendment jurisprudence. *Prouse*, 440 U.S. at 661. Absent reasonable suspicion or probable cause to believe that the driver is violating a traffic regulation or is driving without a license, "we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver." Id. What matters, in short, is whether an officer is targeting a specific person or implementing a general program aimed broadly at the general public or a clearly defined group. See also Camara v. Mun. Ct. of San Francisco, 387 U.S. 523, 532 (1967) (denouncing municipal inspections system whose "practical effect" was to "leave the occupant subject to the discretion of the official in the field," but allowing searches that were in compliance with reasonable administrative scheme); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973) (emphasizing the need to curb "unfettered discretion of members of the Border Patrol" to target individual vehicles).

§ 3.02. Appropriate Safeguards

(a) Suspicion-based policing activities should be conducted only pursuant to a written policy that makes clear:

(1) which personnel are authorized to utilize the method or technique in question;

(2) what training is required before personnel are authorized to utilize it;

(3) the predicate or level of cause that must be present to justify its use;

(4) whether advance permission is required from a supervisor or other third party, including a court, and what form that advance permission must take;

(5) specific steps that officials should take in order to limit the scope of the intrusion, consistent with § 3.03; and

(6) the manner in which use of the suspicion-based technique will be documented, audited, and reported to the public, consistent with § 3.04.

(b) In developing the policy, agencies should consider:

(1) the intrusiveness of the technique at issue, as well as the sensitivity of the information that its use is likely to obtain;

(2) other potential harms that its use could impose, including the potential to exacerbate racial disparities, chill the exercise of constitutional rights, undermine police legitimacy, or be deployed toward illegitimate ends;

(3) the feasibility of obtaining approval in advance of its use, as well as the likelihood that any potential misuse of the technique could be identified through after-the-fact review; and

(4) the degree to which any particular safeguard would impose undue burdens on the agency or unduly impede legitimate law-enforcement investigations.

(c) The written policy should, consistent with § 1.06(b) (policy transparency), be made available to the public, except when there is a substantial and articulable risk that doing so would compromise the agency's ability to carry out its policing obligations.

Comment:

a. Regulatory approach. This Chapter adopts a regulatory approach to suspicion-based seizures, encounters, and "information gathering" activities—described collectively as "policing activities." See § 2.02 (defining "information gathering"). The goal of this Chapter is to ensure that agencies take responsibility for the manner in which officers conduct suspicion-based activities, and to minimize to the extent possible the risk that these techniques are deployed in arbitrary, unjustified, or discriminatory ways.

The approach outlined here differs in important ways from the traditional approach used by courts to regulate suspicion-based searches and seizures under the Fourth Amendment to the U.S. Constitution. As a matter of Fourth Amendment law, searches and seizures typically require warrants or probable cause—or for lesser intrusions, reasonable suspicion. Meanwhile, policing activities that fall short of a search or seizure are left entirely unregulated. This approach—bounded as it is by the text of the Fourth Amendment as well as the nature of the judicial function—is not designed to address the full panoply of concerns that suspicion-based investigative activities may pose. As the U.S. Supreme Court itself has emphasized, its Fourth Amendment doctrines are not intended to remedy the problems of racial bias and disparate impact, to promote the goals of legitimacy or harm-minimization, or to facilitate internal and external agency accountability. And of course, they do nothing to regulate the activities that fall beyond the Fourth Amendment's scope. It is therefore essential that government activities that intrude on individual liberty, privacy, or autonomy be regulated in some way.

Although agencies and legislatures must adhere to any constitutional requirements, they have considerable leeway to regulate in areas that the U.S. Constitution does not, and in particular to adopt a more comprehensive regulatory scheme. Many agencies already have in place department polices that address the many potential issues with various information-gathering activities in ways the traditional constitutional requirements of warrants and probable cause do not (and cannot). In addition, some states and municipalities have laws that regulate various aspects of information gathering by police. To the extent that any given agency lacks those policies, this Section describes what a comprehensive administrative or legislative regime ought to include.

b. Written policy. The threshold requirement in this Section is that all suspicion-based policing tactics be carried out pursuant to a written policy that, absent a demonstrable, articulable need for confidentiality, is made available to the public. (Redaction is an option if part, but not all, of a policy must remain confidential.) This requirement also could be satisfied through legislation, which then could be implemented through more specific department policy.

This requirement accomplishes two important goals. First, it ensures that key decisions about how and when a particular technique may be used are made by responsible department officials, and not by individual officers in an ad hoc fashion. Second, it informs members of the public of these critical policy choices and, in doing so, permits at least some measure of accountability from outside of the law enforcement agency. This external check is particularly

important when it comes to surveillance techniques that fall short of a Fourth Amendment search, and therefore are not subject to judicial scrutiny of any sort.

In implementing this requirement, agencies will need to determine when a new policy is required, and when the use of a particular technique falls within an existing agency policy. For technologically enhanced searches and seizures, the line is a fairly easy one to draw: agencies should have separate policies to deal with each of the technologies that officials are permitted to use. And in practice, many agencies already do. For more routine investigative activities, there inevitably may be some ambiguity as to what precisely constitutes a new "technique." All searches of physical property, for example, arguably could be covered by a single policy or broken up into broad categories with specific policies and procedures for searches of homes, automobiles, and containers. Ultimately, agencies will need to use their common sense and practical experience in deciding whether a new policy is necessary. The various considerations listed in subsection (b) for what a policy should include also can provide some guidance for whether a distinct policy is needed. Regarding searches of persons, more intrusive searches like strip searches require additional protections that should be spelled out separately. Existing agency manuals suggest agencies already are thinking in these terms. Many agencies have separate policies—or subsections of policies—to deal with different kinds of searches of persons, including field searches, strip searches, searches of juveniles, and the like.

c. Primary safeguards. This Section then sets out the basic questions that high-level agency officials should consider—and address through written policy—in order to ensure that they are in fact taking adequate responsibility for technologies and tactics that are used. First, officials must decide who within the agency is permitted to use the technique and whether those individuals will need any specialized training in order to do so appropriately. For some techniques, the answer may very well be that any personnel may use it. For others, however, stricter limits may be appropriate. A number of agencies permit only a small number of specially trained officers to fly drones.

Second, officials should articulate the set of circumstances under which a particular technique may be used and decide who within the agency will be responsible for ensuring that the predicate has been met. Here again, agencies have a range of options to choose from that go beyond the familiar Fourth Amendment standards of reasonable suspicion and probable cause. For certain less intrusive techniques, officials reasonably might decide not to require any predicate beyond the threshold requirement of a legitimate law-enforcement purpose. In other contexts, probable cause

alone may not be sufficient. For example, the federal Wiretap Act, 18 U.S.C. § 2510, prohibits the use of wiretaps to investigate low-level offenses and requires the requesting agency to show that less intrusive tactics would not be effective. Similarly, some agencies require officers to obtain supervisor approval prior to using certain investigative tactics, such as consent searches. And in some cases, agencies may even require approval from the chief of police.

Agency officials also should identify the steps that individual officers, or others within the agency, should take in order to limit the scope of the intrusion to its lawful objectives. And agencies should consider in advance the manner in which the use of a particular technique will be documented, audited, and reported, both to promote accountability within the agency and to facilitate broader public accountability over policing. Additional guidance on these aspects of the agency policy is provided in §§ 3.03 (Minimization) and 3.04 (Documentation, Auditing, and Reporting).

Importantly, in formulating its policy, an agency reasonably may decide to lean more heavily on some regulatory strategies than on others. An agency might decide, for example, not to impose a predicate but to nevertheless require either prior approval from a supervisor or after-the-fact documentation in order to ensure that a technique is not abused. What this Section requires is that agencies make these decisions affirmatively and transparently, based on a careful consideration of the various factors outlined in subsection (b).

d. Considerations. The considerations described in subsection (b) are consistent with the overall approach of this Chapter, which is to encourage agencies to view suspicion-based policing activities from a *regulatory* perspective, i.e., to identify the various risks and policy considerations associated with a particular policing activity and consider the feasibility of various approaches to mitigating the potential harms.

A key factor of course is the intrusiveness of the technique in question, as well as the sort of information that its use is likely to uncover. Physical searches, for example, generally are thought to be more intrusive than observation from a distance. Long-term location-tracking information, or histories of credit-card purchases over a period of weeks or months, can reveal a great deal of sensitive information even if any individual data point would not.

Importantly, subsection (b) asks agencies and legislatures to consider other factors as well, such as the feasibility of obtaining prior approval and the ease of detecting any misconduct that may have occurred after the fact. The decision to deploy a drone, for example, rarely is made in a

split second; it therefore is precisely the sort of technique that could be regulated in part through supervisory review. Another factor is the degree to which a particular regulatory strategy is suited to addressing the particular concerns that use of a technology or tactic presents. In some cases, supervisory review alone—or even after-the-fact reporting—may be sufficient to ensure that use of the technique is justified based on the facts available. Studies suggest that simply requiring someone to explain their reasons to a third party can induce better decisionmaking. In other contexts, however, supervisors (and in particular, lower-level supervisors like sergeants or lieutenants) may be susceptible to some of the same investigative pressures that skew individual officers' decisionmaking. In these contexts, approval by the agency head—or by someone outside the agency, such as a police commission or a judge—may be necessary.

REPORTERS' NOTES

1. Constitutional backdrop. As compared to some of the other Chapters in this volume, the Sections in this Chapter address an area of policing that has been heavily constitutionalized. The core of the U.S. Supreme Court's Fourth Amendment jurisprudence deals precisely with the set of activities addressed here: policing activities aimed at specific targets, based on some level of suspicion that they are engaging in unlawful conduct.

And yet, as the Supreme Court itself has made clear, the Fourth Amendment rules that govern the use of targeted (or suspicion-based) policing activities are designed to address only a subset of the possible concerns that their use may pose. The Court has emphasized, for example, that a police tactic may be "reasonable" for Fourth Amendment purposes even if it creates a serious risk of disparate racial impact. See Whren v. United States, 517 U.S. 806 (1996) (permitting stops for pretextual reasons so long as there is some objective basis for the stop). And it has made clear that so long as there is probable cause for suspicion of even a minor offense, it does not matter for Fourth Amendment purposes whether a search or arrest was in fact prudent or wise. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("[T]he standard of probable cause applies to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations."). Similarly, the Supreme Court generally has approached policing activities with a narrow frame, focusing on the specific facts of a particular encounter, as opposed to evaluating the broader systemic consequences that the use of a particular tactic might pose. See, e.g., Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, not an Incident*, 82 U. CHI. L. REV. 159, 162 (2015) (identifying a "mismatch" between judicial analysis of stop-and-frisk and its real-world practice, where courts focus on the facts in individual cases but stop-and-frisk is "in reality . . . more typically carried out by a police force en masse as a *program*") (emphasis in original); see also Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting) (rejecting the notion that suspicionless police stops are "isolated instance[s] of negligence," but rather are the "product of institutionalized training procedures" that

instruct officers to stop first and find suspicion later). And of course, many of the activities that constitute "information gathering" for the purposes of these Principles are not subject to regulation at all under the Fourth Amendment because the courts have not deemed them to be "searches" or "seizures." See § 2.02 (defining "information gathering"). In short, the Fourth Amendment never was meant to be a comprehensive code for the police, and it could not possibly fulfill that function.

2. Legislative and administrative regulation. Legislative and administrative regulation of suspicion-based policing, on the other hand, has been a patchwork quilt. Although, as discussed below, some agencies have developed comprehensive and transparent regulatory schemes for at least some of these tactics, many others have not. See, e.g., STINGRAYS AND THE CHICAGO POLICE DEPARTMENT, ACLU ILLINOIS (2019) (noting the Chicago Police Department's failure to develop internal policies on Stingrays, which can be used to obtain location data and other identifying information from all cellphones in a particular location); Joseph Goldstein, *New York Police Are Using Covert Cellphone Trackers, Civil Liberties Group Says*, N.Y. TIMES (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/nyregion/new-york-police-dept-cellphone-tracking-stingrays.html (noting the New York Police Department's failure to do the same); see generally AUTOMATIC LICENSE PLATE READERS, NYCLU, https://www.nyclu.org/en/automatic-license-plate-readers (observing flaws in agencies' policies regarding the collection, use, sharing, and retention of location information gathered from automatic license-plate readers). Too often, agency policies on various kinds of searches and seizures simply restate the constitutional line. See Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. L. REV. 1, 32 (2019) ("Virtually every policing agency has a 'search and seizure' policy that, more often than not, just restates the constitutional requirement that a stop be based on reasonable suspicion."); e.g., TAMPA POLICE DEP'T, STANDARD OPERATING PROCEDURES 2 (2011), http://www.justiceacademy.org/iShare/Library-Manuals/TampaPD.pdf (explaining that an officer may frisk upon "reasonable belief that the individual may be armed"); HONOLULU POLICE DEP'T, POLICY ON WARRANTLESS SEARCHES AND SEIZURES 4 (2019), http://www.honolulupd.org/information/pdfs/WarrantlessSearchesandSeizures-10-31-2019-10-14-58.pdf (specifying that an "investigative stop" requires "specific and articulable facts which . . . with rational inferences from those facts, reasonably warrants the intrusion.").

The failure on the part of legislatures and agencies to regulate where the courts have not (and could not) has, across a variety of contexts, caused real and substantial harm. Countless studies and reports have found racial disparities in the use of various investigative techniques, particularly those that do not require any degree of individualized suspicion under the Fourth Amendment, and thus often are left entirely to officer discretion. See, e.g., ACLU of Illinois, *Racial Disparity in Consent Searches and Dog Sniff Searches: An Analysis of Illinois Traffic Stop Data from 2013* (2014); see also Richard A. Oppel, Jr., *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES (Nov. 20, 2014) (describing similar findings of disparate impact in Durham, North Carolina, and Austin, Texas); CHOLAS-WOOD ET. AL., AN ANALYSIS OF THE METROPOLITAN NASHVILLE POLICE DEPARTMENT'S TRAFFIC STOP PRACTICES (2018), https://www.nashville.gov/Portals/0/SiteContent/MayorsOffice/docs/reports/policing-project-nashville-

report.pdf (finding substantial and unexplained racial disparities in low-level traffic stops, which typically involve the greatest degree of officer discretion given the sheer number of potential violators). There also have been many examples of police intruding into protected First Amendment spaces or targeting groups on the basis of protected First Amendment activity. See, e.g., *Activists Say Chicago Police Used 'Stingray' Eavesdropping Technology During Protests*, CBS CHICAGO (Dec. 6, 2014), https://chicago.cbslocal.com/2014/12/06/activists-say-chicago-police-used-stingray-eavesdropping-technology-during-protests/ (describing police surveillance during protests); Matt Apuzzo & Adam Goldman, *After Spying on Muslims, New York Police Agree to Greater Oversight*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/nyregion/nypd-spying-muslims-surveillance-lawsuit.html (detailing New York Police Department's decade-long surveillance of Muslim neighborhoods after the September 11 terrorist attacks); see Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR NEWS (Oct. 27, 2017) (noting that IRS applied higher scrutiny to applications for tax-exempt status from groups whose names included words like "Tea Party" and "Patriots."). There likewise have been many documented instances of police officials deploying investigative resources to serve personal as opposed to public ends. See Sadie Gurman, *Across US, Police Officers Abuse Confidential Databases*, ASSOC. PRESS (Sept. 28, 2016), https://apnews.com/699236946e3140659fff8a2362e16f43 (documenting widespread police abuse of law-enforcement databases for personal use, including gathering information on romantic partners, business associates, neighbors, and journalists). Finally, the absence of transparency and sound regulation of certain techniques *itself* can undermine agency legitimacy wholly apart from the manner in which the techniques are in fact used. See, e.g., Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595, 1609 (2016) (describing the public backlash against the Seattle Police Department's drone program—despite the drones' very limited capabilities—due largely to the fact that the department had acquired the drones in secret and had failed to develop a policy to govern their use). In some cases, failure to regulate at the front end has resulted in agencies losing access to certain investigative tools entirely. See, e.g., Crump, supra, at 1606-1607 (noting that the Seattle Police Department ultimately was forced to end its drone program); Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. 192, 211-214 (2019) (recounting how City of New Orleans was forced to end its use of Palantir's predictive-profiling service after public backlash regarding the lack of transparency around Palantir agreement).

3. Regulatory framework. The goal of this Chapter—as well as the Chapter on encounters that follows—is to develop a more comprehensive regulatory framework to address the full range of concerns that are implicated whenever police officials engage in suspicion-based policing. The challenge in doing so is that the tactics and technologies that agencies use vary across a number of dimensions, including their intrusiveness, their susceptibility to abuse, and the frequency with which they are used. Requesting an individual's utility bill implicates a very different set of interests than requesting several years or months of credit-card transactions. Regulatory strategies—such as supervisory review—that work well for low-frequency activities are simply

not going to be feasible (or effective) for techniques that are used dozens of times each day. See generally, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 595 (1992) (citing "the frequency with which a command will apply" as a key consideration in deciding how best to regulate); Kyle D. Logue, *In Praise of (Some) Ex Post Regulation: A Response to Professor Galle*, 69 VAND. L. REV. EN BANC. 97 (2016) (outlining the various considerations that inform the choice between ex ante and ex post regulation).

In lieu of a specific set of requirements, this Section requires that all suspicion-based policing activities take place pursuant to a written policy—and sets out the six regulatory choices that each policy would need to resolve. What this ensures, at the very least, is that high-level officials take the time to consider the potential harms associated with the technique in question, to identify potential strategies to mitigate them, and, ultimately, to take responsibility—in a transparent fashion—for how the technique will be used.

The six regulatory strategies outlined in subsection (a) are modeled after the techniques that legislatures and agencies themselves have adopted to regulate various suspicion-based policing activities. Agencies routinely limit the use of certain tactics or technologies to officers who have received specialized training or work as part of specific units. See, e.g., BALTIMORE POLICE DEP'T, POLICY 1004: CELL-SITE SIMULATORS (2016) (limiting use of "Stingray" technology to trained members of the Advanced Technical Team); SEATTLE POLICE DEP'T MANUAL, 16.170 AUTOMATIC LICENSE PLATE READERS (2019) ("Only employees trained in the use of ALPR equipment will use and access ALPR devices and data."); SEATTLE POLICE DEP'T MANUAL, 12.045 BOOKING PHOTO COMPARISON SOFTWARE (2014) (limiting use of BPCS facial-recognition software to "department-trained photo unit personnel"); L.A. CNTY. SHERIFF'S DEP'T, POLICY: USE OF CELL-SITE SIMULATOR TECHNOLOGY (2016) ("Only specific, sworn Department personnel, as well as trained technicians working under their direction, will be authorized to use and/or access the cell-site simulator technology."); MICHIGAN STATE POLICE, STATEWIDE NETWORK OF AGENCY PHOTOS ACCEPTABLE USE POLICY 2 (recommending that "only trained facial examiners should conduct FR searches"); see also INT'L ASS'N OF CHIEFS OF POLICE, AVIATION COMM., RECOMMENDED GUIDELINES FOR THE USE OF UNMANNED AIRCRAFT (2012) ("U[nmanned aircrafts] will only be operated by personnel, both pilots and crew members, who have been trained and certified in the operation of the system.").

Agencies and legislatures also have established predicate requirements—ranging from a legitimate purpose to probable cause—for a variety of investigative activities, including those that would not constitute a Fourth Amendment search. See, e.g., SEATTLE POLICE DEP'T MANUAL, 12.045 BOOKING PHOTO COMPARISON SOFTWARE (2014) (requiring officer to establish "reasonable suspicion" before using facial-recognition software); MICHIGAN STATE POLICE, STATEWIDE NETWORK OF AGENCY PHOTOS: ACCEPTABLE USE POLICY 3 (restricting use of *mobile* facial-recognition software to where officer has "probable cause," valid court order, or individual is unable to provide reliable identification); SALT LAKE CITY POLICE DEP'T, POLICY MANUAL, POLICY 612.5.1: COVERT USE OF SOCIAL MEDIA 482 (2018) (requiring "reasonable suspicion" for use of covert alias on social media for investigative purposes); AUSTIN POLICE DEP'T, POLICY

MANUAL, POLICY 455.6: UTILIZATION AND ACCESS TO SOCIAL MEDIA MONITORING TOOLS 414 (2017) (requiring "reasonable suspicion" or "criminal predicate or threat to public safety" before using social media for investigative purposes); GEORGIA BUREAU OF INVESTIGATIONS, GUIDELINES FOR THE USE OF SOCIAL MEDIA BY THE INVESTIGATIVE DIVISION (2012) 31-32 (requiring "reasonable suspicion" or "criminal predicate or threat to public safety" before creating online alias on social media for investigative purposes).

The requirement of supervisory approval is another common regulatory technique, which can be used either in conjunction with a predicate, or as an alternative safeguard in circumstances in which it may be difficult to articulate precise standards in advance. See, e.g., NEW ORLEANS POLICE DEP'T, OPERATIONS MANUAL, CHAPTER 1.2.4: CONSENT TO SEARCH 4 (2018) ("Before an officer may conduct a consent search, the officer must have the express approval of his or her supervisor."); L.A. CNTY. SHERIFF'S DEP'T POLICY, USE OF CELL-SITE SIMULATOR TECHNOLOGY (2016) ("Each use of a cell-site simulator by qualified Department personnel must be approved by the Chief of Detective Division or his/her designee(s) prior to deployment of the simulator."); SEATTLE POLICE DEP'T MANUAL, 5.125: SOCIAL MEDIA (2019) ("Any employees using non-official social media accounts for investigative purposes will obtain written permission from the Chief of Police, regardless of duty assignment."); GEORGIA BUREAU OF INVESTIGATIONS, GUIDELINES FOR THE USE OF SOCIAL MEDIA BY THE INVESTIGATIVE DIVISION 32 (2012) (requiring supervisory approval to create online alias or engage in online undercover activity); SALT LAKE CITY POLICE DEP'T, POLICY MANUAL, POLICY 612.5.1: COVERT USE OF SOCIAL MEDIA 482 (2018) (requiring supervisory approval to use covert online alias for investigative purposes).

And as discussed in greater detail in § 3.03, agencies have provided guidance to officers on how to limit the scope of intrusions in various ways. See, e.g., BALTIMORE POLICE DEP'T, POLICY 1004: CELL-SITE SIMULATORS (2016) (limiting data captured by Stingray technology to specific criminal investigations and mandating that any data captured not relevant to the investigation be "purged" within 24 hours); OAKLAND POLICE DEP'T, POLICY 609: CELLULAR SITE SIMULATOR USAGE AND PRIVACY (2017) (limiting types of information that may be gathered using Stingray). Finally, both statutes and policies often specify the manner in which use must be documented and subjected to periodic audit. See, e.g., OR. REV. STAT. § 837.362 (2019) (requiring public agencies that use drones to establish data collection and storage procedures); TEX. GOV'T CODE ANN. § 423.008 (2013) (requiring law-enforcement agencies to submit biennial reports to governor and public regarding drone usage, including how often and when drones were used, the number of criminal investigations aided by use of drones, the type of information collected, and cost of using drones); BALTIMORE POLICE DEP'T, POLICY 1004: CELL-SITE SIMULATORS (2016) ("The BPD shall document each use of the equipment referenced in this Policy. Random audits of usage shall be conducted."); SEATTLE POLICE DEP'T, POLICY 12.045: BOOKING PHOTO COMPARISON SOFTWARE (2014) (setting forth specific procedures for retaining, logging, and auditing BPCS facial-recognition system and its associated data).

These regulatory requirements also are consistent with the guidance that law-enforcement organizations, such as the International Association of Chiefs of Police (IACP), have provided on

regulating the use of various investigative tools. For example, the IACP's model policy regarding automatic license-plate readers (ALPRs) instructs agencies to designate which officials will be permitted to utilize the technology and ensure that these individuals are trained adequately; to establish specific policies and protocols for accessing historical ALPR data; and to document all ALPR deployments and outcomes. DAVID J. ROBERTS & MEGHANN CASANOVA, INT'L ASS'N OF CHIEFS OF POLICE, AUTOMATED LICENSE PLATE RECOGNITION SYSTEMS: POLICY AND OPERATIONAL GUIDANCE FOR LAW ENFORCEMENT (2012). Similarly, IACP's model policy on "surveillance" activities states that long-term monitoring of individuals and groups must be approved in advance by supervisory officials, and only may be approved if there is reasonable suspicion of criminal activity and a clear showing that less intrusive techniques would not be effective. IACP LAW ENFORCEMENT POL'Y CTR., MODEL POLICY, SURVEILLANCE 1 (2009). The policy spells out a variety of additional considerations, including the safety of officers or members of the public, the risk of violating individuals' civil liberties, as well as the risk of undermining public confidence in the department. Id. at 3-4. Finally, consistent with these principles, the policy sets out procedures for minimizing the acquisition and retention of information that goes beyond the scope of the investigation and provides for documentation and ongoing supervisory review. Id. at 8.

A number of jurisdictions already have in place statutes requiring agencies to develop "use policies" to govern the use of various surveillance technologies and to address precisely the set of questions included here. See, e.g., OR. REV. STAT. § 837.362 (2019) (requiring public agencies that use drones to establish procedures governing drone data collection and storage); TEX. GOV'T CODE ANN. § 423.007 (2013) ("The Department of Public Safety shall adopt rules and guidelines for use of an unmanned aircraft by a law enforcement authority in this state."); see also ACLU, *Community Control over Police Surveillance*, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance (listing 13 cities that have passed legislation regarding community control of police surveillance, which requires city council approval for surveillance equipment and mandates procedures regarding data collection, training, and public impact reports); POLICING PROJECT, NYU SCHOOL OF LAW, *Authorized Policing Technology (APT) Act Working Draft*, https://www.policingproject.org/apt-act (proposing model ordinance for regulating police surveillance in a manner consistent with these Principles). In short, although these Principles address a pressing need for more comprehensive, uniform regulation of various suspicion-based investigative tactics, they also reflect a great deal of consensus on what a regulatory approach ought to entail.

§ 3.03. Minimization

Agencies should limit the scope of suspicion-based policing activities to that which is no broader than necessary to acquire the information or evidence that justifies the intrusion in question; and they should take steps to minimize the acquisition of information from third parties who themselves are not properly subject to investigation.

Comment:

a. Limiting the scope of intrusions. In carrying out suspicion-based policing activities, agencies and officers should take steps to limit the scope of the intrusion to that which is necessary to acquire the information sought. See § 1.04 (on the importance of minimizing the overall intrusiveness of policing). Courts routinely have held under the Fourth Amendment that a search must be limited to the specific persons or places in which the item sought could be found. An officer may not, for example, search for a sawed-off shotgun in a jewelry box. (Police may, of course, under the "plain view" doctrine, seize any contraband or evidence that they happen to come across.) Courts have applied similar principles to limit the scope of searches of computers or other personal devices that typically contain vast stores of information unrelated to the investigation at issue. Similarly, a number of state and federal statutes regulating various surveillance activities—most notably the wiretap provisions of Title III of The Omnibus Crime Control and Safe Streets Act of 1968—require agencies to minimize the acquisition of communications or records that go beyond the scope of the original authorization.

This same general principle should apply to investigative activities that fall short of a Fourth Amendment search. Minimization is particularly important when it comes to technologically enhanced searches, or searches of third-party records, which have the potential to sweep in a great deal of personal information beyond that which is originally sought. Agencies can accomplish this in various ways. For example, some models of drones can be programmed to follow a specific flight path and avoid pointing their cameras at any location that is not covered by the authorization in question. When searching a person's location history to confirm whether the individual was near a particular crime scene, officers can refrain from looking up information about any other addresses or locations where that person has been.

REPORTERS' NOTES

A bedrock principle of Fourth Amendment law is that searches must be narrowly tailored to ensure that they do not "take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Maryland v. Garrison, 480 U.S. 79, 84 (1987); see also TELFORD TAYLOR, TWO STUDIES OF CONSTITUTIONAL INTERPRETATION 24-41 (1969). The scope of a lawful search under the Fourth Amendment is "defined by the object of the search" and limited to "the places in which there is probable cause to believe that it may be found." United States v. Ross, 456 U.S. 798, 824 (1982); Arizona v. Hicks, 480 U.S. 321, 325 (1987) ("[T]aking action, unrelated to the objectives of the authorized intrusion, . . . produce[s] a new invasion of respondent's privacy

unjustified by the [] circumstance that validated the entry."). As the Court explained in *Ross,* "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." 456 U.S. at 824.

This principle takes on still greater importance in the digital world. Riley v. California, 573 U.S. 373, 396-397 (2014) ("[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house."); Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 3 (2015) (noting that "[t]he facts of computer storage . . . create the prospect that computer warrants that are specific on their face will resemble general warrants in execution simply because of the new technological environment"). Likewise, searches of large private databases "have the potential to expose exceedingly sensitive information about countless individuals not implicated in any criminal activity, who might not even know that the information about them has been seized and thus can do nothing to protect their privacy." United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010). See also § 2.05 (Acquiring or Accessing Data, Records, or Physical Evidence Held by Third Parties).

For this reason, courts and policymakers have imposed a variety of limitations on the scope of permissible intrusions. In Groh v. Ramirez, 540 U.S. 551 (2004), for example, the Court made clear that for physical searches, the warrant itself must identify not only the particular place to be searched, but also the items sought. Cf. Andresen v. Maryland, 427 U.S. 463 (1976) (upholding a warrant authorizing the seizure of any evidence "showing or tending to show fraudulent intent [in violation of a specified code provision] . . . together with other fruits, instrumentalities and evidence of crime at this [time] unknown"). In the context of cell-phone searches, courts have required agencies to submit search protocols that limit the scope of the search to the specific applications or functions that are likely to contain the information sought. E.g., In re Search of Apple iPhone, IMEI 013888003738427, 31 F. Supp. 3d 159, 169 (D.D.C. 2014) (denying search warrant application for cell phone because it did not explain "how the search will proceed, and thus how the government intend[ed] to limit its search of data outside the scope of the warrant"); United States v. Phua, Nos. 2:14-cr-00249-AGP-PAL, 2015 WL 1281603, at *7 (D. Nev. Mar. 20, 2015) (same). Similarly, courts have required search protocols or prescreening procedures before granting search-warrant applications for e-mail accounts. E.g., In re Search of Info. Associated with [Redacted]@mac.com, 25 F. Supp. 3d 1, 8-9 (D.D.C. 2014) (requiring government to work with online-services provider to prescreen information based on specific search protocol); In re [Redacted]@gmail.com, 62 F. Supp. 3d 1100, 1104 (N.D. Cal. 2014) (denying search warrant application for e-mail account and suggesting that the government must, at minimum, identify a "date restriction" or make a "commitment to return or destroy evidence that is not relevant to its investigation"); see also Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 576-577 (2005) (arguing that the plain-view doctrine should be narrowed or abolished for digital-evidence searches).

Minimization requirements likewise have played an important role in federal statutes governing various forms of government information gathering and surveillance. See, e.g., Title III

of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (requiring officials to take steps to minimize interception of communications unrelated to wiretap authorization); Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801(h) (requiring "specific procedures . . . designed . . . to minimize the acquisition and retention . . . of non-publicly available information concerning non-consenting United States persons").

Importantly, legislatures and agencies have also recognized the importance of these protections in contexts that do not directly implicate the Fourth Amendment. For example, legislatures have imposed various limits on the use of drones. See, e.g., KY. REV. STAT. ANN. § 500.130 (providing that law enforcement utilizing an unmanned aircraft system (UAS) "shall minimize data collection on nonsuspects"). Agencies have also issued guidance restricting the use of automated license-plate recognition (ALPR) systems—including restrictions on queries of the dataset or limits on the purposes for which the system may be used. See, e.g., SEATTLE POLICE DEP'T MANUAL § 16.170 (restricting use of ALPR to limited purposes such as locating stolen vehicles, and noting that "ALPR will not be used to intentionally capture images in private area or areas where a reasonable expectation of privacy exists"). And some have imposed procedures for the use of social media—for example, by limiting the duration of social media investigations or prohibiting the retention of information that is unrelated to criminal activity. See, e.g., GEORGIA BUREAU OF INVESTIGATION INVESTIGATIVE DIVISION DIRECTIVE 8-6-5 (requiring officers to terminate investigation after 30 days if it does not yield information related to criminal activity); AUSTIN POLICE DEPARTMENT GENERAL ORDERS, G.O. 455.8, 455.9 (requiring investigations involving online alias to be reviewed every 90 days, and providing for deletion of all information that does not relate to criminal nexus within 14 days).

§ 3.04. Documentation, Auditing, and Reporting

In order to facilitate agency supervision and public accountability, policing agencies should, when practicable:

(a) require agency officials to document their use of suspicion-based policing activities;

(b) periodically review agency use of suspicion-based activities to determine compliance with agency policy, assess their efficacy, identify any potential concerns associated with their use, and make appropriate changes to agency policies and practices in response;

(c) periodically inform the public of which suspicion-based activities the agency is engaging in, with what regularity and to what degree of efficacy.

Comment:

a. Documentation. Agencies routinely rely on documentation, auditing, and reporting requirements to facilitate supervision, ensure compliance with agency policies, and assure the public that agencies are using their authority to search and seize in a judicious and nonarbitrary manner. Many agencies already require officers to document certain kinds of search and seizure activities, such as stops and arrests, and they issue annual reports that describe the sorts of offenses for which the techniques were used, as well as the demographics of those stopped or searched. Agencies also require officers to document deployments of various technologies, such as drones.

In deciding whether and how to document the use of any given policing activity, agencies should—consistent with § 3.02(b)—consider the feasibility of documenting each use, the risk of harm that could potentially result if the activity is used improperly, and the likelihood of uncovering possible misconduct or misuse in the absence of such documentation. For certain forms of technologically enhanced surveillance, such as the use of automated license-plate readers or social-media-monitoring software, documentation potentially can be incorporated into the technology itself through automated audit trails. In these contexts, it is difficult to justify the decision *not* to activate these capabilities, or not to conduct periodic audits to identify potential problems. These automated systems also could be augmented in various ways, for example by requiring officers also to briefly document the basis for taking the action in question, which can be used to facilitate more careful oversight and review. For other tools, including more traditional street-enforcement tactics, manual recordkeeping may be the only option—and, depending on the intrusiveness of the activity and the frequency with which officers engage in it, may not always be worth the effort. Even in these contexts, however, technology can help. Officer cellular phones can often be equipped with data-entry applications to facilitate quick and easy reporting. Agencies also could require officers to document the frequency with which they engage in certain policing activities without requiring them to provide more specific information about each use. Some agencies, for example, require officers to document business checks or police−citizen encounters through their computer-aided dispatch systems, which could be used to track other activities as well.

Agencies also should issue periodic reports that inform the public of the policing activities they are engaging in and the degree to which they have proven effective. Particularly when it comes to various surveillance technologies—such as drones, Stingrays, or facial-recognition software—this sort of reporting can facilitate more effective public scrutiny of police decisionmaking and lead

to more informed discussions about whether the benefits of using these technologies justify their budgetary and social costs.

Public reporting also can enable more informed judicial review. One of the challenges that courts often face is that they see only a small subset of police activity and, more often than not, see cases in which the police employed a particular tactic successfully to find inculpatory evidence or contraband. What they do not see are the many cases in which a particular tactic failed to turn up evidence. Having more and better data about the efficacy of various policing practices can help courts better assess to what extent the factors that officers are relying on—or the techniques they are using—are in fact consistent with what the U.S. Constitution requires to justify a search or seizure.

Although reporting requires a commitment of agency resources and therefore imposes costs of its own, in many instances these costs can be quite minimal. To the extent that agencies already are routinely documenting and auditing how they are using various technologies and tactics—which, as discussed in this Chapter and in Chapter 13, is an essential component of internal agency accountability—it should require little additional effort to generate aggregate statistics or de-identified data that can be publicly shared.

REPORTERS' NOTES

Policing agencies long have recognized that documenting, auditing, and reporting are important tools of both internal and external agency accountability. See, e.g., International Association of Chiefs of Police, Technology Policy Framework (January 2014), https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Technology%20Policy%20Framework%20January%202014%20Final.pdf (emphasizing importance of documentation, auditing, and enforcement in regulating use of surveillance technologies). Proper documentation and auditing can help ensure that individual officers are using information-gathering techniques in a manner that is consistent with agency policy, and they can ensure at the agency level that the policies and practices regarding the use of specific information-gathering techniques are consistent with the goals of public safety, harm-minimization, and agency legitimacy outlined in Chapter 1. Documentation and auditing can show, for example, that a particular investigative technique rarely is effective at yielding probative evidence in criminal investigation, and it can help agencies identify alternative strategies to pursue. See Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 42 (2016) ("When we know *whether* and *how* the police have adopted a big data tool to expand their surveillance discretion, we can assess whether such technologies are worth their financial, institutional, and social costs."); see, e.g., ACLU, YOU ARE BEING TRACKED: HOW LICENSE PLATE READERS ARE BEING USED TO RECORD AMERICANS'

MOVEMENTS 13-15 (July 2013), https://www.aclu.org/files/assets/071613-aclu-alprreport-opt-v05.pdf ("Of the 1,691,031 plates scanned by the Minnesota State Patrol from 2009–2011, just 852 citations were issued and 131 arrests were made. That is 0.05 percent of plate reads." (internal citations omitted)). Routine public reporting can facilitate more informed discussion of agency practices—and often can help assuage public concerns about how particular tactics or technologies are used. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1848 (2015). It also can help courts to better supervise police use of information-gathering techniques that trigger Fourth Amendment scrutiny. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2075 (2016) (arguing that systematic facts allow a judge to "assess the consistency, the descriptive accuracy, and even the predictive accuracy of the probable-cause scripts that are routinely presented to her as justifications" for Fourth Amendment searches); Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561, 634 (2019) ("[D]ata encourages courts to think programmatically about the Fourth Amendment.").

Many agencies already require officers to document a variety of information-gathering activities—ranging from consent searches and field interviews, to searches of automated license-plate reader (ALPR) databases and drone deployments. See, e.g., SAN JOSE POLICE DEP'T DUTY MANUAL L 3310 (providing for documentation of field interviews); SEATTLE POLICE DEP'T MANUAL § 16.170 POL-5 (requiring officers to document their reason for accessing historical ALPR data); BALTIMORE POLICE DEP'T, POLICY 1004, CELL-SITE SIMULATORS (2016) (requiring documentation of Stingray use). And agencies at times make aggregate data public as well. See, e.g., *About*, POLICE DATA INITIATIVE, https://www.policedatainitiative.org/ (initiative involving more than 130 law-enforcement agencies that have released more than 200 datasets to promote open data and transparency in policing). Finally, a number of jurisdictions have adopted statutes or ordinances requiring agencies to document and report on the use of various techniques. See, e.g., SEATTLE, WA., SURVEILLANCE ORDINANCE 1253156 § 14.18.060 (2017) (requiring annual, detailed reports on surveillance-technology use); BERKELEY, CA., SURVEILLANCE TECHNOLOGY USE AND COMMUNITY SAFETY ORDINANCE 7,592–N.S §§ 2.99.020(2), 2.99.070 (same); OR. REV. STAT. ANN. § 131.935 (requiring agencies to collect demographic data on traffic stops); N.H. REV. STAT. ANN. § 261:75-b(XI) (requiring agencies using APLRs to report annually number of devices in use, matches made, matches that resulted in stops or searches of vehicles or individuals, and other requested information); ARK. CODE ANN. § 12-12-1805 (requiring entities using APLRs to compile statistical data including number of license plates scanned and number of matches into format sufficient for public review every six months).

In most agencies, however, documenting, auditing, and reporting on the use of information-gathering techniques is patchy at best. Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013) (arguing that "data collection and research efforts [] fall far short of what we would need to make informed judgments about policing"). This concern over recordkeeping is particularly acute with the expansion of big-data tools that expand the surveillance discretion of police, such as ALPRs and the use of social media data. Joh, supra at 20; Hannah

Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917 (2021) (arguing that modern policing practices and new technologies allow police to engage in "low-visibility" strategies and have decreased police transparency).

The lack of data regarding the use of various information-gathering techniques makes it difficult to answer even rudimentary questions about their efficacy—or the manner in which they are used. Barry Friedman & Elizabeth G. Jánszky, *Policing's Information Problem*, NYU School of Law, Public Law Research Paper No. 19-39, at 15–21 (Sept. 1, 2019) (arguing that we lack information to assess utility or social costs of many policing practices, such as ALPRs, body-worn cameras, and facial-recognition technology). The absence of accurate information also can generate community mistrust—and, ultimately, backlash against the technology itself. See, e.g., Gregory McNeal, *Drones and Aerial Surveillance: Considerations for Legislatures*, BROOKINGS INST. (Nov. 2014), https://www.brookings.edu/research/drones-and-aerial-surveillance-considerations-for-legislatures/ (noting that lack of transparency around use of drones may lead citizens to believe that they "represent Big Brother's eye in the sky").

Although routine documenting, auditing, and reporting undoubtedly impose some costs on agencies, these costs can be mitigated in various ways. Most agencies already have systems in place to facilitate internal record-keeping—such as computer-aided dispatch (CAD) and record management systems (RMS)—which also can be utilized to share information with the public. POLICE FOUNDATION, OPEN DATA AND POLICING: A FIVE-PART GUIDE TO BEST PRACTICES, PART I: DEVELOPING OPEN DATASETS (2018) [hereinafter OPEN DATA AND POLICING]. Similarly, many police technologies—such as social-media-monitoring software and ALPR systems—have built in auditing and recordkeeping capabilities which can be used to facilitate both internal and external accountability. See Joh at 29 (arguing that one of potential benefits of big-data policing is that it "will produce information capable of audits and third party examination—a stark contrast from conventional surveillance"); Ferguson at 615-616 (arguing that digital-surveillance technologies, such as GPS tracking and ALPR systems, can be used to monitor police and foster accountability); see also OPEN DATA AND POLICING (identifying variety of best practices, featuring case studies, for departments seeking to develop open-data sets); *ArcGIS Open Data for Police*, ESRI (explaining that police can leverage technology from geographic information systems to produce open-data sets and providing an open-data solution services package to help agencies get started).

§ 3.05. Notice to Courts and Targets of Investigations

(a) Agency requests for a court order or warrant should identify the policing activities used to obtain the information underlying the request, as well as the methods and techniques to be used in executing the order requested.

(b) In cases in which the target is prosecuted, the agency or prosecutor should inform the target about any policing activities that produced evidence against the target.

(c) In a case in which the target is not prosecuted, the agency should inform the target of any particularly invasive methods or techniques that were used to gather information about the individual, although the agency may delay providing notice in so far as it would impede an ongoing investigation of either the individual or the broader criminal enterprise of which the individual is believed to be a part.

Comment:

a. Generally. This Section serves a number of important purposes. First, it enables courts to fulfill their constitutional obligation to define the scope of the Fourth Amendment and to supervise adequately searches and seizures that fall within the Fourth Amendment's reach. Second, it ensures that criminal defendants are afforded their due-process right to review the evidence against them and to challenge the use of any evidence that may have been obtained improperly. Third, it ensures that individuals are made aware of—and are able to challenge—governmental intrusions into their lives and property. These purposes are imperiled when agencies conceal from courts and from targets of government searches, particularly criminal defendants, the tactics they used or intend to use to obtain information. See also § 3.02 (discussing aggregate disclosure to the broader public).

In any number of instances, judges have expressed serious concerns that relevant information was kept from them. Such information includes the methods agency officials intended to use to execute a court order or warrant and the means by which agency officials gathered evidence to support the court order or warrant in the first place. For example, in warrant applications to search a particular address or location where the defendant was found, agencies sometimes have alluded to nonexistent confidential sources in lieu of disclosing the actual techniques, such as Stingray cell-site simulators, they used to locate the defendant. Law-enforcement officials also have relied on what sometimes is referred to as "parallel construction", which involves working backward to develop an alternative path for obtaining information or evidence in order to avoid disclosing how officials originally came upon it. Similarly, agencies, in requesting court orders and warrants, have at times not provided judges with full and candid information about the means by which officers intended to execute the order. Tactics such as these undermine the legitimacy of judicial proceedings, breed mistrust among judges regarding law-enforcement officers, and run the risk of circumventing constitutional or other protections.

b. Reasons to notify judges. Notice to judges is necessary to enable judges to perform the functions required of them by statutes and the Constitution. Court orders and warrants have evidentiary predicates, be they "relevance" to a legitimate investigation or "probable cause"; and judges have an obligation to assess independently whether the predicate has been met. Judges need to know the means by which the information was obtained in order to ensure that it is reliable and was obtained lawfully. The warrants themselves must describe with "particularity" the places to be searched and the items that may be seized. In order to be specific about what is permitted pursuant to a warrant, judges need to know what the requesting agency intends to do to execute it. This sort of notice is particularly important when an agency plans to seize computers or records that contain vast amounts of information—not only about the target but also potentially third persons. The same is true of certain forms of digital surveillance, which necessarily sweep up information about many people at once. Judicial supervision is essential to ensure that agency officials are taking the steps necessary to both minimize the collection of information that exceeds the scope of the investigation and regulate the use of any incidental records that are inadvertently obtained. See also § 3.03 (on limiting the scope of information-gathering activities).

c. Notice to individuals who subsequently are prosecuted. There are independent reasons to notify the targets of government information gathering. The most obvious apply to targets who subsequently become criminal defendants. Those individuals have a right to know how information about them was acquired so that they may challenge the lawfulness of the procedures used. They also have a due-process right to assure any evidence against them is reliable and to know of any possible exculpatory evidence, both of which may be implicated by the methods of information collection. Courts have long held that the government's interest in preserving confidentiality must give way when the information at issue is material to the defense. Because few issues are more central to the defense than the question of whether evidence was obtained lawfully and is therefore admissible against the accused, it is particularly important that this information be disclosed.

This does not mean that the government necessarily must reveal every detail about a particular technology or technique used. For example, courts have held that the government need not disclose the precise placement of an electronic-surveillance device or the precise technical specifications for a piece of equipment. But agencies should, at a minimum, provide sufficient information to enable defendants to address the accuracy or lawfulness of the investigative techniques that were used.

d. Notice to targets who are not prosecuted. Agencies also should—at least in some circumstances—provide notice to individuals who are the targets of information-gathering activities but who are not prosecuted. Under the Federal Rules of Criminal Procedure, as well as analogous state rules, agencies already are required to notify the targets of all searches and surveillance activities conducted pursuant to a warrant, although notice may be delayed to prevent flight, the destruction of evidence, or harm to witnesses. In some cases, individuals also must be notified when the government obtains information about them from third parties. See § 2.05 (addressing notice to targets of third-party information gathering). Such notice provisions ensure that individuals have an opportunity to challenge the legality of government intrusions into their lives and promote the broader systemic goal of ensuring the propriety and legality of government action.

A more difficult question arises with regard to information-gathering activities that are not conducted pursuant to a warrant or a court order. A blanket presumption in favor of providing notice of all information-gathering activities—every license-plate scan or query made of another agency's database—would impose an immense administrative burden on law enforcement. At least some of the information-gathering techniques that are subject to these Principles are minimally intrusive. In addition, many are used in the early stages of an investigation, long before it is clear whether or when an individual will in fact be prosecuted. Enterprise investigations in particular may take a long time to come to fruition. For at least some information-gathering activities, then, aggregate notice to the public, along with robust auditing by the agency itself, see § 3.02, may be sufficient to ensure that these techniques are used responsibly. However, for more intrusive information-gathering activities—including comprehensive data requests from third parties, trash drops, or long-term physical surveillance—notice may indeed be appropriate, and legislatures and agencies ought to consider requiring it, subject to the same sorts of delay provisions that apply to warrant-based searches.

e. Need for confidentiality. Any exceptions to disclosure requirements should be construed narrowly and generally limited to circumstances in which disclosure would lead to specific and articulable harms, such as retaliation against confidential sources. Generalized concerns that public awareness of a particular technology could eventually lead to attempts to circumvent or avoid it typically are not sufficient to justify withholding material information from courts. And certainly, agencies themselves should not be the ones to strike that balance unilaterally. A variety of

strategies, including submitting documents under seal, may be used to avoid widespread disclosure while giving courts the information that they need in order to fulfill their constitutional role.

REPORTERS' NOTES

1. Established law. Many of the propositions in this Section are matters of established law. For example, in Franks v. Delaware, the U.S. Supreme Court held that criminal defendants have a right to challenge warrants as being based on false statements made by officers in obtaining them—a right that defendants cannot exercise if critical information is kept out of warrant applications. 438 U.S. 154, 155-1556 (1978); see also United States v. Ferguson, 758 F.2d 843, 848 (2d Cir. 1985) (applying *Franks* to material omissions from affidavits as well); Olson v. Tyler, 771 F.2d 277, 281 n.5 (7th Cir. 1985) (same). Similarly, in Roviaro v. United States, the Court held that defendants are entitled to know the identity of confidential informants when that information is material to their defense. 353 U.S. 53, 62 (1957). Courts have applied similar principles to require disclosure of the nature or location of surveillance activity. See, e.g., United States v. Foster, 986 F.2d 541, 543 (D.C. Cir. 1993) (holding that defendant demonstrated need for disclosure of observation spot from which officer observed drug transaction in order to challenge officer's ability to identify defendant accurately); see also 18 U.S.C. § 2518(9) (Wiretap Act prohibition of use of intercepted communications against defendant unless defendant is provided copy of warrant application that resulted in court order). Similarly, notice to targets of warrant-based searches is mandated by Rule 41 of the Federal Rules of Criminal Procedure, as well as by analogous rules in various states. FED. R. CRIM. P. 41(f)(1)(C); see, e.g., CAL. PENAL CODE § 1535 (providing for notice of property seized pursuant to warrant), § 1546.2 (providing for notice of execution of warrant for electronic information); IDAHO COURT RULE 41(e)(2); MINN. STAT. ANN. § 626.16; WYO. R. CRIM. P. 41(f)(1)(C). A number of federal and state statutes likewise require notice be provided to targets when agencies seek to obtain certain kinds of information from third parties. See, e.g., Video Privacy Protection Act, 18 U.S.C. § 2710(b)(3) (requiring prior notice to customer if videotape-service provider discloses personally identifiable information to law enforcement).

Courts also have held in various contexts that in order to comply with the Fourth Amendment's particularity requirements, search-warrant applications must, at least in some circumstances, disclose the manner in which a search is to be conducted. See, e.g., In re Search of Apple iPhone, 31 F. Supp. 3d 159, 166 (D.D.C. 2014) (denying search-warrant application for cellphone because it lacked sufficient search protocol); United States v. Phua, 2015 WL 1281603, at *7 (D. Nev. Mar. 20, 2015) (denying search-warrant applications for cellphones and iPads because they lacked search protocols). This is particularly true in the context of computer searches and searches of third-party databases, for which courts may need additional information in order to ensure that the search they are authorizing does not exceed its permissible scope. See United States v. Galpin, 720 F.3d 436, 447 (2d Cir. 2013) (noting that "[t]he potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous," which "demands a heightened sensitivity to the particularity requirement"); United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1177 (9th Cir. 2010) (emphasizing that because

government searches of databases "have the potential to expose exceedingly sensitive information about countless individuals not implicated in any criminal activity," the interests of everyone "are best served if there are clear rules to follow"); Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. REV. BRIEF 1, 40 (2011) (comparing computer-search warrants to general warrants and concluding that courts can fulfill their constitutional duty only by imposing ex ante restrictions on execution of computer warrants). This same principle applies when police request to use novel search technologies and techniques—such as Stingrays and cell-tower dumps—that have the potential to sweep in data belonging to individuals who are unrelated to the case. See In re Application of U.S. for Warrant, 2015 WL 6871289, at *3 (N.D. Ill. 2015) (imposing requirements for use of cell-site simulator to address "collection of innocent third parties' information"); In re U.S. ex rel. Order Pursuant to 18 U.S.C. Section 2703(d), 930 F. Supp. 2d 698, 702 (S.D. Tex. 2012) (denying application for order seeking cell-tower dump, "a very broad and invasive search affecting likely hundreds of individuals," where agents didn't understand the technology nor discuss what they would do with innocent people's data). Importantly, the need for disclosure in these contexts does not necessarily turn on the propriety or desirability of permitting or requiring magistrate judges to impose search protocols for digital searches. Compare Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 VA. L. REV. 1241, 1246 (2010) (arguing that magistrates lack constitutional authority to impose ex ante search restrictions), with Adam M. Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 590-591 (2016) (arguing that magistrates should impose ex ante search protocols on cell-phone searches). Even if judges do not impose limits on scope, they must, at the very least, be able to understand what it is they are authorizing the government to do. See, e.g., United States v. Patrick, 842 F.3d 540, 546 (7th Cir. 2016) (Wood, J., dissenting) (expressing concern that courts "know very little about the [Stingray] device, thanks mostly to the government's refusal to divulge any information about it."); Zach Lerner, *A Warrant to Hack*, 18 YALE. J.L. TECH. 26, 44 (2016) (noting that "judges charged with ruling on remote access search warrant applications may not fully understand what they are being asked to authorize"); State v. Andrews, 227 Md. App. 350, 376 (2016) (holding that pen-register-order application which did not disclose intent to use cell-site simulator "failed to provide the necessary information upon which the court could make [] constitutional assessment[]").

The requirement that policing agencies disclose to courts the techniques used to obtain the information that forms the basis for the requested warrant or court order is less clearly established but nevertheless enjoys some support in existing law. At least one court has in fact held that such notice is constitutionally required. United States v. Moalin, Slip. Op. 3:10-cr-04246-JM-3, at 7 (9th Cir. Sept. 2, 2020). Others have lent support to this principle in a variety of ways. For example, a number of courts have held that evidence obtained as a result of a warrant-based search must be suppressed if the information used to support the warrant application was obtained unlawfully. E.g., United States v. Wanless, 882 F.2d 1459, 1466 (9th Cir. 1989) ("[T]he good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search."). And although some courts have applied the good-faith exception to the

exclusionary rule to admit the evidence, these same courts have made clear that the determination depends on the egregiousness of the prior unlawful conduct—which itself requires that the conduct be disclosed to courts. E.g., United States v. O'Neal, 17 F.3d 239, 243 n.6 (8th Cir. 1994) (holding that issuance of a search warrant cannot sanitize "clearly illegal police behavior"). Indeed, several courts have emphasized that the failure to disclose the unlawful conduct to the issuing magistrate at the time of the application counsels strongly in favor of suppression. See, e.g., United States v. Bain, 874 F.3d 1, 21 (1st Cir. 2017) (noting that application of good-faith exception depends "on the accuracy and completeness of the manner in which the information supporting the warrant was conveyed to the magistrate"); United States v. Reilly, 76 F.3d 1271, 1280-1281 (2d Cir. 1996) (holding that "the good faith exception does not apply when officers do not provide an issuing judge with details about their conduct during a pre-warrant search"). In addition, judges have, on a number of occasions, expressed concern that they were misled by police or prosecutors about the manner in which information was obtained. See, e.g., United States v. Patrick, 842 F.3d 540, 546 (7th Cir. 2016) (Wood, J., dissenting) (expressing concern that "the government appear[ed] to have purposefully concealed the Stingray's use [in executing an arrest warrant] from the issuing magistrate, the district court, defense counsel, and even this court").

2. Animating concerns. What animates these various cases and statutes is the basic notions that judges cannot fulfill their duty of independent oversight of the information-gathering process if they do not operate in a world of full information—and that individuals who are the targets of information gathering cannot exercise and protect their rights if critical facts are withheld from them. See United States v. Taylor, 935 F.3d 1279, 1303-1304 (11th Cir. 2019) (Tjoflat, J., concurring in part & dissenting in part) (arguing that "[i]t is especially important to demand candor in warrant applications" to ensure integrity in "a process which plays a crucial role in protecting [constitutional] rights"); United States v. Rettig, 589 F.2d 418, 422 (9th Cir. 1978) (finding that officers' failure "to advise the judge of all the material facts . . . deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant"); see also Stephen W. Smith, *Gagged, Sealed, and Delivered: Reforming ECPA's Secret Docket*, 6 HARV. L. & POLICY REV. 601, 620 (2012) (noting that in absence of notification, "law-abiding citizens never charged with a crime are prevented from ever learning of government intrusions into their electronic lives," which undermines their ability to protect their rights and hampers effective judicial and legislative oversight of these techniques).

To be sure, at times there may be reasons to limit notification to targets or defendants, or to delay it for a period of time. Both federal and state statutes, for example, permit the government—with court approval—to delay notification of wiretaps, orders, and other covert surveillance activities for a period of time when there is reason to believe that notice would put witnesses in danger, lead to the destruction of evidence, or otherwise seriously hamper an ongoing investigation. E.g., USA PATRIOT Act § 213, 18 U.S.C. § 3103a(b) (providing for delayed notice of a warrant or court order if "the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result" such as flight, destruction of evidence, or harm to witnesses); Wiretap Act, 18 U.S.C. § 2518(8)(d) (providing for notice

within 90 days of when wiretap order expires, but allowing for postponement upon "showing of good cause."). Similarly, courts have recognized that the need to protect the identity of confidential informants may prevail over a defendant's interest in disclosure—at least in circumstances in which the information is not essential to preparing an adequate defense. E.g., United States v. Napier, 436 F.3d 1133, 1136 (9th Cir. 2006) (balancing defendant's interest in disclosure against government's interest in ensuring informant's safety and upholding denial of motion to unseal); United States v. Cintolo, 818 F.2d 980, 1003 (1st Cir. 1987) (holding that government need not disclose precise location of electronic-surveillance equipment). And of course, for certain kinds of information-gathering activities, such as the use of automated license plate readers (ALPRs)—mandatory notification simply may not be feasible.

3. Regulatory framework. This Section addresses these competing concerns in two ways. First, in the case of criminal defendants, subsection (b) adopts a strong presumption in favor of disclosure of the information-gathering techniques that were used. As courts have pointed out, defendants cannot identify potential problems with the government's information-gathering activities unless they are apprised at least in general terms about the techniques that are used. See, e.g., United States v. Rose, 2012 WL 1720307 (D. Mass. 2012) (finding that defendant had "met his burden of proof to the extent that some of the requested information" about GPS surveillance device used to track his location "may help him to delineate the scope of a possible Fourth Amendment violation."); United States v. Hartman, 2015 WL 13864168 (C.D. Cal. 2015) (granting defendant access to certain information about software used to obtain evidence against him). As the Comment explains, however, subsection (b) does not necessarily require that agencies disclose every last detail about the technique at issue; rather, it requires that they provide defendants with enough information to contest the accuracy, validity, and lawfulness of the various techniques that were used. Meanwhile, subsection (c)—which applies to targets who are not eventually prosecuted—urges disclosure primarily in the case of more intrusive information-gathering techniques and permits delayed notification when necessary to preserve the integrity of the investigation.

Disclosure to judges, however, does not raise any of these same concerns. Courts have various mechanisms in place to ensure confidentiality for highly sensitive information. See, e.g., FED. R. CRIM. P. 49.1 (providing for redactions, filings under seal, and protective orders to protect private information). And disclosure to courts would not face the sorts of resource constraints that might preclude mandatory notification to all targets of minimally intrusive information-gathering techniques.

Finally, concern that disclosure—either to defendants or to the courts—will invite greater public scrutiny or regulation of a particular law-enforcement tactic should not be used to justify withholding information. Indeed, the very fact that public awareness of a particular tactic or technique might invite greater regulation is an argument in favor of disclosure, not against it. See generally Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917 (2021) (arguing that transparency plays significant role in reforming policing); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U.L.

REV. 1827 (2015) (same). There have been a number of examples in recent years of agencies concealing the use of various investigative techniques through the use of "parallel construction," which involves recreating an alternative path to the evidence in order to avoid disclosing how it was originally obtained. See, e.g., OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, A REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S USE OF ADMINISTRATIVE SUBPOENAS TO COLLECT OR EXPLOIT BULK DATA (2019) (finding that DEA engaged in parallel construction to conceal bulk-data-collection programs); Kim Zetter, *Emails Show Feds Asking Florida Cops to Deceive Judges*, WIRED (June 19, 2014), https://www.wired.com/2014/06/feds-told-cops-to-deceive-courts-about-stingray/ (reporting that Florida police had routinely told judges in warrant applications that they obtained information from confidential source rather than disclosing use of Stingrays). When these techniques and programs eventually became public, there was considerable public debate about the propriety of their use. See, e.g., Aaron Gregg, *FBI Surveillance Devices May Interfere with 911 calls, U.S. Senator Says*, WASH. POST (Aug. 24, 2018), https://www.washingtonpost.com/business/2018/08/24/fbi-surveillance-devices-may-interfere-with-calls-us-senator-says/ (reporting on letter by Sen. Ron Wyden asking DOJ to be more forthcoming on potentially disruptive nature of cell-site simulators); *Bipartisan Committee Staff Report: Clear Guidelines Needed For "Stingray" Devices*, *H. Comm. on Oversight*, 114th Cong. (Dec. 19, 2016), https://republicans-oversight.house.gov/report/bipartisan-committee-staff-report-clear-guidelines-needed-stingray-devices/ (bipartisan report recommending that Congress pass legislation regulating use of cell-site simulators). The end result was a combination of self-regulation by law enforcement as well as greater legislative and judicial oversight. See, e.g., Adam Lynn, *Tacoma Police Change How They Seek Permission to Use Cellphone Tracker*, NEWS TRIBUNE (Nov 15, 2014) (reporting that local judges started requiring police to use explicit language to get permission to use cell-site simulators after unwittingly signing orders police said authorized them to use the devices).

CHAPTER 4
POLICE ENCOUNTERS

§ 4.01. Officer-Initiated Encounters with Individuals

An encounter is a face-to-face interaction between an officer and a member of the public, conducted for the purpose of investigating unlawful conduct or performing a caretaking function. It does not include social, non-investigative, or non-caretaking interactions between a police official and a member of the public.

Consistent with current law, this Chapter adopts the following terms and definitions:

(a) "Initial encounter": An encounter in which the officer does nothing to impede the individual from leaving or otherwise terminating the encounter—and a reasonable person would in fact feel free to do so.

(b) "Stop": An encounter that is brief in duration and does not constitute an arrest and that a reasonable person would not feel free to leave or otherwise terminate.

(c) "Frisk": A pat-down search of an individual's body during a stop, conducted over the individual's clothing for the purpose of finding a weapon.

(d) "Custodial arrest": An encounter in which an individual is taken into custody and transferred to a stationhouse or other temporary holding facility.

Comment:

a. Encounters, generally. Face-to-face encounters between officers and members of the public are an essential—and common—aspect of police work. Officers approach people on the street to ask for information, or because they see someone behaving suspiciously and wish to investigate further. Officers conduct traffic stops and issue citations to enforce traffic laws. They break up fights and help defuse tense situations. And when necessary, they take individuals into custody. All of these are essential tools of law enforcement that, when used appropriately, enable officers to help maintain public safety.

At the same time, as discussed in greater detail throughout this Chapter, these sorts of interactions have the potential to erode the very sense of public safety and security that they are meant to promote. When officers treat residents in a harsh or aggressive manner, routinely stop individuals who are innocent of any criminal offense, or fail to explain their actions when there is

ample opportunity to do so, community members may come to mistrust the police and question the legitimacy of law enforcement. Individuals who do not trust the police may be less likely to report crime or otherwise cooperate and engage with law enforcement in the co-production of safety. They also may be less willing to comply with the law. In addition, encounters that are unduly coercive, or are conducted in a discriminatory manner, can impose physical, dignitary, and other harms on the individuals involved.

These Principles offer guidance to agencies and to officers on how to use these tools in a way that promotes, rather than detracts from, law enforcement's public-safety mission. Although policymaking around the use of encounters often is said to involve a tradeoff between liberty and privacy on the one hand and security on the other, that is not always the case. There are instances in which certain police tactics actually can undermine safety while intruding on liberty and privacy. When police act in a manner that is unduly coercive or intrusive, they may in fact be undermining the broader goal of keeping the public safe. And even when there is a tradeoff—which does occur at times—that line must be drawn carefully to maximize the benefits of policing while minimizing any harms. The Principles in this Chapter are designed to ensure that encounters between officers and members of the public are conducted in a manner that promotes the public's sense of safety and security, while at the same time promoting the safety of the officers carrying out those actions.

b. Social interactions excluded. The focus of this Chapter is on interactions between officers and members of the public conducted for an investigative or community-caretaking purpose. The community-caretaking purpose refers to actions that are not initiated for the purpose of investigating crime, such as when an officer enters a home to render aid to someone inside. Beyond investigative and community-caretaking actions, officers also interact with members of the public in order to better get to know the community and learn about its problems and concerns. These sorts of interactions are not the subject of this Chapter, and are addressed separately in the Section on community policing, § 1.08.

c. Initial encounters. These Principles use the term "initial encounter" to describe any interaction between an officer and a member of the public that is investigative in character, but legally falls short of a stop or an arrest. Although courts sometimes describe these as "voluntary" or "consensual" encounters, these Principles intentionally do not adopt that language because of a concern that at least some of the encounters characterized this way by courts are not in fact voluntary or consensual.

d. Stops. Consistent with constitutional law, these Principles define a "stop" as an encounter in which a reasonable person would not feel free to leave or to otherwise terminate the interaction. At the same time, agencies should be aware that many individuals may not in fact feel free to leave in circumstances that courts have said fall short of a stop. Studies consistently have shown that individuals often do not feel free to walk away or decline to speak with officers—even if officers behave in a nonthreatening manner, or make clear that the individual may terminate the encounter at any point. Indeed, the notion that individuals should feel free to terminate an encounter initiated by law enforcement is somewhat in tension with the notion, also reflected in case law, that individuals should assist law enforcement and comply with law-enforcement requests. When officers ask a motorist, "may I see your license?" that is clearly a command even when phrased as a question. It is unclear whether all individuals would understand the question "may I speak with you?" differently. In addition, the degree to which an individual feels free to leave may depend on that person's race, age, or gender, as well as prior experiences with law enforcement, which typically are factors that courts do not take into account, and of which officers themselves may be unaware. In cases of ambiguity, officers should ensure that they have a legitimate law-enforcement justification for initiating the encounter.

e. Frisks. This Principle borrows the terminology adopted by the Supreme Court in Terry v. Ohio, 88 S. Ct. 1868 (1968), to describe a limited pat-down search, conducted during a stop, over an individual's clothing, for the purpose of finding a weapon. As the *Terry* Court itself acknowledged, however, the use of the term "frisk" should not be understood to minimize the seriousness of the physical intrusion that it entails, and the importance of ensuring, consistent with §§ 4.02 and 4.06, that it is used both lawfully and sparingly. Finally, as discussed in § 4.04, the Court has extended the *Terry* rule to permit officers, in the course of a vehicle stop, also to conduct a protective sweep of those areas within the passenger compartment of a vehicle that are within the driver or passengers' immediate control. Although some courts have described these searches as "car frisks," in order to avoid confusion these Principles use "frisk" to refer to the limited search of a person, and "protective sweep" to describe a search of an automobile or other area.

f. Custodial arrests. These Principles distinguish between a custodial arrest—in which an individual is taken into custody and transported to the stationhouse or to a temporary detention facility—and a brief detention out in the field conducted for the purpose of issuing a citation. Although both a citation and a custodial arrest must be supported by probable cause, a custodial

arrest involves a much greater intrusion into the interests of the arrested person's privacy, autonomy, and bodily integrity, and also potentially exposes the arresting officer to a greater risk of harm. For those reasons, these Principles urge legislatures and agencies to permit officers to issue a summons or a citation in lieu of custodial arrest, and encourage officers to in fact do so when permissible under state law and consistent with the goal of public safety. See § 4.05. These Principles also distinguish between custodial arrests and stops for the purpose of issuing a summons in describing the circumstances under which officers should be permitted to conduct a frisk or a search. See § 4.06.

REPORTERS' NOTES

1. Encounters, generally. Leaders both in and out of law enforcement have emphasized the need to ensure that encounters are conducted in a manner that promotes public safety and police legitimacy. In particular, officials have recognized that the goals of safety and legitimacy are not in conflict with one another, but in fact are interrelated: Tactics that emphasize crime reduction at the expense of trust and security do not make communities safer as a result. See, e.g., Police Executive Research Forum, Constitutional Policing as a Cornerstone of Community Policing 16 (2015) ("[o]ur past approaches to policing didn't decrease the gap between us and the community. Increasing arrests for mostly nonviolent offenses didn't necessarily make our communities safer" (quoting Chief Ron Teachman)). The International Association of Chiefs of Police (IACP), for example, has acknowledged that use of heavy-handed enforcement tactics by departments has resulted in "a reduction in perceptions of police fairness, legitimacy, and effectiveness," to the detriment of public safety. IACP National Policy Summit on Community–Police Relations: Advancing a Culture of Cohesion and Community Trust (2015). Numerous studies support this conclusion. See Chris L. Gibson, Samuel Walker, Wesley G. Jennings & J. Mitchell Miller, *The Impact of Traffic Stops on Calling the Police for Help*, 20 CRIM. JUST. POL'Y REV. 10, 1-21 (2009); Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization* (Columbia Law School Public Law & Legal Theory Working Paper Group Paper No. 14-380, April 2014); Jennifer Fratello, Andrés F. Rengifo & Jennifer Trone, Vera Institute of Justice, Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications (2013).

2. Initial encounters and stops. Studies have shown that individuals may not in fact feel free to terminate encounters that courts would describe as "consensual" or "voluntary" as a matter of law. Janice Nadler writes that "empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse is extremely limited under situationally induced pressures" that are common to police–citizen encounters. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (2002); David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure*

Standard, 99 J. CRIM. LAW & CRIMINOLOGY 51 (Fall 2008); Alisa M. Smith, et al., *Testing Judicial Assumptions of the "Consensual" Encounter*, 14 FLA. COASTAL L. REV. 285 (2013); Kathryne M. Young & Christin L. Munsch, *Fact and Fiction in Constitutional Criminal Procedure*, 66 S.C. L. REV. 445 (2014). In one survey, less than one-quarter of respondents said that they would feel free to walk away if an officer approached them on the sidewalk and asked to speak with them, even if respondents did not wish to talk with the officer. Kessler, supra, at 53. Respondents who said they knew they had a legal right to walk away were only slightly more likely to feel free to do so. Id. at 78. As William Stuntz notes, "the truth is that ordinary people never feel free to terminate a conversation with a police officer." William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1215 (1998). See also Tracey Maclin, *Black and Blue Encounters—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991) ("common sense teaches us that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost.'").

A number of courts likewise have recognized that individuals may feel compelled to comply with officer requests, even when they are delivered in a polite and nonthreatening manner. The New Jersey Supreme Court, for example, has emphasized that "many persons, perhaps most, would view the request of a police officer to make a search as having the force of law." State v. Johnson, 346 A.2d 66, 68 (N.J. 1975). The U.S. Supreme Court itself appears to acknowledge the gap between legal and actual voluntariness—in Schneckloth v. Bustamonte, the Court repeatedly used scare quotes around the terms "voluntary" and "consent." 412 U.S. 218, 227, 228 (1973). The Court emphasized that the legal standard for voluntariness must strike a balance between legitimate law-enforcement interests and the need to ensure "the absence of coercion"—and that the Court's test reflects "a fair accommodation" of the interests involved. Id. at 227.

3. Custodial arrests. Both state and federal courts have recognized a distinction between a "custodial" arrest and a brief detention out in the field conducted for the purpose of issuing a summons, which some have referred to as a "non-custodial arrest." See, e.g., People v. Bland, 884 P.2d 312, 316 (Colo. 1994) (distinguishing "between custodial arrests, which are made for the purpose of taking a person to the stationhouse . . . and non-custodial arrests, which involve only temporary detention for the purpose of issuing a summons."); Linnet v. State, 647 S.W.2d 672, 674-675 (Tex. Crim. App. 1983) (same); State v. McKenna, 958 P.2d 1017, 1021-1022 (1998) (same). The U.S. Supreme Court has likewise made clear that there is a constitutionally significant difference between a seizure for the purposes of issuing a summons or a citation, and a full custodial arrest. Knowles v. Iowa, 525 U.S. 113 (1998) (holding that a warrantless search incident to arrest is permissible only in the context of a custodial arrest). See also David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for A Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143 (2000). There is no standard definition of a "custodial arrest" under the law. Courts and legislatures define it in different ways for different purposes. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 310 (2016). The definition here emphasizes police custody and conveyance to a law-enforcement facility, and does not depend on whether a suspect is searched thoroughly or "booked" such that a permanent record is made of the encounter.

§ 4.02. Justification for Encounters

(a) Absent state or federal law to the contrary, an officer may, in any location in which the officer is lawfully present:

(1) conduct an initial encounter with an individual without any suspicion that the individual is involved in or has evidence of a crime;

(2) conduct a stop of an individual based on reasonable suspicion to believe that the individual is involved in or has evidence of unlawful conduct;

(3) issue a summons or a citation to an individual based on probable cause that the individual has engaged in unlawful conduct; and

(4) conduct a custodial arrest of an individual based on probable cause that the individual has committed a felony or a misdemeanor, so long as an arrest is permitted under state law.

(b) Agencies should ensure that officers exercise this authority consistent with §§ 4.03 to 4.07.

(c) Encounters that would not be permissible under this Section because officers lack the required level of suspicion should not occur at all, unless they are conducted consistent with the requirements of Chapter 5, dealing with suspicionless searches and seizures.

Comment:

a. Generally. This Section describes the minimum level of suspicion or cause that an officer must have in order to initiate an encounter, conduct a stop, issue a summons, or make an arrest. It largely tracks what courts have said are the threshold constitutional requirements for those actions. However, just because officers *may* conduct a stop or an arrest does not mean that doing so is appropriate or consistent with the goals of public safety. Section 4.03 sets out additional factors that agencies should consider in providing guidance to officers on whether any of these actions are appropriate in a given case.

b. Initial encounters. As a matter of federal constitutional law, an officer may approach an individual for any reason so long as the officer does nothing to impede the individual's freedom to leave or otherwise terminate the encounter—and so long as a reasonable person would feel free to walk away or otherwise terminate the encounter. These Principles accept that understanding, recognizing nonetheless that there is a degree of fiction in the claim that individuals do indeed feel

free to leave or terminate encounters with the police. Some jurisdictions have imposed additional requirements on initial encounters—New York, for example, requires that officers have an "objective, credible reason" to approach a person on the street—these Principles do not go that route. Experience suggests that such requirements are both difficult to enforce and largely ineffective in addressing the concerns with the officer-initiated encounters described throughout this Chapter. Instead, it is important for agencies, consistent with § 4.03, to provide guidance and training to officers as to when these sorts of encounters are appropriate, as well as how they should be conducted to minimize the risk of undermining legitimacy and trust.

c. Stops based on reasonable suspicion. This Section adopts the standard first announced in Terry v. Ohio, 88 S. Ct. 1868 (1968), that a police officer may briefly detain a person or vehicle if the officer has reasonable suspicion to believe that the target of the stop is involved in or has evidence of criminal activity. Reasonable suspicion is more than a hunch. Officers must be able to narrate the reasons for their suspicion. Neither race, nor any other protected status, such as gender identity, should be used as a basis for reasonable suspicion to justify a *Terry* stop, unless the characteristic is part of a specific suspect description that includes substantially more information than the person's race or protected status.

Agencies also should consider requiring officers to articulate the specific offense that they believe has occurred or is about to occur. Although in *Terry* itself the officer was able to specify clearly the crime in question, courts since have upheld stops based on more generalized suspicion of criminal activity—for example, flight from an officer in a high-crime area. Even if legally permissible, these sorts of stops should be discouraged. Studies suggest that stops based on vague or generalized criteria are less likely to lead to arrest or to turn up any evidence of criminal activity, and therefore may result in unnecessary intrusions. There also is evidence to suggest that when officers rely on such criteria, racially discriminatory and class-based effects emerge.

A stop based on reasonable suspicion must be brief, typically no longer than 20 minutes, and must be limited in scope to investigating the offense that the officer suspects and can articulate, unless during the course of the stop the officer develops reasonable suspicion to believe that another offense has occurred or is about to occur. A stop that exceeds the scope or duration permitted on the basis of reasonable suspicion becomes a de facto arrest, and is unlawful absent probable cause to support it.

Whenever possible, the grounds for the stop should be memorialized in some fashion, preferably prior to the stop. Many officers today wear body cameras, which typically must be turned on before such stops. It should be a simple matter for the officer to state—when time permits—the basis for the stop. When time does not permit, the basis for the stop can be recorded on a form pertaining to the stop immediately after the fact. In addition, principles of procedural justice require that, absent some public-safety reason to the contrary, officers inform individuals why they are being stopped at some point during the encounter.

d. Past crimes as a basis for reasonable suspicion. Like probable cause, reasonable suspicion has a temporal dimension and may become stale. Although officers may stop an individual based on suspicion of a completed offense, officers must have some basis for thinking that the stop will in fact further an investigation of that offense. For example, if an officer sees a vehicle that previously had been seen leaving the scene of a robbery, an officer may have reasonable suspicion for stopping the vehicle to speak to the driver, even if the robbery occurred several days or weeks earlier. On the other hand, information that someone had been in possession of narcotics or a firearm at some earlier point in time would not justify a stop absent additional reason to believe that the individual currently is in possession of contraband or a weapon.

e. Arrests. An arrest is a more serious intrusion than a stop, and must therefore be based on a higher level of suspicion. An arrest must be supported by probable cause that the individual detained has committed a crime or a violation. Probable cause requires that an officer have sufficient facts to cause a reasonably prudent person to think that a crime is being or has been committed. An officer may develop probable cause based on direct observation of potential criminal activity, or based on a credible, corroborated tip from an informant. See also § 12.03. As with stops based on reasonable suspicion, officers should articulate the basis for an arrest as proximate as possible thereto. Given the wide array of criminal offenses for which police have discretion to arrest, an arrest should not occur unless it is necessary to protect the public or to ensure that the person appears in court. See § 4.05.

f. Programmatic seizures. The Principles in this Chapter apply to officer-initiated encounters that are based on suspicion specific to the individual or individuals involved. As discussed in greater detail in Chapter 5, officers also are permitted to search and seize individuals as part of a suspicionless search and seizure program, such as a sobriety checkpoint or airport security. Such programmatic searches and seizures need not be based on individualized suspicion,

but must instead be conducted in an evenhanded and nonarbitrary manner, according to a policy that is set out in advance. See § 4.05.

REPORTERS' NOTES

These Principles generally adopt the basic framework first announced in Terry v. Ohio, 392 U.S. 1 (1968), which recognizes three broad categories of police–citizen encounters: initial encounters, which do not require any suspicion; investigative stops, which must be supported by reasonable suspicion; and arrests, which must be supported by probable cause. As the U.S. Supreme Court explained in *Terry*, this approach accommodates the fact "that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." Id. at 10.

Courts repeatedly have emphasized that although a stop falls short of an arrest, it nevertheless constitutes a significant intrusion, and that officers must be able to point to specific, articulable facts relating to the person stopped that are indicative of involvement in a criminal offense. Department policies likewise mirror these admonitions. See, e.g., SEATTLE POLICE DEPARTMENT MANUAL § 6.220 (defining "reasonable suspicion" as requiring "specific, objective, articulable facts" that "would create a well-founded suspicion that there is a substantial possibility" of criminal conduct); NYPD PATROL GUIDE § 212-11 ("The officer must be able to articulate specific facts establishing justification for the stop; hunches or gut feelings are not sufficient."). In *Terry* itself, the Court relied on the fact that Officer MacFadden had seen three men take turns walking by the same store 24 times and peering into the window, conferring with one another in between trips—behavior that MacFadden concluded was strongly indicative of an impending robbery. The Court recognized that, in these circumstances, although MacFadden lacked probable cause to make an arrest, it was reasonable for him to briefly detain Terry to confirm or dispel his suspicions. 392 U.S. at 4.

In the decades after *Terry* was decided, however, courts—including the U.S. Supreme Court—have interpreted reasonable suspicion to require much less than the constellation of facts that had prompted Officer MacFadden to act. In Illinois v. Wardlow, 120 S. Ct. 673 (2000), for example, the Court upheld a stop based on "unprovoked flight" from the police in a "high crime area." As many have since pointed out, factors such as these may not be indicative of criminality, particularly in communities in which there is considerable fear or mistrust of the police. See, e.g., Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (the fact that in some communities Black and Hispanic males are disproportionately singled out by the police "suggests a reason for flight totally unrelated to consciousness of guilt."). Courts also have permitted stops at airports and bus terminals based on a drug-courier profile that deems virtually *all* conduct potentially suspect. As Judge Pratt pointed out in U.S. v. Hooper, a traveler's actions under the profile may be suspicious if the person "arrived late at night" or "arrived early in the morning"; used a "one-way ticket" or a "round-trip ticket"; "traveled alone" or "travelled with a companion"; "acted too nervous" or "acted too calm"—just to name a few. 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting); see also United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987), rev'd 490

U.S. 1 (1989) (noting the profile's "chameleon-like way of adapting to any particular set of observations").

Officers in agencies across the country have relied on these sorts of nebulous factors to justify literally millions of stops, an overwhelming percentage of which have failed to turn up any evidence. In New York, for example, researchers found that a majority of the more than 4.4 million stops were justified based on factors such as the suspect being in a "high crime area" or exhibiting "furtive movements." Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015). Officers recovered guns in just 0.1 percent (one-tenth of one percent) of stops. See Floyd v. New York, 959 F. Supp. 2d 540, 542 (S.D.N.Y. 2013). Philadelphia police stopped more than 200,000 pedestrians in the first half of 2012, and recovered just three guns. See Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281 (2016) (citing these and other comparable statistics); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854-858 (2011) (citing additional studies).

In addition to the sheer number of stops that produce no evidence of criminality, the evidence is overwhelming that when stops are used with frequency, the impact of those stops falls disproportionately—often extremely disproportionately—on people of color. In New York, Black and Hispanic individuals accounted for 52 percent of the population, and 83 percent of individuals stopped. Floyd, supra, at 559. In Los Angeles, one study found that African Americans were more than 2.5 times more likely to be stopped than were whites. Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (2008). See also U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 19 (2014) (hereinafter NEWARK DOJ REPORT) (finding that stops disproportionately impacted minority residents); U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 47 (2016) (same).

A federal court ultimately found that the justification New York City Police Department (NYPD) officers provided for a substantial percentage of stops fell short of reasonable suspicion. But it is hard to deny that the permissive stance that courts generally have adopted in defining "reasonable suspicion" has given officers considerable leeway to conduct these sorts of encounters. Given the courts' permissive stance, these Principles are designed to provide officers and agencies with more sturdy guidance to ensure that encounters are safe, productive, and supportive of more trusting relationships between officers and members of the public.

Although a few scholars have argued in favor of abandoning the reasonable-suspicion standard and replacing it with a more stringent probable-cause standard, these Principles advocate instead a return to the principles articulated in *Terry* itself. Throughout the opinion, the Justices emphasized the need for "specificity in the information upon which police action is predicated"—and detailed at length the constellation of facts that MacFadden had observed over a period of time that led him to suspect Terry and his companions of planning a robbery. In *Terry*, Officer MacFadden briefly stopped three individuals he suspected of committing a "particular crime[] in progress." Today, agencies instruct officers to "proactively polic[e] people that they suspect *could*

be offenders." Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 1, 164 (2015).

Importantly, these Principles make clear that officers should be able to articulate not only the basis for their suspicion, but also the particular offense they that they suspect. See, e.g., TUCSON POLICE DEPARTMENT GENERAL ORDER 2214.1 (adopting this standard); Friedman & Stein, supra at 347 (advocating this approach). This standard would help to ensure that officer suspicions are indeed based on more than a mere "hunch." In addition, this standard would encourage officers to pay more attention to behavioral cues indicative of criminal activity (which, like "casing," typically are indicative of a particular crime), as opposed to non-behavioral characteristics such as location or manner of dress. Studies suggest that stops based on more specific, behavioral factors are more likely to turn up evidence or contraband and lead to overall reductions in crime. For example, a study conducted by the New York State Attorney General's office of NYPD stop data found that stops based on factors that clearly gave rise to reasonable suspicion were substantially more likely to result in an arrest than were stops based on vaguer criteria that arguably fell short of reasonable suspicion. See Civil Rights Bureau, Office of the Attorney General, The New York City Police Department's "Stop & Frisk" Practices (1999); see also Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City's Stop-and-Frisk Policy*, 10 ANN. APPL. STAT. 365 (2016); Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43. Studies also suggest that officers are more likely to rely on non-behavioral cues in deciding whether to stop racial minorities. Geoffrey P. Alpert, John M. MacDonald & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407 (2005). To the extent that stops based on non-behavioral cues also are less effective, this raises serious procedural-justice concerns.

At the same time—in view of the difficulty that courts have had in defining the precise requirements of reasonable suspicion—these Principles do not advocate in favor of the approach followed in New York state, which requires causal thresholds for all encounters that legally fall short of a stop. Under People v. De Bour, 352 N.E.2d 562 (N.Y. 1976), officers in New York must have "an objective, credible reason" to approach a person on the street, and must have "founded suspicion that criminality is afoot" in order to ask more prying questions. As Professor Debra Livingston notes, the New York courts' approach "has not really worked" to accomplish the goal of "protect[ing] individuals from arbitrary or intimidating police conduct." Debra Livingston, *Police Patrol, Judicial Integrity, and the Limits of Judicial Control*, 72 ST. JOHN'S L. REV. 1353 (1998). A survey of New York cases makes clear that "cases with almost identical facts produce different results." Id. at 1361 n.12 (quoting BARRY KAMINS, NEW YORK SEARCH AND SEIZURE 103 (1997)); see also WAYNE R. LAFAVE, 4 SEARCH & SEIZURE § 9.4(e) (5th ed.) (noting similar confusion); Mark A. Leslie, *The Gradation of Fourth Amendment Doctrine in the Context of Street Detentions:* People v. De Bour, 38 OHIO ST. L.J. 409 (1977) (expressing concern that "police may be prompted by lower requirements of suspicion to act more freely upon their instincts.").

Instead, these Principles urge agencies to ensure that officers understand that initial encounters may be unwelcome or nonconsensual, and that officers should—consistent with

§ 4.03—limit the use of such encounters to circumstances in which they directly further important law-enforcement interests and minimize harm. Officers also should minimize the intrusiveness of all encounters by following the principles of procedural justice outlined in § 4.03(b).

§ 4.03. Ensuring the Legitimacy of Police Encounters

(a) Officers should exercise their authority to approach, stop, and arrest individuals, recognized in § 4.02, in a manner that promotes public safety and positive police–community relations, and minimizes harm.

(b) Officers should establish the legitimacy of their encounters with members of the public by treating individuals with dignity and respect, explaining (insofar as is not inconsistent with investigative objectives) the basis for the officers' actions, giving individuals an opportunity to speak and be heard, and engaging in behaviors that convey neutrality, fairness, and trustworthy motives.

(c) Agencies should ensure that officers carry out these principles through policy, recordkeeping, and training and supervision of officers.

Comment:

a. Generally. Officers have considerable discretion in deciding whether to initiate an encounter with a member of the public, issue a summons, or conduct an arrest. In some circumstances, the necessity of officer intervention is readily apparent. An officer may witness a crime in progress or observe an individual driving recklessly. Or an officer may see someone behaving in a manner that very likely is indicative of criminal activity. In Terry v. Ohio, 88 S. Ct. 1868 (1968), an officer observed a pattern of behavior that gave him strong reason to believe that the individuals involved had been casing a jewelry store. Intervening in those circumstances is good police work, and generally should be encouraged.

Much of the controversy surrounding the use of officer-initiated encounters falls on the other end of the spectrum. In some jurisdictions, officers are instructed to make large numbers of traffic and pedestrian stops in order to create opportunities to conduct searches or frisks to look for weapons or contraband. Officers make stops on the basis of less individualized, vague criteria, such as claiming that an individual has engaged in "furtive movements" while in a high-crime area. Officers also make stops to investigate low-level infractions, such as riding a bicycle on a sidewalk, trespassing, driving with a broken taillight, or failing to signal when changing lanes. The

goal is to use the stop as a basis for investigating the possibility of more serious crimes—such as drug trafficking or possession of a firearm—for which the officer has little or no articulable suspicion. Similarly, officers walk up and down the aisles of buses and ask to search some passengers' persons or luggage, again with little or no articulable suspicion.

There are a number of concerns with using officer-initiated encounters in this manner. All officer-initiated encounters impose some costs on the person stopped. At a minimum, the encounter takes up time, and can result in missed appointments and obligations. Individuals may experience the stops as frightening or intrusive. Any time an officer initiates an encounter with a member of the public, there also is some risk that the encounter could escalate and put both the officer and individual at risk of harm. Stops and arrests also can result in complaints against officers, as well as litigation against the department, particularly when they are conducted in the absence of individualized suspicion or are deployed in racially biased ways.

There are costs to public safety and the legitimacy of law-enforcement agencies as well. When officers stop or approach individuals on the basis of little or no suspicion, there is a much greater likelihood that the individual stopped will be innocent of any crime or violation. Individuals who are stopped may question the officers' motives for stopping them, and may conclude that they were singled out unfairly. Numerous studies have found that individuals who are stopped and questioned by police—particularly if they are stopped frequently—are less likely to report crimes or otherwise cooperate with the police. In the aggregate, communities in which such stops are frequent may come to view these enforcement practices as evidence of institutionalized mistrust, which itself can undermine the legitimacy of the police and reduce residents' willingness to cooperate with law enforcement, to the detriment of overall public safety.

Similar concerns are present when officers take steps to enforce minor offenses that are committed frequently by many citizens but largely ignored. Studies suggest that individuals routinely distinguish between legality and legitimacy. Individuals who are stopped or arrested may recognize that they are in fact guilty of violating a law, but nevertheless question the legitimacy of the officers' actions—particularly if certain offenses are enforced more aggressively in some neighborhoods than in others.

Finally, there have been serious concerns expressed regarding the practice of conducting stops in order to check for outstanding warrants. In some jurisdictions, officers stop thousands of pedestrians and motorists each year for this reason. If a warrant is found—even for a minor offense,

such as an unpaid traffic ticket—the officer can then make an arrest and conduct a more extensive search. Such stops often are justified based on suspicion of minor infractions, or may be lacking in justification entirely. Experience in jurisdictions across the United States makes clear that such pretextual use of traffic and pedestrian stops can significantly undermine perceptions of police legitimacy. And, as discussed above, they also can result in unnecessary intrusions on individual liberty, and may put both officers and members of the public at greater risk of injury. In developing policies and practices to limit the use of investigative encounters generally, agencies should consider adopting specific limitations either on the conduct of stops for the purposes of identifying outstanding warrants, or on the conduct of warrant checks themselves. As discussed in § 2.08, agencies also should consider revisiting existing warrant practices which, in some places, have resulted in there being more outstanding warrants than residents in the area.

Some have credited the use of these sorts of aggressive enforcement strategies with bringing down crime. Some studies suggest that making large numbers of stops in a particular area may have short-term effects on crime rates. But other studies suggest that situational approaches—like addressing littering or abandoned lots—contribute more to crime reduction in hotspots than proactive enforcement efforts do. Even if the evidence in favor of such efforts was stronger, using stops in this manner could raise safety and legitimacy concerns. Stops that fail to turn up evidence or contraband may not be a good use of officer time, yet still can increase the potential for violent conflict between officers and members of the public. Frequent use of stops and arrests for minor offenses may pull individuals into the criminal-justice system needlessly—at great cost both to the individuals and to others in the community. See also § 1.04. And to the extent that use of stops reduces residents' willingness to cooperate and exacerbates police–community tensions, it may make it more difficult for the department to do its job.

b. When and how encounters should be conducted. To address these concerns, agencies should, at a minimum, limit the frequency with which encounters take place. When encounters do take place, agencies should adopt policies to ensure that officers treat individuals in a procedurally just way so as to minimize harm to individuals stopped, consistent with the principles outlined above.

First, agencies should limit the overall use of initial encounters, stops, and arrests to circumstances in which they directly promote public safety and minimize harm to the public. See also § 1.04. Arrests should not occur unless necessary to protect public safety or ensure appearance

in court. And agencies should minimize the use of stops based on vague, non-individualized factors or broad demographic categories. For example, studies suggest that when officers focus on behavioral cues—such as conduct indicative of criminal activity—as opposed to nonbehavioral cues—such as an individual's location or manner of dress—they are more likely to be correct in their suspicions regarding the target's participation in criminal activity. Agencies also should avoid using stops as a pretext to investigate potential crimes that are unrelated to the basis for the stop. And agencies should, in partnership with their communities, decide under what circumstances enforcement of low-level offenses is consistent with the agencies' public-safety goals. To the extent that particular offenses are deemed a priority, they should be enforced evenhandedly throughout a jurisdiction.

Second, agencies should ensure that once an officer decides to initiate an encounter or engage in an arrest, the officer uses the encounter as an opportunity to reinforce, rather than undermine, the legitimacy of the police. Officers can do this by engaging the principles of procedural justice—treating individuals respectfully, with dignity, and (when not inconsistent with investigative objectives) explaining their reasons for initiating an encounter or taking a particular enforcement action. Officers also should give individuals an opportunity to exercise "voice" during encounters, and generally should convey trustworthy motives. Officers should abide by these principles throughout the entire encounter, including as individuals are brought to the police station and decisions are made about the possession of their property.

c. Policies, recordkeeping, and supervision. Agencies should develop policies and enforcement priorities that are consistent with these Principles. Agencies should not impose minimum quotas for officer-initiated encounters, and should not evaluate officers based on the number of stops, citations, or arrests that they conduct. In particular, agencies must never impose quotas to generate revenue. As discussed in greater detail in § 13.03, agencies should instead evaluate officers' conduct in ways that encourage them to work cooperatively with members of their communities and address their public-safety needs. Finally, agencies should work with other government officials and community members to develop alternative strategies for dealing with public-safety concerns.

In addition, agencies should develop policies and practices to monitor and learn from the ways in which officers interact with members of the public. Many agencies have instituted data-collection programs to track stops, searches, and arrests. Doing so enables agencies to assess

whether officers' actions are effective and conducted in an unbiased manner. Requiring officers to record what actions they took—and importantly, why—also can encourage officers to reflect on their own decisions and to consider whether their actions are in fact consistent with department values and priorities. Other agencies have used body-worn-camera footage to assess whether officers are conducting themselves appropriately in the course of encounters. Video footage also can be useful for training purposes by giving officers clear examples of what is expected of them. Body cameras also can be used as an encounter occurs, or beforehand, for officers to articulate the reason for initiating an encounter. When body cameras are not available, contemporaneous stop reports are essential.

REPORTERS' NOTES

This Section draws the distinction between officers' lawful authority to initiate encounters, which often involves considerable discretion, and the manner in which that discretion should be used. In particular, it addresses the use of encounters in circumstances in which the encounters are not immediately necessary to address ongoing or imminent public-safety risks. As prior notes underscore, some departments have adopted the tactic of using wide-scale, nonconsensual encounters in an effort to fight crime. Although there is some evidence that this "proactive" use of encounters can help reduce crime, there also is mounting evidence about the costs that use of these tactics can impose. See NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 177-206 (2018) (hereinafter NATIONAL ACADEMIES REPORT).

Those who favor aggressive use of traffic and pedestrian stops justify their use in one of two ways. First, they argue that proactive stops enable officers to uncover illegal guns and drugs. Second, they point out that stopping large numbers of people can have a deterrent effect by sending a message that criminal conduct will not be tolerated, and that individuals should leave their contraband and weapons at home. See, e.g., EDWIN MEESE III & JOHN G. MALCOLM, POLICING IN AMERICA: LESSONS FROM THE PAST, OPPORTUNITIES FOR THE FUTURE (2017); Michael R. Bloomberg, *'Stop and frisk' keeps New York safe,* WASHINGTON POST, Aug. 18, 2013. The first has not been borne out by the evidence. Study after study indicates that in situations in which proactive stops are utilized, hit rates tend to be quite low. See, e.g., Expert Report of Jeffrey Fagan at 63; Floyd v. City of New York, No. 08 Civ. 1034 (S.D.N.Y. 2008) (0.15 percent of stops in New York City resulted in seizure of a gun, and 1.75 percent in seizure of contraband); ACLU of Massachusetts, "Stop and Frisk Report Summary" (2014) (finding that just 2.5 percent of stops turned up weapons or contraband). As for the deterrent claim, the evidence is mixed. A small number of studies suggest that proactive use of stops and arrests in cities like New York has had a modest effect on crime. See, e.g., David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime?* 15 CRIMINOLOGY & PUB. POL. 31 (2016). But that evidence is contested. See, e.g., Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and*

Burglary Rates in New York City, 2003-2010, 31 JUSTICE QUARTERLY 96 (2014) (finding few effects). In addition, studies comparing the use of proactive stops and arrests to use of more holistic problem-solving tactics have found that the latter is more effective at bringing down crime. See Anthony A. Braga, *The Effects of Hot Spots Policing on Crime*, 31 JUSTICE QUARTERLY 633 (2014).

In 2018, the National Academy of Sciences issued a comprehensive report that examined available evidence regarding the efficacy of various proactive enforcement strategies, including the use of traffic and pedestrian stops. NATIONAL ACADEMIES REPORT. It found evidence to suggest that stop-and-frisk programs may help reduce crime when used in a targeted fashion in crime hotspots. Id. at 149. However, the Report cautioned that these outcomes "are generally observed only in the short term" (less than a year), and that there is little evidence about the extent to which these and other "proactive" approaches "will have crime prevention benefits at the larger jurisdictional level." Id. at 5. The Report also stressed that "aggressive, misdemeanor arrest-based approaches to control disorder generate small to null impacts on crime." Id. at 8.

Importantly, any purported gains to public safety must be weighed against the potential costs that use of these tactics can impose. Using stops in this manner can expose agencies and officers to lawsuits and complaints. The U.S. Constitution is clear that officers must have reasonable, articulable suspicion of criminal activity to justify a stop. When agencies encourage officers to make widespread use of stops based on vague, generalized criteria, there is a strong likelihood that a substantial number of stops will fall short of this constitutional threshold. See, e.g., U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 8 (2014) (hereinafter NEWARK DOJ REPORT) (finding that 93 percent of stops reported by Newark officers lacked reasonable suspicion). Major cities across the country—including New York, Boston, Philadelphia, Milwaukee, and Newark—have faced lawsuits over aggressive use of traffic and pedestrian stops based on insufficient cause and in a manner that disproportionately targets people of color. At the height of "stop and frisk" in New York, these encounters accounted for one-third of all complaints against officers. NEW YORK CIVILIAN REVIEW BOARD, JANUARY TO JUNE 2011 REPORT 6 (2011). In many cities, the proactive use of police stops resulted in litigation, which typically ended either with a judgment against the city or a consent decree. See, e.g., Floyd, supra; ACLU of Illinois, *Stop and Frisk*, https://www.aclu-il.org/en/campaigns/stop-and-frisk (last visited July 6, 2018) (describing settlement agreement); Bailey et al. v. City of Philadelphia et al., C.A. No. 10-5952, Settlement Agreement, available at https://www.aclupa.org/download_file/view_inline/744/198 (last visited July 6, 2018).

In addition, numerous studies and reports—as well as plentiful evidence in the public sphere—make clear that proactive use of stops can significantly impact police legitimacy and public trust. See, e.g., Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization* 11 J. EMPIRICAL LEGAL STUD. 751-785 (2014); Jennifer Fratello, Andrés F. Rengifo & Jennifer Trone, Vera Institute of Justice, Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications (2013); CHARLES EPP, ET AL., PULLED OVER: HOW TRAFFIC STOPS DEFINE RACE AND CITIZENSHIP 126-133 (2014). Widespread use of "stop and frisk" has led to countless

protests in cities across the country. See, e.g., John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, NEW YORK TIMES, June 17, 2012. Justice Department investigations in cities like Chicago and Newark have pointed to deep-seated frustration on the part of residents, primarily persons of color, who report being stopped repeatedly in their communities. NEWARK DOJ REPORT at 11; U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 142 (2014). Indeed, criticism of such tactics stretches at least as far back as the 1960s, when two presidential commissions pointed to aggressive policing in minority communities as one of the root causes of hostility and mistrust. See The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders (1968); The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice (1967). Although agencies may have initiated proactive enforcement programs with all good intentions, the fact of the matter is that their overuse has alienated communities, lessened public trust in the police, and led to considerable social unrest.

Thus, this Section encourages agencies to adopt practices and policies to limit the use of police encounters to those that promote public safety without undermining public trust. Agencies can do this in a number of ways. A number of agencies have adopted enforcement strategies that deemphasize high-volume use of stops and arrest, and focus instead on problem solving and targeted deterrence. See, e.g., New York City Police Department, "Tackling Crime, Disorder, and Fear: A New Policing Model," available at https://www1.nyc.gov/html/nypd/html/home/POA/pdf/Tackling_Crime.pdf. And they have reinforced through policy and training the fact that certain tactics, even if lawful, can potentially undermine community trust. See, e.g., AUSTIN POLICE DEPARTMENT, POLICY MANUAL § 306.5 (reminding officers that "overuse of the consent search can negatively impact the Department's relationship with our community.") Finally, states and individual agencies have adopted stop-data-collection programs to monitor officer use of encounters to ensure that officers act in a manner that is consistent with department values and priorities. See, e.g., CAL. GOV. CODE § 12525.5 (requiring law-enforcement agencies to gather and report on traffic-stop and pedestrian-stop data); 625 ILL. COMP. STAT. ANN. 5/11-212 (same); CONN. GEN. STAT. § 54-1m (requiring collection of motor-vehicle-stop data).

Among the policies that agencies should specifically consider are policies to limit or prohibit the use of stops for the purpose of conducting a warrant check. There are—as countless studies have documented—an extraordinary number of outstanding warrants in the United States. See *Strieff*, 136 S. Ct. at 2073 (Kagan, J., dissenting) (citing studies). In Ferguson, Missouri, a town with just 21,000 residents, the U.S. Department of Justice found that there were 16,000 outstanding warrants. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 55 (2015) (hereinafter FERGUSON REPORT). In Cincinnati, a study found that the city had 100,000 warrants with only 300,000 residents. See Helland & Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping,* 47 J. LAW & ECON. 93, 98 (2004) Some of these warrants may be years—or even decades—old. See, e.g., Preeti Chauhan et al., *The Summons Report: Trends in Issuance and Disposition of Summonses in New York City, 2003–2014* (2015), https://www.jjay.cuny.edu/sites/default/files/news/Summons_Report_DRAFT_4_24_2015_v8

.pdf (finding that more than 73,000 of the warrants stemming from summonses issued in 2003 were still open as of 2014).

The proliferation of warrants creates an incentive for officers to conduct stops in order to look for outstanding warrants—and then, if a warrant is found, to conduct a full-blown search to look for weapons or contraband. Indeed, some police manuals encourage officers to run warrant checks during all stops precisely because it could give rise to a reason to search. See EPP ET AL., PULLED OVER at 33-36 (2014). In some jurisdictions, officers conduct thousands of stops and warrant checks each year. The use of stops in this manner raises all of the concerns about legitimacy and intrusiveness discussed above. It also potentially helps to perpetuate the system of fines and fees that falls disproportionately on the poor and on racial minorities. See, e.g., FERGUSON REPORT at 42-61. For all of these reasons, agencies should consider policies to limit the use of stops for the purpose of conducting a warrant check. Jurisdictions also should, consistent with § 2.08, revisit existing warrant practices to minimize the various harms that the proliferation of warrants has caused.

Finally, the expanding literature on procedural justice—not to mention common sense—makes clear that the manner in which an officer conducts an encounter can shape how the encounter is perceived. See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE LAW 53 (2002); Tracey L. Meares & Peter Neyroud, *Rightful Policing*, NAT'L INST. OF JUSTICE (2015); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 344-345 (2011). By treating people respectfully, explaining the basis for the stop and encounter, and giving people voice, officers can use the stops that necessarily will occur to promote the legitimacy of policing and enhance the agency's mission. Section 1.06 talks about procedural justice in policing and accumulates the evidence in its support. A number of agencies have adopted this approach, training officers that every encounter is an opportunity to promote the community's trust in the police and elicit its cooperation in promoting public safety. Wesley G. Skogan, Maarten Van Craen & Cari Hennessy, *Training Police for Procedural Justice*, 11 J. EXP. CRIMINOLOGY 319 (2014) (evaluating effectiveness of Chicago's training program).

§ 4.04. Permissible Intrusions During Stops

(a) During a stop, an officer may:

(1) request identification and make other inquiries as necessary to investigate the crimes or violations for which the officer has reasonable suspicion; and

(2) conduct a frisk of a person, or a protective sweep of the passenger compartment of a vehicle, based on reasonable suspicion to believe that the person is armed and dangerous.

(b) Unless an officer receives information that supports probable cause of a crime or violation, the officer must terminate the encounter upon completion of these investigative efforts.

Comment:

a. Generally. Once an officer detains a person, the officer is permitted to take certain additional steps either to confirm or dispel the officer's suspicions, or to ensure the officer's safety. Some actions, such as seeking identification or asking questions, do not require any additional cause. Other actions, such as a protective frisk, require additional justification beyond the reason for the stop itself—specifically, that the officer have reasonable suspicion to believe that the individual is armed and dangerous.

The concern in both instances is that absent proper limits—including those addressed by other Sections in this Chapter—those secondary intrusions may themselves become the goal of the stop, leading to unnecessary and perhaps unnecessarily intrusive encounters between officers and the public. This Section addresses that concern in two ways. First, it makes clear that encounters must be limited in scope and duration to that which is necessary to resolve the officer's suspicions regarding the particular offense in question, or to ensure the officer's safety. This discourages officers from turning routine traffic and pedestrian stops into fishing expeditions on the off chance that officers may stumble on incriminating evidence of an unrelated offense. Second, it reinforces the Fourth Amendment rule that the only permissible justification for a protective frisk is an officer's reasonable, articulable belief that the individual stopped is armed and dangerous.

b. Protective sweep of a vehicle. An officer may conduct a protective sweep of the passenger compartment of a vehicle based on reasonable suspicion that the driver or passengers are armed and dangerous. The sweep must be limited to those areas that could contain a weapon and are immediately accessible to the driver or passengers—or would be once the driver or passengers are permitted to reenter the vehicle.

c. Lawful gun possession. A number of states permit individuals to carry a concealed weapon on their persons or in their vehicle. The existence of these laws poses a number of difficult questions regarding the permissible scope of an officer's authority to search for and secure a lawfully-possessed firearm during a stop. Chief among them is the question of whether—and under what circumstances—an officer may presume that an individual who is armed lawfully is

nevertheless dangerous to the officer or others. A number of state courts and lower courts have considered this question, and have reached conflicting results. Agencies in states with conceal-carry laws should provide clear guidance to officers, consistent with both state and federal law, regarding the steps they reasonably may take to protect themselves during interactions with individuals who are armed lawfully.

REPORTERS' NOTES

For the most part, this Section adheres to existing U.S. Supreme Court precedent, both about what authority officers possess when they conduct stops, and what authority they do not. In particular, it allows a request for identification during a stop, Hiibel v. Sixth Judicial District, 542 U.S. 177 (2004), so long as there is reasonable suspicion for the stop in the first place. And it permits a frisk of the outer clothing of a person if the officer can articulate a threat to his or her safety or the safety of others, Terry v. Ohio, 392 U.S. 1 (1968). It similarly permits a protective sweep of the passenger compartment of a vehicle based on reasonable suspicion that the vehicle contains a weapon that would be immediately accessible to the driver or passenger. Michigan v. Long, 463 U.S. 1032 (1983). It also makes clear, consistent with Rodriguez v. United States, 135 S. Ct. 1609 (2015), that a stop may not be longer than necessary to accomplish the purpose of the stop.

Finally, as Comment *c* acknowledges, there is an open question under existing law as to the scope of the *Terry* rule in states that permit individuals to carry a concealed firearm either on their person or in their vehicle. In particular, courts have divided over whether an officer may assume that an individual who is armed *necessarily* is also dangerous. Compare United States v. Robinson, 846 F.3d 694, 699 (4th Cir. 2017) (en banc) ("when the officer reasonably suspects that the person he has stopped is armed, the officer is warranted in the belief that his safety . . . [is] in danger . . . thus justifying a *Terry* frisk" (internal citations and quotation marks omitted)), United States v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013) (same), with State v. Vandenberg, 81 P.3d 19, 22 (N.M. 2003) ("To justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous. . . . Any indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed." (emphasis in original) (internal citations omitted)), *and* State v. Bishop, 203 P.3d 1203, 1218 (Idaho 2009) ("weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger"). Agencies should provide clear guidance to officers on the scope of their authority when dealing with individuals who are lawfully armed—and in the absence of controlling authority from state or federal courts, should consult with local officials and community members on how best to assure officer safety while respecting the legislature's judgment that individuals ought to be permitted to carry a weapon in public.

§ 4.05. Minimizing Intrusiveness of Stops and Arrests

(a) An officer should make an arrest or issue a citation only when doing so directly advances the goal of public safety. When authorized under governing law, an officer should issue a citation in lieu of a custodial arrest, or a warning in lieu of a citation, unless the situation cannot be effectively resolved using the less intrusive means.

(b) In conducting a stop or arrest, officers should minimize undue intrusions on the liberty, time, and bodily integrity of the person stopped.

(c) Legislatures and agencies should promote the use of less intrusive procedures, and should consider restricting the use of arrests for certain categories of offenses.

Comment:

a. Summonses and arrests. Officers possess the power of arrest in order to further a number of societal goals: to maintain public order, initiate the criminal process against a defendant, facilitate the preservation of evidence, and help to ensure an individual's appearance at later proceedings. At the same time, an arrest can impose a variety of costs. An arrest involves a serious—even if temporary—deprivation of liberty, which can be frightening and humiliating, and can disrupt an individual's ability to fulfill family or work obligations. As a result of arrest, an individual may face significant fines and fees, loss of public housing, loss of a job, deportation, and child-custody consequences. These in turn can have serious ripple effects on the individual's family and community. Studies show that once a person is taken into custody, and held there, the possibility of eventual incarceration increases. Any time an officer decides to make an arrest, there is some risk that the officer will encounter physical resistance that may necessitate the use of force—which can result in injury to both the officer and the civilian involved. Finally, arrests are expensive: an arrest typically takes an officer off the street for several hours, and imposes various other processing and administrative costs on agencies and courts.

In some circumstances, an arrest may be the most appropriate—and perhaps the only—way to achieve the aforementioned objectives. But in many instances, these same goals may be achieved in other ways. Officers often have options available to them other than arrest. For many defendants, a summons may be just as effective at ensuring their appearance in court. In some cases, a warning or other intervention may be sufficient to resolve the situation and deter future crimes or violations. In those situations, an arrest constitutes an unnecessary intrusion on

individual liberty, and should be avoided. That is particularly true for individuals who are suspected of offenses for which the maximum penalty is a fine.

Finally, although a summons or a citation may be preferable to an arrest in many circumstances, it is important to note that these lesser sanctions can impose significant costs as well. For many individuals, having to pay even a small fine may mean forgoing other necessities such as food, electricity, or medical care. Some may simply be unable to pay. In some jurisdictions, individuals who cannot pay their fines and fees may face jail time or other consequences, such as loss of a driver's license. Much like an arrest, a criminal summons or a citation also may result in a criminal record, which can affect an individual's eligibility for employment or occupational licenses, loans, and public benefits. An additional concern with summonses and citations is that jurisdictions may come to see them as a revenue-generating mechanism. This can skew incentives and result in policies that encourage officers to issue summonses or citations in circumstances in which doing so does not in fact promote public safety, and instead imposes substantial burdens on communities that often are least able to bear them.

For all of these reasons, agencies should encourage officers to consider using lesser sanctions when doing so is consistent with the needs of public safety and permissible under governing law. Agencies should not impose minimum quotas or targets for citations or arrests, or evaluate officers based on the quantity as opposed to quality of enforcement actions taken. In addition, states and municipalities should revisit policies that incentivize agencies to issue citations in order to raise revenues either for the agency or for the municipality as a whole. Such policies often impose disproportionate burdens on low-income and minority communities and should be discontinued.

b. Minimizing the intrusiveness of encounters. All enforcement actions taken by the police represent a notable intrusion into individual liberty. They can cause considerable anxiety, discomfort, and disruption. There are a number of steps that officers should take—and agencies can encourage through policies and training—to limit the overall intrusiveness of encounters. To the extent practicable, officers should limit the duration of stops and noncustodial arrests, as well as the time that arrested persons spend in police custody. Officers also should avoid the unnecessary use of handcuffs and other restraints, particularly when dealing with juveniles and other vulnerable populations. And officers should take steps to minimize the intrusiveness of searches—by limiting the scope of a search to what is necessary to maintain officer safety or

recover evidence, by ensuring whenever practicable that individuals are searched by an officer of the same gender, and by limiting the use of strip searches and other similarly invasive tactics.

c. Need for legislative and agency policy on citations and arrests. Agencies should provide officers with clear guidance on how the discretion to arrest should be used. Agencies typically are in a much better position to consider the costs and benefits of arrests in various circumstances, and to partner with other agencies and civic organizations in developing alternatives.

Many states, municipalities, and agencies already have adopted various policies and programs to encourage the use of lesser sanctions and to restrict the use of arrests. Most states permit officers to issue a summons or a citation in lieu of arrest for low-level offenses. Some require officers to issue a summons or a citation in lieu of an arrest for certain offenses unless an arrest is necessary to preserve the peace, or there is some reason to believe that the individual will fail to appear at later criminal proceedings. A number of jurisdictions have provided officers with alternative mechanisms for addressing disruptive or disorderly conduct that otherwise would necessitate arrest. These include crisis drop-off centers for the mentally ill, detox centers for individuals under the influence of drugs or alcohol, and homeless shelters where officers can take individuals who are in need of services and support. Jurisdictions also have taken steps to reduce reliance on formal sanctions for juvenile misconduct, which often can better be addressed through school discipline, counseling, or other services.

d. Mandatory arrest policies. In many jurisdictions, officers are required either as a matter of department policy or state law to make an arrest in certain circumstances—typically in cases that involve domestic violence. The goal of these provisions is to protect victims by ensuring that officers take claims of abuse seriously, and that the alleged perpetrator is removed from the area and unable to cause further injury. Limiting officer discretion in these cases also reduces the risk that officers will take some claims of abuse more seriously than others based on factors that are unrelated to the severity of the harm imposed. Increasingly, however, practitioners and scholars have come to doubt that mandatory-arrest policies are in fact an effective means of achieving these objectives. In particular, studies suggest that mandatory-arrest policies may discourage victims from calling the police for fear of the collateral consequences of an arrest on the suspect and family. These findings suggest that, at the very least, jurisdictions should continue to assess whether the policies have had their intended effects, and whether these same goals might be achieved in ways that minimize some of the attendant harms. Whatever the benefits of these arrests, they are, like

other arrests, costly to the individuals arrested and to their communities, and should be justified by clear public-safety needs.

REPORTERS' NOTES

Certain enforcement actions are simply part of what police officers do, and what we expect them to do. A number of offenders will need to be arrested. In the course of conducting arrests, searches will be required. Acting in lieu of arrest, officers will issue summonses.

Although these actions are at times necessary, and are certainly familiar, this Section recognizes that all actions that law-enforcement officers take during the course of an encounter impose *some* costs, which officers should strive to minimize to the extent possible. Handcuffs limit an individual's ability to move, and can be painful and humiliating. All searches, however brief, subject individuals to unwanted contact with strangers. The costs associated with these actions can be exacerbated if undertaken in a manner that accounts insufficiently for the individual's dignity. For example, searches and frisks of an individual's person are more intrusive when conducted by an officer of the opposite gender, or when conducted in public view.

An arrest in particular constitutes a serious intrusion on an individual's liberty and imposes any number of additional harms, from dignitary costs to threats to one's livelihood. See, e.g., Amanda Gellar et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 24 AM. J. PUB. HEALTH 231, 232 (2014). This is true even if the individual is detained only briefly and ultimately is not charged. See Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402. An arrest may lead to loss of employment, eviction from public housing, or even loss of custody of one's children. See, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826-833 (2015); 24 C.F.R. § 966.4(l)(5)(iii)(A) (2016). It can have immigration consequences as well. See Jain, supra. Arrests increase the likelihood of pretrial detention and conviction, as well as longer prison sentences. See Christopher T. Lowenkamp et al., Laura & John Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013), https://perma.cc/8DLL-FJ35; Mary T. Phillips, New York City Criminal Justice Agency, *Pretrial Detention and Case Outcomes, Part I: Nonfelony Cases* 26, 30, 35, 40 (2007). The consequences of arrest may spill well beyond arrestees themselves and affect parents, spouses, children, and the communities to which they belong.

Arrests may be costly for officers and agencies as well. Arrests are dangerous. An arrest may provoke a violent response, risking the physical safety of officers, bystanders, and the individual in question. See Cynthia Lum & George Fachner, Int'l Ass'n of Chiefs of Police, Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database 7 (2008), https://perma.cc/XZ96-NPDD (finding that one of the most common circumstances of officer death, second only to an automobile accident, is an arrest situation). Arrests also are expensive: studies estimate that each arrest costs departments several thousands of dollars and takes officers off the

street for hours. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 319 (2016) (noting that an arrest takes an officer off the street for between four and 13.5 hours).

Although fines (and accompanying fees) sometimes are available as an alternative to arrest, these sanctions themselves are not costless. Individuals may not have enough money to pay the fines, and may face consequences similar to those that result from arrest. In some jurisdictions, for example, individuals who cannot pay fines face jail time. See, e.g., ARIZ. REV. STAT. ANN. § 13-810 (2017); MO. REV. STAT. § 558.006 (2016). In others, they can be stripped of their driver's licenses, severely limiting their ability to work. See VA. CODE ANN. § 46.2-395; but see Thomas v. Haslam, 329 F. Supp. 3d 475 (M.D. Tenn. 2018) (holding that a Tennessee law that permits the state to revoke an individual's driver's license for failure to pay court costs is unconstitutional as applied to indigent defendants). Even if an individual can pay, the money spent on the fine is money not available for other necessities like rent, food, utilities, or medical care. Criminal summonses and citations also may create a criminal record and trigger many of the collateral consequences associated with arrests. See also § 1.10 (Policing for the Purpose of Revenue Generation).

Any rational system of criminal justice would take those costs into account. The proper approach, outlined in this Section, is one of minimization. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 362-363 (2016). Stated simply, policing agencies and officers ought to pursue legitimate public-safety purposes using the least intrusive means available, so long as their actions are within the bounds of governing law. If a less intrusive means would accomplish the public purpose equally well, the officer should not use the more intrusive tactic.

§ 4.06. Consent Searches

(a) During any encounter, an officer may ask for permission to search a person or a person's property.

(b) Agencies should adopt policies to ensure that consent searches are used sparingly and only in circumstances in which they are likely to be productive. Specifically, agencies should consider:

(1) prohibiting officers from seeking consent to search absent reasonable suspicion to believe that the search will turn up evidence of a crime or violation;

(2) requiring officers to explain (when not inconsistent with investigative objectives) why they want to conduct a search and that the individual has the right to refuse consent; and

(3) requiring officers to obtain and document, either in writing or in some other reliable form such as body-worn-camera video, acknowledgement that consent was sought and provided.

(c) The scope of a consent search must not exceed the scope of the consent given, and should be no broader than necessary to achieve the investigative objective motivating the request for consent.

Comment:

a. Animating concerns. Consent searches serve a number of important functions. Society has an interest in detecting and deterring criminal activity. If an officer lacks probable cause to justify a search, but nevertheless has reason to believe that an individual is involved in criminal activity, a consent search may be the only means of uncovering evidence or furthering the investigation. Even if an officer has probable cause to believe that a crime has been committed, and could thus obtain a warrant, the target of the search may prefer to grant the officer permission to search so as to quickly dispel the officer's suspicion.

At the same time, there is a risk that consent searches may be used in ways that impose unnecessary costs on the public, and, in doing so, undermine public trust in the police. These include possible privacy and dignitary costs, among others. Individuals who consent to a search may nevertheless find the experience intrusive and unsettling. Many of the circumstances in which officers seek consent—such as traffic or pedestrian stops—are inherently coercive. Even if an individual is advised of his or her right to refuse, the individual may feel compelled to give officers permission to search to avoid unduly prolonging the encounter or increasing the likelihood of getting a citation. It is therefore difficult to conclude with confidence that anyone who is asked by a police officer for permission to search "consents" in the ordinary meaning of that term. An individual who "consents" may nevertheless perceive the encounter as involuntary and illegitimate—particularly if the person is innocent of any crime. These concerns are exacerbated by the fact that consent searches have the potential to be used in racially disparate ways. In one jurisdiction after another, studies have shown that officers are more likely to seek consent from minority drivers and pedestrians—but that searches of minorities are in fact less likely to turn up evidence or contraband. These disparities can further undermine legitimacy and trust. Finally, a number of studies suggest that frequent use of consent searches may be a poor use of officer time. Hit rates often are extremely low, and even "successful" searches often turn up only small quantities of drugs.

In view of these concerns, a number of jurisdictions have limited the use of consent searches in various ways. Many departments and states require officers to obtain written acknowledgement of consent. Others require that officers have articulable suspicion that the search will turn up evidence or contraband before asking for permission to search. Still others require officers to obtain supervisor approval prior to conducting a search. Finally, at least one state highway patrol has banned the use of consent searches outright.

b. Use of the term "consent." Although there are reasons to doubt whether any given search conducted with permission is in fact "consensual" in the ordinary sense of the term, these Principles nevertheless adopt the phrase "consent searches" to describe the police activity in question. The phrase is widely used throughout judicial opinions and police department manuals. Because one of the primary goals of these Principles is to provide guidance to agencies—as well as legislatures that may adopt statutes to regulate agency or officer conduct—these Principles, to the extent possible, use familiar terms to avoid the possibility of confusion and to increase the likelihood of adoption.

c. Requirement of reasonable suspicion and explanation. Officers should not seek consent to conduct a search unless they have reasonable suspicion to believe that the search will turn up evidence of a crime and unless they can explain to the individual why they would like to conduct a search, to the extent this is not inconsistent with investigative objectives. A reasonable-suspicion standard recognizes society's interest in uncovering evidence of criminal activity, and it gives officers an important tool with which to close the investigative gap between their initial suspicions and probable cause for a search or arrest. At the same time, the standard eliminates the use of consent searches in precisely the circumstances in which they are least likely to be efficacious, and most likely to undermine legitimacy and trust. Absent reasonable suspicion, an officer at best has a mere hunch that something is off—and at worst, is operating on the basis of explicit or implicit bias, unfounded hunch, whim, or caprice. Studies suggest these are precisely the circumstances in which officers' actions are most likely to disproportionately affect minority groups. The additional requirement of an explanation can both assuage fears that the officer is acting arbitrarily and help define the scope of the consent.

d. Written acknowledgement. A reasonable-suspicion requirement is more closely tailored to the underlying concerns with consent searches than is the requirement of written acknowledgement that the target was informed that he or she did not have to consent to the search. Research casts serious doubt on the idea that consent forms meaningfully alter the inherent

coerciveness of police–citizen encounters. An individual who feels compelled to consent to a search—out of deference to authority or fear of the consequences of refusing—may feel just as compelled to consent in writing.

"Consent" forms still can serve an important purpose: they create a record of the encounter, and thus help ensure that officers inform individuals of their right to refuse permission to search. But these same purposes can be achieved in other ways—for example, by documenting an encounter using body-worn-camera video. Indeed, body-worn-camera video may be more effective at documenting the circumstances under which an individual agrees to permit officers to search. For this reason, these Principles do not require that consent be obtained in writing if the department has mechanisms in place to document the encounter in an equally effective way.

REPORTERS' NOTES

Consent searches are a common tool for police departments. Courts repeatedly have stressed the importance of permitting officers to seek cooperation from the public, as well as the fundamental value of consent itself. As the U.S. Supreme Court observed, "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." United States v. Drayton, 536 U.S. 194, 207 (2002). See also Fernandez v. California, 134 S. Ct. 1126, 1132 (2014); Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973). From the perspective of police departments, seeking consent to search saves officers time by forgoing the procedural requirements of obtaining a warrant. See, e.g., Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 McGEORGE L. REV. 27, 31 (2008). Additionally, asking for consent is sometimes the sole investigatory tool available to an officer who believes a crime has occurred. As the Court acknowledged in *Schneckloth*, "[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence." *Schneckloth,* 412 U.S. at 227.

1. Animating concerns. Despite their legality and usefulness, various issues surrounding consent searches mitigate against their broad use. First and importantly, "consent" searches often are not voluntary in any meaningful sense. Statistics reported by police departments suggest that the vast majority of people consent to searches when asked to do so by police officers—which raises serious doubts about how voluntary these searches are. L.A. POLICE DEP'T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE AND AUDIT STATISTICS AND THE CITY STATUS REPORT COVERING PERIOD OF JANUARY 1, 2006-JUNE 30, 2006, at 8 (2006) (reporting that of 16,228 requests for consensual search made during the first half of 2006, 16,225, or 99.9 percent, were granted); ALEXANDER WEISS & DENNIS P. ROSENBAUM, UNIV. OF ILLINOIS AT CHICAGO, ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNUAL REPORT: EXECUTIVE SUMMARY 10 (2011) (reporting that in 2010, requests for consent to search during a traffic stop were granted 82 percent of the time). Extensive psychological research suggests that people asked to consent often do not

feel free to refuse, either because they feel required to comply with the request of an authority figure or because they fear the consequences of refusal. As Marcy Strauss writes, there is "abundant evidence" that "individuals read a police officer's request as a demand that they will . . . most assuredly obey." See, e.g., Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 240-241 (2001); see also Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155; Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority* (Unpublished Dissertation, Rutgers University, 1999). As noted earlier in this Chapter, even the U.S. Supreme Court has recognized that consent may not be truly voluntary. Schneckloth v. Bustamonte, 412 U.S. at 227, 228; § 4.01, Reporters' Notes.

Overreliance on consent searches can have negative effects on public perceptions of police legitimacy. In 2008, the Bureau of Justice Statistics reported that 18.4 percent of people asked to consent to a search reported the officer's actions as both improper and disrespectful, as compared to 5.6 percent of drivers who were not subject to a consent search. In addition, 36.6 percent of those asked to consent to a search said that they perceived the underlying stop to be illegitimate as a result, compared to 5.6 percent of drivers generally. Jacinta M. Gau, *Consent Searches as a Threat to Procedural Justice and Police Legitimacy: An Analysis of Consent Requests During Traffic Stops*, 24 CRIM. JUST. POL'Y REV. 752, 768 (2013).

There is also a significant risk that consent searches may be used in racially disparate ways. Department statistics consistently show that officers are significantly more likely to ask African American or Hispanic motorists or pedestrians for consent to search—but that searches of minorities are in fact less likely to turn up contraband. A 2014 study found that Illinois state troopers were 2.5 times more likely to ask Hispanic motorists for consent to search, but were 2.5 times more likely to find contraband in searches of white motorists. ACLU of Illinois, *Racial Disparity in Consent Searches and Dog Sniff Searches: An Analysis of Illinois Traffic Stop Data from 2013* (2014); see also Richard A. Oppel, Jr., *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES (Nov. 20, 2014) (describing similar findings of disparate impact in Durham, North Carolina, and Austin, Texas). A number of law-enforcement agencies and officials have recognized these risks. For example, the Kalamazoo, Michigan, police department revised its consent-search policy after a commissioned study found that Black motorists were stopped at a rate at least two times greater than white motorists. In explaining the need for the revisions, Chief Jeff Hadley cited the "collateral damage" to community relations caused by previous policies. Aaron Mueller, *Traffic Stops by Kalamazoo Police Down by Nearly Half in 6 Months Since Racial Profiling Study*, MLIVE.COM (March 3, 2014), http://www.mlive.com/news/kalamazoo/index.ssf/2014/03/racial_profiling_study_prompts.html.

Finally, given that consent searches often are conducted based on little or no suspicion, there is reason to doubt their effectiveness. The hit rates for consent searches generally are low. See, e.g., Illya D. Lichtenberg & Alisa Smith, *Testing the Effectiveness of Consent Searches as a Law Enforcement Tool*, 14 JUSTICE PROFESSIONAL 95, 102-104 (2001) (finding consent-search hit rates for detection of drugs ranging between 9.4 percent and 22.9 percent over various periods in Maryland and Ohio); REPORT OF THE NEW JERSEY SENATE JUDICIARY COMMITTEE'S

INVESTIGATION OF RACIAL PROFILING AND THE NEW JERSEY STATE POLICE 86 (2001) (noting that just "37 seizures resulted from the 271 consent searches in the year 2000."). An Ohio study found that as officers made greater use of consent searches, hit rates went down, which suggests that consent searches are most effective when officers are more discerning in deciding when to use them. Lichtenberg & Smith, supra.

2. The limits of written consent forms. Although a number of jurisdictions have responded to these concerns by requiring officers to obtain consent in writing, there is some reason to doubt that consent forms can fully address the concerns described here. As Nancy Leong and Kira Suyeshi note, "a signed consent form does not signify that a suspect rendered consent voluntarily. The form does little to improve a suspect's understanding of her rights, particularly when the suspect is poorly educated, frightened, not fluent in English, or otherwise impaired in her ability to understand." Nancy Leong & Kira Suyeshi, *Consent Forms and Consent Formalism*, 2013 WISC. L. REV. 751, 751 (2013). To the extent that individuals feel singled out by the request itself, a consent-to-search form is unlikely to address those concerns. Finally, there also is some risk that the presence of a signed consent form may dissuade courts from looking sufficiently closely at whether consent was in fact voluntary. Id.

3. Requirement of reasonable suspicion. These Principles urge agencies to limit the use of consent searches to circumstances in which they are likely to turn up evidence of crime—namely, when officers have reasonable suspicion to believe that the target of the search is involved in criminal activity. Absent reasonable suspicion to justify the search, an officer's request to search is based on little more than a hunch. As Justice Sotomayor has argued, "[w]hen we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner." Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

Several departments across the United States already have taken this approach. See, e.g., AUSTIN POLICE DEP'T, AUSTIN PD POLICY MANUAL 145 (2017) ("Officers should . . . only request a consent search when they have an articulable reason why they believe the search is necessary and likely to produce evidence related to an investigation."); MILWAUKEE POLICE DEP'T, STANDARD OPERATING PROCEDURE: 085 CITIZEN CONTACTS, FIELD INTERVIEWS, SEARCH AND SEIZURE (2014) (same); Mueller, supra (noting a similar policy in Kalamazoo, Michigan). In addition, some state courts have interpreted their state constitutions to require a similar "reasonable suspicion" requirement for consent searches. See State v. Fort, 660 N.W.2d 415, 416 (Minn. 2003) ("[I]n the absence of reasonable, articulable suspicion a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop's underlying justification is invalid."); State v. Carty, 790 A.2d 903, 905 (N.J. 2002).

4. Additional precautions. Agencies also can take additional steps to ensure that consent searches are used in a manner that is consistent with these Principles. First, agencies should ensure there is a mechanism in place to document that officers in fact sought consent to search. Written consent forms can serve this purpose, but so too can requiring officers to document consent using an audio or video recording. See, e.g., AUSTIN POLICE DEP'T, AUSTIN PD POLICY MANUAL, supra

at 147 ("For consent searches not involving a vehicle or subject stop, an officer with supervisory approval may document the voluntary consent using only video and/or audio recording.").

A number of agencies also have monitored the use of consent searches by requiring officers to get supervisor approval before conducting a search. NEW ORLEANS POLICE DEP'T, OPERATIONS MANUAL, CHAPTER 1.2.4 SEARCH AND SEIZURE POLICY STATEMENT 20 (2016) ("An officer shall immediately notify a supervisor when considering a search based on consent. Before an officer may conduct a consent search, the officer must have the express approval of his or her supervisor."); AUSTIN POLICE DEP'T, AUSTIN PD POLICY MANUAL 145 (2017) (same).

§ 4.07. Searches Incident to a Lawful Custodial Arrest

(a) A search incident to a lawful custodial arrest is justified in order to protect the safety of officers or others, or to prevent the destruction of evidence.

(b) Agencies should develop policies to ensure that searches incident to arrest are no broader than necessary to serve these purposes, and that they are not used as pretext to look for evidence of a crime or violation that is unrelated to the offense for which the individual was arrested.

(c) A search conducted at the time of arrest generally should be limited to a pat-down search of the arrestee and a search of the immediately surrounding area from which the arrestee could access a weapon or evidence. Agencies should limit the use of more intrusive searches to circumstances in which there is reasonable suspicion to believe that the arrestee is concealing a weapon or evidence that would not be uncovered through a pat-down search.

(d) An officer may conduct a more thorough search of the arrestee's person or property after transport to the stationhouse or to a detention facility. Such search should either:

(1) consistent with Chapter 5, be conducted pursuant to a written policy that specifies the scope of the search and is applied evenhandedly, see §§ 5.01 to 5.06; or

(2) be based on reasonable suspicion, documented in advance, that the search will turn up evidence or contraband.

Comment:

a. Permissible rationales. Searches conducted incident to arrest fall under one of the longstanding exceptions to the general rule that searches of persons or property must be conducted pursuant to a warrant supported by probable cause. Although a search incident to arrest is *triggered*

by a suspicion-based action—an arrest supported by probable cause—the search itself need not be supported by any individualized suspicion that it will turn up evidence or a weapon. Thus, some of the same concerns about suspicionless searches reflected in § 5.01 apply here.

Courts have recognized two permissible justifications for dispensing with both warrants and cause in this context: officer safety and the preservation of evidence. Taking an individual into custody exposes officers (or others present) to risk of harm, and also may increase the risk that the arrestee will attempt to destroy evidence during transport or processing. The degree of risk that a particular individual poses may not always be apparent to an officer at the time of the arrest. For this reason, courts have permitted officers to conduct a protective search absent any articulable suspicion that it is in fact necessary in that particular instance.

When neither of these risks is present, however, the mere fact of arrest is insufficient to justify the search. For example, courts have long held that, absent exigent circumstances, officers must obtain a warrant before searching an arrestee's home or office beyond the immediate grab area. Officers also are not permitted to search an arrestee's vehicle absent a reason to believe that the vehicle contains evidence related to the crime of arrest. And they are required to obtain a warrant before searching the contents of an arrestee's cellular phone or computer.

b. Potential for abuse. Although searches incident to arrest further important law-enforcement goals, they also can be subject to abuse. Such searches require no independent, individualized justification beyond the reason for the arrest itself. Thus, the authority to search incident to arrest creates an incentive for officers to arrest individuals in circumstances in which they otherwise would have issued a warning or a citation. Officers also have been known to arrest individuals for minor offenses, search them for evidence of drugs or other contraband, and then let them go without ever taking them into custody. In such instances, the search itself becomes the goal, rather than a byproduct of an officer's decision to take someone into custody. Those practices can unduly increase the overall incidence of arrest, as well as the collateral costs imposed on individuals who are arrested. See § 4.05. Still another concern is that searches incident to arrest may be more intrusive than is in fact necessary to protect officers or prevent the destruction of evidence. This is particularly true of searches conducted out in the field. Such searches often occur in a public setting in view of others, which increases the level of stigma or humiliation on the part of the arrestee. At the same time, because they take place in a noncustodial setting—and typically without a supervisor present—there is a greater potential for abuse.

c. Limitations on scope. In light of the aforementioned concerns, a number of jurisdictions have placed limits on searches incident to arrest, either by prohibiting such searches altogether following an arrest for minor offenses or by prohibiting custodial arrest for minor offenses. Such policy changes may be especially warranted in jurisdictions that are unable to address the pretextual use of arrests in other ways. These Principles do not adopt such a categorical rule. Instead, § 4.05 makes clear that agencies should limit the use of arrests in circumstances in which less intrusive means would be equally effective at promoting public safety or preserving order.

This Section adds two further limitations: (1) that searches incident to arrest should not be used as a pretext to look for evidence of crimes unrelated to the offense in question, and (2) that searches conducted in the field should generally be limited to a pat-down unless there is cause to believe that the arrestee is concealing a weapon or evidence that would not be uncovered during a pat-down search. The policy urged here would help reduce the incentive to conduct unnecessary arrests in order to look for evidence of crime, while at the same time minimizing the intrusiveness of searches that do in fact take place. As discussed below, officers could then conduct a more thorough search after transport—so long as the search is conducted pursuant to a written policy that is applied evenhandedly to all arrestees. Although the Supreme Court in United States v. Robinson interpreted the Fourth Amendment to permit a more comprehensive search incident to arrest, a number of jurisdictions, including New York City, have limited the use of field searches in the manner described in this Section.

Jurisdictions may wish to consider additional measures as well. For example, to address concerns over pretextual use of searches incident to arrest—particularly in circumstances in which the officer has no intention of actually taking the person into custody—agencies could require officers to notify dispatchers of the arrest, including the offense for which the person was arrested, prior to conducting the search. Doing so would both discourage pretextual arrests and enable departments to monitor officer compliance with these Principles.

d. Distinguishing two kinds of searches. This Section distinguishes between searches conducted at the time of the arrest (typically out in the field) and subsequent searches that are conducted either at the stationhouse or at a detention facility. Although courts have at times justified *both* categories of warrantless searches as "incident to arrest," they differ in important ways that should be reflected in agency policy and practice. Searches conducted contemporaneously to a custodial arrest are justified by an immediate need to protect officer safety and secure evidence. In

this regard, they are similar to other protective actions that officers sometimes are permitted to take in the context of a traffic or pedestrian stop—such as ordering a driver to step out of the car or conducting a frisk.

Subsequent searches of arrestees after transport to the station or to a detention facility—including fingerprinting or DNA collection, inventory searches of impounded vehicles, and searches of the arrestee's person or property—are justified by a much broader range of law-enforcement and institutional goals, which are not necessarily related to the individualized circumstances of the particular arrest in question. These include the need to identify the arrestee, to secure the arrestee's belongings, and to protect jail guards and inmates by ensuring that potential weapons or contraband are not brought into the facility. In short, they need not be justified by concerns over officer safety or the destruction of evidence alone. Although these search procedures are triggered by the fact of arrest, they are indistinguishable from other kinds of suspicionless, programmatic searches, and should be conducted according to the suspicionless search and seizure Principles in Chapter 5. In particular, they should be conducted either pursuant to written policies that are applied evenhandedly to all individuals who are taken into custody, or on the basis of articulable, individualized suspicion, documented in advance, that a more intrusive search is required of an individual.

REPORTERS' NOTES

Searches incident to arrest are justified on two grounds: protecting the safety of the officer and securing any evidence that might be on or near the arrestee. As the U.S. Supreme Court explained in United States v. Robinson, 414 U.S. 218 (1973), a custodial arrest places the officer and the arrestee "in close proximity" for an extended period of time. Evidence shows that attempted arrests lead to officer injuries and fatalities more than almost any other police activity. See *2015 Law Enforcement Officers Killed & Assaulted, Fed. Bureau of Investigation: Uniform Crime Reporting*, tbl. 23, 73, 101. Although dissenting judicial opinions of the last century on occasion have called the legality of searches incident to arrest into question, see, e.g., Harris v. United States, 331 U.S. 145, 195 (1947) (Jackson, J., dissenting); Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting), searches incident to arrest have a long history of acceptance in American law as well as English law, in which they were used by constables at least since the 17th century. See Sheppard, *The Offices of Constables, Ch. 8 § 2, no. 4* (London 1650)*;* Welch, *Observations on the Office of Constable 12, 14* (1754).

Still, there are two problems with the search-incident-to-arrest authority as presently constituted. First, in certain circumstances it enables officers to conduct searches in a manner that is more intrusive than is justified by the underlying rationales of safety and evidence gathering.

Second, the authority incentivizes officers to arrest individuals in circumstances in which they otherwise would have issued a warning or a citation. See, e.g., State v. Sullivan, 16 S.W.3d 551, 552 (Ark. 2000) (officer testified that he arrested driver instead of issuing a citation because he suspected the driver of being involved with narcotics); State v. Pierce, 642 A.2d 947, 961 (N.J. 1994) (expressing concern that an expansive search-incident-to-arrest doctrine "creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits." (internal citations omitted)).

The Supreme Court has mitigated, though not resolved, these two related problems of pretextual and overly intrusive searches. In Arizona v. Gant, 556 U.S. 332 (2009), the Court narrowed the scope of searches incident to arrest in the automobile context by holding that officers may not search an arrestee's vehicle unless they have reason to believe that the arrestee could gain access to the vehicle or that the vehicle contains evidence related to the crime of arrest. In Riley v. California, 134 S. Ct. 2473 (2014), the Court held that the permissible scope of a search incident to arrest does not include the digital contents of the arrestee's cellular phone. Despite these selective limitations, the general rule permitting searches incident to arrest endures, as do the attendant challenges of pretextual and overly intrusive searches.

These challenges could be addressed in a variety of ways. Several state courts and legislatures have rejected the Supreme Court's broad rule and held that a search incident to arrest is invalid unless the circumstances justify it under one of the two rationales of evidence protection and safety. For example, in State v. Caraher, 653 P.2d 942 (Or. 1982) the Supreme Court of Oregon held that a search incident to arrest must be both relevant to the underlying crime and reasonable in light of all the facts. Similarly, in Zehrung v. State, 569 P.2d 189 (Alaska 1977), the Supreme Court of Alaska held that officers may only conduct a search incident to arrest in order to search for weapons or to look for evidence of the crime for which the person is arrested. In State v. Kaluna, 520 P.2d 51, 60 (Haw. 1974), the Hawai'i Supreme Court required that searches incident to arrest be "no greater in intensity than absolutely necessary under the circumstances." Id. at 58. The Model Code of Pre-Arraignment Procedure similarly adopts a limitation on the circumstances that permit a warrantless search. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 230.2 (AM. LAW INST. 1975) (prohibiting searches incident to "a traffic offense or other misdemeanor").

A number of states also prohibit custodial arrests for certain types of offenses, thereby eliminating the possibility of a search incident to arrest. See, e.g., ALA. CODE § 32–1–4 (1999) (prohibiting custodial arrests for all misdemeanor traffic offenses not involving injury to persons or driving while under the influence); CAL. VEH. CODE ANN. § 40504 (West 2000) (prohibiting custodial arrests, subject to certain exceptions, for non-felony traffic offenses); KY. REV. STAT. ANN. § 431.015(1), (2) (Michie 1999) (prohibiting custodial arrests, subject to exceptions, for misdemeanors if there are reasonable grounds to believe that the person being cited will appear in court); LA. REV. STAT. ANN. § 32:391 (West 1989) (prohibiting custodial arrest for traffic violation offenses, subject to exceptions; permitting custodial arrest for traffic misdemeanor and felony offenses); MINN. R. CRIM. P. 6.01, subdiv. 1(1)(a) (requiring issuance of citations in misdemeanor

cases "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation."); N.M.S.A. 1978, § 66-8-123 (prohibiting custodial arrests, subject to certain exceptions, for misdemeanor traffic offenses); S.D. CODIFIED LAWS § 32–33–2 (1998) (prohibiting custodial arrests for misdemeanor traffic violations, subject to exceptions); TENN. CODE ANN. § 40–7–118(b)(1) (1997) (prohibiting custodial arrests for misdemeanors, subject to exceptions); VA. CODE ANN. § 46.2–936 (Supp. 2000) (prohibiting custodial arrests, subject to certain exceptions, for misdemeanor traffic offenses). In states that leave discretion to officers, a number of courts have held that arrests for minor misdemeanors amount to an abuse of the officers' discretion to decide whether to make an arrest. State v. Brown, 792 N.E.2d 175 (Ohio 2003) (holding that, absent certain special circumstances, an arrest for a minor misdemeanor violates the state constitution); State v. Bayard, 71 P.3d 498 (Nev. 2003) (finding that an officer abused his statutory discretion by using custodial arrest for a traffic violation); State v. Bauer, 36 P.3d 892 (Mont. 2001) (finding that an officer abused his statutory discretion by using custodial arrest for possession of alcohol by a minor); State v. Harris, 916 So.2d. 284 (La. Ct. App. 2005) (finding that an officer abused his statutory discretion by using custodial arrest for possession of alcohol by a minor). Elsewhere, these Principles likewise urge states and agencies to encourage or require officers to consider alternatives to arrest, including warnings or citations. See § 4.05.

In dealing specifically with the problems of pretextual and overly intrusive searches, these Principles do not adopt either of the two categorical approaches. Instead, this Section makes clear that an arrest should not be conducted as a pretext to search. See, e.g., McCoy v. State, 491 P.2d 127 (Alaska 1971) ("The arrest must not be a pretext for the search; a search incident to a sham arrest is not valid."). And it reduces both the incentive for officers to conduct pretextual arrests and the overall intrusiveness of searches by limiting the scope of a search that may be conducted out in the field to a pat-down, unless there is cause to believe that a more exhaustive search is necessary to uncover evidence or a weapon on the arrestee's person. This Section permits officers to conduct a more thorough search at the stationhouse or a detention facility, so long as that search is conducted in accordance with the Principles on suspicionless searches in Chapter 5, or on the basis of reasonable suspicion that the arrestee is concealing a weapon or contraband in a manner that would not be detected through a routine search.

By drawing a distinction between searches out in the field and searches conducted back at the stationhouse, this Section ensures a closer fit between the scope of a search incident to arrest and its permissible rationales. The former is aimed primarily at preventing the destruction of evidence and ensuring that the individual arrested is safe for transportation. The latter furthers the additional goal of ensuring the integrity of the detention facility and the safety of other detainees. At the same time, this Section recognizes that all custodial arrests, no matter the underlying offense, may present a danger to the officer—and that officers should therefore be permitted to conduct a pat-down search following any custodial arrest.

A number of jurisdictions have adopted similar policies. The New York City Police Department (NYPD), for example, instructs officers to conduct a pat down in the field, and to

conduct a full search only at the station. See NYPD Patrol Guide, Procedure No. 208-05, Arrests – General Search Guidelines. The Honolulu Police Department similarly limits the search at the scene to a pat down. See Honolulu Police Department Policy, Security Control of Arrestees. Colorado law limits the scope of a search incident to an arrest for a minor traffic violation or for a minor municipal offense to a protective pat-down search for weapons. See People v. Clyne, 541 P.2d 71 (Colo. 1975) (overruled on other grounds by People v. Meredith, 763 P.2d 562 (Colo. 1988)).

§ 4.0x. Police-Involved Pursuits

(a) Officers should consider a person to be "fleeing" only when it is reasonably apparent that the person is attempting to elude or evade capture by a police officer, after the officer has attempted to conduct a lawful stop or custodial arrest of that person. Officers should not consider a person to be fleeing when such person has no legal obligation to stop or submit and engages in lawful avoidance of contact with a police officer.

(b) Police should pursue a fleeing person, whether by foot or vehicle, only when:

(1) the nature and severity of the conduct or offense for which the person would be pursued are such that the person's immediate apprehension directly advances the goal of public safety; and

(2) the pursuit would not subject the officer, the fleeing person, or a member of the public to an undue risk of harm.

The decision to continue or terminate a pursuit should be based on an ongoing evaluation of these factors.

(c) All pursuits should be conducted in a manner commensurate with the considerations above and consistent with the principles set forth in § 1.04. A pursuit should cease immediately once the pursuit poses an undue risk of harm to any person or when immediate apprehension is no longer necessary to advance the goal of public safety.

(d) If a pursuit results in the apprehension of a fleeing person, the person should, as soon as reasonably practicable, be placed in the custody of officers who were not involved in the pursuit, to minimize the risk of retaliation or reprisals by any pursuing officers. Any use of force during or after a pursuit should be applied according to the principles set forth in Chapter 7.

(e) Agencies should develop policies dedicated specifically to addressing how pursuits should be conducted, including which tactics are permitted and prohibited. Policies should

recognize the distinctions between pursuits conducted on foot and those conducted in vehicles, and should account for the different risks posed by each to participants and bystanders.

Comment:

a. Police-involved pursuits require special attention. Although it may seem plain that police should pursue and apprehend persons seeking to avoid a lawful stop or arrest by a police officer, a growing body of research indicates that not all police-involved pursuits are necessary to promote public safety, and that some pose an unreasonable risk of injury or death to officers, to members of the public, and to persons in flight. Although pursuits involving vehicles are particularly risky for participants and nonparticipants alike, pursuits by foot can also be dangerous and expose officers, persons in flight, and bystanders to considerable safety risks. In fact, it is fair to say that no pursuit is without some risk. Despite those risks, many pursuits are commenced without specific consideration of whether immediate apprehension of a fleeing person is necessary to advance public safety or whether a pursuit constitutes a disproportionate response to the circumstances that preceded it, in light of the risks posed by pursuit. This Section addresses how to maximize the benefit to public safety that police-involved pursuits can offer when conducted appropriately, while minimizing risks.

b. Defining "flight." Police pursuits necessarily involve someone who is attempting to avoid apprehension by police. This Section establishes two elements for determining whether a person is fleeing from police and, consequently, can be the subject of a police pursuit. First, it requires that police officers have attempted to conduct a lawful stop or custodial arrest of the person. This element ensures that police officers have legal authorization to stop and detain someone (i.e., the constituent acts involved in apprehending them) before commencing a pursuit. Second, it establishes a reasonableness standard for determining whether the person is attempting to avoid being the subject of a lawful stop or custodial arrest. This necessarily implies that the person, in the eyes of a reasonable observer, must have attempted to avoid apprehension after being obligated by law to comply with an officer's command to stop or to permit their arrest. Accordingly, someone who would otherwise be free to refuse an officer's request to stop could not then be pursued once they attempt to lawfully avoid police contact, a fact this Section makes clear. This element ensures that officers recognize and heed the difference between lawful

avoidance and unlawful evasion. Additionally, this element does not permit officers to use a person's lawful avoidance to justify another attempted stop of that person unless the other stop can be independently justified on other grounds. This Section does not address when stops and arrests are lawful; that is the subject of the rest of this Chapter.

c. Conducting appropriate pursuits. Recognizing the risks associated with police pursuits, this Section permits police pursuits only when circumstances warrant such action. It sets forth two requirements for commencing and continuing a pursuit, both of which ultimately are rooted in the preservation of public safety and well-being, and which should be considered in relation to one another in making a decision to commence or terminate a pursuit.

First, it is important to recognize that the cessation of pursuit of a person does not imply that the person has been allowed to escape or avoid accountability. In favoring pursuits, officers and others, including members of the public, may have in mind rule-of-law considerations—that taken as a whole it is bad for deterrence and the orderly functioning of society if individuals simply can commit offenses and then flee. However, police pursuits are merely one tactic for apprehending offenders. Police can utilize other means to ensure that criminal conduct is held to account. For example, when a fleeing person's identity is known, it may be possible to delay apprehension to a time when active pursuit is unnecessary, thus holding that person accountable without heightening the risk involved in apprehension. Alternatively, investigation after the fact may reveal the fleeing suspect's identity.

Next, it is important to understand that all pursuits carry inherent risk of harm, and this risk must inform when pursuits occur. This is not to say that there must be absolutely no risk of harm at all before officers engage in pursuit, as that would mean pursuits never would occur. Particularly when the person in flight is armed or has otherwise demonstrated a potential for violence, pursuit may be called for despite the risks. Importantly, when the risk of harm arising from the pursuit itself outweighs the benefit gained by the immediate apprehension of the fleeing person, this Section requires that the pursuit cease immediately.

Finally, because pursuits carry inherent risk, they should be reserved only for situations in which public safety favors or requires the immediate apprehension of a person. Making this determination requires consideration of a variety of factors, including the nature and severity of the conduct for which apprehension would be sought, the likelihood of identifying the suspect otherwise, and—again—the likelihood of harm from the pursuit itself. If the risks of harm are

tangible, pursuit may be inappropriate when apprehension is unnecessary to eliminate a threat of future, serious unlawful acts or harm to other individuals, or when the individual can be apprehended otherwise.

d. Minimizing retribution against fleeing suspects. Pursuits can be immensely frustrating and stressful experiences for the officers involved. See generally Simon Baldwin et al., *Stress-Activity Mapping: Physiological Responses During General Duty Police Encounters*, 10 FRONTIERS IN PSYCH. 1 (2019) (describing the physiological effects of various policing-related tasks, including those implicated by police pursuits, such as threat assessment, use of force, and apprehension of suspects). Sometimes, this frustration and stress can lead officers to seek retribution or use disproportionate force against fleeing suspects once they have been apprehended. See generally Peter. G. Renden et al., *Effects of Threat, Trait Anxiety and State Anxiety on Police Officers' Actions During an Arrest*, 22 Leg. Crim. Psych. 116 (2017) (discussing the consistently negative impact of acute stress on police task performance, including the increased use of disproportionate force when a threat is perceived); Arne Nieuwenhuys et al., *Shoot or Don't Shoot? Why Police Officers are More Inclined to Shoot When They are Anxious*, 12 Emotion 827 (2012) (finding that officers who experienced high-anxiety shooting scenarios were more likely to shoot surrendering suspects than those in low-anxiety scenarios). Retribution can take the form of verbal insults, threats of physical or deadly force—even when no use of force is warranted or legally permitted—or acts of omission like delayed administration of medical care. Further, even when no retribution is intended by an officer, high stress during and after a pursuit can severely impair judgment and motor-skill performance, increasing the likelihood that officers will miscalculate the force necessary to apprehend and detain a fleeing person. This conduct obviously is harmful to the apprehended person, but it also may lead to disciplinary or even criminal process against the officer, even when the pursuit otherwise was conducted appropriately and for a legitimate safety purpose. To avoid these outcomes, this Section proposes that a person who has been apprehended by a pursuing officer be placed, as soon as reasonably practicable, in the custody of officers uninvolved with the pursuit to ensure that the person's police custodians remain dispassionate, thereby minimizing the risk of reprisal against that person.

e. Pursuit policies. Although police pursuit policies have received increased attention in recent years, many departments still lack dedicated policies that address pursuit specifically and account for the unique circumstances and risks associated with pursuits. Some departments instead

rely on their existing stop, arrest, and use-of-force policies to guide officer conduct across all contexts, including those involving pursuits. This approach, however, poorly prepares officers to understand their obligation to preserve public safety in pursuit scenarios, fails to inform them of permitted and prohibited tactics, and offers no guidance about when pursuits are to be commenced, ended, or avoided altogether. The only way to guide officers adequately on these aspects of pursuit operations is to address them within policies specifically dedicated to them.

For example, the Baltimore Police Department's foot-pursuit policy comprises eight pages of comprehensive guidance on core pursuit principles, prohibited actions, officer responsibilities during pursuits, and considerations for commencing and terminating pursuits, among other directives. See generally Baltimore Police Department, Policy 1505 – Foot Pursuits (2021). In contrast, an October 2021 review of the policies of the 15 largest police departments by officer headcount revealed that although all had a vehicular-pursuit policy of some kind, four departments lacked any kind of dedicated foot-pursuit policy and at least one department offered only nominal foot-pursuit guidance.

REPORTERS' NOTES

1. Pursuits are common and necessary. Although official counts of police-involved pursuits are frustratingly difficult to come by, it is apparent that pursuits are a rather commonplace occurrence for American law enforcement, particularly larger municipal police agencies. Available data is limited, but statistics from the U.S. Department of Justice indicate that local and state law-enforcement agencies engage in approximately 68,000 police-involved vehicle pursuits per year, a tally separate from the countless more that occur via foot, for which data is virtually nonexistent. See BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., POLICE VEHICLE PURSUITS, 2012–2013 2 (2017) (providing statistics for 2012, the most recent year for which federally aggregated national data is available); see also JOEL H. GARNER & CHRISTOPHER D. MAXWELL, UNDERSTANDING THE USE OF FORCE BY AND AGAINST THE POLICE IN SIX JURISDICTIONS, FINAL REPORT 35 (2002) (reporting that, in a sample of 7,512 arrests reviewed from six urban police departments, three percent involved pursuit by foot and 2.4 percent involved pursuit by car). More recent state-level data from 2019 supports the notion that pursuits are common, with Connecticut having recorded 739 for the year, Pennsylvania recording 1,965, Illinois recording 512 (of which 270 occurred in Chicago alone), and California recording an astounding 8,822. See PENN. STATE POLICE BUREAU OF RES. & DEV., PENNSYLVANIA POLICE PURSUITS 2019 ANNUAL REPORT 1, 4 (2020); ILL. L. ENFORCEMENT TRAINING & STANDS. BD., ANALYSIS OF ILLINOIS POLICE PURSUIT REPORTING: 2019 3 (2020); CONN. GEN. ASSEMBLY, CONNECTICUT POLICE PURSUIT DATA – 2019, SUMMARY DESCRIPTIVE INFORMATION 4 (2020); CAL. HIGHWAY PATROL, REPORT TO THE LEGISLATURE, SENATE BILL 719, POLICE PURSUITS 2 (2020); see also David Struett, *66% of Chicago Police Chases in 2019 Ended*

in Crashes — 8 of them Fatal — Yet Pursuit Policy Went Unchanged until Late 2020, Emails Show, CHICAGO SUN-TIMES (May 12, 2021), https://chicago.suntimes.com/crime/2021/5/12/22425231/lori-lightfoot-chicago-police-vehicle-pursuit-policy-emails. The frequency of police-involved pursuits indicates that they serve a vital function, one linked to a central mission directive of most police agencies: enforcement of the laws through the apprehension of lawbreakers. However, the ubiquity and usefulness of pursuit as a practice does not alone justify its unguided use, particularly given the heightened risk pursuits pose to the safety of participants and bystanders.

2. Vehicle pursuits are dangerous. The 68,000 vehicle pursuits recorded by the U.S. Department of Justice for 2012 resulted in 351 deaths, just shy of the 355 deaths that resulted on average each year between 1996 and 2015. See BUREAU OF JUST. STATS., supra, at 1, 6. Of these annual deaths, 65 percent were of individuals in the vehicle being pursued, 29 percent were of motorists uninvolved with the pursuit, four percent were of pedestrian bystanders, and just over one percent were of persons in police vehicles. Id. at 6. Although officers were much less likely than others to suffer fatal injuries during pursuit collisions, officer deaths resulting from pursuit-related collisions have accounted for five to six percent of all line-of-duty deaths each year from 1970 to 2016. See Michael White, Lisa Dario & John Shjarback, *Assessing Dangerousness in Policing: An Analysis of Officer Deaths in the United States, 1970–2016*, 18 CRIMINOLOGY & PUB. POL'Y 11, 18 (2019).

Fatalities are just one indicator of dangerousness and represent a relatively small subset of the total number of injuries resulting from police-involved pursuits. For example, the California Highway Patrol reported that nearly a quarter of the vehicle pursuits conducted by local and state law enforcement in California in 2019 resulted in collisions, with approximately one-third of those resulting in injuries to at least one person. See CAL. HIGHWAY PATROL, supra, at 2 (reporting that 23.3% of the 8,822 total pursuits for 2019 resulted in a vehicular collision, 32.7% of which—or 672—resulted in injury). In Connecticut, 17.8 percent of pursuits involved a collision, with just under one-third of those resulting in injury. See CONN. GEN. ASSEMBLY, supra, at 4. And in Chicago, a staggering 66 percent of pursuits resulted in collisions, with 4.4 percent of those resulting in fatal injury. See Struett, supra. The risks to both property and person are thus demonstrably high, particularly when pursuits occur in population centers and high-traffic areas.

3. Foot pursuits are dangerous. Available data, while limited, indicates that foot pursuits are more likely to end in an officer-involved shooting and to disproportionately impact people of color than interactions not involving pursuits. According to data reported by the Federal Bureau of Investigation, 14 police officers were killed from 2016 to 2019 while pursuing suspects on foot. See Fed. Bureau of Investigation, Law Enforcement Officers Killed and Assaulted, Uniform Crime Reports, available at https://ucr.fbi.gov/leoka. An investigation by the Chicago Tribune revealed that more than one-third of the 235 police shootings in Chicago from 2010 to 2015 involved a foot chase, and that 94 percent of persons shot by police during such encounters were Black. See Angela Caputo, Jennifer Smith Richards & Jason Meisner, *Third of Police Shootings Started with Foot Chases, Tribune Analysis Finds*, CHI. TRIB. (Sept. 07, 2016), https://www.chicagotribune.com/investigations/ct-chicago-police-shooting-foot-chase-met-20160907-story.html. Around one-half

of those pursuits resulting in a shooting began with enforcement of a minor offense, such as public drinking or curfew violations. See id. Thirteen of the 81 civilians shot by police after a foot chase had no gun, and four were completely unarmed. See id.

Similarly, foot pursuits were involved in 22 to 27 percent of all officer-involved shootings in Los Angeles County, 48 percent of all such shootings in Philadelphia, and 26 percent of all such shootings in Las Vegas. See LAS VEGAS METRO. POLICE DEP'T, USE OF FORCE AND VEHICLE PURSUIT ANNUAL 5-YEAR STATISTICAL REPORT 2016–2020, at 34 (2020); Robert Kaminski et al., *Correlates of Foot Pursuit Injuries in the Los Angeles County Sheriff's Department*, 15 POLICE QUARTERLY 177, 179 (2012). The same trends are evident in Austin, Texas, where officers chased over 2,000 persons on foot from August 1, 2010, to July 31, 2013, resulting in injuries to 150 officers and one in five suspects. See Tony Plohetski, *Dangerous Pursuit: Austin Police Foot Chases Can Lead to Injuries, Shootings*, AUSTIN AM.-STATESMAN (Sept. 8, 2013), https://www.statesman.com/news/20130908/dangerous-pursuit-austin-police-foot-chases-can-lead-toinjuries-shootings. Additionally, more than 30 percent of all police shootings in Austin during this period involved a foot pursuit. See id.

4. Pursuits are costly. Civil liabilities arising from pursuit-related injuries and property damage can be substantial. In 2019, just two wrongful-death settlements arising from deaths sustained during police-involved vehicular pursuits (representing just two percent of all settlements) accounted for 30 percent of all money paid to settle police-related torts lawsuits in Chicago that year. See CITY OF CHICAGO, REPORT ON CHICAGO POLICE DEPARTMENT 2019 LITIGATION 2 (2020). Vehicle pursuit cases also comprised 74 percent of all jury-awarded damages paid by Chicago on behalf of the Chicago Police Department that year. See id. In one case, a jury returned a $21.3 million award, the highest such award for a vehicle-pursuit case in more than 15 years. Even after the award was negotiated down to $19.25 million during post-verdict settlement discussions, the award still eclipsed prior pursuit-related post-verdict settlements in that timespan. See id. Another case resulted in a $450,000 settlement awarded to an unarmed military veteran who, after being pursued on foot for drinking an open container of alcohol on the sidewalk, was shot by multiple police officers. See Caputo et al., supra. Although these figures come from just one municipality, they are indicative of the high cost that pursuit-related liabilities can impose for both settled and adjudicated torts claims.

5. Dedicated pursuit policies are needed. Dedicated and comprehensive pursuit policies help limit the risks and costs associated with pursuits, and may reduce their rate of occurrence altogether. A 1999 study of 436 law-enforcement agencies found that when pursuit policies were more restrictive of officers' ability to initiate a pursuit, the rate of pursuits decreased, as did the rate of excessive use of force. See Conan Becknell, G. Larry Mays & Dennis M. Giever, *Policy Restrictiveness and Police Pursuits*, 22 POLICING: AN INT'L J. OF POLICE STRATEGIES & MGMT. 22, 93 (1999). A 1997 survey of 800 police departments found that larger municipal police departments were more likely than smaller departments and county departments to have written pursuit policies. See Geoffrey P. Alpert, *Police Pursuit: Policies and Training*, NAT'L INST. OF JUST. (1997). Of the

800 departments surveyed, 48 percent reported a policy change within the previous two years, and 87 percent of those policies were more restrictive than the policies they replaced. See id.

Police departments increasingly have recognized the importance of having dedicated pursuit policies, and have developed policies that, to varying degrees, offer guidance and impose limitations on when and how to pursue fleeing persons. The Atlanta, Georgia, Police Department, for example, permits vehicle pursuits only for nine enumerated felony offenses, and prohibits them entirely for traffic offenses, misdemeanors, and property crimes. See ATLANTA POLICE DEP'T, POLICY MANUAL, STANDARD OPERATING PROCEDURE 3050 (2021). The Orlando, Florida, Police Department similarly prohibits vehicle pursuits for nonfelony offenses, but permits commanders to make case-by-case exceptions. See ORLANDO POLICE DEP'T, POLICY AND PROCEDURE § 1120.11 (2018). The state of New Jersey grants considerable latitude to its officers to determine whether to commence a pursuit, particularly if they reasonably believe the fleeing person poses an imminent threat to others, but it constrains the tactics officers can deploy in their pursuit, such as prohibiting vehicle pursuits conducted against the permitted direction of traffic. See N.J. OFF. OF THE ATT'Y GEN., USE OF FORCE POLICY ADDENDUM B, VEHICULAR PURSUIT POLICY 4-6, 8-9 (2020). The Las Vegas, Nevada, Police Department has a dedicated foot-pursuit policy prohibiting officers involved in a pursuit from laying hands on the suspect so long as the suspect is not endangering anyone. See LAS VEGAS METRO. POLICE DEP'T, DEPARTMENT MANUAL, § 5/212.05 (2021). The department credits the policy for a 23-percent drop in use-of-force incidents and an 11-percent drop in officer injuries, though researchers have been unable to verify those claims because the department did not track foot-pursuit statistics at that time. See Zara Abrams, *What Works to Reduce Police Brutality*, 51 MONITOR ON PSYCHOLOGY 30 (2020); see also Phillip Atiba Goff, *Identity Traps: How to Think About Race and Policing*, BEHAV. SCI. & POL'Y 2(2), at 11, 17 (2016).

Despite these trends, and despite a multiplicity of policy models available to adapt, many police departments lack any kind of meaningful policy on police-involved pursuits, leaving their officers with inadequate guidance. Additionally, although some departments have policies relating to vehicle pursuits, they may lack policies relating to foot pursuits, which are different enough from vehicle pursuits and other policing scenarios to warrant their own policies. For example, vehicle-pursuit policies may direct officers on the appropriate use of tactics such as ramming, box-ins, pursuit intervention technique (PIT) and tactical vehicle intervention (TVI) maneuvers, and road spikes, while foot-pursuit policies may discuss surveillance and containment strategies such as block searching and K-9 support. Compare vehicle pursuit policies, CITY OF PORTLAND POLICE BUREAU, DIRECTIVES MANUAL § 0630.05 (2021), LAS VEGAS METRO. POLICE DEP'T, DEPARTMENT MANUAL § 6/014.00 (2021), and NEW ORLEANS POLICE DEP'T, POLICY MANUAL § 41.5, with foot pursuit policies, CITY OF PORTLAND POLICE BUREAU, DIRECTIVES MANUAL § 0630.15 (2021), LAS VEGAS METRO. POLICE DEP'T, DEPARTMENT MANUAL § 5/212.05 (2021), and NEW ORLEANS POLICE DEP'T, POLICY MANUAL § 41.4 (2015). Although a department's vehicle- and foot-pursuit policies should contain guidance that accounts for any factors that may be uniquely applicable to those scenarios, all policies should contain discussion of common considerations that apply across all contexts, such as the impact that traffic, weather, and time of

day may have when deciding whether to commence, continue, or terminate a pursuit. See, e.g., CITY OF PORTLAND POLICE BUREAU, DIRECTIVES MANUAL §§ 0630.05, 0630.15 (2021); NEW ORLEANS POLICE DEP'T, POLICY MANUAL §§ 41.4-41.5 (2015).

Further, policies should extend beyond discussion of permissions and prohibitions and address adjacent considerations that inform and motivate officer conduct prior to, during, and after pursuits. For example, even among departments that have robust operational policies on pursuits, most lack any discussion relating to whether an officer will face disciplinary action for exercising discretion to decline to pursue or to terminate a pursuit prior to apprehending the fleeing person. To their credit, some departments, like the Portland, Oregon, Police Department, stand as exceptions, and offer a template for others to follow, but departments should treat these considerations seriously enough to develop their own tailored policies. See CITY OF PORTLAND POLICE BUREAU, DIRECTIVES MANUAL § 0630.15 (2021).

As a final note, there has been some legislative movement toward imposing a statewide policy on pursuits. Washington, for example, enacted a law effective July 2021 that, among other requirements, imposes probable-cause and reasonable-suspicion standards for the commencement of pursuits, depending on the nature of the underlying offense, and prohibits them outright for lower-level offenses. See H.B. 1054, 67th Leg., Reg. Sess. (Wash. 2021). Other states, like Kentucky, have enacted bills that require departments to develop their own policies and require officers to receive a baseline level of training before becoming authorized to participate in pursuits. See 20 R.S. H.B. 298, 2020 Reg. Sess. (Ky. 2020). Legislative attention to this issue should be encouraged, particularly since state involvement in this issue could motivate further deliberation and action at the local level.

CHAPTER 5

POLICING IN THE ABSENCE OF INDIVIDUALIZED SUSPICION

§ 5.01. Definition and Legality of Suspicionless Policing Activity

(a) For purposes of this Chapter, policing activity includes information gathering, seizures, and encounters, as those terms are used in Chapters 2, 3, and 4 of these Principles.

(b) As stated in § 2.01(b), policing activity is suspicionless when it is conducted in the absence of cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conducted or threatens public safety.

(c) In addition to any other limitations imposed by the U.S. Constitution, suspicionless policing activity should occur only if it is conducted pursuant to the Principles in this Chapter or the Principles governing consent or searches incident to arrest in Chapter 4.

Comment:

a. Distinguishing suspicionless and suspicion-based policing activities. The searches and other information-gathering practices addressed in Chapters 2 and 3, and the stops, arrests, and other encounters addressed in Chapter 4, typically are based on some form of cause to believe that a particular individual or situation requires investigation or immediate assistance. In contrast, suspicionless police actions are conducted in the absence of any such "individualized" suspicion. For example, when officers conduct a sobriety checkpoint, they have no reason to suspect that any particular driver who is stopped was driving under the influence. Similarly, scans of passengers at airports, drug testing of students, and inventory searches of arrested persons or jail detainees all occur in the absence of reason to believe that any particular search will bear fruit. Of course, experience or empirical analysis may suggest that a certain percentage of those people stopped at a checkpoint, subjected to drug testing, or inventoried at the police station will be in violation of the law. But that assessment does not distinguish any given individual within the targeted group from any other and, as such, does not constitute individualized suspicion as used in this Section.

b. Regulation of suspicionless policing activity. Suspicionless policing activity should not be prohibited simply because it takes place in the absence of individualized suspicion. Such actions are a common and important means of detecting and deterring crime and protecting the public. For instance, routine safety inspections minimize hazardous workplace conditions by incentivizing business to take precautionary measures. Checkpoints might deter and detect drunken driving or

illegal immigration. Technological surveillance of high-crime areas can enhance public safety and reduce crime in those areas. But the fact that these policing activities are suspicionless means that special regulatory rules are necessary.

Under traditional Fourth Amendment doctrine, the requirement of individualized suspicion—either "reasonable suspicion" or "probable cause"—serves two important functions: it ensures that there is sufficient justification for the intrusion and it limits officer discretion by providing a standard for distinguishing between those who may be searched or seized and those who may not. Warrants add an additional layer of protection by requiring that the determination of probable cause be made by a neutral magistrate, divorced from law enforcement, and by describing with particularity the place to be searched or the person or item to be seized.

In the absence of warrants and individualized suspicion, it is essential that there be alternative mechanisms in place to ensure that searches and seizures and other policing activities are justified, are not directed at individuals or groups in an arbitrary or discriminatory fashion, and are limited in scope consistent with their justification. The U.S. Constitution may require such limitations. But even if it does not, the Principles in this Chapter are intended to ensure that suspicionless policing activities are carried out in a reasonable and evenhanded manner.

c. Scope of this Chapter. Examples of suspicionless policing activity include residential and business inspections, roadblocks, drug and DNA sampling, inventories of impounded vehicles, camera surveillance of public areas, use of tracking technology, and data collection from third-party entities. These types of policing endeavors usually are carried out pursuant to a statute or a formal or informal policy and are programmatic in nature. Per § 2.02, this Chapter would not cover casual or adventitious visual observation of the type that occurs during routine policing, nor, per § 4.01, does it cover encounters that simply involve "social, non-investigative, or non-caretaking interactions between a police official and a member of the public." However, as do Chapters 2 through 4, this Chapter covers many types of policing actions that, to date, have not been considered searches and seizures under the Fourth Amendment.

Thus, for instance, this Chapter governs systematic public surveillance and data collection, even when it may not be governed by current Fourth Amendment doctrine. These practices are within the purview of this Chapter because of their potential for infringing privacy, chilling First Amendment rights, and enabling oppressive government power. Indeed, as Chapter 2 notes, the courts, spurred by technological developments, have begun to recognize the need to adjust the

traditional view that the Fourth Amendment is not implicated by either government surveillance of public places or by government access to personal information surrendered to third parties. Regardless of whether the U.S. Supreme Court ultimately repudiates entirely the public-exposure and third-party doctrines that today largely govern the definition of a "search," the assumption of this Chapter is that those doctrines should not allow policing agencies to engage in systematic information collection without any form of regulation whatsoever. As such, this Chapter imposes more restrictions on police access to information than may be imposed on private companies seeking the same information (although these Principles are of course not meant to foreclose regulation of private surveillance).

Although this Chapter adopts a broad definition of suspicionless policing activity, it does not address consent searches or searches incident to arrest—two types of potentially suspicionless police actions that clearly *are* governed by the Fourth Amendment. Both types of searches often are conducted in the absence of particularized suspicion that the search will turn up evidence of wrongdoing or is necessary for officer safety (although § 4.06(b) recommends that consent searches be limited to situations in which the officer has reasonable suspicion). They thus raise many of the same concerns as to necessity, arbitrariness, and discrimination discussed here. However, consent searches and searches immediately incident to arrest typically take place in the context of suspicion-based encounters, and thus are dealt with separately in Chapter 4.

REPORTERS' NOTES

1. The value of suspicionless policing activity. The sort of policing activity addressed in this Chapter—often referred to in the case law and academic literature as "programmatic," "regulatory," "administrative," "deterrent," or "special needs" searches—is an essential and increasingly ubiquitous tool of policing. See generally WAYNE LAFAVE, JEROLD H. ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 3.9 (3d ed. 2007). One of the principal functions of these types of suspicionless actions is deterrence. For example, if businesses know they may be subject to periodic, unannounced inspections, they are more likely to comply with the applicable regulatory programs that the inspections are meant to enforce. Suspicionless policing also may be necessary to detect wrongdoing in circumstances in which there are few if any objective indicia of suspicion: for example, federal officials have justified the use of fixed immigration checkpoints on the border on the ground that officials typically cannot tell from looking at a vehicle whether it is being used to transport undocumented immigrants. Other goals sought to be achieved by suspicionless policing activity include protecting the public (as with drug testing), protecting police and correctional officials (as with inventories), or collecting and storing information that may have investigative uses at some later time (as with many types of technological surveillance).

What distinguishes suspicionless policing from the various practices discussed in Chapters 3 and 4 is that all are conducted without individualized cause, i.e., cause to believe that those targeted are involved in wrongdoing or endanger the public. Airport security is the paradigmatic example: although there is some risk that an individual could try to bring a weapon on board, airport officials have no reason to suspect *any particular passenger* of trying to do so. Indeed, one of the goals in setting up robust security measures is to deter people from bringing weapons to the airport in the first place. The same is true of sobriety checkpoints. Dozens of cars are stopped without any basis for thinking that any particular driver is under the influence of drugs or alcohol (and indeed the vast majority of drivers are sober). Likewise, regulatory inspections, inventory searches, pervasive closed-circuit television surveillance, and metadata-collection programs usually are conducted without cause to believe any particular entity or person affected by the action is harboring evidence of wrongdoing. In many of these contexts, requiring individualized suspicion would mean disallowing the programs altogether.

2. Animating concerns. In interpreting the Fourth Amendment's "reasonableness" requirement, courts generally have preferred that searches and seizures be based on "individualized suspicion." City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing"). This requirement ensures that intrusions are "justified" and helps to cabin officer discretion by providing a standard for determining who may be subjected to the intrusion and who may not. In the absence of individualized suspicion, the primary worry raised by the reasonableness inquiry is that searches and seizures either will take place unnecessarily or on the basis of arbitrary, capricious, or impermissible criteria. For example, in striking down discretionary license and registration stops in Delaware v. Prouse, the U.S. Supreme Court explained that "when there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations . . . we cannot conceive of any *legitimate* basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver." Delaware v. Prouse, 440 U.S. 648, 661 (1979) (emphasis added). See also City of Los Angeles v. Patel, 576 U.S. 409, 421 (2015) (expressing concern that the suspicionless hotel-registry inspection regime "creates an intolerable risk that searches . . . will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests"); United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (disallowing suspicionless "roving-patrol stops" near the border because permitting such stops . . . would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers").

Recognizing these concerns, courts repeatedly have emphasized the importance of alternative safeguards to ensure that suspicionless searches and seizures are reasonably necessary to further important law-enforcement or regulatory objectives and are conducted in an evenhanded manner. For example, courts have said that suspicionless searches or seizures must further a "legitimate" or "substantial" government interest sufficient to warrant the intrusion on individual privacy. See, e.g., New York v. Burger, 482 U.S. 691, 708 (1987). Courts also have required that

searches "be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, 443 U.S. 47, 51 (1979); see also Donovan v. Dewey, 452 U.S. 594 (1981) (requiring that statute authorizing administrative inspections provide "a constitutionally adequate substitute for a warrant.").

3. Confusing doctrine. Although courts consistently have recognized these concerns with suspicionless searches and seizures and the importance of proper safeguards to address them, neither the U.S. Supreme Court nor the lower courts have settled on what the safeguards should be. The result is a doctrine that has been criticized as "incoherent," "devoid of content," and "a conceptual and doctrinal embarrassment of the first order." Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 257-258 (2011) (summarizing criticism); see also Anthony Amsterdam, *Perspectives on the Fourth Amendment*, MIN. L. REV. 349, 418 (1974); Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable"*, 84 GEO. WASH. L. REV. 281, 287 (2016); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective*, 25 AM. CRIM. L. REV. 669 (1988); Stephen Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. L. REV. 87, 89 (1989); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L. J. 1721, 1725 (2014). Several justices, from both ends of the ideological spectrum, also have expressed frustration with the doctrine. See, e.g., Indianapolis v. Edmond, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (stating "I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."); Chandler v. Miller, 520 U.S. 305, 327 (1997) (Rehnquist, J., dissenting) (expressing confusion at Court's decision to strike down suspicionless drug testing of Georgia legislators while upholding drug-testing programs of border-patrol officers and students on similarly shaky evidence); Skinner v. Ry. Labor Execs.' Ass'n., 489 U.S. 602, 639 (Marshall, J., dissenting) (noting that in the "years since this Court . . . first began recognizing 'special needs' exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted"); New Jersey v. T.L.O., 469 U.S. 325, 358 (1985) (Brennan, J., dissenting) (criticizing the "Rorschach-like 'balancing test'" in the Court's special-needs cases).

Much of the difficulty with the Court's analysis derives from its stance—at least since its decision in *Edmond*—that the primary determinant of when a given suspicionless action is permitted depends on whether it is aimed at "detect[ing] evidence of ordinary criminal wrongdoing." 531 U.S. at 37. If so, the Court usually finds the government action unconstitutional; if, instead, the search or seizure is justified by "special needs . . . beyond the normal need for law enforcement," it virtually always is permitted on the ground that the government's law-enforcement interests outweigh the individual's privacy and autonomy interests. Id. Although it may well be the case that the government should not be allowed to, for example, collect large pools of information on innocent individuals for the purpose of using it in later criminal investigations, the special-needs framework has proven difficult to apply consistently. In *Edmond*, the Court held that a suspicionless automobile checkpoint established to detect illegal drugs was aimed at investigating ordinary criminal wrongdoing and thus violated the Fourth Amendment. But in earlier cases, the Court

permitted automobile checkpoints set up to identify drunk drivers, undocumented immigrants, and unlicensed drivers, despite the fact that in all three of those scenarios criminal prosecution can result. Compare *Edmond*, 531 U.S. at 34 (drug interdiction), with United States v. Martinez-Fuerte, 428 U.S. 542 (1976) (immigration); Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (drunk drivers); *Prouse*, 440 U.S. 648 (1979) (license and registration). As Justice Rehnquist made clear in his *Edmond* dissent, 531 U.S. at 50-51 & n.2, checkpoints designed for ostensibly "regulatory" purposes nonetheless are usually backed up by criminal prosecution.

The distinction has only grown more confusing over time. In Ferguson v. Charleston, 532 U.S. 67, 69 (2001), the U.S. Supreme Court struck down a program of compelled drug testing for pregnant women because the "immediate objective" was to gather evidence to enable officers to make an arrest, despite the fact that the "ultimate goal" was to "get the women in question into substance abuse treatment and off of drugs," an objective that is easily classified as "regulatory" rather than crime-related in nature. In contrast, in *Patel*, 576 U.S. at 420, the Court held that nonconsensual inspections of hotel registries for the purpose of deterring and detecting prostitution, sex trafficking, and drug sales—certainly all aspects of ordinary crime control—nonetheless constituted a "special needs" situation that did not require a warrant (although the Court did require an administrative subpoena in nonconsensual situations). And in Maryland v. King, the Court upheld a Maryland statute authorizing suspicionless DNA collection from all felony arrestees as a means of "identification," although it was plain to all involved that the purpose of the program was to help clear the backlog of unsolved rape and homicide cases. 469 U.S. 435, 466 (2013) (Scalia, J., dissenting) ("The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous.").

The focus on the ordinary crime-control test also has led courts to neglect considerations that should be important to analysis of suspicionless searches and seizures. On the one hand, courts have struck down a number of suspicionless programs without regard for the seriousness of the crime problem that the programs sought to address, the effectiveness of the programs, or the degree to which the programs furthered their objectives in an evenhanded and nondiscriminatory manner. Compare, e.g., People v. Jackson, 782 N.E.2d 67 (2002) (invalidating an automobile checkpoint set up after a spike in "carjackings and robberies" because its primary purpose was to "serve the governmental interest in general crime control"); Mills v. District of Columbia, 571 F.3d 1304, 1311-1312 (D.C. Cir. 2009) (invalidating suspicionless checkpoints in high-crime "Neighborhood Safety Zones" in Washington, D.C.).

On the other hand, courts routinely have upheld suspicionless searches in the absence of any meaningful standards to guide officer decisionmaking. In New York v. Burger, for example, the U.S. Supreme Court approved a suspicionless search of a junkyard for stolen car parts despite the fact that neither the statute nor department policy provided any guidance for deciding which junkyards officers were to inspect on any given day, and did not place any limits on the number of times that officers could inspect a particular location. 482 U.S. 691 (1987). Indeed, the Court itself acknowledged that "it was unclear from the record why, on that particular day, Burger's junkyard was selected for inspection." Id. at 695 n.2. Nevertheless, the Court held that the statute provided

a "constitutionally adequate substitute for a warrant" because "it notifie[d] the operator as to who is authorized to conduct an inspection" (any law-enforcement officer) and limited inspections to "regular and usual business hours." Id. at 711. Neither of these protections satisfies the warrant's function in avoiding arbitrary decisions as to whom to target or how often. In Samson v. California, 547 U.S. 843 (2006), the Court upheld a suspicionless search of a parolee under a statute that merely stated that parolees "are subject to search or seizure by a probation officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause." CAL. PENAL CODE § 3607(b)(3). As Justice Stevens pointed out in dissent, there were "no policies—no 'standards, guidelines, or procedures'—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion." Id. at 860-861 (Stevens, J., dissenting). In *Samson* itself, the petitioner was simply "walking down a street with a woman and a child" when a police officer spotted him and decided to search him. Id. at 846.

In short, the U.S. Supreme Court's suspicionless-search jurisprudence appears to have lost sight of both the rationales that distinguish suspicion-based searches and seizures from suspicionless searches and seizures and the protections that are necessary to ensure that the latter actions are carried out in an evenhanded and nonarbitrary manner. The resulting case law is both over- and under-restrictive, disallowing some practices that may in fact be entirely sound, while permitting others that could benefit from more careful regulation. Perhaps more importantly, the existing case law fails to give law-enforcement agencies and legislatures any meaningful guidance on how best to craft suspicionless search and seizure policies to harness the benefits of these programs while minimizing attendant harms. That is the task that the remainder of this Chapter takes up.

4. A return to first principles. This Chapter specifies the core concerns common to *all* suspicionless policing activity, whether formally designated Fourth Amendment searches and seizures or not, from inventory searches, checkpoints, and safety inspections to surveillance systems and data-collection programs. It identifies the protections that are necessary in place of warrants and probable cause to ensure that such policing actions are both justified and nonarbitrary.

First, in place of a magistrate's determination that the policing activity is justified, this Chapter requires, in § 5.02, that the decision to introduce a suspicionless program be made through written policy, adopted either by a legislative body or by the agency itself. Second, these Principles also make clear, in §§ 5.03 and 5.06, that a suspicionless program must be designed to further an important law-enforcement or regulatory objective and be limited in scope to that which is necessary to further that objective.

To protect against arbitrariness, this Chapter also sets forth both a nondiscrimination principle, in § 5.04, and a constraint-on-discretion principle, in § 5.05. Both Principles ensure that, in the absence of cause, there is some other criterion in place for deciding which individuals or entities to subject to information gathering and encounters and that the criteria are applied in a neutral manner that limits officer discretion. The nondiscrimination principle provides that the decision to focus a suspicionless policing program on a subset of the population—for example, student athletes instead of all high-school students—must be justified on the basis of evidence

showing that the target group is more likely to be involved in wrongdoing than the rest of the relevant population. The constraint-on-discretion principle ensures that, once the group subject to the policing action is selected in a nondiscriminatory fashion, the decision as to whom or what to investigate within the targeted group—whether it be a single person, car, or business, or a larger unit—is governed by agency policy and is not the product of a case-by-case determination by officers in the field.

§ 5.02. Requirement of Written Policies

Suspicionless policing activity should be authorized by written policies developed through the process described in § 1.06 that identify, for each program:

(a) the specific harm sought to be detected or prevented;

(b) the permissible scope of the suspicionless policing activity;

(c) the persons, entities, or activities subject to the policing activity;

(d) if persons or entities will be selected from among the target group, the manner in which that will occur;

(e) the manner in which the effectiveness of the program will be evaluated;

(f) a finite period at the end of which any data generated by the program regarding identified or identifiable individuals will presumptively be destroyed or rendered inaccessible, consistent with § 6.02; and

(g) sanctions for violating the policy's provisions.

Comment:

a. Purpose of written policies. In the regulation of suspicionless policing activity, written policies serve three important functions. First, they help to ensure that a particular program is justified by requiring either legislatures or upper-level officials to determine in advance that the intrusions that will occur under the program are in fact necessary to further important law-enforcement or regulatory objectives. Second, the process of developing policies increases the opportunity for community involvement and the likelihood of democratic accountability. And third, policies help to cabin officer discretion by setting out the criteria that officers must use in deciding which individuals or entities may be subject to suspicionless policing activity.

b. Content of the policy. To ensure that the policy in fact serves the justification and discretion-minimization functions described in Comment *a*, this Section provides that the policy should address the objectives and scope of the program; the persons or entities to be targeted;

whether specific individuals or entities will be selected from among the target group and, if so, how; and the manner in which the legislature or agency will evaluate the program's effectiveness. A statute or regulation authorizing a fusion center (a data collection and dissemination unit aimed at fusing data from numerous sources) might address, for example: whether the center is aimed at ferreting out counter-terrorism, felonies, all crime, or any type of unlawful activity; the types of records that will be collected (e.g., criminal records, other public records, utility records, credit-card reports, communications metadata); whether the center will collect information about everyone in the jurisdiction and, if not, the rationale for focusing on certain groups; and the type of data (e.g., number of successful prosecutions using fusion-center information) that can assist in assessing the program's usefulness.

These requirements provide the framework for the rest of the Principles in this Chapter. Subsections (a) and (e) help implement § 5.03, which requires that the goals of the suspicionless program outweigh its impact on individual interests. Those subsections ensure that policymakers and the public explicitly identify the goals of the suspicionless activity and require that there be mechanisms in place to evaluate whether the program actually furthers these objectives. The requirements in subsections (b), (c), and (d), regarding identification of the scope and methods of the program, help implement §§ 5.04 through 5.06, which ensure that suspicionless policing activities are only as broad as necessary to achieve their objectives and that they be carried out in a nondiscriminatory and evenhanded manner. It would not be overly burdensome to include this type of information in authorizing legislation or regulation, and doing so would go a long way toward ensuring that suspicionless policing activities take place in a manner that furthers legitimate law-enforcement or regulatory objectives while minimizing attendant harms. See § 1.04.

Subsection (f) works in tandem with Chapter 6 on data retention by requiring that the authorization for the program indicate whether data about identified or identifiable people will be collected and, if so, when it should be destroyed. For instance, a suspicionless camera-surveillance program might generate images of people 24 hours a day that are stored in government databanks. As § 6.02 explains, this type of data should only be retained as long as it relevant to the purpose of the program. To implement that mandate, § 6.02(b) requires that the authorizing policy indicate a finite period at which time the data should be destroyed, with extensions possible if the government makes specific showings.

Finally, subsection (g) requires that the authorizing policy establish accountability mechanisms. Chapters 13 and 14 provide principles governing sanctions for failure to abide by sound policing policies. Thus, consistent with Chapters 1 through 12, this Section does not address the sanctions issue in detail. But subsection (g) does require that the policy provide consequences for failing to abide by its provisions and any restrictions on how the policy is implemented, as set forth in §§ 5.04, 5.05 and 5.06.

c. Legislative or administrative authorization. This Section does not express a preference for either legislative or agency policymaking. For many suspicionless programs, especially those that apply to a broad segment of the public or are likely to be permanent, legislatures may best be suited to make the threshold determination of whether the goals of the program are sufficiently weighty to justify the intrusion at issue—a point some state courts have recognized. In such instances, it may be optimal for legislatures to identify in general terms the objective, scope, and targets of the program, and to delegate to the relevant agency the power to implement the program through more specific guidelines. In other situations, an administrative body—a commission, a task force, or the upper echelons of the agency—might be better suited to devise the policy, on the ground it will be better acquainted with the relevant concerns and more attentive to local problems.

Whether legislative or administrative in origin, a suspicionless program should, consistent with § 1.06, be developed through a transparent process that involves the public. Such a process is often more likely than either judicial review or executive decisionmaking, standing alone, to produce policies that effectively balance law-enforcement and community interests and legitimize those policies in *any* policing context. In the suspicionless-policing context, there are several other important reasons for using the political process. First, it ensures that members of the public, through their representatives, are on notice that the government is contemplating a program that does not require individualized cause and thus necessarily will intrude upon perfectly innocent activity and may interfere with the liberty interests of the public. When such programs are sprung on an unsuspecting public they sometimes provoke a hostile reaction and are thus likely undermine public-safety objectives—results a more consultative approach could have avoided. Second, because programmatic policing actions can affect a significant number of people, public input can be particularly useful in helping policymakers gauge the scope of the perceived problem and consider ways of dealing with it, including methods that do not involve policing activity at all. Third, for many suspicionless programs—for instance, health and safety inspections, sobriety

checkpoints, camera surveillance, and drug testing—public disclosure can be an effective law-enforcement strategy. It can both educate the public about law-enforcement problems and enhance deterrence of problematic behavior.

The emphasis on public input is not meant to approve of purely majoritarian approaches to policing policymaking. Although public input is particularly important in developing policies for suspicionless policing activity, given the likelihood it will affect large groups of people, other Principles in this Chapter, in particular the nondiscrimination principle in § 5.04 and the constraint on discretion principle in § 5.05, limit the extent to which majoritarian impulses control regulatory policy. These two principles, enforceable by the courts, prohibit irrational focus on particular groups and require that any policy that is enacted be evenly applied so as to visit its impact on everyone within its ambit, not just those whom the police want to confront.

REPORTERS' NOTES

1. Need for written policy. The requirement of a written policy in this Section is consistent with the U.S. Supreme Court's repeated assertion that suspicionless searches and seizures generally should take place pursuant to a statute or regulatory scheme that serves as an "adequate substitute for a warrant." New York v. Burger, 482 U.S. 691 (1987); see also United States v. Biswell, 406 U.S. 311, 316 (1970) (noting that the government must have a "reasonable" inspection plan, one that does not leave the target "to wonder about the purposes of the inspector or the limits of his task."); Donovan v. Dewey, 452 U.S. 594, 600 (1981) (same); Brown v. Texas, 443 U.S. 47, 51 (1979) ("the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers"). A number of state courts likewise have held that suspicionless searches "must be carried out in accordance with agency guidelines limiting officer discretion." Lookingbill v. State, 157 P.3d 130, 136 (Okla. 2007); see also State v. Atkinson, 688 P.2d 832, 837 (Or. 1984) (en banc) (holding that an inventory search "must be conducted pursuant to a properly authorized administrative program, designed and systematically administered so that the inventory involves no exercise of discretion by the law enforcement person directing or taking the inventory").

Relying on these precedents, courts have invalidated programmatic searches conducted in the absence of an administrative plan. For example, in State ex rel. Accident Prevention Div. of Workmen's Compensation Bd. v. Foster, 570 P.2d 398 (Or. Ct. App. 1977), an Oregon Court of Appeals invalidated a warrantless workplace inspection after finding that the statute—which required only that searches take place at "reasonable times and within reasonable limits and in a reasonable manner"—did not provide sufficient guidance on "the manner of selection of the premises to be searched." See also United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992) (administrative search held unreasonable in light of government's concession "that there

was no administrative plan promulgating selection criteria"); Gooden v. Brooks, 251 S.E. 2d 698 (N.C. Ct. App. 1979) (finding insufficient a conclusory allegation that an inspection plan existed); State v. Luxon, 230 S.W.3d 440, 447 (Tex. App. 2007) (invalidating checkpoint because "evidence showed that [officers] did not follow any authoritatively standardized procedures in operating the roadblock").

However, as discussed in the Reporters' Notes to § 5.01, courts—and in particular, the U.S. Supreme Court—have not always been consistent in ensuring that the administrative plan in question in fact offers meaningful guidance to agency officials in deciding which individuals or premises to search or seize. The immigration checkpoints at issue in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), are another case in point. Although all cars traveling on a particular road were required to pass through the checkpoints, officers then were authorized to refer a small subset of vehicles to a "secondary inspection" based in part on the racial characteristics of the occupants, and in the absence of any individualized suspicion or specific, neutral criteria to guide officers in making these determinations. Id. at 563. Similarly, lower courts have routinely upheld inspections conducted in the absence of any administrative plan describing the criteria by which entities are to be selected for inspection. See, e.g., Bruce v. Beary, 498 F.3d 1232, 1242 (11th Cir. 2007) (upholding administrative inspection conducted on the basis of a tip in the absence of an administrative plan); United States v. Thomas, 973 F.2d 1152, 1156 (5th Cir. 1992) (same). The policies in these cases would not be consistent with this Section.

2. Legislative versus administrative policymaking. Although this Section does not take a position on whether suspicionless policing activity must be *legislatively* authorized or whether, instead, administrative regulations are sufficient, a number of state courts also have required express statutory authorization for checkpoints and other suspicionless programs. See, e.g., Sims v. State Tax Comm'n, 841 P.2d 6, 9 (Utah 1992) (requiring specific statutory authorization for sobriety checkpoints); State v. Henderson, 756 P.2d 1057, 1063 (Idaho 1988) (invalidating sobriety checkpoint because "[t]he Idaho legislature has not provided police with statutory authority to establish roadblocks"); Nelson v. Lane Cnty., 743 P.2d 692, 696 (Or. 1987) (requiring that automobile checkpoints be authorized by "a law or ordinance providing sufficient indications of the purposes and limits of executive authority."); State v. Holt, 887 S.W.2d 16, 19 (Tex. Crim. App. 1994) (en banc) (invalidating a sobriety checkpoint "[b]ecause a governing body in Texas has not authorized a statewide procedure for DWI roadblocks"). As these courts have made clear, legislative authorization ensures that—as is the case for searches conducted pursuant to a judicial warrant—the decision that a search or seizure is necessary and appropriate is made by officials outside the executive branch. See, e.g., *Nelson*, 743 P.2d at 104 ("The authority to conduct roadblocks cannot be implied. Before they search or seize, executive agencies must have explicit authority from outside the executive branch."); State v. Sims, 808 P.2d 141, 149 (Utah Ct. App. 1991) (noting that "both warrants and statutes originate outside the executive branch, serving to check abuses of that branch's law enforcement power"). A number of scholars likewise have argued in favor of greater legislative oversight of suspicionless searches and seizures. See, e.g., Christopher Slobogin, *Panvasive Surveillance, Process Theory, and Nondelegation*, 102 GEO. L. J. 1721, 1766-

1770 (2014) (arguing in favor of greater legislative supervision of suspicionless-surveillance regimes); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1877-1884 (2015) (arguing in favor of legislative authorization and oversight of policing practices); Thomas DiLenge, *Fourth Amendment Law after* Michigan Department of State Police v. Sitz, 9 J. L. & POL. 561, 587 (1993) (arguing that legislative authorization can . . . create an "objective benchmark against which [courts] can evaluate the 'reasonableness' of any government seizure").

In practice, many suspicionless programs are in fact legislatively authorized. For instance, most regulatory inspection programs and border and airport checkpoints are authorized by federal, state, or municipal legislation, which then is implemented through regulations developed by an agency. See 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2 (5th ed. 2015) (discussing a wide range of business inspection schemes, all of which "are intended to ensure compliance with statutes and administrative regulations having as their purpose protection of the employees or customers[.]"); 19 U.S.C. §§ 1581(a) and 1582 (authorizing inspections of vessels and vehicles at the border and directing the secretary of the U.S. Department of the Treasury to "prescribe regulations for the search of persons and baggage"). In many states, sobriety, license-and-registration, and fish-and-wildlife checkpoints likewise are authorized by statute. See, e.g., HAWAI'I REV. STAT. § 291E-19 (authorizing sobriety checkpoints); N.C. GEN. STAT. § 20-16.3A (authorizing use of checkpoints for any legitimate law-enforcement or regulatory purpose); UTAH CODE ANN. §§ 23-20-19, 27-12-19 (authorizing checkpoints to enforce fish-and-game laws and to inspect livestock). Many other types of programmatic actions are authorized in a similar fashion. See, e.g., City of Los Angeles v. Patel, 135 S. Ct. 2443, 2447 (2015) (hotel-record inspection program authorized under Los Angeles Municipal Code § 41.49); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 608-609 (1989) (drug-testing program implemented under authority of 45 U.S.C. § 431(a) and Federal Railway Administration regulations promulgated at 49 CFR § 219.101(a)(1)); Donovan v. Dewey, 452 U.S. 594, 604 (1981) (inspection program based on Mine Safety Act and regulations in the Code of Federal Regulations); Vernonia School District 47J v. Acton, 515 U.S. 646, 649-650 (1995) (drug policy promulgated by elected school board).

Public input also can be solicited directly. For instance, in connection with camera surveillance programs, the American Bar Association's Standards on Technologically-Assisted Physical Surveillance provide that "in cases where deterrence rather than investigation is the primary objective, the public to be affected by the surveillance [should be] notified of the intended location and general capability of the camera; and [be given] the opportunity, both prior to the initiation of the surveillance and periodically during it, to express its views of the surveillance and propose changes in its execution, through a hearing or some other appropriate means." AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS ON TECHNOLOGICALLY-ASSISTED PHYSICAL SURVEILLANCE, Standard 2-9.3(b)(ii). Some jurisdictions have required a similar process. See, e.g., DIST. COLUMBIA METROPOLITAN POLICE DEP'T, CAMERA SURVEILLANCE, available at http://mpdc.dc.gov/node/214522 (D.C. regulations governing use of closed-circuit television system); DEP'T HOMELAND SEC., CCTV: DEVELOPING PRIVACY BEST PRACTICES 6-8 (2007), available at http://

www.dhs.gov/xlibrary/assets/privacy/privacy_rpt_cctv_2007.pdf (recounting the practices of several cities and towns).

§ 5.03. Justification

Legislatures and agencies should authorize suspicionless policing activities only when there is a sound basis for believing that they will accomplish an important law-enforcement or regulatory objective, and when achieving that objective outweighs their infringement on individual interests such as privacy, dignity, property, and liberty.

Comment:

a. Public-safety justification. As indicated in the Comments to § 5.01, suspicionless policing activity can serve a number of important law-enforcement and regulatory purposes, many of which would be difficult to achieve or achieve as well without resort to suspicionless actions. Nevertheless, suspicionless policing may affect large numbers of people, most of whom will by definition be innocent of any wrongdoing. Implementation of these programs may at the least inconvenience people and, at times, can involve significant intrusion. Thus, suspicionless policing activities should be backed by a legitimate public safety or regulatory justification that is both important and likely to be achieved through the program and, even then, should be authorized only if the public-safety benefits outweigh any negative impacts on privacy, dignity, property, and liberty. Before authorizing such actions, jurisdictions should consider whether there are suspicion-based alternatives that could achieve the same public-safety or regulatory objective in a manner that is less inimical to privacy, dignity, property and liberty interests. But they should also recognize that suspicionless policing activity, when implemented evenhandedly as required by these Principles, actually may be the less-intrusive option.

b. Sources of justification. As § 5.02 indicates, these types of assessments ideally would be carried out with public input. In addition to feedback from the public, expert assistance may be necessary. There is now considerable research on the efficacy of various suspicionless policing techniques such as checkpoints, drug testing, and camera surveillance. Policy-makers should consult these sources when carrying out the balancing required by this Section.

REPORTERS' NOTES

1. Justification as analyzed in the courts. In approving suspicionless searches and seizures under the "special needs" test, courts often have noted that alternatives based on suspicion are not likely to be effective, or that suspicionless actions are the only realistic means of achieving the government's aims. See, e.g., Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 623 (1989) (considering whether "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion"); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (noting that "maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border"); Camara v. Municipal Court, 387 U.S. 523, 535-536 (1967) (underscoring that "there is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimal standards required by municipal codes is through routine periodic inspections of all structures.").

Still, courts have provided little guidance on *how much* evidence is needed to show that an important government interest is at stake or that a suspicionless program will be effective at dealing with it. In Chandler v. Miller, 520 U.S. 305, 319 (1997), the U.S. Supreme Court struck down a Georgia statute requiring candidates for high office to submit to a suspicionless drug test on the ground that there was no evidence in the record to suggest that the state's concerns about candidate drug use "are real and not simply hypothetical for Georgia's polity." See also National Federation of Federal Employees-IAM v. Vilsack, 681 F.3d 483 (D.C. Cir. 2012) (invalidating suspicionless drug testing of federal employees working with at-risk youth in residential Job Corps programs and noting "the absence of a documented problem" of staff drug use). But in National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), the U.S. Supreme Court approved a drug-testing program aimed at customs agents despite similarly slim evidence that the program would address a significant problem. See id. at 683 (Scalia, J., dissenting) (noting that the record failed to show "*even a single instance*" in which drug use on the part of customs officials contributed to "bribe-taking, . . . poor aim, . . . unsympathetic law enforcement" or any of the other concerns that the government expressed (emphasis in the original)).

Further, when judges evaluate the justification for a particular program, they often balance the overall social necessity of the program against the intrusion to just one citizen. In Board of Education v. Earls, for example, the U.S. Supreme Court weighed the intrusiveness of urine testing for any given student against the school district's interest in addressing drug use among all students. 536 U.S. 822, 831-832 (2002). Yet, in reality, many citizens are burdened by these suspicionless searches. See Friedman & Stein, supra, at 298 (describing this practice as akin to comparing "an apple to an orchard").

2. How justification is determined. One reason courts have not been particularly adept at evaluating effectiveness, impact, and alternatives is that institutionally they are not in the best position to weigh social needs. Rather, at least in the first instance, the legislative and executive branches are best equipped to carry out the analysis called for by this Section. As a general matter, these branches have greater data-collection resources at their disposal, more flexibility in

responding to changing circumstances, and more leeway to provide detailed policies than the judiciary. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 861 (2004). Further, governments often must make decisions on the basis of imperfect information, and it can take years for research to demonstrate whether a particular strategy is in fact effective at achieving its objectives. Compare Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 462 (1990) (Stevens, J., dissenting) (citing early studies suggesting that sobriety checkpoints were less effective than suspicion-based stops at reducing impaired driving) with Randy W. Elder et al., *Effectiveness of Sobriety Checkpoints for Reducing Alcohol-Involved Crashes*, 3 TRAFFIC INJURY PREVENTION 266 (2002) (reviewing 11 studies that showed substantial reduction in alcohol-involved crashes in jurisdictions that adopted checkpoint programs). Moreover, many of the costs of suspicionless policing activity—particularly intangible costs like individual privacy—may be difficult to measure. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 902-903 (2015) (citing a variety of intangible costs associated with police intrusions and noting that such costs typically "are not reflected in existing assessments of the costs of policing or criminal justice policy.").

These difficulties should not, of course, absolve government of the responsibility to make assessments as to need and efficacy as best as they are able. Jurisdictions should make an effort both to evaluate periodically the necessity and effectiveness of suspicionless programs, and to gather, when possible, additional data to enable more careful scrutiny of existing programs. Cf. Tracey Meares & Bernard Harcourt, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 848 (2011) (noting that, in some circumstances, hit rates can be used to evaluate the effectiveness of suspicionless search and seizure programs). State and federal entities like the National Institute of Justice and the National Academy of Sciences, as well as academic institutions, can help to support efforts at making intelligent use of statistical information. See, e.g., NATIONAL ACADEMY OF SCIENCES: PROACTIVE POLICING: EFFECTS ON CRIMES AND COMMUNITIES (2018) (consensus report on the efficacy and effects of hot-spot policing and other types of policing). It is important to note that, as the Comments to previous Sections point out, the legislative or executive balancing of law enforcement and citizen interests is not the last word. The Sections that follow cabin the implementation of statutory or regulatory policies about suspicionless policing activity in significant ways.

§ 5.04. Nondiscrimination in Determining the Targeted Group

Any suspicionless policing policy that targets a particular group of persons or entities rather than the entire relevant population should be justified by a sound basis in fact.

Comment:

a. Nondiscrimination principle. In a suspicion-based regime, the requirement that there be cause for suspicion provides a basis for distinguishing between those who may be subject to a

policing action and those who may not. It keeps government action from being arbitrary or discriminatory. This Section provides an analogue to the cause requirement for suspicionless policing activity targeted at a subgroup of the population. It requires that there be a demonstrable basis for distinguishing between the target group and the rest of the population.

Although, by definition, suspicionless policing activities are not based on individualized suspicion directed at a particular person or entity, if § 5.03 is followed there always will be some evidence-based reason for conducting them. To the extent that a suspicionless regime is directed at the entire population, the justification required by § 5.03 is sufficient. Many suspicionless policing policies apply on their faces to every person or every entity that triggers the need for the policies in the first instance. Policies that authorize airport checkpoints affect all plane passengers; health-and-safety-inspection laws govern all houses and businesses within the municipality; a surveillance program might be aimed at everyone in the jurisdiction. The added advantage of such population-wide programs is that they are likely to have been enacted only after careful consideration. Legislators generally will be reluctant to establish a program that affects influential constituents or large numbers of constituents unless it is aimed at achieving a substantial public-safety objective.

In contrast, a policy that singles out a subgroup that is no more likely than others in the population to pose the particular public-safety or regulatory risk is likely to be both ill-considered and discriminatory. Thus, to the extent that a suspicionless policing policy targets a subgroup of the population, there must be a basis in fact for treating that group differently. As one obvious example, a policy that explicitly authorizes inspections of only Muslim-owned businesses, or one that authorizes sobriety checkpoints only in Black neighborhoods, would be irrational and presumably unconstitutional in virtually all contexts.

But suspicionless policing also can work more subtle discrimination. To take examples from four U.S. Supreme Court cases: a drug-testing policy might explicitly target students engaged in extracurricular activities rather than all students; a DNA-collection program might target arrestees rather than the general population; a parolee-monitoring policy might authorize searching a parolee at any time; and a drug-interdiction program might focus solely on buses. If the rationale for the first policy is to detect or deter drug use in the schools, the rationale for the second policy is to obtain evidence from arrestees that later can be used to identify perpetrators of past crimes, the basis of the third policy is to minimize criminal behavior, and the rationale for the fourth policy is curtailing drug trafficking, it is not clear, at least without more data, that any of the policies justify

targeting the groups at which they are aimed. If drug use is fairly consistent throughout the entire student population, or those who are arrested but not convicted are no more likely to have been involved in "cold cases" than the average citizen, or parolees on the street are no more likely than others to be committing a crime, or those who use buses are no more likely than those who use cars to transport drugs, the rationales targeting the particular subgroup of the population lose force.

b. Comparison groups. In applying this Section, agencies and legislatures should consider whether the suspicionless program is either under- or over-inclusive, both of which are of concern. A program is underinclusive if it focuses too narrowly on a particular group to the exclusion of other groups that may be just as likely to be engaged in the sort of wrongdoing that the program is designed to prevent. If a suspicionless program is underinclusive, it may fail to address the harms posed by those who fall outside the target group. It also may undercut agency legitimacy by making people feel that they have been unfairly singled out.

A program is overinclusive if it casts its net too broadly and includes individuals or entities who do not in fact pose the sorts of risks the program is meant to address. An overinclusive suspicionless program wastes agency resources by taking up officer time to conduct unnecessary or unproductive policing actions. It also imposes an unnecessary burden on those who need not have been included among the target group. Moreover, the legitimacy of an entire program may be undermined if it is overinclusive. Although some degree of under- or over-inclusiveness is to be expected in any government endeavor, agencies should strive to minimize those sorts of costs both in designing the program and in evaluating its effectiveness.

REPORTERS' NOTES

The nondiscrimination principle endorsed in this Section has not been adopted explicitly by the U.S. Supreme Court in the search-and-seizure context, and the outcomes in some cases are inconsistent with it. However, the principle is consistent with the U.S. Supreme Court's repeated assertion that the government must demonstrate a "special need" to justify regulating conduct through a suspicionless search regime. For example, in Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989), the Court emphasized that suspicionless drug testing of railway employees was permissible due to the "safety-sensitive tasks" in which they were engaged, signaling that drug testing of other types of government employees may not be permissible. In Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 661 (1995), the Court permitted drug testing of student athletes in part because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." Applying this principle, the Eleventh Circuit invalidated a suspicionless drug-testing program of public-assistance recipients under the Temporary Aid for

Needy Families (TANF) program because the government had failed to show that drug use was especially prevalent among TANF applicants, and because the rationales that the government offered would apply with equal force to all residents in the state. Lebron v. Sec. of Florida Dep't of Children & Families, 772 F.3d 1352 (11th Cir. 2014).

The nondiscrimination principle also resonates with, although it is not equivalent to, the Equal Protection Clause's requirement that the government have a rationale for singling out some individuals or groups as opposed to others. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."); Vill. of Willowbook v. Olech, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). It should be unacceptable that some individuals are subjected to government information gathering or encounters while others are not, without a basis in evidence for distinguishing the two. Although courts have not decided whether the decision to search some individuals but not others should be subject to heightened scrutiny, "heightened scrutiny regularly is applied when enumerated rights are at stake." Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable"*, 84 GEO. WASH. L. REV. 281, 337 (2016); see also Dist. of Columbia v. Heller, 554 U.S. 570, 628 (2008) (heighted scrutiny for statutes that infringe on the right to bear arms); Foucha v. Louisiana, 504 U.S. 71, 84-86 (1992) (heightened scrutiny when classification implicates freedom from physical restraint). At the least, a rational basis for such distinctions is required. Cf. *Vernonia*, 515 U.S. at 685 (O'Connor, J., dissenting) (noting that "[t]he evidence of a drug-related sports injury problem . . . was considerably weaker" than the evidence indicating drug-related disruption in the classroom).

Finally, this Section reflects "a fundamental norm of administrative procedure [that] requires an agency to treat like cases alike." Westar Energy, Inc. v. Fed. Energy Reg. Comm'n., 473 F.3d 1239, 1241 (D.C. Cir. 2007). In a variety of administrative contexts, courts have invalidated agency action when the agency applied its standards in arbitrary or discriminatory ways. See, e.g., Green Cnty. Mobilephone v. Fed. Commc'ns Comm'n, 765 F.2d 235, 237 (D.C. Cir. 1985) ("We reverse the Commission not because the strict rule it applied is inherently invalid, but rather because the Commission has invoked the rule inconsistently. We find that the Commissioner has not treated similar cases similarly"); Distrigas of Mass. Corp. v. Fed. Power Comm'n, 517 F.2d 761, 765 (1st Cir. 1975) ("[An administrative agency] has a duty to define and apply its policies in a minimally responsible and evenhanded way."); Crestline Mem'l Hosp. Ass'n v. Nat'l Lab. Rels. Bd., 668 F.2d 243, 245 (6th Cir. 1982) ("The NLRB cannot 'treat similar situations in dissimilar ways'"); Contractors Transport Corp. v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976) ("'[p]atently inconsistent application of agency standards to similar situations lacks rationality' and is prohibited under the APA's arbitrary and capricious standard"). See Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 144-146 (2016).

Although courts have long recognized the importance of the nondiscrimination principle in various settings, they have not always abided by that principle in evaluating suspicionless search-and-seizure programs. The DNA-testing and drug-testing examples described in Comment *a* are illustrative. In Maryland v. King, there was no evidence to suggest that DNA testing of arrestees was any more likely to solve cold crimes than DNA testing of the general population. As Justice Scalia pointed out in his dissent, because Maryland already collected DNA from individuals upon conviction, the additional DNA samples obtained through the arrestee collection program would all come from those who ended up being *acquitted* of crime. 569 U.S. 435, 481-482 (2013) (Scalia, J., dissenting). A similar comment can be made about the gratuitous search of a parolee walking down the street with a woman and child, which took place in Samson v. California, 547 U.S. 843 (2006). See id., at 862 (Stevens, J., dissenting) ("the notion that a parolee legitimately expects only so much privacy as a prisoner is utterly without foundation"). Likewise, the drug-testing policy approved in Board of Education v. Earls focused on students involved in extracurricular activities despite the absence of proof (and contrary to the likely probability) that those groups were more heavily involved in drug use than the general student body. 536 U.S. 822, 853 (Ginsburg, J., dissenting) (noting that "[n]ationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than their less-involved peers."). And the suspicionless bus-boarding drug interdiction program at issue in Bostick v. Florida, 501 U.S. 429 (1991), was similarly suspect. See United States v. Flowers, 912 F.2d 707, 710 (4th Cir. 1990) (sweep of 100 busses netted seven arrests). Absent some justification for singling out those particular groups, those programs would not be consistent with the nondiscrimination principle. And even if a reason exists, all suspicionless policing activities must comport with the constraints on discretion set out in § 5.05.

§ 5.05. Constraining Discretion

(a) A suspicionless policing policy should be implemented evenhandedly according to criteria developed in advance.

(b) Evenhandedness requires that, within the group targeted for a suspicionless policing action under § 5.04, the procedure be applied to:

(1) every person or entity within that group;

(2) a subset of that group that is selected on a random or neutral basis; or

(3) a subset of that group that there is sound basis for believing is more likely to be engaged in unlawful conduct or pose a greater risk of harm than the rest of the target group.

Comment:

a. Importance of evenhandedness and generality. This Section works in tandem with the nondiscrimination principle found in the previous Section. It applies after a jurisdiction has identified the group to be subjected to suspicionless policing activity pursuant to §§ 5.03 and 5.04. The core tenet expressed here is that when carrying out the authorized action, government officials in the field should not be able to pick and choose whom to subject to policing actions, but rather should act in an evenhanded manner that avoids arbitrary or discriminatory exercises of discretion. Thus, a policy authorizing inspections of a particular type of business also ought to make clear under what circumstances, if any, subsets of that type of business can be subject to inspection. A policy authorizing sobriety checkpoints ought to specify the criteria for determining the circumstances, if any, under which only a subset of motorists may be stopped at an established checkpoint. The areas to be subject to a camera-surveillance program authorized by a city council should be selected on neutral grounds.

The requirement of evenhandedness furthers a number of important goals. First, it minimizes the risk of arbitrary intrusions by ensuring that the decision of whom to subject to suspicionless policing reflects evidence-based legislative or agency policy, and not the whim or caprice of officers in the field. In the absence of cause, there is a risk that such a decision, if left to individual officers, would be based on impermissible or arbitrary criteria such as the person's race or physical appearance.

Second, it helps guard against unjustified or ill-conceived programmatic policies by broadly distributing the costs of the program across the target population. The more people or entities that are affected by a program, the greater will be the backlash against one that is irrational or overly intrusive. Otherwise, there is a risk that officials will try to minimize these political costs by concentrating the costs of an authorized program on less-powerful or underrepresented groups, for example, by focusing inspections on less influential business owners within a particular industry, or by locating checkpoints in low-income or minority neighborhoods.

Third, a program that is carried out in an evenhanded manner is likely to be perceived by the target group as both more legitimate and less intrusive. Although airport screenings are time-consuming and annoying, they are not thought to be as intrusive as a stop of a single individual on the airport concourse. Because everyone is subjected to the same screening procedures, individuals are not left to wonder why their bags were searched while others were not. Similarly, sobriety

checkpoints are thought to be less intrusive or jarring than a stop of a car singled out by the highway patrol.

b. Implementing evenhandedness. This Section furthers these goals by requiring that either the program apply to the target population as a whole on a universal or neutral basis or there be some legitimate, demonstrable basis for singling out certain groups as opposed to others. Specifically, in the absence of cause, the requirement of evenhandedness should be met in one of three ways: searching every person or entity that falls within the target group (universal application); searching a neutrally selected or random subset of that group (neutral or random application); or—in what amounts to another application of the nondiscrimination principle of § 5.04, but at the implementation stage rather than the policy formation stage—searching a subcategory that is demonstrably more likely to be involved in wrongdoing than the rest of the target population (statistical application).

Suspicionless policing activity should conform to this Section at each stage in the decisionmaking process. For example, in carrying out a legislatively authorized sobriety-checkpoint program, an agency first will need to decide where the checkpoints should be located. Consistent with this Section, an agency may decide to rotate checkpoints along major thoroughfares in different parts of town (neutral application) or to concentrate checkpoints in particular neighborhoods that have experienced higher rates of alcohol-involved crashes or fatalities (statistical application). An agency then will need to decide whether to stop every car that passes through the checkpoint (universal application) or to stop every fifth or tenth car (neutral application).

By conducting suspicionless information gathering and encounters in a universal and neutral manner, agencies can eliminate any possibility that discretion or bias will be used in selecting the individuals or entities to be subjected to such activity. In theory, agencies can do the same by relying on statistical application. However, unless used carefully, the statistical method of reducing bias could actually reinforce it, especially if it relies on data collected from prior discriminatory policing practices. Further, if used to single out a particular person, vehicle, or business, the statistical method could lead to the reintroduction of precisely the sort of discretion that this Section is designed to avoid, and it generally should not be an option unless it can reliably produce the equivalent of individualized suspicion.

However, there are circumstances in which universal or neutral application either would not be possible given the nature of the program or would be appreciably less effective at achieving the

program's goals. For example, an agency may wish to concentrate its inspections on those businesses that have had the highest rates of accidents or consumer complaints; so long as the agency has sufficient information at its disposal to make such a determination and applies its formula according to an administrative plan or algorithm that is transparent, this approach would likewise be consistent with this Section. Similarly, in selecting the site for a sobriety checkpoint, a jurisdiction may wish to focus its resources on neighborhoods with higher rates of alcohol-involved fatalities or a higher concentration of bars and other establishments that serve alcohol. On the other hand, an agency should not limit sobriety checkpoints to certain high-crime areas when instances of impaired driving are just as likely (or more likely) in other neighborhoods, because doing so would not be designed to further the goals of the program and may be perceived as discriminatory.

Of course, this Section would not prohibit *suspicion-based* policing of individuals or entities that happen to fall within a group targeted by a suspicionless program. Although such actions at times have been analyzed under the "special needs" framework, they should conform to the Principles on suspicion-based policing activities discussed in Chapters 3 and 4.

REPORTERS' NOTES

This Section addresses two concerns with agency implementation of suspicionless policing activity that courts have routinely recognized. First and most directly, it guards against arbitrary actions by requiring that individuals or entities be selected according to a neutral plan that constrains officer or agency discretion. As courts repeatedly have acknowledged, the "grave danger" when it comes to suspicionless searches and seizures is that, in the absence of suspicion or alternate safeguards, officers may rely on arbitrary or impermissible criteria in deciding whom to search or seize. See the Reporters' Notes to § 5.01.

Second, the requirement of neutrality and evenhandedness serves as an additional check against unnecessary suspicionless programs by evenly distributing the costs of the programs across the target population—thereby increasing the likelihood of political pushback against unusually intrusive or ill-conceived programs. As Justice Robert H. Jackson stated: "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112-113 (1949) (Jackson, J. concurring).

Given the importance of evenhandedness, agencies should ensure that suspicionless policing activities conform to this Section at all stages in the decisionmaking process. Certain categories of such activities, such as subway inspections or sobriety checkpoints, actually involve

two stages at which discretion may be exercised. The first stage involves the agency deciding which sites should be subjected to suspicionless action. When, as is often necessary in such situations, policing agencies decide to carry out a suspicionless program in one area as opposed to another, they are unequally distributing benefits (in terms of crime prevention) and burdens (in terms of inconvenience and intrusion). This unequal distribution ought to be justified, ideally by reference to quantified evidence that focusing on the areas chosen for the suspicionless action is more likely to further the goals of the program. Agencies increasingly are relying on data to pinpoint significant public safety problems and make decisions about how best to allocate limited resources. See Lawrence Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing and Tracking,* 42 CRIME & JUSTICE 377, 378, 383 (2013). At the same time, unsophisticated use of such data can perpetuate racialized or otherwise unbalanced policing, without having significant impact on crime rates. See, e.g., William S. Isaac, *Hope, Hype and Fear: The Promise and Potential Pitfalls of Big Data*, 15 OHIO ST. J. CRIM. L. 543, 553-558 (2018) (reporting studies); Andrew Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High Crime Areas*," 63 HASTINGS L.J. 179, 215-216 (2001).

Courts have acknowledged that jurisdictions can employ a range of criteria in making this determination, so long as the criteria are closely linked to the goals of the program. For example, as the Second Circuit described in MacWade v. Kelly, the New York Police Department selected subway stations for its Container Inspection Program "based on a sophisticated host of criteria, such as fluctuations in passenger volume and threat level, overlapping coverage provided by its counter-terrorism initiatives, and available manpower." 460 F.3d 260 (2d Cir. 2006). A number of other decisions, from both the lower courts and the U.S. Supreme Court, have highlighted similar types of neutral, evidence-based findings in evaluating suspicionless programs. Compare Lowe v. Commonwealth, 337 S.E.2d 273 (Va. 1985) (upholding sobriety-checkpoint plan developed after extensive research into locations within city where there had been DUI arrest and alcohol-related accidents), with State v. Parms, 523 So.2d 1293 (La. 1988) (sobriety checkpoint unconstitutional because there was "no evidence of [a] basis for the site selection"). See also Indianapolis v. Edmond, 531 U.S. 32, 35 (2000) (drug-interdiction checkpoint locations selected "based on such considerations as area crime statistics and traffic flow"); United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976) (immigration checkpoints located "on important roads leading away from the border"). A failure to rely on neutral criteria that reflect the stated goals of the checkpoint program can create the impression that decisions are being made on the basis of impermissible criteria, such as race. See, e.g., Angela Caputo, "Chicago Police Sobriety Checkpoints Target Black, Latino Neighborhoods," CHICAGO TRIBUNE, May 8, 2015 (alleging that minority neighborhoods in Chicago were targeted with sobriety checkpoints while white neighborhoods with much higher rates of drunk-driving fatalities were not).

Evenhandedness is still more important when it comes to the second stage of a suspicionless program—an officer's decision to confront a particular individual at the chosen site or a particular entity within the target group. In this context, courts often have required that selection take place either on a universal or neutrally determined basis. For instance, the U.S.

Supreme Court has indicated that police at individual checkpoints should stop all vehicles or stop vehicles based on their position in line. Delaware v. Prouse, 440 U.S. 648, 657 (1979) (distinguishing random stops from roadblocks "where all vehicles are brought to a halt or to a near halt"); United States v. Ortiz, 422 U.S. 891, 895-896 (1975) (invalidating checkpoint near the border where officers searched vehicles that "arouse[d] their suspicion," a procedure that did not limit "to any meaningful extent the officer's discretion to select cars for search"); see also United States v. Marquez, 410 F.3d 612, 614 (9th Cir. 2005) (upholding referral to secondary checkpoint at airport because it was made on a "completely random" basis); State v. Book, 847 N.E.2d 52 (Ohio Ct. App. 2006) (holding courthouse officer's security screening was unreasonable when, as a professional courtesy, he did not screen some courthouse visitors he had known for a long time, and there was no objective policy exempting those persons from screening). Courts have made a similar point in drug-testing cases as well. See, e.g., Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 622 (1989) ("in light of the standardized nature of the [drug] tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate"); Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986) (approving drug-testing program of jockeys because either "each jockey is required to take a breathalyzer test daily" or urinalysis occurred "by a lottery"). Many police-department policies also recognize the importance of this principle. See NEW YORK POLICE DEP'T, PG-221-16, VEHICLE CHECKPOINTS (June 1, 2016) (requiring nonarbitrary stops at vehicle-safety checkpoints, such as stopping every third vehicle); CHICAGO POLICE DEP'T, S04-08-05, SOBRIETY SAFETY CHECK PROGRAM (Mar. 28, 2003) (requiring nonarbitrary stops at sobriety-safety checkpoints, such as stopping every fifth vehicle; WASH. D.C. METRO. POLICE DEP'T, GO-PER-100.24, DRUG SCREENING PROGRAM (Sept. 11, 2015) (providing that all sworn department members are subject to random drug screening as determined by a computer database); CHICAGO POLICE DEP'T, E01-08, RANDOM DRUG AND ALCOHOL TESTING PROGRAM (Feb. 21, 2012) (same).

Despite these precedents, courts in several contexts have dispensed with—or more often, simply ignored—the evenhandedness requirement and have permitted searches and seizures to take place in the absence of any meaningful constraints on officer or agency discretion. This is particularly true in the context of administrative inspections of regulated industries—ranging from coal mines and factories to pharmacies and barbershops—which some courts have upheld despite clear evidence in the record that officers selected a particular location on the basis of a hunch or some other rationale that was unrelated to any systematic administrative plan, and yet may not have qualified as a legitimate suspicion-based search. See, e.g. New York v. Burger, 482 U.S. 691, 694 n.2 (1987) (acknowledging that "it was unclear from the record why, on that particular day, Burger's junkyard was selected for inspection"); Commonwealth v. Eagleton, 521 N.E.2d 1363 (1988) (inspection of auto-body shop requested by police who were suspicious of the shop because of late-night activity there). Courts have upheld similarly standardless searches of parolees. See Samson v. California, 547 U.S. 843 (2006).

Although courts have emphasized that individuals in these contexts have a "reduced expectation of privacy," that observation is largely beside the point. As the U.S. Supreme Court

itself has recognized, "the 'grave danger' of abuse of discretion . . . does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police–citizen contact." *Prouse*, 440 U.S. at 662 (1979); see also Los Angeles v. Patel, 135 S. Ct. 2443, 2456 (noting that the hotel-inspection statute "creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests."). And indeed, there is substantial evidence in the case law that such discretion is occasionally exercised in arbitrary or discriminatory ways. See, e.g., Gordon v. City of Moreno Valley, 687 F. Supp. 2d 930 (C.D. Cal. 2009) (finding that plaintiffs adequately stated a claim against the city for singling out African-American-owned barber shops for "raid-style" inspections); Turner v. Dammon, 848 F.2d 440, 442 (4th Cir. 1988) (noting that police, not state license inspectors, conducted 100 warrantless searches of a particular bar without issuing a single citation).

There may be circumstances in which regulatory prerogatives or individuals' reduced expectations of privacy counsel in favor of permitting searches on less than probable cause. See, e.g., New Jersey v. T.L.O., 469 U.S. 325 (1985) (permitting searches of students' belongings at school on the basis of reasonable suspicion); United States v. Knights, 534 U.S. 112 (2001) (upholding search of probationer's apartment on the basis of reasonable suspicion). But then that lowered suspicion threshold should be the basis for approving the search, not the existence of an administrative scheme.

§ 5.06. Suspicionless Police Activity Beyond the Authorized Scope

Suspicionless policing activity should neither exceed the scope of the authorization that is required under § 5.02 nor exceed the justification for that authorization that is required under § 5.03.

Comment:

a. Pretext prohibition. A final concern is that the agency or individual officers may use a suspicionless program to pursue objectives other than those associated with the program itself. For instance, police have been known to use license-and-registration checkpoints for the actual purpose of searching vehicles for drugs, relying either on drug-sniffing dogs or consent as a basis to search. Agencies also have used health-code and license inspections to look for evidence of drugs or other criminal activity on the basis of tips or hunches that would fall short of the probable cause necessary to conduct a suspicion-based search. These types of pretextual actions create an incentive to conduct policing activities beyond the scope of the authorized policy, undermine the legitimacy of law-enforcement agencies, and increase the likelihood that the program is not justifiable either as a legal or policy matter.

This Section's prohibition on such actions is consistent with U.S. Supreme Court precedent. The Supreme Court has made clear that although pretext arguments are not relevant when a search and seizure is based on individualized suspicion, they *are* relevant when such suspicion is lacking, precisely because the constraint imposed by the suspicion requirement is absent. This Section is designed to curb such practices by requiring that agencies implementing a suspicionless regime refrain from methods or actions that venture beyond what is necessary to effectuate the stated purpose of the policy. This Section also follows from § 2.04(b)'s prohibition of pretextual policing "as a general strategy."

b. Nature of inquiry. The language in this Section contemplates an objective inquiry, focused on whether the conduct of the government is consistent with the written policy required under § 5.02, and not on any particular official's subjective motivation for sanctioning or carrying out a purportedly suspicionless action. A checkpoint set up to check licenses should not involve drug-sniffing dogs. A business inspection should not stray into private offices unless relevant papers are there. Blood taken for a drug test should be tested only for the presence of drugs.

However, this Section does not rule out any of these actions if they are authorized pursuant to § 5.02. The point simply is that suspicionless enforcement and public-safety actions should be so authorized, and police officials should not act outside the scope of their authorization. In some circumstances, the Fourth Amendment permits people or entities subject to a suspicionless action to demand proof of such authorization via an administrative warrant or subpoena; in any event, policing officials should always explain the source of their authority and its scope.

REPORTERS' NOTES

1. Goal. The goal of this Section is to reinforce the authorization requirement of § 5.02 and to ensure that agency action does not exceed the scope of the authorization. When conducting suspicionless policing activity, it is inappropriate to circumvent the political-authorization process. If officials obtain authorization under the guise of furthering one set of interests, but in fact pursue a different set of goals, authorization is lacking, and the public or authorizing entity may not have seen the secondary purpose as sufficiently weighty to justify what actually is occurring.

2. Pretext. The use of suspicionless searches and seizures as a pretext to accomplish other goals is well documented. For example, license-and-registration checkpoints have been used to facilitate the use of drug-sniffing dogs or to seek consent from motorists to conduct a search for drugs. See Brooks Holland, *The Road 'Round* Edmond: *Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 312 (2006) (documenting use of license checkpoints to facilitate use of drug-sniffing dogs); see also United States v. Moreno-Vargas, 315

F.3d 489, 490 (5th Cir. 2002) (drug dogs present at immigration checkpoint); United States v. Davis, 270 F.3d 977, 979-980 (D.C. Cir. 2001) (license-and-registration checkpoint set up in neighborhood based on tips of drugs, guns, and assaults in the area); United States v. McFayden, 865 F.2d 1306, 1312 (D.C. Cir. 1989) (license-and-registration checkpoint set up as part of "Operation Cleansweep", a drug-interdiction program). Business inspections have been used as a pretext to look for evidence of ordinary criminal activity, typically on the basis of tips or hunches that fall far short of probable cause. See, e.g., Gordon v. City of Moreno Valley, 687 F. Supp. 2d 930 (C.D. Cal. 2009) (inspections of African-American-owned barber shops included warrant checks of patrons and employees); Berry v. Leslie, 767 F.3d 1144 (11th Cir. 2014), opinion vacated for rehearing en banc, 771 F.3d 1316 (11th Cir. 2014) (SWAT team used to conduct "administrative inspection" of African-American-owned barber shop, which included warrant checks and extensive searches of storage areas where no barbering services were performed); Swint v. City of Wadley, 51 F.3d 988 (11th Cir. 1995) (SWAT team used to conduct "administrative inspection" of nightclub based on a tip of potential drug activity).

The U.S. Supreme Court has recognized the risk of pretextual searches in suspicionless search and seizure cases. For instance, in City of Los Angeles v. Patel, it expressed concern that the hotel-inspection ordinance in question "creates an intolerable risk that searches authorized by it will . . . be used as pretext to harass hotel operators and their guests." 135 S. Ct. 2445, 2552-2553 (2015); see also Wyman v. James, 400 U.S. 309, 321 (1971) (noting that "nothing [in the record] supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity."). In some cases, the Court even has suggested that, in contrast to pretextual searches based on suspicion, pretextual suspicionless searches are unconstitutional. Cf. Kentucky v. King, 563 U.S. 452, 464 (2011) (noting that an officer's motives are relevant in connection with inventory searches and administrative inspections, which are paradigmatic suspicionless searches); Whren v. United States, 517 U.S. 806, 811 (1996); Florida v. Wells, 495 U.S. 1, 4 (1990); New York v. Burger, 482 U.S. 691, 716-17 n. 27 (1987). As *Patel* suggests, failure to restrict pretextual searches and seizures not only creates a temptation to use a search or seizure program as a means of pursuing unauthorized objectives, but also gives agencies an incentive to search particular individuals or entities more often than they otherwise would. In *Patel*, as in several earlier cases, the Court recognized that "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." 576 U.S. at 409 (citing Camara v. Municipal Ct. of City & Cnty. of San Francisco, 387 U.S. 523, 534 (1967) and Donovan v. Lone Steer, 464 U.S. 408, 415 (1984)).

3. Purpose of search. This Section ensures that suspicionless policing activities are conducted solely for the purposes stated in the written policy by making clear that the method of carrying out the suspicionless actions must be limited to that which is necessary to carry out the regulatory program at issue. For example, this Section would preclude officers from conducting warrant checks of employees and patrons—as was the case in *Gordon*—because such warrant checks are unrelated to the licensing statutes that the inspections were meant to enforce. Similarly,

this Section would preclude searching areas of a business—such as storage rooms and private offices—unless these areas contain paperwork or equipment that is subject to regulation. It also would prohibit deploying drug-sniffing dogs or obtaining consent to search cars for drugs at a "sobriety" checkpoint unless searches for drugs also were authorized specifically by the relevant policy. This Section does not require exploration of an officer's subjective motives for carrying out a suspicionless search or seizure. But it does require analysis of whether government officials used methods or engaged in actions that were inconsistent with the avowed purpose of the search.

4. Reasonableness of search. A number of courts have endorsed a similar principle in evaluating the reasonableness of suspicionless searches and seizures. See, e.g., *Berry*, 767 F.3d at 1153, vacated for rehearing, 771 F.3d at 316 (raid violated Fourth Amendment because it far exceeded in scope that which was necessary to enforce licensing regulation); United States v. $124,570 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989) (holding that an airport screening that went beyond looking for dangerous items violated the Fourth Amendment); see also, United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) (holding that if a person alerts a magnetometer at the airport he or she should be asked to remove metal items rather than be subject to a frisk); State v. Heapy, 151 P.3d 764, 767 (Haw. 2007) (use of chase car to stop motorists who turned off the road prior to sobriety checkpoint exceeded the authorized scope of the program at issue); State v. Baldwin, 475 A.2d 522, 526 (N.H. 1984) ("question posed to the defendant while she was stopped at the road check, as to whether she had any weapons, clearly exceeded the scope of any permissible road check to determine compliance with fish and game laws."). To the extent that courts have at times permitted suspicionless searches and seizures that exceed the scope of the written policy or legislative authorization, these decisions would not be consistent with this Section. See, e.g., United States v. Machuca-Barrera, 261 F.3d 425, 432 (5th Cir. 2001) (basing an assessment of whether a border stop regarding citizenship status was ultra vires on its duration rather than "the questions asked"); United States v. Espinosa-Cerpa, 630 F.2d 328, 334 (5th Cir. 1980) (holding that even when the statute invoked to justify boarding a vessel authorizes safety and documentation inspections, that authority "permissibly extends to boarding to look for obvious customs and narcotics violations"); Lujan v. State, 331 S.W.3d 1668 (Tex. Ct. Crim. App. 2011) (upholding a license checkpoint despite the presence of drug-sniffing dogs); McCray v. State, 601 S.E.2d 452 (Ga. 2004) (same).

CHAPTER 6
POLICING DATABASES

§ 6.01. Authorization

(a) A policing database is an electronic or paper database controlled by a government agency that contains information resulting from, or used as a basis for engaging in, any of the policing functions identified in § 1.01.

(b) A policing database should be created only if necessary to facilitate a legitimate policing objective.

(c) Any policing database that contains information about identified or identifiable individuals should be governed by written policy or policies that specify:

(1) the purpose of the data collection, including the criteria for inclusion in the database;

(2) the scope of data to be collected, including the types of individuals, locations, or records that will be the focus of the database; and

(3) the limits on data retention, the procedures for ensuring the accuracy and security of the data, the circumstances under which the data can be accessed, and mechanisms for ensuring compliance with these rules, consistent with the Principles in the remainder of this Chapter.

(d) Databases that aggregate data from more than one jurisdiction generally should be authorized by statute or ordinance governing all affected jurisdictions.

Comment:

a. Scope of policing databases. In pursuing the legitimate policing objectives set out in § 1.01(a), agencies typically will collect and maintain data about their activities. In the past this largely was done in paper-based files, but today virtually every agency uses electronic and digital databases. Agencies are increasingly also purchasing data relevant to the policing function from private companies. To the extent that an agency maintains control over the data it has collected or purchased, these Principles apply. Thus, for instance, these Principles apply to fusion centers that bring together, under agency control, information from a number of different sources. They also apply to data collected and controlled by police but maintained by third parties, such as cloud-computing services. (If data instead is maintained outside agency auspices, such as with a bank, a

communications carrier, or a utility company, these Principles do not apply. Still, an agency's *access* to databases that it does not control—whether through purchase, compulsory process, or some other mechanism—should be in accordance with the Principles in Chapters 2, 3, and 5.)

Consistent with the definition of policing agencies in § 1.01, these Principles apply not only to databases maintained by traditional law-enforcement or national-security agencies, but also to databases maintained by agencies like the Internal Revenue Service, the Securities Exchange Commission, or state health and safety departments to the extent that those agencies use the information in their databases to investigate individuals for wrongdoing that can lead to criminal or administrative penalties. In contrast, this Chapter does not govern databases maintained by agencies like state divisions of motor vehicles that do not carry out policing functions.

Policing databases might contain a wide array of information.

Casefiles contain information about an investigation of a particular individual, including evidence gathered during an investigation; citations or warrants; information about detentions, arrests, prosecutions, and convictions; information relevant to civil or administrative cases or incidents (such as calls for medical assistance or investigations of regulatory violations) that involve the police; and also include information that is linked to a specific crime rather than to an individual, such as files describing stolen property or other unsolved crimes.

Watchlists contain information about known or suspected offenders or other people "reasonably suspected" of belonging to groups that policing agencies believe should be monitored. Examples include no-fly lists, sex-offender registries, and so-called "gang databases." They also include missing-person lists.

Programmatic databases contain information about individuals obtained as a result of suspicionless programs of the type discussed in Chapter 5. These include DNA, fingerprint, and other identification databanks; images obtained through camera surveillance; vehicle-travel data from license-plate-recognition systems; and information gleaned from inspection programs, drug testing, or roadblocks. These types of databases also may include data acquired—through purchase or otherwise—from third parties, including license-plate records and financial records purchased from a private vendor.

Consensual databases contain information about individuals who voluntarily have provided personal information in connection with various public-safety programs (e.g., anti-kidnapping fingerprint programs, crime-alert programs, and specialized police-protection programs).

Finally, *multijurisdictional databases* contain combinations of these databases from a number of police jurisdictions, aggregated and intended for access by other agencies. Obvious examples are the fingerprint, arrest, and conviction databases maintained by the federal government. More recent examples include metadata collected by federal national-security agencies, fusion centers that bring together information from a number of jurisdictions and make that information accessible statewide, and the growing use of target databases for facial-recognition analysis.

One type of police-maintained database that is not meant to fall within the ambit of this Chapter is a database containing files on investigations of police misconduct, or related files (such as "*Brady* lists" that describe officer conduct that is material to challenging the prosecution's case). Although such a file could contain information "resulting from or used as a basis of [a] policing function" such as search or seizure, surveillance or questioning witnesses, and thus could be said to fall within the definition in subsection (a), the information in such files is aimed at the police themselves, not the public. Police misconduct files are governed by special confidentiality rules. They are also often the subject of litigation that may call for different rules about purging and de-identification than those that apply to files on citizens. More generally, aggregate, de-identified information about police practices might need to be retained for research purposes. Chapters 13 and 14 deal with issues surrounding the collection of information relevant to disciplining and researching the police.

b. The need for regulation. Casefiles, watchlists, and programmatic, consensual and multijurisdictional databases can be crucial to implementing the policing objectives set out in § 1.01(a). By facilitating identification, easing access to investigative information and evidence, and enabling the use of algorithms, they can enhance the efficiency of legitimate policing objectives. For these reasons, virtually every agency relies on all or most of these five types of databases.

At the same time, the creation and maintenance of databases by agencies can raise several concerns: unnecessary accumulation of information about blameless individuals (including people who are stopped for no legitimate reason); discriminatory or otherwise improper collection of data; misuse of data; mistakes based on inaccurate data; inadvertent disclosures; and security breaches (especially when the databases are computerized). These concerns are particularly acute when agencies accumulate information about individuals that relates to allegations of criminal activity.

If such information is inaccurate or maintained beyond the period relevant to law enforcement, it can lead to inferences that are unjustified and to police actions that should not occur, including stops and arrests. Innocent individuals can have their lives upended because of bureaucratic errors or inertia.

Accordingly, this Chapter requires written policies promulgated pursuant to § 1.06 that make clear the purpose and content of each database and that protect against inaccuracy and unauthorized access. The various issues raised by subsection (c)(3) should be addressed by statute or ordinance, although specific details can of course be left to regulation.

c. Identified or identifiable information. This Chapter governs only databases containing information about "identified" or "identifiable" individuals. As defined in the Principles of the Law, Data Privacy, "identified" data is "directly linked to a specific person," while data is "identifiable" when "there is a moderate probability that it could be linked to a specific person" (as might be the case with a database that lists addresses but no names). Id. § 2(b)(2). The Principles in this Chapter do not apply to "nonidentifiable" data, which the Principles of the Law, Data Privacy, define as data that has a "low probability" of being associated with a known person, id. § 2(b)(3), and might include data about crime "hot spots" or information about patterns of vehicular accidents. Although in theory almost any anonymized data can be re-identified, data for which there is a low probability of identification does not raise sufficient concerns about privacy to warrant coverage under this Chapter.

d. Multijurisdictional databases. Subsection (d) stipulates that when information from multiple jurisdictions is collected in a database, the policy governing its scope and use should be adopted through statutory enactment that applies to all affected jurisdictions (except, of course, those outside the United States). Given the number of people involved and the diverse interests likely to be implicated, any plan to house in one database identified or identifiable data from a number of jurisdictions should be subject governance by the democratic process. Thus, the purpose and scope of DNA databases, fusion centers, and federal-identification and metadata programs should be determined by a legislative body accountable to all persons whose data might be in the database. Although such legislation often may have to come from Congress, to the extent that federal regulation would run afoul of the constitutional anti-commandeering doctrine prohibiting unfunded federal mandates, it may have to originate at the state or local level.

REPORTERS' NOTES

1. Police-maintained databases. Organized repositories of information—today usually called databases—have long been maintained by policing agencies. Paper-based systems housing criminal and fingerprint records were used throughout the 20th century. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 160 (2d ed. 1998). As early as the 1930s, the Federal Bureau of Investigation established the first criminal-evidence laboratory, which facilitated analysis of fingerprints, hair, blood, and firearms. Id.

Since the advent of computerization, and especially since the 1990s, the capacity, scope, and accessibility of policing databases have increased significantly. Such databases now exist at the federal, state, and local levels. Criminal records (over 20 million in number) have become available to virtually every police department in the United States through the federal National Instant Criminal Background Check System, and in 2019 were accessed over 28 million times. See 2019 NICS OPERATIONS REPORT, www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view. Also available from federal sources are immigration, gang, wanted-person, sex-offender, violent-offender, and stolen-gun, vehicle and boat files; files that are accessed by law enforcement up to 17 million times a day. *National Crime Information Center (NCIC)*, FED. BUREAU OF INVESTIGATION, [https://perma.cc/8GJW-N8R2]. Since the late 1990s, biometric databases providing digitized images of fingerprints and other identifying features have become accessible through the National Criminal Information Center (NCIC). *Fingerprints and Other Biometrics*, FED. BUREAU OF INVESTIGATION, [https://perma.cc/S924-BWM2]; Stephanie Hitt, *NCIC 2000*, FBI L. ENFORCEMENT BULLETIN, July 2000, at 12, [https://perma.cc/MDU7-QKSP]. More recently, the Combined DNA Index System (CODIS) containing the DNA of almost 15 million offenders has come online. *CODIS-NDIS Statistics*, FED. BUREAU OF INVESTIGATION, available at www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics. Facial-recognition technology provides the FBI with over 50 million facially recognizable profiles that over the two-year period ending in April 2019 were accessed by police over 150,000 times. See Nathan Ingraham, *FBI's Facial Recognition Database Will Contain 52 Million Images by 2015*, THE VERGE (Apr. 14, 2014), [https://perma.cc/TMG8-USKS]; Kimberly del Greco, Deputy Ass't Director, Criminal Justice Division, FBI, *Statement Before the House Oversight and Reform Committee* (June 4, 2019), available at www.fbi.gov/news/testimony/facial-recognition-technology-ensuring-transparency-in-government-use. And Customs and Border Protection use this technology to identify passengers over three million times a year. Lori Aratani, *Facial-Recognition Scanners at Airports Raise Privacy Concerns*, WASH. POST (Sept. 15, 2018), https//perma.cc/Y2ME-ZZE3]. The FBI is spending more than a billion dollars expanding its Next Generation Identification system to include not only fingerprints and photos, but iris scans, palm prints, gait and voice recordings, scars, tattoos, and DNA legitimately obtained through other means. Criminal Justice Information Services, https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ (accessed May 5, 2021). This Chapter refers to these various types of programs as "multijurisdictional" databases and states that they should generally be authorized by statute or regulation at the federal level and, if used by state policing agencies, legislation or regulation within the particular state as well.

The National Security Agency (NSA) and other federal agencies tasked with protecting national security maintain numerous other types of databases that likewise are multijurisdictional. Probably the best known federal-data national-security accumulation effort is the NSA's "metadata" program—made famous following the revelations by Edward Snowden—which collected phone numbers and email addresses from overseas communications. Glenn Greenwald & Spencer Ackerman, *NSA Collected US Email Records in Bulk for Over Two Years Under Obama*, THE GUARDIAN (June 27, 2013), [https://perma.cc/GFE6-72KT]. Although that data-collection program was reportedly terminated, the NSA still has the capacity to collect the content as well as the related metadata of communications between national-security targets and other parties, including American citizens. Charlie Savage, *Disputed NSA Phone Program is Shut Down, Aides Say*, N.Y. TIMES (Mar. 4, 2019), [https://www.nytimes.com/2019/03/04/us/politics/nsa-phone-records-program-shut-down.html]. A separate effort is the federal Terrorist Watchlist, which contains over one million names (although its constitutionality has been called into question in light of its scope). Timothy Bella, *The FBI's Watchlist Violates the Constitution, Federal Judge Says*, WASH. POST, Sept. 5, 2019.

Most states maintain their own databases with respect to DNA, fingerprints, and other biometric information. See Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. ANN. SUR. AM. L. 639 (2014). A separate development is the aggregation and sharing of private and public data through "fusion centers." Seeded by federal funding after the Sept. 11, 2001, terrorist attacks, but run by state law-enforcement agencies, these centers gather or coordinate information from a huge number of public and private database systems, including those that record judicial decisions, real-estate and financial transactions, vehicle travel, and public-health information. *Recommendations for Fusion Centers: Preserving Privacy and Civil Liberties While Protecting Against Crime and Terrorism*, THE CONSTITUTION PROJECT 4 (2012), [https://perma.cc/2H6L-6JAJ]

Local police departments also maintain a number of data lists on gang membership, crime hotspots, gun-crime violators, arsonists, and the like. K. Babe Howell, *Gang Databases: Labeled for Life*, 35 CHAMPION 28 (2011); N.Y. POLICE DEP'T, NYC CRIME MAP, [https://perma.cc/5PVQ-3SM9] (cataloging crime by geographic location); *Wash. DC Police Crime Mapping*, D.C. METRO. POLICE DEP'T, [https://perma.cc/2RMF-4JNH] (providing a crime map searchable by geographic location and crime type, including gun crimes, arson, and other violent crimes). Technology also allows police departments to capture car license-plate numbers, faces, and social-media traffic. NANCY G. LA VIGNE ET AL., URBAN INST., USING PUBLIC SURVEILLANCE SYSTEMS FOR CRIME CONTROL AND PREVENTION: A PRACTICAL GUIDE FOR LAW ENFORCEMENT AND THEIR MUNICIPAL PARTNERS 3-5, 25-27 (2011), [https://perma.cc/4R46-ACM7] (describing license-plate-reading systems); CLARE GARVIE, ALVARO BEDOYA & JONATHON FRANKLE, GEORGETOWN LAW CTR. ON PRIVACY & TECH., THE PERPETUAL LINEUP 2, 22-23 (2016), [https://perma.cc/5QLT-VBVP]; John Buntin, *Social Media Transforms the Way Chicago Fights Gang Violence*, GOV'T TECH. (Sept. 30, 2013), [https://perma.cc/CPW3-MSLL]; CHICAGO POLICE DEP'T, GENERAL ORDER G10-01, GANG VIOLENCE REDUCTION STRATEGY (Dec. 31, 2015), [https://perma.cc/K5VJ-NC2M] ("The

Department GVRS . . . is comprised of multiple components: information gathering, analysis, dissemination of intelligence, linking of gangs to their factions, social network mapping, and a variety of mission-specific operations focused on targeted gang members and their associates.").

2. Third-party databases. Private institutions and public entities other than policing agencies also maintain databases that can be useful to law enforcement, but typically are not controlled by the policing agency in the sense used in this Chapter. Those include databanks containing bank records, phone records, cell-site location information (CSLI), internet-service-provider logs, credit-card records, utility records, and travel logs. See generally Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1089-1095, 1101 (2002). Additionally, government agencies other than those involved in policing house a trove of personal information of potential use to law enforcement, including tax records, division-of-motor-vehicle records, social-security records, property records, and dozens of others. See, e.g., Dalia Naamani-Goldman, *Anti-terrorism Program Mines IRS' Records*, L.A. TIMES, (Jan. 15, 2007), [https://perma.cc/U434-DVUN] (describing a mining program named REVEAL that allowed the FBI to access 16 private and public databases, including those maintained by the Social Security Administration for investigative purposes). See also Susan Stellin, *Security Check Now Starts Long Before You Fly*, N.Y. TIMES (Oct. 21, 2013), [https://perma.cc/GMF5-KWAC] (describing the TSA's pre-screening program, which involves obtaining information about passengers from both government and private databases and, in some instances, sharing information about passengers with private entities such as debt collectors); Rachel Levinson-Waldman, WHAT THE GOVERNMENT DOES WITH AMERICANS' DATA, BRENNAN CTR. FOR JUSTICE (Oct. 8, 2013), [https://perma.cc/EA3X-HZZT] (describing a number of instances in which the government mines data from both government and private databases). If police access those types of databases, including databases maintained by other government agencies, the Principles in Chapter 2, Chapter 3 (when suspicion-based) and Chapter 5 (when suspicionless) apply.

3. The uses and abuses of police databases. The value to law enforcement of police databases is enormous, especially as policing increasingly moves toward technologically based crime fighting. HOME AFFAIRS SELECT COMM., A SURVEILLANCE SOCIETY? FIFTH REPORT OF SESSION 2007-08 (UK HC 2008-09 58-I) ("The foundation for all new technologies is the database."); see also Herring v. United States, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting) ("Electronic databases form the nervous system of contemporary criminal justice operations."). The advantages of national and local criminal record, watchlist, and surveillance and facial-recognition databases are well known. Easy access to data about criminal activity facilitates "hot-spot" policing, investigations of suspects, and pretrial detention and sentencing decisions. As detailed here and in Chapter 5, DNA and other identification databases and databases from surveillance programs can significantly increase the efficiency and accuracy of crime-scene investigations.

Ranged against these benefits of police-maintained databases are several potentially serious costs. Minimizing those costs is the focus of the remaining Principles in this Chapter.

The overarching danger inherent in government collection of information, especially now that computerization has facilitated the process vastly, is the temptation to create and maintain

voluminous records about everyone, threatening individual security and privacy. This concern was captured by then-Judge William Rehnquist, when he stated "most of us would feel that . . . a dossier on every citizen ought not to be compiled even if manpower were available to do it." William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 U. KAN. L. REV. 1, 10 (1974). With the advent of modern computers, the availability of human capital no longer is an issue. Even when data collection is limited, it can be immensely revealing about everyday life. For instance, although metadata typically only consists of phone numbers, IP addresses, length of call, and other non-content information, former NSA General Counsel Stewart Baker stated that "metadata absolutely tells you everything about somebody's life. If you have enough metadata, you don't really need content." Alan Rusbridger, *The Snowden Leaks and the Public*, THE N.Y. REVIEW OF BOOKS (Nov. 21, 2013), [https://perma.cc/MTM5-AJYG]. Congress acknowledged the menace associated with expansive government data collection when in 2003 it defunded, by voice vote, the post-Sept. 11, 2001, program known as "Total Information Awareness," the icon for which depicted an all-seeing eye looking out over the globe, accompanied by the maxim "Knowledge is Power." *Senate Rebuffs Domestic Spy Plan*, Reuters, Jan. 23, 2003, available at http://www.wired.com/politics/law/news/2003/01/57386.

Bolstering this general worry about government data collection are several, more specific concerns. One potential downside of law-enforcement databases is the temptation of agency personnel to misuse database information. J. Edgar Hoover's illegal use of FBI files is well known. See CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 51 (1991) (describing Hoover's use of information in FBI files to blackmail, discredit, or destroy his adversaries). Many more recent abuses have been documented, including illicit use of national-security databases, vehicle databases, and local police databases. See, e.g., Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment for Analyzing Public Government Surveillance*, 66 EMORY L.J. 527, 553 (2017) (detailing government efforts to obtain and retain data on political opponents, protesters, and religious groups); Amy Pavuk, *Law-Enforcer Misuse of Driver Database Soars*, ORLANDO SENTINEL (Jan. 22, 2013), [https://perma.cc/B8XP-4PJ4] (detailing abuse of driver databases); James Hamilton & Steve Blum, *Top Ten List of Police Database Abuses*, RENSE.COM (June 12, 2002), [https://perma.cc/E4HB-ASQP] (detailing sale of police data to organized-crime syndicates, probing of political opponents, and stalking of acquaintances); Camaj v. Dep't of Homeland Sec., 542 F. App'x 933, 933 (Fed. Cir. 2013) (per curiam) (immigration officer admitted to 314 unauthorized queries).

A second specific concern associated with police databases is that they facilitate privacy invasions by others. As the multiple successful attacks on government databases by foreign and domestic hackers attest, aggregation of data in one place facilitates identify theft and other invasions. Michael Schmidt, David E. Sanger & Nicole Perlroth*, Chinese Hackers Pursue Key Data on U.S. Workers*, N.Y. TIMES (July 9, 2014), [https://perma.cc/27NE-FVE9]; David E. Sanger, *Russian Hackers Broke Into Federal Agencies, Officials Suspect*, N.Y. TIMES, Dec. 13, 2020, www.nytimes.com/2020/12/13/us/politics/russian-hackers-us-government-treasury-commerce.html.

Police departments have not been immune from such incursions. See Kevin Collier, *Crippling Ransomware Attacks Targeting U.S. Cities on the Rise*, CNN POLITICS (May 10, 2019) (reporting that at least 45 police and sheriff offices have been subject to ransomware attacks since 2013), https://www.cnn.com/2019/05/10/politics/ransomware-attacks-us-cities/index.html. Along the same lines, several scholars have warned about the "massive and disturbing" infringement that could result from hacking into DNA databases. Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. ANN. SURV. AM. L. 639, 687 (2014).

A third concern is the potential for mistakes based on erroneous data. See generally Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541 (2016); Herring v. United States, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting). No-fly lists contain a notorious number of false positives, including the late Senator Ted Kennedy and former assistant U.S. attorney general Jim Robinson. See ACLU, U.S. GOVERNMENT WATCHLISTING: UNFAIR PROCESS AND DEVASTATING CONSEQUENCES (Mar., 2014), [https://perma.cc/DJH2-A8ZH]. States often report lengthy backlogs in updating and correcting criminal-history database information. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014, at 7 (Jan. 2015), [https://perma.cc/X3XL-DZC4]. Gang databases can include individuals who are not in fact gang members. Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention,* 43 U.C. DAVIS L. REV. 79, 126 (2009). Accuracy concerns are exacerbated by the fact that many of those local databases are set up with the help of for-profit enterprises that may not be cautious about the information collected. *Laboratory Services*, FED. BUREAU OF INVESTIGATION, [https://perma.cc/5AAG-YEEY].

The effects of database inaccuracy can be serious. Data errors routinely result in wrongful stops, searches, and arrests. Wayne J. Pitts, *From the Benches and the Trenches: Dealing with Outstanding Warrants for Deceased Individuals: A Research Brief*, 30 JUST. SYS. J. 219, 220 (2009). For instance, in St. Louis, Missouri, erroneous warrants resulted in a number of individuals collectively spending more than 2,000 days in jail from 2005 to 2013, or an average of about three weeks per person. Robert Patrick & Jennifer S. Mann, *Jailed by Mistake*, ST. LOUIS POST-DISPATCH (Oct. 26, 2013), [https://perma.cc/N3RR-P7KR]. Similarly, watchlist errors can have negative effects on a person's ability to work, as well as to travel and even to vote. Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1777-1792 (2016) (documenting impact of no-work, no-vote, no-citizenship, no-fly, and terrorists watchlists); BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION ch. 11 (2015). In a suit brought by 23 individuals who experienced secondary screenings at airports and border crossings, a federal district court ruled that the federal Terrorist Screening Database triggers due process protections because it involves more than a "de minimis" deprivation of liberty. Elhady v. Kable, 391 F.Supp.3d 562, 582 (E.D. Va. 2019).

A fourth and related concern is the phenomenon known as mission creep. Government programs initially aimed at gathering information about "subversives" often have expanded to vacuum up data about individuals simply because they protested against government policies. SETH ROSENFELD, SUBVERSIVES: THE FBI'S WAR ON STUDENT RADICALS, AND REAGAN'S RISE TO

POWER 16, 213-214 (2012). Fusion centers, initially designed as counterterrorism units, now routinely are used in ordinary investigations. Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1463-1466 (2011) (describing privacy, mission creep, and transparency concerns); STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., FED. SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS (Comm. Print 2012) (criticizing fusion centers for producing intelligence of "uneven quality," and for collecting information unrelated to terrorist activities). See also Daniel B. Wood & Alison Tully, *Why L.A. Police Nixed Plan to Map Muslims*, CHRISTIAN SCI. MONITOR (Nov. 20, 2007), [https://perma.cc/2YYB-JPKZ] (describing how the Los Angeles Police Department discontinued a plan to map Muslim enclaves in the city after Muslim and other religious leaders discovered the plan and mounted protests). Similarly, municipal camera systems originally set up to deter violent crime and property theft have been used as means of identifying the homeless and vagrants and removing them from public areas. Clive Norris, *From Personal to Digital: CCTV, the Panopticon and the Technological Mediation of Suspicion and Social Control*, in SURVEILLANCE AND THE SOCIAL SORTING: PRIVACY RISK AND AUTOMATIC DISCRIMINATION 28 (David Lyon ed., 2003).

Finally, casefile and watchlist databases can memorialize the results of biased and racially discriminatory policing. This can lead to further unjustified police confrontations or other adverse effects. See Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (noting that the central flaw in the database of recorded stop-and-frisks performed by the NYPD was the fact that the officers controlled the record and thus inaccurately minimized the number of unconstitutional stops). See generally Sarah Brayne, PREDICT AND SURVEIL: DATA, DISCRETION AND THE FUTURE OF POLICING (2021) (recounting how the Los Angeles Police Department directs its officers to fill out reports on every encounter that include, *inter alia*, identification of people who are subject to illegitimate stops or happen to be with such people, which information is then entered into a database and used to justify subsequent encounters).

4. Law regarding database scope. These potential problems with databases suggest that although their value can be substantial, their creation and maintenance should be monitored carefully. The U.S. Supreme Court has had little to say about the legality of databases maintained by policing agencies, but the Court—as well as individual justices—have at times acknowledged the regulatory problems they pose. See, e.g., Whalen v. Roe, 429 U.S. 589, 605 (1977) (noting "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."); United States v. Jones, 565 U.S. 400, 416 (Sotomayor, J., concurring) ("I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.").

Federal and state statutes recognize the need for controls on data accumulation by the police. The Privacy Act requires that federal agencies only maintain information that is "relevant and necessary to accomplish a purpose" that the agency is required to accomplish, Privacy Act, 5 U.S.C. § 552a(e)(1) (2012). Although the Act provides exemptions for any agency "which performs as its

principal function any activity pertaining to the enforcement of criminal laws," those exemptions make clear that the information retained should pertain to an "identifiable individual" in specific criminal cases or consist of "investigatory material compiled for law enforcement purposes,"—stipulations that are analogous to the casefiles and watchlists described in the Comments to this Section. Id. at (j), (k). The Act also regulates the retention of data regarding the exercise of First Amendment activities. 5 U.S.C. § 552a(e)(7). More specific federal laws regulate police access to various kinds of third-party records, including medical records, cable-television-subscriber histories, and financial records. See Erin Murphy, *The Politics of Privacy in the Criminal Justice System*, 111 MICH. L. REV. 485 (2013) (describing more than a dozen federal privacy statutes). States and localities have adopted various provisions as well. See, e.g., Freedom of Association and Assembly Protection Act, MD. CODE ANN., PUB. SAFETY § 3-701(d)(1)-(2) (West 2017) (regulating police retention of information about protected First Amendment activities); District of Columbia First Amendment Assemblies Act of 2004, D.C. CODE § 5-331.02 et seq. (West 2017) (same).

These various statutes, however, are piecemeal at best. And often the protections they afford are limited in scope. See, e.g., CAL. CIV. CODE § 1798.90.51 (West 2017) (requiring vehicle-location information be collected with "respect for individuals' privacy and civil liberties," but providing no substantive limitations on such collection); see also Sarah Brayne, *The Criminal Law and Law Enforcement Use of Big Data*, 154 ANN. REV. L. & SOC. SCI. 293, 301 (2018) (because of "dragnet surveillance techniques that make possible everyday mass surveillance at an unprecedented scale, the threshold for inclusion in police databases is lower in the age of big data."). These Principles set out a framework for regulating police databases in a manner that preserves their utility for legitimate policing objectives while minimizing the various harms that their use can impose.

§ 6.02. Purging of Databases

(a) Agencies should destroy or render inaccessible any information that is irrelevant to the designated purpose of a database.

(b) Programs implementing subsection (a) should include policies requiring that policing databases be purged:

(1) after a finite period specified in the authorization creating the database, which may be extended only if the agency can show that the specific type of data, or the data in a particular individual's case, continues to be necessary for the purpose for which it was originally obtained, or for a separate purpose authorized pursuant to § 6.01;

(2) when necessary to make a correction to the database pursuant to § 6.03(c); or

(3) when otherwise required by law.

Comment:

a. The relevance test. The temptation on the part of governmental agencies to forever maintain data about everyone on the assumption it might eventually prove useful is especially great with the advent of computerized databases that easily house terabytes of information. But over-storage increases the chances that an individual's information will be accessed by unauthorized personnel or misused by authorized personnel, and also increases the chances that the data will become outdated and therefore inaccurate. Records not pertinent to a legitimate policing objective should not be accessible to police officials. Accord, Principles of the Law, Data Privacy § 8.

Relevance obviously is contextual. For instance, the information in casefiles and watch lists is more likely to be relevant for a longer period of time than the information in programmatic databases, which can include data about large numbers of innocent individuals never suspected of any wrongdoing. Even within a casefile, the relevance of the names, addresses, and phone numbers of people near the scene of a crime, or the credit-card and communications records of a suspect, may vary greatly depending on developments in a case. Furthermore, information that is relevant at the time it is obtained may become irrelevant with the passage of time. Generally, purging should occur after an acquittal or a dismissal of charges (recognizing that this information may still be retained in court databases), as well as when investigative stops are determined to have been groundless.

For the most part, this Section leaves the judgment calls that have to be made to agencies maintaining the data. However, § 6.03(b)(3) requires periodic audits of databases to ensure the information they contain remains relevant. Further, this Section sets out some specific but nonexclusive situations in which purging should occur.

b. Specified time limits. The key limitation in this Section, which reinforces the similar provision in § 5.02(f) that applies to programmatic databases, is the requirement that database policies state a finite point at which collected data should be destroyed. A presumptive retention period puts teeth into the otherwise vague command to delete irrelevant information. Without such a provision, the temptation is too great to keep all data that is collected, exacerbating the harms described previously.

In some types of situations, legitimate law-enforcement interests may justify retaining data for long periods. For instance, a policy reasonably could provide that felony arrest and conviction records or DNA profiles in serious cases be kept at least as long as the relevant individual is alive, and perhaps longer, unless a case ends in acquittal. In contrast, casefiles in less serious cases, including in cases in which conviction results, might be rendered inaccessible much earlier—a stance that is reflected in some state expungement statutes. Certain types of data collected through suspicionless programs, such as those involving closed-circuit television recordings or license-plate readers, might be destroyed even sooner, perhaps within a week or even just 24 hours if no crime is reported in the monitored areas.

This Section provides for retention of data beyond the designated period when it continues to be necessary to carry out the purpose for which it was obtained. For instance, there may be justification for a law-enforcement agency to retain camera-surveillance data of a particular area beyond the specified period if it shows that access to the recordings is necessary for an ongoing investigation. An agency may be able to retain the DNA of a suspect even after acquittal if it can show that it would be relevant to another criminal case. The burden is on the agency to document the reason for the extension. Occasionally, data that are no longer useful for their original purpose may become necessary for another legitimate policing objective. However, unless there is legislative or regulatory authorization for the new purpose, as required in § 6.01(c), destruction of the data still must occur.

It is important to note that records that might ordinarily be purged should not be if, as prescribed in Chapter 14, they are relevant to an investigation of police misconduct. As indicated in the Comments to § 6.01, police misconduct files are not the subject of this Chapter. But this Section should not be read to require purging of information in casefiles or other policing databases that *are* the subject of this Chapter—even if, for instance, charges against the subject of the file have been dismissed—when the record remains relevant to the subject's treatment by the police.

c. Purging pursuant to corrective process. This Section also requires purging of data that is shown to be inaccurate—and therefore very likely irrelevant to a legitimate policing objective—through the procedure set out in § 6.03(c). This procedure is most likely to apply to casefiles (for instance, as a means of purging invalid arrest warrants) and to watchlists, which often erroneously identify individuals as persons of interest (e.g., as gang members or terrorist sympathizers).

d. Other laws. The laws most likely to require purging of police records are expungement laws, which exist in every jurisdiction. However, agencies often ignore expungement laws or fail to implement them in a consistent fashion. This Section requires strict adherence to expungement laws, which are most likely to apply to casefile databases.

REPORTERS' NOTES

1. Law regarding data destruction. Federal and state laws typically require destruction of data that are no longer are relevant to the acquiring entity. The federal Privacy Act limits the retention of records to those that are "relevant and necessary" to accomplish a purpose of the agency. 5 U.S.C. § 552a(e)(1). Other statutes have specific data-destruction rules applicable to financial institutions, 16 C.F.R. § 314.4(b)(2), (c) (2017), medical establishments, 45 C.F.R. § 164.310(d)(2)(ii) (2017), video businesses, 18 U.S.C. § 2710(e), business organizations, N.Y. GEN. BUS. LAW § 399-H (McKinney 2017), and all types of consumer data. 16 C.F.R. § 682(a) (2017). See generally DANIEL SOLOVE & PAUL SCHWARTZ, PRIVACY LAW FUNDAMENTALS 220 (2017) (describing relevant state laws). The Federal Trade Commission's "disposal rule" requires that covered entities take "reasonable measures" to destroy irrelevant data, which include "burning, pulverizing, or shredding papers . . . so that the information cannot practicably be read or reconstructed," 16 C.F.R. § 682.3(b)(1) (2017), and "destruction or erasure of electronic media . . . so that the information cannot practicably be read or reconstructed." 16 C.F.R. § 682.3(b)(2) (2017). The Principles of the Law, Data Privacy, similarly state that "[a] data controller shall retain personal data only as consistent with the scope of notice, the purposes for which notice is provided, and purposes that are consistent with these Data Privacy Principles" and provide for destruction of the data when it no long serves those purposes. Principles of the Law, Data Privacy § 10 (AM. L. INST. 2020).

These general rules often are applied to specific types of policing databases. For instance, federal regulations governing criminal-history records and related information require that states not only "assure that all information which is retained by a project has relevancy and importance," but that "[i]nformation retained in the system must be reviewed and validated for continuing compliance with system submission criteria before the expiration of its retention period, which in no event shall be longer than five years." 28 C.F.R. § 23.20(h) (2017). Many state statutes set out maximum lengths of time for data storage of policing information. See, e.g., MINN. STAT. § 13.824(3)(a) (2017) ("data collected by an automated license plate reader . . . must be destroyed no later than 60 days from the date of collection"); MONT. CODE ANN. § 46-5-118 (2017) ("license plate data . . . may not be preserved for more than 90 days"); cf. CAL. CODE § 1798.90.51(b)(2)(G) (2016) (requiring a "usage and privacy policy" that sets out, inter alia, "[t]he length of time ALPR information will be retained, and the process the ALPR operator will utilize to determine if and when to destroy retained ALPR information").

Some courts likewise have required that information obtained through surveillance, especially surveillance that captures information about non-suspects, be destroyed within a short

period of time. In re Application of the U.S. for an Order Relating to Tels. Used by Suppressed, 2015 WL 6871289, at *4 (N.D. Ill. Nov. 9, 2015) (requiring that all data acquired by a Stingray—a device that captures data from all cellphones in the vicinity—other than information identifying the particular phone used by the target, be destroyed within 48 hours after capture, and also prohibiting use of the extraneous data for further searching of or against third parties). See also In re Search of Info. Associated with Facebook Account Identified by the Username Aaron.Alexis that is Stored at Premises Controlled by Facebook, Inc., 21 F. Supp. 3d 1, 9-11 (D.D.C. 2013) (limiting retention of Facebook data).

In contrast, some police regulations allow for data to be stored for fairly long periods of time. See, e.g., S.F. ADMIN. CODE § 8.3 (2017) ("records . . . may be destroyed five years after they were created"); *Forms Retention Schedule*, CHICAGO POLICE DEPARTMENT 11.717 (Jan. 17, 2018), [https://perma.cc/L3QJ-7XL4] (allowing data to be retained for one to 10 years depending on classification). Furthermore, most police regulations do not define "destruction" and thus do not set out adequate standards to ensure that information cannot be read or reconstructed. Compare *NYPD Patrol Guide* (Apr. 5, 2016), [https://perma.cc/L3AC-7J64] (silent as to data destruction entirely) to GA. CODE ANN. § 50-18-95(b) (2017) ("records shall be destroyed in such a manner that they cannot be read, interpreted, or reconstructed"). As such, those policies would not meet the requirements of this Section.

2. Expungement of arrest and conviction records. A federal law grants expungement for misdemeanor drug offenses when the offender successfully completes probation. 18 U.S.C. § 3607 (2012). See also 18 U.S.C. § 3607(a), (c) (2012) (requiring courts to expunge the record of a person, under 21 years old at the time of the offense, if he or she was found guilty of simple possession and had not previously been convicted of a federal or state crime relating to controlled substances). But there is no general federal expungement statute, despite repeated proposals to enact one for nonviolent offenders. See, e.g., Fresh Start Act of 2019, H.R. 5043 (115th Cong.); see also Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records*, SETON HALL UNIV. 41-45 (2013), [https://perma.cc/U2EQ-DMXF] (discussing the provisions of federal proposals). Given the limited statutory authority, federal courts grant expungement only in extraordinary circumstances. Moreover, since the U.S. Supreme Court's decision in Kokkonen v. Guardian Life Ins. Co. of Amer., 511 U.S. 375 (1994), limiting the reach of federal courts' ancillary jurisdiction, most Courts of Appeals have held that they lack equitable power to expunge criminal records. See, e.g., United States v. Wahi, 850 F.3d 296 (7th Cir. 2017).

State legislatures and courts are more likely to require expungement, although there too expungement is rare. See Margaret Love, *Restrictions on Access to Criminal Records: A National Survey*, COLLATERAL CONSEQUENCES RES. CTR. (Mar. 9, 2017), [https://perma.cc/7CEG-4QJE] (describing a recently updated nationwide survey of state expungement law that found that since 2013, 27 states have given courts some authority to restrict access to criminal records but that only 12 states give courts authority to seal criminal records altogether); Ross E. Cheit, *The Elusive Record: On Researching High Profile 1980s Sexual Abuse Cases*, 28 JUST. SYS. J. 79, 81 (2007) (providing a chart detailing rules regarding destruction of records in all 50 states, with

expungement most likely when arrest does not result in conviction or the conviction is for a misdemeanor). When statutes do not exist or do not cover a particular situation, most state courts hold that they have inherent authority to expunge based on a balancing of society's interest in the record against the harm to the individual that arises from its continued existence. Anna Kessler, *Excavating Expungement: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 416-418 (2015). Some courts have grounded this authority in the Due Process Clause. Id.

However, scholars have documented that even when statutory language exists, mandated expungement does not always occur. One study found that expungement of a conviction record often fails to take place even after official exoneration. Amy Schlosberg, Evan Mandery & Valerie West, *The Expungement Myth*, 75 ALB. L. REV. 1229, 1229-1230 (2011-2012). Expungement of arrestees' DNA records after dismissal or acquittal on criminal charges, required under most state DNA laws, has also been said to be "largely a myth." Elizabeth Joh, *The Myth of Arrestee DNA Expungement*, 164 U. PA. L. REV. ONLINE 51, 51 (2015). Many federal and state laws grant expungement only from "public records" accessible by employers, the press, and so on, while maintaining law-enforcement access. See, e.g., 18 U.S.C. § 3607(c) (2012) ("The expungement order shall direct that there be expunged from all official records, except the nonpublic records [retained by the central repository for use by courts in subsequent proceedings], all references to [the individual's] arrest for the offense, the institution of criminal proceedings against him, and the results thereof."). See also S.C. CODE ANN. § 17-1-40 (2017).

Some authors have argued that offenders should be able to ask for expungement not only of charges that result in acquittal or dismissal, but also of records of conviction, after a specified time period proportionate to the crime has elapsed. See, e.g., Sara Shiavone, *Wiping the Slate Clean: A Proposal to Expand Ohio's Expungement Statute to Promote Effective Offender Reintegration*, 45 CAP. U. L. REV. 509, 543-546 (2017) (calling for expungement eligibility within six months to five years after conviction, depending on the offense). Whether or not a jurisdiction adopts that position, expungement laws that do exist should be implemented rigorously and—unless relevant law states otherwise—law enforcement agencies should not have access to the expunged material.

3. Departmental policies. In some domains, policing agencies have been active in establishing retention policies, with many calling for limited retention periods. For instance, most police departments have policies governing the retention of footage from police body cameras. See *Police Body Camera Policies: Retention and Release*, BRENNAN CTR. FOR JUSTICE (Aug. 3, 2016), [https://perma.cc/DC5K-M79X] (chart listing the retention policies for different cities). Closed-circuit television (CCTV) recordings provide another example. At one time, surveillance-camera recordings in Baltimore had to be destroyed within 96 hours unless a crime was reported that the surveillance could help solve. Stephen McMahon, Cent. Dist. Commander for Balt. City, Remarks at the International Association of Chiefs of Police Meeting (Apr. 17, 2002). That policy no longer exists, but the Department does require that aerial surveillance data be destroyed after 45 days, *Frequently Asked Questions*, BALTIMORE POLICE COMMUNITY SUPPORT PROGRAM, [https://perma.cc/JY44-PV6K], although this requirement is not always enforced. Jay Stanley, *Baltimore Aerial Surveillance Program Retained Data Despite 45-Day Privacy Policy Limit*,

ACLU (Oct. 25, 2016), [https://perma.cc/M8AK-AGNW]. Colorado allows for effectively unfettered access to CCTV recordings during the first year after collection, but it requires a custodian to record the reason for access after one year has passed, and it requires that the recordings be destroyed after three years unless an investigatory or judicial proceeding has commenced. COLO. REV. STAT. ANN. § 24-72-113 (West 2017).

Police departments also have adopted policies limiting how long license-plate data may be maintained. See, e.g., BOS. POLICE DEP'T, SPECIAL ORDER ON LICENSE PLATE RECOGNITION SYSTEM (Sept. 14, 2011), [https://perma.cc/Y7YU-4K62] (requiring deletion of data after 90 days); L.A. CNTY. SHERIFF'S DEP'T, FIELD OPERATIONS DIRECTIVE ON AUTOMATED LICENSE PLATE RECOGNITION (APLR) SYSTEM (Aug. 17, 2009), [https://perma.cc/7625-D9U9] (requiring deletion only after two years); OHIO EMERGENCY MGMT. AGENCY, FY 2010 LOCAL PROGRAM GUIDANCE AND APPLICATION PACKAGE (Dec., 2010), [https://perma.cc/9AHM-SN4V] (requiring immediate deletion); MESQUITE POLICE DEP'T, ACLU OPEN RECORDS REQUEST FOR MPD ALPR RECORDS 10465-10466, [https://perma.cc/8LSV-SWD6] (indefinite retention).

At one time, records maintained by the federal government's counterintelligence services that were not directly linked to national security could be maintained only for six months, but that period has now been extended to five years. U.S. DEP'T OF JUSTICE, OFF. DIR. NAT'L INTEL., GUIDELINES FOR ACCESS, RETENTION, USE AND DISSEMINATION BY THE NATIONAL COUNTERTERRORISM CENTER AND OTHER AGENCIES OF INFORMATION IN DATASETS CONTAINING NON-TERRORISM INFORMATION 6 (Mar. 2012) [https://perma.cc/ZM7J-3UT9] [hereinafter NCTC REP.] The American Bar Association's Standards on Law Enforcement Access to Third Party Records provide that database records should be destroyed when no longer relevant to legitimate law-enforcement interests. AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE STANDARDS, LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS § 25-6.1(b)(ii) (3d ed. 2013), [https://perma.cc/2756-MG3L].

§ 6.03. Accuracy

(a) Policing databases should be as accurate, complete, and current as reasonably possible.

(b) A policing database should not be considered to have met this standard unless, at a minimum, the agency controlling it requires:

(1) standardized procedures for entering data;

(2) training of and supervision over those who enter data; and

(3) periodic determinations, by an auditor outside the agency when possible, of whether the information in the database is accurate and is authorized to be retained in policing databases under §§ 6.01 and 6.02.

(c) Policing agencies should establish a procedure that allows persons identified in policing databases to correct or delete inaccurate information pertaining to them, as promptly as possible.

(d) To facilitate use of the correction procedure described in subsection (c), individuals whose information is in a policing database:

(1) should be notified of that fact whenever the information is used as a basis for an adverse action against them involving a deprivation of liberty or property; and

(2) should be entitled to obtain through open records laws or other appropriate channels the information pertaining to them, unless such access would demonstrably compromise legitimate policing objectives.

Comment:

a. Steps to ensure accuracy. Significant negative consequences, including mistaken arrests or stops, loss of employment, and unnecessary stigmatization, can flow from the inclusion of erroneous information in a database. For example, at any given moment, there are tens of thousands of individuals at risk of detention or arrest because of invalid warrants. Erroneous or outdated arrest records can make obtaining housing, a job, or government benefits difficult or impossible.

To avoid those consequences, it is essential that databases contain accurate, complete and current information. But there are significant obstacles to achieving that goal. To begin with, the information that is entered in the database may be faulty for any number of reasons. Second, even if the information is accurate, it usually is entered into the database by human beings, who easily can make errors. Names can be misspelled or identities confused. Even technological inputs can be inaccurate, as when a GPS monitoring system misstates a car's location because the satellite feed has been blocked. Third, information can become outdated.

Policing agencies have a duty to ensure the accuracy of any databases they maintain. This Section requires that agencies implement standardized procedures for inputting data and training and supervising those who carry out that task. It also requires that periodic checks on the database be conducted, by an outside auditing entity if possible, to monitor both the accuracy of data and its relevance to legitimate law-enforcement endeavors. If these requirements are not met, policing databases should not be accorded a presumption of reliability. The practical effect of this provision

is that litigants and others should be able to challenge information contained in records systems that do not follow procedures designed to reduce error.

b. Correction procedures. To provide an additional protection against the negative consequences that can flow from the inclusion of erroneous information in a database, the policy authorizing the database should require that policing agencies provide a mechanism for correcting database errors. No-fly lists, gang-member lists, and arrest records are notorious for including inaccurate information or information that once was accurate but becomes out of date. Even diligent police agencies may not catch all errors or promptly remove erroneous information, and some agencies may fail to do so out of inertia or bias. Individuals should have the ability to eliminate erroneous information about them from the database as promptly as possible. Most jurisdictions have a process for correcting one's criminal record, and some courts have recognized a due process interest in such a procedure.

c. Notice. This Section also requires that a policing agency notify individuals, either immediately or within a short period of time, when information about them in a policing agency's database has led to an adverse action. (This notice requirement is independent of the provisions in § 3.05 that address notice to individuals who are subject to prosecution or information-gathering practices and in § 6.06(c) that require notice of data breaches). "Adverse action" is defined as a deprivation of liberty or property by government agents and would clearly encompass a delay or special screening at an airport based on a no-fly list or a stop on the street based on a gang-member list. Without such a notification requirement, an individual may be detained repeatedly or otherwise deprived of property or liberty because, unbeknownst to the individual, he or she has been identified erroneously as a person who warrants monitoring. This notification requirement should apply both when the subject is identified and when, as might be the case when the adverse action is based on an address or phone number, the subject is identifiable.

Consistent with Principles of the Law, Data Privacy § 8, this Section also provides that, subsequent to such notice or independently of it, individuals who provide verifiable identification are entitled to view information about them in the policing database and, if the information is inaccurate, to take advantage of the correction procedure. However, in situations in which the individual has not been subject to an adverse action and is simply attempting to discover whether he or she is in a database, § 6.03(d)(2) requires that the individual use the formal process established by federal or state open records and privacy statutes for accessing information in

government files. Further, agencies can decline to answer such requests if they can demonstrate that disclosure will demonstrably affect legitimate law-enforcement objectives, such as preventing the detection or capture of a suspect or protecting an informant when, for instance, the information is of such a nature that its source is obvious. In practice, this exception would prevent access to most open casefiles and some watchlists, but it generally would not prevent access to programmatic databases, which contain data obtained through suspicionless police actions, and it typically should permit access to closed casefiles and watchlists like those purporting to identify gang members or violent offenders.

REPORTERS' NOTES

1. Statutory and administrative approaches to ensuring accuracy. Statutes and regulations aimed at ensuring accuracy of databases have existed for some time. On the most general level, all privacy acts require reasonable efforts to maintain accuracy. See, e.g., 5 U.S.C. § 552a(e)(5) (agencies are to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."). Specific to criminal-justice issues, the Code of Federal Regulations seeks to ensure "that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of such information and to protect individual privacy." 28 C.F.R. § 20.1 et seq. (2017). The regulations require that criminal-disposition information appear in the database within 90 days of the decision and that the local agencies transmitting the information query the central state database to confirm the information's accuracy. Id. They also state that "[c]riminal justice agencies shall institute a process of data collection, entry, storage, and systematic audit that will minimize the possibility of recording and storing inaccurate information and upon finding inaccurate information of a material nature, shall notify all criminal justice agencies known to have received such information." Id. Finally, the regulations require that states provide individuals the right to access and review for accuracy and completeness their criminal-history records, and be afforded an opportunity to make corrections. Id. See also DEP'T HOMELAND SECURITY PRIVACY OFFICE, ANN. PRIVACY REP. 4 (July, 2006), [https://perma.cc/J3SX-H7QR].

Consistent with those regulations, all states also have quality-control statutes. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 2002 OVERVIEW (Nov. 2003) [https://perma.cc/8KXS-8X8K] (surveying state laws); see also *Recommendations for Fusion Centers: Preserving Privacy and Civil Liberties While Protecting Against Crime and Terrorism*, THE CONSTITUTION PROJECT 20-21 (2012), [https://perma.cc/2H6L-6JAJ] (describing state policies regarding correction of misinformation). However, in obvious tension with this Section, the federal government has exempted the National Criminal Information Center from the quality-control requirements applicable to other agencies

because much of its information comes from state and local sources that, the government asserts, cannot be monitored easily. 28 C.F.R. § 19.96(b)(6) (2012). According to the Department of Justice, state retention and auditing practices have been and remain deficient, and "[m]uch more needs to be done to achieve uniformity in the improvement of record quality and completeness." U.S. DEPT. OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 126 (June, 2006), [https://perma.cc/4UH4-WM3F]. Although this report is now 15 years old, significant inaccuracy problems remain. See Wayne Logan & Andrew Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 559-563 (2016).

Several solutions to the database-inaccuracy problem have been proposed: (1) a "national accreditation process for criminal history record repositories," which would function much the same way that crime laboratories are accredited, U.S. DEPT. OF JUSTICE, supra, at 126; (2) improved federal enforcement of the data-quality requirements that exist, perhaps by using funding as leverage, Logan & Andrew Ferguson, supra, at 596-604; (3) dictating that certain types of data, e.g., data from gang-member databases, is never admissible in a criminal proceeding, see, e.g., Rebecca A. Hustader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671 (2014); (4) improved audits similar to those used in the healthcare system, cf. Nicole Gray Weiskoff & Chunhua Weng, *Methods and Dimensions of Electronic Health Record Data Quality Assessment: Enabling Reuse for Clinical Research*, 20 J. AM. MED. INFORMATICS ASS'N 144, 145 (2013); (5) a loss of the presumption of database reliability if the state does not require regular auditing processes, Erin Murphy, *Databases, Doctrine and Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 832 (2010); and (6) providing for a civil remedy if government fails to take corrective action.

Although all of those proposed solutions have some merit, this Section focuses on the latter three—auditing, a presumption against reliability if reliability-enhancing processes are not adopted, and the creation of a robust data-correction process. Auditing is a good first step to ensuring accuracy and completeness. But as Professor Erin Murphy points out, "it is arguably impossible to regulate databases substantively—to truly inquire whether a particular series of tests or entries or searches were accurate, fair, and correct." Thus, she continued, "it is much easier to impose procedural requirements upon databases—to inquire into the existence and thoroughness of protocols for those processes and to presume inadequate or defective any database system maintained without them." Murphy, supra, at 829. That recommendation is adopted in this Section.

The import of such a rule could be significant. In both Arizona v. Evans, 514 U.S. 1 (1994), and Herring v. United States, 555 U.S. 135 (2009), the defendant was arrested based on outdated arrest-warrant information in criminal-record databases. Although members of the Court were aware that those databases contain thousands of invalid arrest warrants, the Court refused to apply the exclusionary rule in either case. In *Herring*, however, Chief Justice Roberts stated that exclusion might be required if there were proof of knowing, reckless error, or if there were evidence of "systemic errors" that called into question the accuracy of the entire database. 555 U.S. at 147-148. Failure to monitor a database adequately in the manner set out in this Section

could be considered rebuttable evidence of the type of "systemic error" to which Chief Justice Roberts referred. In any event, that would be the import of this Section.

2. Correction process. The third means of assuring accuracy adopted in this Section is a meaningful data correction process. Given the possible consequences of erroneous database information—wrongful arrests, restrictions on travel, damage to reputation—several commentators have argued that the Due Process Clause requires the government to provide a procedure for correcting database errors. See, e.g., BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 259 (2017); Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148 (2006); Shaudee Navid, *They're Making a List but Are They Checking It Twice?: How Erroneous Placement on Child Offender Lists Offends Due Process*, 44 U.C. DAVIS L. REV. 1641 (2011). Consistent with this Section, the Principles of the Law, Data Privacy, provide that—with some exceptions that apply when the burden or risk of correction would outweigh the risks to the individual of failing to correct—"[d]ata controllers shall provide data subjects with a reasonable process by which they can challenge the accuracy of their personal data." Principles of the Law, Data Privacy § 8(d)(1) (AM. L. INST. 2000). If the challenge is successful, the data controller is to correct the error in all copies that it possesses; if the challenge is not successful, the Principles provide that "[w]hen reasonably practicable, the data subject shall be entitled to add a statement of disagreement to the record where the data is contained[;]" a statement that should accompany the data if transmitted to another entity. Id. § 8(d)(2).

As the Commentary to the Principles of the Law, Data Privacy, notes, various federal and state laws provide for both a corrective process and individual access to records. In addition to the federal regulations requiring a correction process noted above, the federal Privacy Act provides that government agencies "shall [permit an] individual" whose record is maintained by the agency: (1) "to review the record" and (2) "request amendment of a record." 5 U.S.C. § 552a(d)(2) (2012) (originally styled as the Computer Matching and Privacy Protection Act of 1988). The Act also states that "if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of . . . material [in a record], such material shall be provided to such individual" unless a confidential informant's identity would be revealed. 5 U.S.C. § 552a(k)(2). Similarly, the Fair Credit Reporting Act requires that an entity must, upon request of the consumer, disclose "information in the consumer's file at the time of the request," and provide a "right to dispute information in the file." 15 U.S.C. § 1681g(c)(1)(B) (2012). Summarizing the best practices recommended in reports, guidelines, and model codes regarding consumer data in the United States, Canada, and Europe, the Federal Trade Commission suggested that mandatory disclosures be made, inter alia, of the uses to which the data will be put, potential recipients of the data, and the nature of the data and means by which it is collected, and that consumers be allowed both to correct inaccurate data and to seek monetary damages for violation of privacy standards. *Fair Information Practice Principals*, FEDERAL TRADE COMMISSION (June 25, 2007), http://www.ftc.gov/reports/privacy3/fairinfo.shtm.

Most states also provide express statutory remedies for those seeking to correct law-enforcement records. See OHIO REV. CODE ANN. § 1347.09(A)(1) (West 2017) (providing for a data-correction process, and requiring notification of any corrections to parties designated by the individual); Soderlund v. Merrigan, 955 A.2d 107, 113-114 (Conn. App. Ct. 2008) (surveying cases allowing for a cause of action based on the view that failure to correct a record is a ministerial action not subject to immunity). However, they do not always require notification and are split as to whether the remedy is administrative or judicial. See CAL. PENAL CODE § 11126 (West 2017) (requiring an agency to respond to inquiries about whether a record exists and, if so, requiring that the individual first attempt to resolve any inaccuracy with the agency directly before moving on to an administrative proceeding); COLO. REV. STAT. § 24-72-307 (2017) (requiring the individual to first make a written request for correction to the state's custodian before allowing appeal in the district court of the jurisdiction where the record is located); GA. CODE ANN. § 35-3-37(e) (2017) (requiring the individual to file a complaint with the agency responsible for the record but allowing appeal to a court of original jurisdiction); MINN. STAT. § 13.08, 13.085 (2017) (providing for both injunctive action to compel compliance and administrative action for violations of state data practices). The Uniform Criminal Records Accuracy Act, proposed by the Uniform Law Commission, provides that subjects of records may seek correction of a criminal history record, that review of that request must take place with 40 days, and that, if correction is deemed necessary, it must be made within 14 days of that decision; further, notification of the correction must be sent to other agencies with which the information has been shared as well as to any person the subject identifies as having received the inaccurate information. UNIFORM CRIMINAL RECORDS ACCURACY ACT, §§ 303, 401-403 (UNIF. L. COMM'N 2018).

The primary obstacle to both the due-process and the statutory-based corrective actions is a practical one. As Kenneth Karst noted long ago, "[d]iscovery of the inaccuracy depends on the subject's access to his own file and his awareness of the need to inspect it. Even when a record is freely accessible to its subject, there is no assurance that the subject will know of its existence or its content." Kenneth L. Karst, *"The Files" Legal Controls over the Accuracy and Accessibility of Stored Personal Data*, 31 L. & CONTEMP. PROBS. 342, 358 (1966). Subsection (d)(1) addresses this obstacle by imposing an affirmative duty on the police to notify individuals that they are in a database when the database is used as a basis for a police action against them, such as a stop, preferably at the time of the action. This requirement is particularly important in connection with watchlists, such as no-fly lists and gang-member lists, which are notoriously expansive. Cf. Elhady v. Kable, 391 F.Supp.3d 562, 581-583 (E.D. Va. 2019) (holding that delays and special screenings at airports experienced by individuals thought to be on the federal Terrorist Screening Database were not "de minimis" and that these deprivations infringed procedural due process, given the absence of an "ascertainable standard for inclusion or exclusion" and "independent review" of placements on list); Gonzalez v. Immigr. & Customs Enf't, 416 F. Supp. 3d 995 (C.D. Cal. May 7, 2019) (barring the Immigration and Customs Enforcement from issuing detainers based on information found in certain of its databases because they "often contain incomplete data, significant errors, or were not designed . . . to determine a person's removability."), rev'd in part,

975 F.2d 788, 822-223 (9th Cir. 2020) (requiring "additional findings of fact" regarding whether there was "systemic error" in the agency's records). Unless individuals know about their presence on such lists, they cannot contest the accuracy of the information.

As an additional privacy measure, subsection (d)(2) provides that individuals should be able to inquire as to whether they are in a policing database, even if they have not received such notification. Granting access to one's criminal record is a standard provision in open records laws. See, e.g., VA. FREEDOM OF INFORMATION ACT, § 22.3700 et seq. But this subsection applies to all information about a person in policing databases. The Principles of the Law, Data Privacy, similarly provide that "[d]ata subjects shall be entitled to obtain confirmation from a data controller as to whether or not the data controller or any data processor acting on behalf of the data controller stores personal data about them" and that, if such data is being stored, "this data subject shall be entitled to obtain access to the personal data." Principles of the Law, Data Privacy § 8(a) and (b) (AM. L. INST. 2000). However, those Principles also state that such access need not be provided when "the balance of interests between the data controller and the data subject weigh against access and an opportunity for correction," id. § 8(e)(3), which, in the context of policing databases, this Section defines as situations in which disclosure would prevent capture of a suspect or endanger an informant. The federal Privacy Act makes a similar accommodation. Privacy Act, 5 U.S.C. § 552a(d)(5) ("nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.").

§ 6.04. Security

Policing databases should be secure and protected from unauthorized access. At a minimum, this requires:

(a) protection against access by non-police personnel, unless authorized by law;

(b) identification of an officer who is responsible for security;

(c) storage of the data on closed-network systems, when feasible;

(d) continuous monitoring of the database for security breaches;

(e) a plan for corrective action if a data breach occurs, and

(f) penalties for breach of these rules.

Comment:

a. Rationale for the security requirement. Agencies that maintain databases have a duty to ensure the security of the data therein. The duty could be seen to arise from a fiduciary obligation toward the subjects of the records, or from the fact that, but for the government's aggregation of information, data about individuals would not be as easily accessible. Section 6(b)(i) and (ii) of the

Principles of the Law, Data Privacy, similarly recognizes that data users should maintain confidentiality when "entities hold themselves out to be privacy-respecting" and "cause individuals to reasonably believe that the entity will not disclose their personal data based on reasonable social expectations"—a consideration that applies here. Whatever its source, the duty of security has implications both for who should have access to databases and for how they should be maintained.

b. Non-police access. As a general matter, members of the public and other government agencies should not have access to policing databases. However, if a statute authorizes such access, then a democratic balancing of privacy and societal interests has presumably taken place. For instance, most states have a statute that permits limited public access to arrest and conviction records, and some states permit public access to police body-camera images for limited purposes. Defense attorneys or journalists also might be authorized to access records under certain circumstances. Private data vendors may be authorized to access records as well, but presumably only in aid of the agency's legitimate policing objectives and, again, only if authorized by statute. Absent such statutes, this Section prohibits non-police personnel from accessing policing databases—a prohibition that is bolstered by § 6.06, which requires an unalterable auditing system that memorializes who has accessed the data, for what purpose, and when.

c. Security precautions. This Section requires that a policing agency take a number of steps to enhance the security of its database and prevent unauthorized access to it. First, it requires the agency to appoint an official whose primary duty is database security. Because of the expense and technological expertise required, many departments may farm out security arrangements to private companies or rely on centralized state repositories for much of their data maintenance. Nonetheless, this Section requires that each agency designate an officer who is responsible for data security, as a means of identifying a person to whom inquiries can be directed and who would be responsible for ensuring action is taken at the local level when necessary. Second, because one of the primary risks of unauthorized access is hacking by outside parties, this Section mandates that when data is not in current use or is not of the type that requires online access, an agency should maintain data in a way that makes online access impossible (often called a "closed network" or "air-gapped computer system"). Third, this Section requires that the policing agency, or its outside auditor, continually monitor the database for security breaches; simulation of possible attacks on the database system might be part of that endeavor. Fourth, in the event of a data breach, this Section requires that the agency have a containment plan, which might vary depending on whether

the breach involves a virus, a distributed denial of service attack (involving flooding a network so that it cannot function), or a simple hack into the system to obtain information about a specific person or program. Finally, to further meaningful implementation of these rules, this Section requires that the agency provide for administrative penalties when they are violated.

REPORTERS' NOTES

1. Law on securing databases. Consistent with this Section, privacy acts typically mandate security. See, e.g., 5 U.S.C. § 552a(e)(10) (requiring agencies to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained."). A number of organizations have provided protocols for maximizing the security of databases. Two from the U.S. Department of Commerce's National Institute of Standards and Technology are illustrative. Pauline Bowen, Joan Hash & Mark Wilson, *Information Security Handbook: A Guide for Managers*, NAT'L INST. OF STANDARDS AND TECH. (Oct. 2006), [https://perma.cc/6DSQ-NGSS] (laying out infrastructure, governance, and technological security requirements); Karen Kent & Murugiah Souppaya, *Guide to Computer Security Log Management*, NAT'L INST. OF STANDARDS AND TECH. (Sept. 2006), [https://perma.cc/P944-FKCM]. However, the NIST standards are aimed at federal bureaucracies and probably cannot feasibly be replicated or substantially met by any but the largest state and municipal departments.

With respect to consumer data collection, the Federal Trade Commission lists among its best practices encrypting data for transmission and storage, password protection, and storage of data on servers or computers inaccessible by modem. *Fair Information Practice Principles*, FEDERAL TRADE COMMISSION (June 25, 2007), http://www.ftc.gov/reports/privacy3/fairinfo.shtm. However, in contrast to the stipulation in subsection (c) of this Section, few jurisdictions require segregation of data on closed networks in the law-enforcement context, even when such a practice would not compromise sharing data with other jurisdictions. Cf. N.Y. COMP. CODES R. & REGS. tit. 9 § 6210.11(g) (2017) (requiring that all voting devices "not be capable of being networked"). Another method of incentivizing security arrangements is to require the agency to buy insurance for data breaches, which is becoming increasingly common for small businesses. Michael N. DiCanio, *Preparing for the Inevitable: Insurance for Data Breaches*, N.Y. L.J. (May 19, 2015), http://www.newyorklawjournal.com/id=1202726774292/.

There are hints in the U.S. Supreme Court's jurisprudence that at least minimal database security is a legally protected right. In Whalen v. Roe, 429 U.S. 589 (1977), the Court noted that "[t]he right to collect and use . . . data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures" and went on to remark that "in some circumstances that duty arguably has its roots in the Constitution." Id. at 605. Citing *Whalen*, in United States Department of Justice v. Reporters Committee for Freedom of the Press,

the Court stated that "the fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information," 489 U.S. 749, 770 (1989) (internal quotations omitted). See also NASA v. Nelson, 562 U.S. 134, 159 (2011) ("In light of the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy.").

2. Law governing access by parties other than law enforcement. A number of statutes permit public access to certain types of records under limited circumstances. See, e.g., GA. CODE ANN. §§ 35-3-34, 42-8-62.1 (2017) (allowing criminal-record access to third parties so long as they provide sufficient "identifying information" but allowing first-time offenders to limit public access at the discretion of the sentencing court); 20 ILL. COMP. STAT. ANN. 2635/5 (West 2017) ("All conviction information . . . shall be open to public inspection"); N.Y. PUB. OFF. LAW § 87 (McKinney 2017) (allowing access to body-camera footage through the state's FOIA statute but applying that access provision narrowly to exclude footage for many categories, including noncriminal offenses, domestic violence, and ongoing criminal investigations); D.C. MUN. REGS. tit. 24 § 3902.6 (2017) (providing public access to body-camera footage through standard Freedom of Information Act (FOIA) procedure). But see CAL. PENAL CODE § 11122 (West 2017) (allowing individuals to access their own criminal record but denying third-party access). See also Erik Luna, *Digital Innocence*, 99 CORNELL L. REV 981 (2014) (arguing that the defense ought to have access to government-maintained surveillance data when it can provide exculpatory evidence).

§ 6.05. Police Access to Databases

(a) Agency personnel should be permitted to access a policing database only for legitimate policing objectives, which should be specified in a written policy governing the use of the database that meets the requirements of § 6.01(c).

(b) The policy should make clear:

(1) the predicate level of cause that must be present to justify access and how that predicate should be documented;

(2) whether advance permission from a supervisor or court is required;

(3) which personnel are authorized to access the database and to review data that has been accessed; and

(4) what training is required before personnel are authorized to utilize it.

Comment:

a. The need for regulation. Access by police personnel to their agencies' databases raises many of the same concerns about privacy invasion, arbitrariness, and abuse that are raised by police efforts to access third-party databases that are discussed in § 2.05 and the more traditional searches that are discussed in Chapter 3. Policing databases, especially programmatic databases, can contain an extensive amount of personal information. For instance, fusion centers collect a wide array of information having to do with individuals' travel, financial transactions, and publicly recorded activities. Surveillance tapes or body-camera footage may catalog a person's public actions over long periods of time. Casefiles and watchlists can contain information that, if used inappropriately, can result in stigmatization, unnecessary confrontations with the police, and other negative consequences. The fact that policing agencies already have this information in their possession—as opposed to having to request it from another party—does little to mitigate these concerns.

For those reasons, agencies should develop clear policies to regulate law-enforcement access to police databases, whether by their own personnel, 911 dispatchers, or personnel from law-enforcement agencies with which they share the information. In doing so, they should consider the same sorts of regulatory tools that are used to limit the intrusiveness and arbitrariness of more traditional suspicion-based searches and seizures. See § 3.02.

b. Content of regulation. At a minimum, agency policy should make clear that a policing database may be accessed only for a legitimate policing objective—which must be delineated clearly in the policy itself, as required in § 6.01(c). For instance, as federal law provides, police personnel should not be able to access DNA databases to discover medical information about an individual or sift through surveillance data for nonprofessional purposes. Occasionally, the police wish to access data gathered for one purpose to use for another purpose (e.g., using a DNA database initially created to facilitate identification of arrestees to find matches with crime-scene DNA). In such cases, this Section stipulates that the secondary use is allowed only if a policy or statute authorizes it. Accord Principles of the Law, Data Privacy § 7 (providing that "[p]ersonal data shall not be used in data activities unrelated to those stated in the notice . . . without the consent of the individuals" unless "the use is required by law" or "obtaining consent would be impractical, impermissible under law, or too costly or difficult[.]").

Agencies also should consider whether additional controls are necessary. For certain kinds of databases, some type of predicate beyond a legitimate purpose may be warranted before access

can occur. For instance, an additional predicate may be required to access databases that contain more sensitive information, such as medical information or tax records, or large amounts of information about a person, as might be associated with long-term location tracking. An additional predicate may also be required to access databases that were obtained through suspicionless search and seizure programs (see Chapter 5) and thus are likely to contain information about large numbers of individuals who are innocent of any wrongdoing. In some cases, a traditional Fourth Amendment predicate—like reasonable suspicion or probable cause—may be appropriate; if particularly sensitive information is involved, perhaps an even more substantial showing would be required. In other contexts, an agency may decide to use a lower threshold like "relevance" but limit the use of the database to investigations of more serious crimes or require approval from a supervisor before a database may be used. Access also may be limited to certain types of officers. For instance, only specially trained individuals should be able to access DNA or fingerprint databases. Likewise, before an officer can access gang-member lists, specialized training may be required, given the uneven reliability of these lists and the ease with which they can be misused.

REPORTERS' NOTES

1. Law governing secondary use. A number of federal statutes place restrictions on secondary use of data. See Privacy Act, 5 U.S.C. § 552a(b)(3) (2012) (records may be disclosed only for a "routine use," defined as "the use of [the] record for a purpose which is compatible with the purpose for which it was collected"); Fair Credit Reporting Act, 15 U.S.C. § 1681b(a) (2012) (listing purposes for which consumer reports can be divulged); Driver's Privacy Protection Act, 18 U.S.C. § 2722(a) (2012) (prohibiting disclosure of personal information in a motor-vehicle record for an unlisted purpose); Cable Communications Policy Act, 47 U.S.C. § 551(c) (2012) (limiting disclosure of "personally identifiable information" to the purposes of the act); Gramm–Leach–Bliley Act, 15 U.S.C. § 6802(c) (2012) (limiting disclosure of financial information); HIPAA regulations, 45 C.F.R. § 164.506(a) (2017), 45 C.F.R § 164.508(a)(1) (2017) (placing limits on disclosure of medical information). The Supreme Court's decisions in Vernonia School Dist. v. Acton, 515 U.S. 646, 658 (2008), upholding a drug-testing program, and in Maryland v. King, 567 U.S. 435, 465 (2013), upholding DNA sampling, relied on assurances that the information collected would be held securely and not used for unauthorized purposes. Cf. Birchfield v. North Dakota, 139 S. Ct. 2160, 2178 (2016) (requiring a warrant for blood tests, in part because more than blood-alcohol content might be discovered).

2. Law enforcement access to data. The U.S. Supreme Court's decision in Carpenter v. United States, 138 S. Ct. 2206 (2018), which required a warrant to obtain a defendant's cell-site location data from the individual's common carrier, signaled that police access to some types of records may be limited by the U.S. Constitution. Although *Carpenter* involved records maintained

by a third party, the Court also expressed a general concern about government access to information that is not "voluntarily" surrendered. Id. at 2220 ("in no meaningful sense does the user voluntarily 'assume[] the risk' of turning over a comprehensive dossier of his physical movements."). That concern is present whether the data resides with a third party or the government. Data from government-established license-plate readers, intelligent transportation systems, and closed-circuit television can be as revealing as cell-site location data, and is surrendered no more voluntarily. Thus, while Chapter 5's Principles might justify widespread suspicionless collection of data under these types of circumstances, they do not automatically authorize subsequent access to that data to discover facts about a particular individual. Otherwise the government could avoid the dictates of *Carpenter* simply by collecting the data itself or by purchasing the data from third parties.

Reflecting these types of concerns, federal law has long provided that even when housed within the National Security Agency (NSA), metadata about particular individuals only can be accessed pursuant to a court order. 50 U.S.C. § 1861 (2006) (requiring a production order to obtain "tangible things" in a counterterrorism investigation, at a time when metadata was maintained by the NSA). Similarly, when law enforcement seeks targeted information from other government agencies, statutes sometimes require more than a mere request by a field officer. See, e.g., I.R.C. § 6103(h) (2015) (in non-tax investigations, requiring a demonstration of "reasonable cause" and an inability to obtain the information from another source); Privacy Act, 5 U.C.S. § 552(b)(7) (permitting disclosure of government records in criminal cases if "the activity is authorized by law, and if the head [of the department] has made a written request to the agency."). Federal law, and state-specific Memoranda of Understanding, also place significant limitations on state law enforcement agency access to federal databases. See, e.g., DNA Identification Act, § 14132(b)(3).

§ 6.06. Accountability

(a) Policing agencies should maintain an unalterable record of every instance in which policing databases have been accessed. The record should include:

(1) when the access occurred;

(2) the purpose of the access and the type of data accessed;

(3) who accessed the data; and

(4) the method of access (in particular whether an algorithm was used).

(b) The records kept pursuant to subsection (a) should be audited routinely to ensure compliance with the policies developed pursuant to this Chapter.

(c) When feasible, policing agencies should maintain and periodically make available to the public statistics about the purposes and uses of policing databases, the numbers of people in each database, and the extent to which the databases have been accessed, including any violations of access rules.

(d) If an unauthorized data breach occurs, policing agencies should provide immediate and adequate notice of the breach to the affected individuals, although such notice may be delayed if it would compromise a legitimate law-enforcement investigation.

Comment:

a. Access accountability. A record of when access to a policing database took place, for what purpose, and by whom, is an essential means of ensuring databases are not being misused or manipulated. This Section requires that such a record be maintained, in an unalterable form if feasible. Because police use of algorithms raises special issues, see § 2.06, this Section expressly requires that the audit unambiguously note whether access to databases involves the application of algorithms.

b. Auditing. Simply keeping a record of access is insufficient for ensuring accountability. Auditing of database records is necessary to detect and deter improper use of databases. This Section requires periodic auditing aimed at determining whether access to the database has been consistent with the other Principles in this Chapter, in particular the access rules required by § 6.05. Policing agencies also should consider having researchers conduct the audits. Researchers can help construct more secure systems given their knowledge of how they are misused.

c. Statistical accountability. Police use of databases inevitably is covert. Yet, democratic evaluations of the necessity for, and use of, databases can occur only if the public is kept informed about how databases are used. This information, in redacted form, should be considered a matter of public record. Accordingly, policing agencies should notify the public on a periodic basis about the existence, scope, efficacy, and security of police databases and police access to databases. Accord, Principles of the Law, Data Privacy § 3 (requiring that data users "clearly, conspicuously and accurately explain the data controller's or data processor's current personal-data activities"). Such information provides important feedback both to policymakers and the public, which could lead to the modification of legislation or regulations authorizing and regulating police collection and retention of information about the populace. This type of feedback is particularly important in connection with watchlists and programmatic databases, which easily can proliferate and expand in scope.

Ideally, these publicly disseminated reports about data access would provide information about several aspects of database use: (1) the types of police databases maintained and, with

respect to watchlists and programmatic databases, the number of people in each; (2) the types of third-party databases accessed in connection with programmatic information-gathering and an approximation of how often they were accessed; (3) the number of suspects investigated using databases; (4) the number of algorithmic inquiries conducted and the number of people so identified, (5) the number of events investigated through database access and the approximate number of people identified per event. Additionally, some indication of whether the access to the database produced useful results, in terms of arrests, clearances, exonerations, or some other law-enforcement indicator, is important. Not all jurisdictions can produce all of this information, but this Section requires that every jurisdiction provide data about the first two subjects.

d. Notification of data breaches. As is customary in other fields, agencies that have accumulated personal information and have allowed it to be accessed by unauthorized personnel should have a duty to notify the affected individuals so they can take appropriate corrective steps. For instance, individuals should be alerted if unauthorized parties access expunged records or surveillance data from closed-circuit television cameras. This Section does not specify whether notice need be individualized; in many cases, a general alert may be sufficient. Further, if notification would compromise a legitimate investigation, it need not be given until the investigation is complete.

REPORTERS' NOTES

1. Auditing. Auditing regimes that indicate who has accessed databases, when, and for what purpose are a highly recommended means of safeguarding database security and ensuring accountability. See, e.g., THE TECH. AND PRIVACY ADVISORY COMM., SAFEGUARDING PRIVACY IN THE FIGHT AGAINST TERRORISM 52 (Mar. 2004), [https://perma.cc/SPR4-MJBG]; AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE STANDARDS, LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS § 25-6.2(c) (3d ed. 2013), [https://perma.cc/2756-MG3L]; MARKLE TASK FORCE ON NAT'L SEC. IN THE INFO. AGE, IMPLEMENTING A TRUSTED INFORMATION SHARING ENVIRONMENT: USING IMMUTABLE AUDIT LOGS TO INCREASE SECURITY, TRUST, AND ACCOUNTABILITY (Feb. 1, 2006), [https://perma.cc/GP9H-55W4]. The federal government's national-security guidelines also require auditing. NAT'L COUNTERTERRORISM CTR., ATTORNEY GENERAL GUIDELINES FOR ACCESS, RETENTION, USE AND DISSEMINATION BY THE NATIONAL COUNTERTERRORISM CENTER AND OTHER AGENCIES OF INFORMATION IN DATASETS CONTAINING NON-TERRORISM INFORMATION 6 (Mar. 2013), [https://perma.cc/VU2L-SKB3]. A number of other government agencies do as well. See generally Erin Murphy, *Databases, Doctrine and Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 826-827 (2010).

Many states have statutes requiring routine audits for compliance with existing regulations regarding database procedure. See GA. CODE ANN. § 35-3-32(b)(3) (2017) (requiring the Crime Information Center to "[e]nsure that adequate security safeguards are incorporated so that the data available through this system is used only by properly authorized persons and agencies"); 20 ILL. COMP. STAT. ANN. 2635/21 (West 2017) (mandating representative audits for internal compliance); MINN. STAT. § 13.055(6) (2017) (requiring an annual comprehensive security assessment); CAL. CODE REGS. tit. 11 § 724 (2017) (mandating an audit trail consisting of "the person conducting the query, the date of each query, each agency and/or database queried, and the result of each query"). See also UNIFORM CRIMINAL RECORDS ACCURACY ACT § 104 (UNIF. L. COMM'N 2018) (requiring a "dissemination log" that documents the name of the person making a request for criminal records, the name of the person making the dissemination, the date of the request and dissemination, and "a statement whether the information was disseminated for a purpose other than the administration of criminal justice.").

2. Notice to the public. Title III of The Omnibus Crime Control and Safe Streets Act of 1968 requires judges and prosecutors to make annual reports about interception of communications that occur pursuant to federal law, which the Administrative Office of the United States Courts then compiles and disseminates to the public. 18 U.S.C. § 2519(3) (2012). Those reports indicate, inter alia, how many surveillance applications were submitted, how many warrants were issued, how many extensions of warrants were granted, the number of people whose conversations were intercepted, and the number of interceptions that disclosed incriminating information. See, e.g., *Wiretap Reports*, ADMIN. OFF. OF THE COURTS, [https://perma.cc/XHB7-M3MZ]. California requires periodic notice of government efforts to access communications records when the target is not identified, CAL. PENAL CODE § 1546.2(c) (2017), as well as annual disclosure of "criminal statistics," id. § 13010(g), which in theory could include technologically assisted surveillance. The City of San Francisco requires that law enforcement provide annual reports in connection with the use of "surveillance technology" that provide: (1) a general description of how the technology was used; (2) the identity of other entities with which data obtained through the technology was shared; (3) a summary of public complaints about the technology; (4) the results of internal audits; (5) aggregate information about violations of policies and actions taken in response; (6) crime statistics relevant to the technology's effectiveness; (7) annual costs associated with the technology's use; and (8) data sources, among other types of information. S.F. Administrative Code, § 19B.1, https://sfgov.legistar.com/View.ashx?M=F&ID=7206781&GUID=38D37061-4D87-4A94-9AB3-CB113656159A.

The American Bar Association recommends analogous reports in the data-access context. It provides for "appropriate periodic review and public reporting" as one option for ensuring accountability. AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE STANDARDS, LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS § 25-7.1 (3d ed. 2013), [https://perma.cc/2756-MG3L]. See also CONSTITUTION PROJECT, PRINCIPLES FOR GOVERNMENT DATA MINING: PRESERVING CIVIL LIBERTIES IN THE INFORMATION AGE 24 (Dec., 2010), [https://perma.cc/WG5Y-6QES] (proposing that agencies "[c]onduct and publish the results of regular audits, and report

regularly to Congress"). In its separate Standards Relating to Technologically-Assisted Physical Surveillance, the American Bar Association provides that "government officials should be held accountable for use of regulated technologically-assisted physical surveillance technology by means of . . . periodic review by law enforcement agencies of the scope and effectiveness of technologically-assisted physical surveillance; and maintaining and making available to the public general information about the type or types of surveillance being used and the frequency of their use. Sensitive law enforcement information need not be disclosed." ABA CRIM. JUSTICE STANDARDS, TECHNOLOGICALLY-ASSISTED PHYSICAL SURVEILLANCE § 2-9.1(f)(iv)(v) (1999).

A number of private companies have begun issuing periodic transparency reports. For instance, Apple Inc. and Microsoft Corporation now indicate how often they give data to the government, although the reports are not particularly detailed and are entirely voluntary. See Kashmir Hill, *Thanks Snowden! Now All the Major Tech Companies Reveal How Often They Give Data to Government*, FORBES (Nov. 14, 2013), [https://perma.cc/DEU7-UYDE].

Finally, every state except for Alabama and South Dakota has some form of a data-breach statute, although not all apply to data held by the state itself, and it is not always clear whether they apply to police databases. See *017 Security Breach Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 29, 2017), [https://perma.cc/HK2V-CYPB]. California has one of the most extensive data-breach statutes, requiring written notice detailing what happened, what information was involved, and what is being done to remedy the situation any time a state agency's database of "personal information" is accessed improperly. CAL. CIV. CODE § 1798.29 (West 2018). "Personal information" is defined to include a large subset of data, including any records containing social-security-number, driver's-license-number, and automated-license-plate-reader data. Id. Similarly, Minnesota requires written notice to any citizen whose "private or confidential" information is accessed improperly by outside hackers and the like; access by unauthorized government employees, however, is excluded from the notice requirements, provided that such access occurred in good faith. MINN. STAT. § 13.055 (2018). Some states that require notification allow law enforcement to delay such notification if necessary to avoid impeding a criminal investigation. IND. CODE § 4-1-11-7 (2018).

CHAPTER 7
USE OF FORCE

§ 7.01. Scope and Applicability of Principles

The following Principles:

(a) are intended to guide the conduct of all agencies that possess the lawful authority to use force, which are referred to throughout this Chapter as "agencies";

(b) are intended for consideration by an informed citizenry, and for adoption as deemed appropriate by legislative bodies, courts, and agencies;

(c) are not intended to create or impose any legal obligations or bases for legal liability absent an expression of such intent by a legislative body, court, or agency.

Comment:

a. Scope and applicability of Principles. These Principles relating to the use of force by public-safety agencies are directed at agencies and agency employees that possess this power lawfully.

The intended audience for these Principles relating to the use of force—as is true of all Principles in this project—is broad. The Principles are intended to inform and guide the decisions of all government actors, be they legislative, executive, or judicial, as well as members of the public with an interest in public safety and law enforcement.

The Principles, standing alone, are not intended to create liability in agencies or their employees. First, they are stated at a high level of generality and thus are less specific than should be the rules that govern policing. Second, these Principles contain none of the appropriate limits on liability, such as fault or causation standards. Rather, they are intended to inform the principled development of policies and rules by governmental actors, including legislative bodies, administrative bodies (including public-safety agencies themselves), and courts.

§ 7.02. Objectives of the Use of Force

Officers should use physical force only for the purpose of effecting a lawful seizure (including an arrest or detention), carrying out a lawful search, preventing imminent physical harm to themselves or others, or preventing property damage or loss. Agencies

should promote this objective through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. Definition of "force." Although there are many different definitions of "force" used in law-enforcement law and policy, in these Principles, "force" refers to physically touching a person or object either directly or indirectly, such as by use of a weapon, in order to control or restrain a person, or to seize, examine, or damage property. It does not include nonphysical efforts by officers to influence conduct through commands, warnings, or persuasion, although those efforts can be used to control a person and can be used to avoid the need for physical force.

b. Definition of "deadly force." "Deadly force" refers to physical force that creates a substantial risk of death or serious physical injury, whether or not death results. Except where these Principles make an express distinction, "force" includes both deadly and non-deadly force.

c. Objectives of force. Law-enforcement agencies face the unfortunate reality that some individuals will fail to comply with officer commands and will impede officer efforts, sometimes threatening public order and safety. Officers are therefore given the authority to use force in some circumstances. This authority is a serious responsibility that must be exercised judiciously and with conscious respect for human life, dignity, and liberty. Although the failure to use force also imposes risks, balancing the competing concerns requires that force only be employed for the purpose of achieving an important state end, namely, to conduct a lawful seizure, to conduct a lawful search or frisk, to secure evidence, to prevent imminent physical harm to officers or others, or to prevent property damage, property loss, or evidence destruction. In contrast, force should not be used to punish an individual or retaliate for an individual's conduct or attitude. Moreover, force should not be used to enforce a lawful command unless compliance itself is important to serve public order, officer or public safety, or criminal adjudication. Even if enforcing a command serves an important and legitimate goal, and an individual refuses to comply, the force used should be only as much as is needed to overcome noncompliance, as is developed further in § 7.03. Given the central importance of safeguarding human life, deadly force should be used only to stop a credible threat of death or serious physical injury to the officer or others. Even non-deadly force, however, can cause serious nonphysical harm, serious physical injury, or unexpected death, and should therefore be used with restraint, and in adherence to these Principles. Similarly, force

should not be threatened, such as by brandishing a weapon, if using force would not be permitted under these Principles. Drawing or brandishing a weapon can escalate a dangerous situation and increase the risk of injury.

d. Promoting appropriate use of force. Although many Sections in this Part should be promoted by agency policy, training, and supervision, agency participation in ensuring the appropriate use of force is especially critical. To emphasize the role of agencies, the Sections in this Chapter state that role expressly. This reference is not intended to suggest that other Sections in this Part or others should not be furthered by similar means.

e. Relationship to other Sections. This Section states the permissible purposes of use of force by law-enforcement officers. Even if force is intended to serve one of the purposes stated in this Section, the decision to use force, and the kind and degree of force employed, should comply with the requirements of §§ 7.03 to 7.06. Thus, officers should use the minimum force necessary to serve the law-enforcement purpose safely (§ 7.03); they should seek to avoid force if circumstances permit (§ 7.04); even if force is necessary to serve a permissible purpose, it should not be used if the harm the use of force is likely to cause is disproportionate to the threat to or the significance of the public interest (§ 7.05); and officers should provide clear instructions and warnings before using force whenever feasible (§ 7.06).

REPORTERS' NOTES

The definitions of "force" and "deadly force" in this Section are consistent with both judicial rulings and state and federal statutes. See Mark A. Henriquez, *IACP National Database Project on Police Use of Force*, in NATIONAL INSTITUTE OF JUSTICE, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 19 (1999); see also INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE USE OF FORCE IN AMERICA 2001, at 1 (2001), http://www.theiacp.org/Portals/0/pdfs/Publications/2001useofforce.pdf ("The IACP use of force project defines force as 'that amount of effort required by police to compel compliance from an unwilling subject.'"); cf. TOM MCEWEN, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 5-6 (1996) (describing varying definitions of "force" among law enforcement and researchers, and questioning whether the presence of officers or initial verbal commands should be included in such definitions).

"Deadly force" is defined—by the Model Penal Code and by federal and state courts and statutes—as physical force that creates a substantial risk of death or serious physical injury. See Model Penal Code § 3.11(2) (AM. L. INST. 1985) (defining "deadly force" as force that creates "substantial risk of causing death or serious bodily injury"); Smith v. City of Hemet, 394 F.3d 689, 693 (9th Cir. 2005) ("We also hold that in this circuit 'deadly force' has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model

Penal Code" and noting that "[a] definition including 'a substantial risk of serious bodily injury' is used by police in all fifty states, the District of Columbia, and Puerto Rico"); see, e.g., N.Y. PENAL LAW § 10.00(11) ("'Deadly physical force' means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."); 10 C.F.R. § 1047.7(a) ("Deadly force means that force which a reasonable person would consider likely to cause death or serious bodily harm. Its use may be justified only under conditions of extreme necessity, when all lesser means have failed or cannot reasonably be employed."); Kenneth Adams, *What We Know About Police Use of Force*, in USE OF FORCE BY POLICE, supra, at 1, 4 (1999) (describing definition of "deadly force"); *Deadly Force*, BLACK'S LAW DICTIONARY 760 (10th ed. 2014) ("[v]iolent action known to create a substantial risk of causing death or serious bodily harm."); Restatement of the Law Second, Torts § 131, "Use of Force Intended or Likely to Cause Death," Comment *a* (AM. L. INST. 1965) ("In determining whether the particular means used to effect an arrest are privileged under the rule stated in this Section, the fact that they are or are not intended to cause death or are or are not such that the actor, as a reasonable man, should realize that they are likely to cause such a result, is decisive; the harm which results from their use is immaterial."); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force (January 2017), at http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf (defining "deadly force" as "Any use of force that creates a substantial risk of causing death or serious bodily injury.").

In addition to force that injures or creates a risk of injury to a person, force that results in property damage may also constitute a seizure that could violate the Fourth Amendment. Although a search or an entry may be lawful, "excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment." United States v. Ramirez, 523 U.S. 65, 71 (1998); see also United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."); Foreman v. Beckwith, 260 F. Supp. 2d 500, 505 (D. Conn. 2003) ("when officers act unreasonably in damaging property during the execution of a search warrant, they may be subject to liability for that damage."). However, courts recognize that some property damage may be necessary for the officers to perform a lawful search. See, e.g., Dalia v. United States, 441 U.S. 238, 258 (1979) ("officers executing search warrants on occasion must damage property in order to perform their duty.").

Both federal constitutional rulings and state statutes and rulings also reflect the view expressed in this Section that all uses of force must be justified by a lawful objective. At a minimum, all police uses of force prior to conviction must satisfy the standards set by the U.S. Constitution in the Fourth, Fifth, and Fourteenth Amendments, as interpreted by the decisions of the U.S. Supreme Court and lower federal courts. Those rulings indicate that force is permissible only when it is used to accomplish lawful police objectives. See, e.g., Scott v. Harris, 550 U.S. 372, 383 (2007) (focusing on the "threat to the public" that the officer was seeking to eliminate); Graham v. Connor, 490 U.S. 386, 396 (1989) (including as one of the factors in the Fourth Amendment analysis whether there was an "immediate threat to the safety of the officers").

Most states also have statutes governing the use of force. They typically mirror this Section by setting out permissible uses of force in relation to lawful justifications. See, e.g., CAL. PENAL CODE § 196; FLA. STAT. § 776.05; MISS. CODE ANN. § 97-3-15. Others define the scope of permissible force through common-law defenses to suits and criminal proceedings against police officers for excessive force. See, e.g., Gnadt v. Commonwealth, 497 S.E.2d 887 (Va. Ct. App. 1998) (finding that police officer use of force is not a battery so long as it is justified). Though states may set standards that exceed constitutional minimums, and state statutes differ somewhat in their details, state laws more explicitly than constitutional law emphasize that force must be necessary to achieve an arrest or other law-enforcement end, an emphasis reiterated in this Section. See, e.g., CONN. GEN. STAT. § 53a-22(b) ("[A] peace officer . . . is justified in using physical force upon another person when and to the extent that he or she reasonably believes such to be necessary to: (1) Effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense, unless he or she knows that the arrest or custody is unauthorized; or (2) defend himself or herself or a third person from the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape."); HAW. REV. STAT. § 703-307(1) ("[T]he use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest."); 720 ILL. COMP. STAT. 5/7-5(a) ("A peace officer . . . is justified in the use of any force which he reasonably believes to be necessary to . . . defend himself or another from bodily harm while making the arrest."). See also Reynolds v. Griffith, 30 S.E.2d 81, 83 (W. Va. 1944) ("It is also well settled that officers, in making arrests, may not legally do more than is necessary to bring the person sought to be arrested within the officer's control."); Ortega v. State, 966 P.2d 961, 966 (Wyo. 1998) (approving jury instruction that states "[I]f the officer uses force in excess of what is reasonable and necessary to effect compliance, then he cannot be deemed to be engaged in the lawful performance of his duties."); Restatement of the Law Second, Torts § 131, Comment *f* (AM. L. INST. 1965) ("The use of force intended or likely to cause death for the purpose of arresting another for treason or for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other and less dangerous means.").

§ 7.03. Minimum Force Necessary

In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. Minimum force. As noted in § 7.01, these Sections assert principles to which agencies and their policies should adhere, rather than standards for legal liability. They adopt the view that

use-of-force policies should be more specific and informative than the general "reasonableness" standard applied pursuant to the U.S. Supreme Court's constitutional precedents, though these Principles may also contribute to courts' understanding of appropriate constitutional limits on the use of force. Thus, agency policies should require officers to use only the minimum force that is necessary under the circumstances. Force cannot be considered necessary if a practical, less harmful alternative means exists for achieving the same law-enforcement ends. Force should not be used simply to resolve a situation more quickly, unless the extended delay would risk the safety of the subject, officers, or others, or if it would risk damage to property or would significantly interfere with other legitimate law-enforcement objectives. Nor should force be used before a suspect manifests an imminent threat, when alternatives to force are feasible, or after a suspect no longer threatens a law-enforcement objective.

Officers often make decisions about using force with less than perfect information, in situations that are changing rapidly and are dangerous to the officers' own lives and to the lives of members of the community, and in situations risking psychological harm and the destruction of property. By "necessary force," this Section refers to the minimum amount of force that a well-trained and properly equipped officer would need to use in a situation to achieve one of the legitimate objectives of force stated in § 7.02, taking into account the conditions in which the decision is made and the opportunities for reevaluation. Necessary force is that which is justified in the present or immediate moment. Force is unnecessary if it is carried out either before a legitimate objective is threatened or after a threat to a legitimate objective is resolved. Therefore, force is not to be used to retaliate for prior wrongdoing (such as resistance or flight) by a suspect, or to deter the suspect from resisting or fleeing in the future. Nor may force be used for longer than is necessary. Officers should reevaluate whether continuing to use force is necessary throughout an incident, if it is feasible and safe to do so.

b. Training and supervision. Officers will have difficulty determining the minimum force necessary unless they are trained adequately, equipped properly, and guided by policy and supervision. Law-enforcement agencies and governments play a critical role in ensuring that the use of force by officers is appropriate, because they are best positioned to ensure that these conditions are met.

Training should be designed to prepare officers and agencies to work to minimize the use of physical force prior to the moment when force is applied. As § 7.04 suggests, this includes, but

is not limited to, using less harmful means of applying force when feasible (e.g., less-lethal weapons); using strategies to de-escalate interactions that could lead to the use of force; and making tactical decisions in furthering law-enforcement goals that are likely to obviate the need to use physical force (e.g., collecting additional information; using multiple officers to respond to a call; using specially trained officers and collaborations between officers and community partners to respond in situations involving emotionally disturbed persons; or situating officers to make them less vulnerable to physical threat). Training, in order to be effective, should be repeated and ongoing, and it should be linked to supervision, through internal guidance and discipline of officers.

Effective reporting and investigation of uses of force are crucial to supervision. All uses of weapons and of deadly force, whether injury results or not, should be reported immediately by officers to their supervisors or other agency officials and investigated. Written policy should set out the use-of-force investigative process step by step, including the roles of supervisors.

c. Written policy. Rather than providing detailed provisions that legislatures or agencies should adopt, these Sections state principles to which legislation and agency policies should adhere. Consistent with § 1.06, use-of-force policies should be written, adopted in advance of agency action, and made available to the public, and they should be as detailed as necessary to ensure compliance with these principles. Given how critical the use of force is in policing, it is especially important that there be written policies on the use of force, and that those policies be concise and accessible to officers and to the public. Training on the use of force should be tailored to the specific policies of the agency. Though many agencies make their policies on the use of force public, a minority do not, sometimes out of concern that doing so could provide tactical advantage to criminals who engage with officers. Agencies can accommodate this concern by making the written policies for using force and deadly force available, but keeping supplementary tactical guidance nonpublic. For example, specific tactics used by Special Weapons and Tactics (SWAT) teams may be set out in nonpublic material, while general guidance on when such teams may be used and for what purposes may be set out in policy that is public. See generally § 1.05 (discussing the line between disclosure for transparency and secrecy to protect tactical advantages). Such nonpublic guidance is often provided in the form of internal, agency Standard Operating Procedures.

REPORTERS' NOTES

At a minimum, all police uses of force must satisfy the standards set by the U.S. Constitution in the Fourth, Fifth, and Fourteenth Amendments, as interpreted by the decisions of

the U.S. Supreme Court and lower federal courts. Police uses of force directed at suspects during investigation and arrest are seizures, governed by the Fourth Amendment command that government seizures cannot be "unreasonable." See Graham v. Connor, 490 U.S. 386, 394 (1989). As interpreted by the U.S. Supreme Court, this is an objective, but open-ended standard, one that "allow[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." 490 U.S. at 396-397. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." Id. at 397. The Court has held that a use of deadly force, in particular, is reasonable if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Tennessee v. Garner, 471 U.S. 1, 3 (1985). More generally, the Court's *Graham* decision states that the constitutional reasonableness of a use of force must be evaluated from an objective perspective in light of the totality of the circumstances of the particular case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* supra at 396. Thus, *Graham* recognizes that officers must have discretion to exercise force appropriately. More recently, in 2007, the Court further emphasized the fact-specific nature of the constitutional inquiry, emphasizing that the Fourth Amendment does not provide any "magical on/off switch that triggers rigid preconditions" for the use of reasonable force. Scott v. Harris, 550 U.S. 372, 382 (2007).

Refining the constitutional standard for the use of force is challenging, and lower courts have often struggled to apply the standard to new weaponry and diverse situations. Thus, they have sometimes disagreed on questions such as whether and how to incorporate conduct of the officer just prior to the use of force (or "pre-seizure conduct") into the constitutional analysis. Compare Marion v. City of Corydon, 559 F.3d 700, 705 (7th Cir. 2009) ("Pre-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs."), and Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]reseizure conduct is not subject to Fourth Amendment scrutiny."), with St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) ("court[s] should examine the actions of the government officials leading up to the seizure"), Bella v. Chamberlain, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable."), and Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir. 1993) (holding that an officer violates the Fourth Amendment if he "unreasonably create[s an] encounter" in which an individual would be "unable to react in order to avoid presenting a deadly threat to [the officer]"). See generally Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651 (2004). Most important to this Section, courts differ in characterizing the constitutional significance of using the minimum force reasonably available. Compare Griffith v. Coburn, 473 F.3d 650, 658 (6th Cir. 2007) (requiring officers to effectuate seizures using "the least intrusive means reasonably available") (quoting United States v. Sanders*,* 719 F.2d 882, 887 (6th Cir. 1983)), with Wilkinson

v. Torres, 610 F.3d 546, 551 (9th Cir. 2010) (holding the "availability of a less-intrusive alternative will not render conduct unreasonable"), and Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996) (finding that opinions of a police-tactics expert did not support finding that police conduct was unreasonable). Note, however, that those constitutional rulings are concerned in the first instance with whether officers and agencies may be held liable in constitutional-tort suits brought under 42 U.S.C. § 1983 and *not* with whether particular uses of force, or use-of-force policies or practices, are desirable as a matter of policy. This latter distinction, between a constitutional baseline developed in the context of determining liability and what is desirable as a matter of policy for regulating the use of force ex ante, cannot be stressed strongly enough.

Constitutional rulings and agency policies reflect the view of necessity expressed in this Section. See, e.g., *Harris*, 550 U.S. at 383 (emphasizing the "actual and imminent threat" to pedestrians and to the officer); Tennessee v. Garner, 471 U.S. 1, 11 (1985) (asking whether force was "necessary to prevent escape"); Lolli v. County of Orange, 351 F.3d 410, 417 (9th Cir. 2003) (stating that "a jury could conclude that little to no force was necessary or justified here."); U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 3 (2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf (stating that agents may use deadly force "only when necessary"); Dept. of Justice, Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995), https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1 ("[T]he touchstone of the Department's policy regarding the use of deadly force is necessity. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time. The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail."). The Restatement Second of Torts expresses this view of necessity in the context of the use of deadly force. See Restatement of the Law Second, Torts § 131, Comment *f* (AM. L. INST. 1965) ("The use of force intended or likely to cause death for the purpose of arresting another for treason or for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other and less dangerous means.").

Though no state expressly requires (as this Section does) that force be limited to the minimum force that is necessary, many agencies require that deadly force be used "only when necessary." See, e.g., UTAH CODE ANN § 76-2-404; U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 3 (2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf; Los Angeles Police Dept. Manual § 556, Use of Force, http://www.lapdonline.org/lapd_manual/volume_1.htm#556; New York City Police Dept. Patrol Guide § 203-12 Deadly Physical Force (Aug. 2013), http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-12-deadly-physical-force.pdf; Policing - Revised TD1 - Sec. 7.01 - edited not formatted.doc; Philadelphia Police Dept. Directive 10.1, Use of Force – Involving the Discharge of Firearms (Sept. 18, 2015), https://www.phillypolice.com/assets/directives/PPD-Directive-10.1.pdf. See also SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 51 (2005) (describing minimum-force policies as the "prevailing standard"). Many also require that the

minimum force necessary be used in non-deadly situations. See, e.g., DeKalb County Police Dept. Employee Manual 4-6 (2014), http://www.dekalbcountyga.gov/sites/default/files/EmployeeManual.pdf stating in addition to the need to use minimal force in deadly force situations, that "[w]hen non-lethal force is utilized, officers should only use that force which is minimal and reasonable to effect control of a non-compliant subject."); Metropolitan Police General Order RAR - 901.07 (Aug. 12, 2016), https://go.mpdconline.com/GO/GO_901_07.pdf. Thus, many agencies, including most of the largest agencies and federal agencies, reflect the approach proposed in this Section, mandating that officers use only the minimum necessary force and no more. See WALKER, supra, at 51; Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. 211 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759 (surveying the 50 largest local law-enforcement agencies' use-of-force policies). This is also consistent with recommendations in the President's Task Force on Twenty-First Century Policing and the Police Executive Research Forum's use-of-force principles. See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 45 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf ("Law enforcement officers' goal should be to avoid use of force if at all possible, even when it is allowed by law and by policy."); Police Executive Research Forum, Use of Force: Taking Policing to a Higher Standard (Jan. 29, 2016), https://www.themarshallproject.org/documents/2701999-30guidingprinciples ("Agency use-of-force policies should go beyond the legal standard of 'objective reasonableness' . . . This . . . should be seen as 'necessary but not sufficient,' because it does not provide police with sufficient guidance on use of force.").

Constitutional rulings and state law also reflect the view of imminence expressed in this Section. See, e.g., Graham v. Connor, 490 U.S. 386, 396 (1989) (including as one of the factors in the Fourth Amendment analysis whether there was an "immediate threat to the safety of the officers" and whether the person was "actively resisting"); Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 905 (4th Cir. 2016) ("[A] police officer may *only* use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force."); Galvan v. City of San Antonio, 435 F. App'x 309, 311 (5th Cir. 2010) (noting how officers "reacted with measured and ascending responses—verbal warnings, pepper spray, hand- and arm-manipulation techniques, and then the use of a Taser"; and "did not use force until [the plaintiff's husband] attacked [an officer].").

Although agencies often incorporate *Graham's* reasonableness standard into their written use-of-force policies, they frequently also provide agency rules and procedures for using force that are far more detailed than the constitutional standard, and often more restrictive with respect to when force may be used. See, e.g., Denver Police Dept. Use of Force Policy 107.00 (Mar. 2010) (requiring that use of force not only be reasonable but also be necessary and that officers do not precipitate the use of force by engaging in unreasonable actions); Chicago Police Department General Order, G03-02-02, Force Options (Jan. 1, 2016) (stating that, as a matter of policy, officers "will de-escalate and use Force Mitigation principles whenever possible and appropriate, before resorting to force and to reduce the need for force."), at http://directives.chicagopolice.org/direc

tives/data/a7a57be2-128ff3f0-ae912-9001-1d970b87782d543f.pdf?hl=true. See also Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 33-34 (2003) (describing varying provisions of Department of Justice settlements with municipalities, frequently regarding when officers may use force).

Disagreements exist among policing executives about how and to what degree departmental policy should supplement the constitutional "reasonableness" standard. In advocating for changes to agency policies concerning the use of force, the Police Executive Research Forum (PERF) expressly encouraged law-enforcement agencies to adopt "a higher standard than the legal requirements of *Graham v. Connor.*" Use of Force: Taking Policing to a Higher Standard, supra. On the other hand, some organizations have expressed real concern about departing from federal constitutional standards. Most prominently, in response to a PERF report, the Fraternal Order of Police and the International Association of Chiefs of Police (IACP) released a statement rejecting any "calls to require law enforcement agencies to unilaterally, and haphazardly, establish use-of-force guidelines that exceed the 'objectively reasonable' standard set forth by the U.S. Supreme Court" and arguing that any reforms be "carefully researched and evidence-based." IACP Statement on Use of Force (Feb. 7, 2016), http://lawofficer.com/2016/02/iacp-statement-on-use-of-force/. The subsequent National Consensus Policy on Use of Force released by the IACP in January 2017 does not merely restate the constitutional reasonableness baseline, however, it also includes important guidance and statements concerning de-escalation, verbal warnings, warning shots, ongoing training, and other subjects discussed in these Principles. See International Association of Chiefs of Police, National Consensus Policy on Use of Force, supra.

These Principles adopt the view of those organizations and individuals who believe that agency use-of-force policies should be more specific and informative than the general constitutional "reasonableness" standard. Constitutional litigation typically focuses on a case-by-case analysis of an individual officer's actions, rather than the presence or the quality of municipal policy or practice regarding use of force. Moreover, constitutional cases often avoid reaching determinations regarding the use of force through application of various immunity or justiciability doctrines. See Pearson v. Callahan, 555 U.S. 223 (2009) (holding that courts may address qualified-immunity defenses without addressing the merits of whether officers violated constitutional rights); City of Los Angeles v. Heller, 475 U.S. 796 (1986) (holding that an individual violation must be found first before policy or practice can be relevant); City of Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983) (limiting standard to enjoin police policy in the context of use of force).

The constitutional standard does not speak to how uses of force should be investigated, tracked, or subjected to internal discipline. Nor does the constitutional standard speak to specific types of weapons or tactical situations that officers may face, ranging from mass demonstrations, to emotionally disturbed persons, to juveniles. Agencies cannot expect a coherent body of policy or even guidance on those subjects from the courts; they must themselves define clear and effective standards. See Lorie Fridell, Steve James & Michael Berkow, *Taking the Straw Man to the Ground: Arguments in Support of the Linear Use-of-Force Continuum*, POLICE CHIEF, Dec. 2011,

at 78 (arguing that use-of-force continuum policies better inform officers than "the vague term 'reasonableness'"); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012) (arguing that constitutional standards articulated by courts are inadequate by themselves to guide appropriate police conduct); see also Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864-869 (2014). Modern agencies adopt policies in order to provide detailed guidance to officers. Simply instructing officers to use their discretion to act reasonably is insufficient for this purpose. See, e.g., SAMUEL WALKER, THE POLICE IN AMERICA 225 (1999) (describing use-of-force policy and training). Indeed, courts may themselves give some weight to those policies. Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995) ("Although these 'police department guidelines do not create a constitutional right,' they are relevant to the analysis of constitutionally excessive force.")

In addition, these Principles reflect the view that police officials require more detailed policy and training on the use of force in order to supervise officers effectively. The U.S. Supreme Court has itself recognized that law-enforcement policies, training, and supervision are critical to ensuring that the Fourth Amendment is observed: "Police departments and prosecutors have an obligation to instill this understanding in officers, and to discipline those found to have violated the Constitution." Malley v. Briggs, 475 U.S. 335, 345 n.9 (1986); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 5 (describing the need for annual training on an agency's use of force policy and "regular and periodic training" on techniques such as de-escalation and use of less-lethal force).

§ 7.04. De-escalation and Force Avoidance

Agencies should require, through written policy, that officers actively seek to avoid using force whenever possible and appropriate by employing techniques such as de-escalation. Agencies should reinforce this Principle through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. De-escalation and force-avoidance tactics. This Section adopts the view that agencies should require officers to avoid using force and to de-escalate if they can do so without endangering themselves or others both before and during encounters. Although other Sections concerning the use of force are directed primarily to officers, the framing of this Section is intended to emphasize that achieving the objective of avoiding unnecessary force demands (in particular) institutional as well as individual efforts. In approaching situations in which force might become necessary, agencies can provide officers on the scene with additional information, they can send resources, and they can facilitate communications among officers. Such techniques can provide additional time for officers to assess a situation, reduce the threat an individual poses, and ensure that law

enforcement can achieve its goals without the use of force. Examples of techniques that can be used to de-escalate or avoid the use of force include: tactical repositioning to increase distance or cover; containing the scene in order to reduce the threat to members of the public; and avoiding acts and instructions that are likely to lead individuals to present a risk of serious harm to a police officer.

Although officers should seek to minimize the use of force against all individuals, some subpopulations may require special efforts to limit the use of force. For example, officers may require special training to avoid using force against mentally ill individuals who do not immediately follow law-enforcement instructions. In light of recent research regarding implicit biases, indicating that African American men may be perceived as more threatening than their white peers, agencies may also need to consider special efforts to reduce the risk of disproportionate force against African American men. If force is used against some individuals under circumstances in which steps would be taken to avoid force against others, then adequate steps to minimize force have not been taken.

Policies, training, and supervision, including performance measures, positive incentives, and discipline, should reinforce use of force-avoidance and de-escalation techniques, and training should be provided to all law-enforcement officers on an ongoing and repeated basis.

Many agencies include such techniques in existing policies. Although law-enforcement groups are themselves divided on whether agencies should depart from the constitutional standard, which does not specifically mandate de-escalation and force-avoidance techniques, these Principles endorse the use of tactics to avoid the need to use force, in order to protect the lives of officers and citizens. In general, officers should be routinely equipped with less-lethal tools, and they should be trained to use a range of techniques to defuse situations and avoid the need to use force when it is possible to do so. Complying with this Section does not necessitate detailed written policies laying out every technique that can be used to minimize or avoid force. Rather, much of this Section can and will be implemented through training, supervision, and an agency's broader commitment to reducing harm in policing.

REPORTERS' NOTES

The primary goal of this Section is to encourage agencies to adopt policies and practices that minimize the force used by officers. Agencies vary in their adoption of force-minimization techniques and in the specificity with which they detail these techniques in policy. In general, many agencies include de-escalation, minimization, and force-avoidance tactics in policy. See, e.g., POLICE EXECUTIVE RESEARCH FORUM, AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE (2012), http://www.policeforum.org/assets/docs/Critical_Issues_Series/

an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf; David Griffith, *De-Escalation Training: Learning to Back Off*, POLICE, March 2, 2016, http://www.policemag.com/channel/careers-training/articles/2016/03/de-escalation-training-learning-to-back-off.aspx; Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. 211 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759, at Part II.C (surveying large agencies and finding that most include de-escalation and force-avoidance tactics in policy). Some agencies have quite detailed policies on this subject, while other agencies quite concisely note that minimization should be used. See Seattle Police Manual, Use of Force Policy § 8.100.3 (2013); compare Newark Police Dept. General Order 63-2 (Mar. 4, 2013) (officers "are charged with the responsibility of using minimum force necessary to affect [sic] a lawful arrest."). This Section recognizes that the specificity of the policy may be dictated by agency-specific conditions. Nevertheless, only by explicitly requiring that officers minimize the use of force can departments sufficiently prioritize the use of strategies obviating the need for force. This approach adopts language from the International Association of Chiefs of Police, National Consensus Policy on Use of Force, which states that "[a]n officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force," International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3, at http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf, and conforms with the President's Task Force on Twenty-First Century Policing, which states that "[b]asic recruit training must also include tactical and operations training on lethal and nonlethal use of force with an emphasis on de-escalation and tactical retreat skills." See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 57 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; see also Police Executive Research Forum, Use of Force: Taking Policing to a Higher Standard 5 (Jan. 29, 2016), https://www.themarshallproject.org/documents/2701999-30guidingprinciples ("The Critical Decision-Making Model provides a new way to approach critical incidents," describing a decisionmaking framework for "critical incidents and other tactical situations"); International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3 (stating that "Whenever possible and when such delay will not compromise the safety of the officer or another and will not result in the destruction of evidence, escape of a suspect, or commission of a crime, an officer shall allow an individual time and opportunity to submit to verbal commands before force is used.").

As Comment *a* suggests, efforts to minimize force are especially critical when interacting with groups against whom force has often been used disproportionately, such as African American men. Jon Swaine et al., *The Counted: People Killed by Police in the US*, THE GUARDIAN, http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database; Christine Eith & Matthew R. Durose, U.S. Dep't of Justice, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 12 (2011); Federal Bureau of Investigation, Uniform Crime Reporting Program Data: Supplementary Homicide Reports, 2012 (2012), at http://www.icpsr.umich.edu/icpsrweb/RCMD/studies/35023; Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences*

in Police Use of Force (Working Paper, 2016), http://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police-use-force; Center for Policing Equity, The Science of Justice: Race, Arrests, and Police Use of Force (July 8, 2016), at http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf. Though addressing the disproportionate use of force is a complex task, training and policy to ensure de-escalation and force avoidance are essential to it.

Agencies should also collaborate as necessary before and during crisis situations in order to enable officers to avoid or minimize force. In many jurisdictions, collaboration now occurs between police and mental-health-service providers in order to improve response to persons with mental-health problems, using a model called the Crisis Intervention Team approach. Amy C. Watson and Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, 8 BEST PRACT. MENT. HEALTH 71 (Dec. 2012), at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/; Randolph Dupont, Maj. Sam Cochran, Sarah Pillsbury, Crisis Intervention Team: Core Elements (Sept. 2007), at http://cit.memphis.edu/pdf/CoreElements.pdf. This type of collaboration, and Crisis Intervention Training, has been endorsed by the President's Task Force on Twenty-First Century Policing. See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 43-44 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

Resource constraints make it difficult for all law-enforcement agencies to offer high-quality training on many specialized techniques for minimizing force. Indeed, many believe that effective training must involve reality-based training, interactive role-play scenarios, and field training, which require far more resources than simply instructing officers on a written policy or procedure, or providing just "shoot/don't shoot" training that does not address techniques that can minimize or avoid the need to use force. Mark R. McCoy, *Teaching Style and the Application of Adult Learning Principles by Police Instructors*, 29 POLICING 77 (2006); see also Zuchel v. Denver, 997 F.2d 730, 739 (10th Cir. 1993) (noting expert testimony concluding that training films are viewed "quite often as video games," and that field exercises and "role-play situations" are "much more effective"); International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 4 (describing need for "regular and periodic" training designed to "provide techniques for the use of and reinforce the importance of deescalation" and "simulate actual shooting situations and conditions" and to "enhance officers' discretion and judgment in using less-lethal and deadly force."). It will be crucial for jurisdictions to provide additional resources for agencies to participate in training efforts. Moreover, agencies should think broadly about the kinds of training that may lead to force minimization.

Finally, as noted in Comment *a*, supervision can play a critical role in promoting force avoidance and minimization. Such supervision should include not only additional training and disciplinary consequences for officers who use unnecessary force or violate procedure, but also professional rewards and commendations for officers who resolve conflicts in ways that avoid the need to use force.

§ 7.05. Proportional Use of Force

Officers should not use more force than is proportional to the legitimate law-enforcement objective at stake. In furtherance of this objective:

(a) deadly force should not be used except in response to an immediate threat of serious physical harm or death to officers, or a significant threat of serious physical harm or death to others;

(b) non-deadly force should not be used if its impact is likely to be out of proportion to the threat of harm to officers or others or to the extent of property damage threatened. When non-deadly force is used to carry out a search or seizure (including an arrest or detention), such force only may be used as is proportionate to the threat posed in performing the search or seizure, and to the societal interest at stake in seeing that the search or seizure is performed.

Comment:

a. Policy. Proportionality requires that any use of force correspond to the risk of harm the officer encounters, as well as to the seriousness of the legitimate law-enforcement objective that is being served by its use. This requirement of proportionality operates in addition to the requirement of necessity. It means that even when force is necessary to achieve a legitimate law-enforcement end, its use may be impermissible if the harm it would cause is disproportionate to the end that officers seek to achieve. Thus, the proportionality principle demands that law-enforcement interests go unserved if achieving them would impose undue harm. As the U.S. Supreme Court has noted, "It is not better that all felony suspects die than that they escape." Tennessee v. Garner, 471 U.S. 1, 11 (1985). Thus, when an officer faces a minor threat to the officer's safety, force should not be disproportionate to the physical harm that is threatened. When an officer faces resistance or a threat to the success of an arrest, search, or other law-enforcement activity justifying the use of force, force should not be disproportionate either to the threat or to the significance to the public interest in the specific activity that the officer is using force to achieve. Where engaging in a law-enforcement activity, such as an arrest, may result in a use of force out of proportion to the societal interest in the activity, officers should look for alternatives to the activity in order to minimize the likelihood of disproportionate force.

As noted in § 7.01, this Section is not intended to create a liability rule for policing. Accordingly, it states the objective that force should be proportional to the interests at stake. In practice, officers will not always be able to calibrate the use of force precisely to the degree of threat they face or to the significance of the public interest, and liability rules should reflect that fact.

Subsection (a) limits deadly force to those situations in which an officer is confronted with an immediate threat of serious harm or death to himself or a significant threat to the public. Thus, this Section permits stopping a resisting or escaping suspect only if he or she poses such a threat. This Section does not take for granted that a person suspected of a crime involving force or the threat of force inevitably poses such a threat. This is consistent with the reasoning of *Garner*, which states that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so," *Garner*, 471 U.S. at 11, but it would limit dicta in both *Garner* and *Scott v. Harris* that suggests that deadly force may be used against *any* suspect fleeing a crime in which violence was used or threatened, on the ground that such a suspect always poses a sufficient threat to society to justify such force. Scott v. Harris, 550 U.S. 372, 382 n. 9; *Garner*, 471 U.S. at 10-11. In addition, pursuant to this Section, force should not be used against individuals who pose a threat only to themselves or to property.

The proportionality principle is implicit in many agency policies, use-of-force matrices, and narrative descriptions of force options that are used in training or policy. Nevertheless, departments should make explicit that officers may use greater force only when the significance of the public interest justifies it. Moreover, department policies often do not expressly acknowledge that where the harms of force are disproportionate to the public goal the use of force serves, police officers should permit the goal to go unserved. For example, where the public interest is in enforcing a minor criminal law, it may be better to permit a suspect to escape than to use force in a way that risks great harm to the suspect or third parties.

The U.S. Supreme Court's ruling in *Garner* and other constitutional cases makes clear the need to limit deadly force to situations in which officers or civilians face a serious or deadly threat from a suspect. The Supreme Court has not expressly extended the principle of proportionality to the use of force by officers more generally, but doing so is consistent with the Court's approach to the use of force generally, which requires that courts "'balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the

governmental interests alleged to justify the intrusion.'" Scott v. Harris, 550 U.S. 372, 383 (2007) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

b. Policies barring or limiting certain uses of force. Some uses of force are almost invariably disproportionate and for that reason should be barred. Many agencies already prohibit firing warning shots or firing at or from moving vehicles except in situations in which the officers or others face an imminent and unavoidable threat of death or serious injury. Similarly, agencies commonly bar or limit the use of hog-tying, chokeholds, neck restraints, and other restraints that pose a heightened danger of asphyxiation.

Agencies also provide and train officers in using intermediate weapons that assist in forcing compliance and restraining individuals, but are less likely to cause death, in order to permit officers to use proportional force. Officers should be equipped with some less-lethal tools for using force.

c. Public interests. Proportionality demands different responses in different law-enforcement situations, depending on the public interests at stake and the risks of harm and indignity. Physical harms to individuals are not the only harms that must be taken into account. The use of force can damage or destroy property. It can also cause psychological damage to individuals. All this should also be considered in evaluating the proportionality of force. This evaluation must also recognize that different populations are differently susceptible to harm from the use of force: vulnerable individuals such as juveniles, the disabled, the mentally ill, and the elderly may be at special risk. Thus, the harms of a use of force may be proportional to the law-enforcement goal it serves when used against one member of the public, but disproportionate to the same goal when used against someone more vulnerable to harm.

d. Duty to render aid. Proportionality requires caring for those against whom force is used, once a situation is sufficiently under control. Agencies should instruct and require officers to render necessary medical aid to those against whom force is utilized as soon as is practicable following imposition of such force.

REPORTERS' NOTES

Proportionality is an important component of a harm-minimization use-of-force strategy. The proportionality principle is plainly visible in the U.S. Supreme Court's admonition, "It is not better that all felony suspects die than that they escape." Tennessee v. Garner, 471 U.S. 1, 11 (1989); see, e.g., Scott v. Harris, 550 U.S. 372, 378 (2007) (emphasizing the "great risk of serious injury" posed by car chase); Giles v. Kearney, 516 F. Supp. 2d 362, 368-369 (D. Del. 2007) (finding that "amount of force" an officer used was reasonable because it was "proportionate"). Nonetheless,

state laws on use of force do not adopt a proportionality principle beyond limiting the use of deadly force. Most states directly incorporate the language of *Garner* into their statutes on the use of deadly force. See, e.g., N.H. REV. STAT. § 627:5. But some states have not even updated their deadly force laws to reflect the Supreme Court's decision in *Garner*. See, e.g., CAL. PENAL CODE § 196; FLA. STAT. § 776.05; MISS. CODE ANN. § 97-3-15; N.Y. PENAL LAW § 35.30; 13 VT. STAT. ANN. § 2305. And none of the states incorporate a proportionality principle with respect to the use of non-deadly force, despite widespread acceptance of such a principle by law-enforcement agencies.

The U.S. Supreme Court's decision in Tennessee v. Garner, 471 U.S. 1 (1985), supports limiting the use of deadly force to those circumstances in which the suspect poses a threat of harm to the officer or to others. However, the Court also suggested by implication that any person suspected of having committed a crime involving violence or the threat of violence poses such a threat. See *Garner*, 471 U.S. at 11-12 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."). The Court itself interpreted *Garner* this way in Scott v. Harris, 550 U.S. 372, 382 n. 9 (reading *Garner* to permit deadly force against a suspect who has committed a crime simply because "his mere being at large poses an inherent danger to society"). However, the Court did not explain or support the assumption that probable cause that one has committed one crime involving violence or the threat of violence is sufficiently predictive of an ongoing threat to the public to justify permitting deadly force against such suspects, and the assertion seems problematic in light of contemporary concerns about the use of deadly force. See Rachel A. Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307 (2016). One can imagine circumstances in which the commission of a violent crime—for example a crime of passion directed at a particular individual—implies nothing about an ongoing threat. Nor does it appear from *Garner* that the Court considered carefully the implications of its assertion.

Many agencies have explicitly incorporated a concept of proportionality into their use-of-force policies, particularly with respect to the use of deadly force. See, e.g., Maryland Police and Correctional Training Commissions, Model Policies for Law Enforcement in Maryland 27 (Sept. 27, 2007), http://mdle.net/pdf/mopoman07.pdf; Dallas Police Dept. General Order 901.00, Response Continuum – Philosophy (June 3, 2015), https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569ad58a0e4c1148e6b1079b/1452987794280/Dallas+Use+of+Force+Policy.pdf; San Antonio Police Dept. General Manual, Procedure 501 – Use of Force 1 (Nov. 10, 2015) (stating force may be used "on an ascending scale of the officer's presence, verbal communications, open/empty hands control, physical force, intermediate weapon and deadly force, according to and proportional with the circumstances of the situation."), https://www.sanantonio.gov/Portals/0/Files/SAPD/501-UseOfForce-11-10-15.pdf; Seattle Police Manual, Use of Force Policy § 7.000.4 (2013), https://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles.

See also POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 38 (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf ("Police use of force must meet the test of proportionality").

In addition, many other departments utilize use-of-force matrices or tables in training officers, which are structured to dictate that officers use only proportional kinds and amounts of force. See, e.g., WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON INGRAM, FINAL TECHNICAL REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND OUTCOMES 16-17 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf (finding that a "substantial majority of police agencies" use a "force continuum structure" typically using a linear design); National Institute of Justice, Office of Justice Programs, The Use-of-Force Continuum, http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx (Aug. 4, 2009). These tools often specify categories of less-lethal force that must be used prior to the use of lethal force and link these to categories of suspect actions, such as resistance. For a catalogue of use-of-force spectrums used by departments, and an analysis of the relative effectiveness of these spectrums in guiding uses of force, see Joel H. Garner & Christopher D. Maxwell, *Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions*, *in* NATIONAL INSTITUTE OF JUSTICE, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 37 (1999). For visual models of use-of-force continuums, see INT'L ASS'N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 116 (2006); National Institute of Justice, The Use-of-Force Continuum, supra.

Though these matrices and visual representations highlight the concept of proportional uses of force, they focus on the correspondence between officer conduct and suspect resistance. This focus misses other components of a full proportionality analysis. Thus, these tools typically do not consider whether some law-enforcement interests simply are not worth the harm necessary to achieve them in light of larger law-enforcement and public goals. They focus on bodily harm, rather than the full range of harms that individuals suffer as a result of the use of force, such as emotional harm and damage to property. They often do not address the specific issues that arise when officers respond to vulnerable individuals, such as the mentally ill, disabled individuals, and juveniles. See, e.g., Jeffrey S. Golden, *De-escalating Juvenile Aggression*, POLICE CHIEF, May 2004, at 30, https://www.researchgate.net/profile/Jeff_Golden/publication/256374548_Deescalating_Juvenile_Aggression/links/00b7d522629f647565000000/Deescalating-Juvenile-Aggression.pdf. They may or may not acknowledge that different rules are required in specific contexts, such as mass protests, vehicle pursuits, or domestic-violence situations. Thus, policies should move beyond the limited concept of proportionality reflected in existing tools to take account of these varied factors.

Many agencies, as noted, bar specific uses of force that are invariably disproportionate. See, e.g., New York City Police Dept., Patrol Guide § 203-11 (Aug. 1, 2013), http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-11-use-of-force.pdf [http://perma.cc/PR2Y-YYUK] (prohibiting the use of chokeholds); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 314-315 (2003); Brian Roach, Kelsey Echols

& Aaron Burnett, *Excited Delirium and the Dual Response: Preventing In-Custody Deaths*, FBI L. ENFORCEMENT BULL., July 2014, https://leb.fbi.gov/2014/july/excited-delirium-and-the-dual-response-preventing-in-custody-deaths. In addition, many agencies provide officers with less-lethal weapons pursuant to policy, and they provide training on those weapons. WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON INGRAM, FINAL TECHNICAL REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND OUTCOMES 19 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf (noting that many agencies treat electronic-control weapons and chemical sprays "on their own distinct level of force."); see also POLICE EXECUTIVE RESEARCH FORUM, 2011 ELECTRONIC CONTROL WEAPON GUIDELINES (2011), http://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20control%20weapon%20guidelines%202011.pdf; POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 10 (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf (comparing hours of recruit training provided for different types of weapons).

Training is important to ensure that proportionality principles are applied in the use-of-force context. Already, departments train on proportionality through use-of-force continua. Many officers also receive training in use of firearms, batons, pressure-point control, ground fighting, and other types of use-of-force strategies. See Brian A. Reaves, State and Local Law Enforcement Training Academies, 2006, at 4, 9, 14 (2009), http://www.bjs.gov/content/pub/pdf/slleta06.pdf. Officers likewise should be trained to decide which techniques are proportional to the threat they are facing, in accordance with their use-of-force continuum. See PROTECTING CIVIL RIGHTS, supra, at 119; see also POLICE EXECUTIVE RESEARCH FORUM, RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 46-47 (2015), http://www.policeforum.org/assets/reengineeringtraining1.pdf. All agencies should consider providing additional training on proportionality in use of lethal and nonlethal force. The IACP recommends training on use of force, and specifically less-lethal types of force, and, without endorsing a proportionality principle explicitly, the IACP counsels use where available of "alternatives to higher levels of force," and also notes that deadly force "should not be used against persons whose actions are a threat only to themselves or property." International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3-4.

The Police Executive Research Forum (PERF) has also advocated for a proportionality approach to use of force, stating that departments should adopt policies holding themselves to a proportional approach higher than the legal standard laid out by the U.S. Supreme Court. See POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf. Several organizations have criticized the PERF report's approach to proportionality. Most controversially, the PERF report states that: "Proportionality [] requires officers to consider how their actions will be viewed by their own agencies and by the general public, given the circumstances." Id. at 21. This Section departs from this aspect of PERF's definition of "proportionality," which incorporates the perspective of the public. This Section reflects a more traditional understanding of proportionality, one that is consistent with common-law public-authority defenses and constitutional reasonableness, while also taking into account public interests. See Rachel A. Harmon, *When is Police Violence Justified?*,

102 NW. U. L. REV. 1119, 1178-1183 (2008) (discussing role of proportionality in police uses of force). It is therefore not subject to the same set of critiques or controversies as the PERF report. This Section nevertheless shares the conclusion that U.S. Supreme Court principles do not adequately address proportionality. Moreover, agencies may be well advised to carefully consider perspectives of the public and the community when considering policy and training on the use of force. See GUIDING PRINCIPLES ON USE OF FORCE, supra, at 8, 21; Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872 (2015) (describing the harms from the use of and threat of force and advocating that they be considered in making police policy).

§ 7.06. Instructions and Warnings

Officers should provide clear instructions and warnings whenever feasible before using force. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. Instructions and warnings. Whenever possible, officers should provide clear instructions to individuals, should make clear if a call for conduct is a request or a command, and should indicate the consequences of refusing to comply with a mandatory order. A verbal warning about force should incorporate these elements in a statement that indicates that force will be used unless a subject complies with a specific command.

Verbal warnings may be inadequate for communicating with individuals who do not speak English or are unable to hear or to understand the warnings. If an officer suspects that a verbal warning would not be understood, the officer should seek to communicate in nonverbal ways, to the degree circumstances allow. However, gun shots should not be used to communicate a nonverbal warning.

Although federal constitutional law does not always require the use of a warning, it does recognize that warnings are relevant to whether force is reasonable under the law. Specifically, the U.S. Supreme Court held in Tennessee v. Garner, 471 U.S. 1 (1985), that warnings should be given "where feasible" before using deadly force against a fleeing suspect, and lower federal courts have examined whether warnings were provided, both as to deadly and non-deadly force. While it is common for agencies to recommend that officers provide warnings when feasible before using deadly force, echoing *Garner*, some agencies neglect to provide clear requirements in policy or training on the subject, and still more neglect to provide requirements that such warnings be used

for non-deadly types of force. Warnings are often feasible and advisable when intermediate or lesser types of force are used, and sound policy should require (and training should emphasize) that warnings be used when possible to avert the need to use force.

In addition to warnings, when feasible, officers should give individuals who may be subjected to force clear instructions about what conduct the officer considers essential to avoid force, and should do so in a way that conveys the mandatory nature of the order and the consequences of refusing to comply.

REPORTERS' NOTES

The U.S. Supreme Court held in Tennessee v. Garner that warnings should be given "where feasible" before using deadly force against a fleeing suspect. See Tennessee v. Garner, 471 U.S. 1, 12 (1985); Bryan v. MacPherson, 630 F.3d 805, 831, 833 (9th Cir. 2010) (finding failure to warn the plaintiff before tasing her "militate[s] against finding [the defendant's] use of force reasonable"); Casey v. City of Federal Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) (finding "[t]he absence of any warning" before the officer deployed her taser "makes the circumstances of this case especially troubling"); see also Jones v. Wild, 244 F. App'x 532, 533 (4th Cir. 2007) (noting that officer "gave a verbal warning prior to releasing" police dog); Estate of Martinez v. City of Fed. Way, 105 F. App'x 897, 899 (9th Cir. 2004) (finding no liability, explaining that "[v]erbal warnings are not feasible when lives are in immediate danger and every second matters"); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 4 ("Where feasible, the officer shall identify himself or herself as a law enforcement officer and warn of his or her intent to use deadly force.").

Clear officer instructions and warnings help to reduce the need for use of force by preventing miscommunication that can lead to escalation. See, e.g., Dept. of Justice, Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995), https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1; Minn. Dept. of Public Safety, Use of Force and Deadly Force Model Policy (Oct. 2011), https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/Use-of-Force-Deadly-Force-Model-Policy.doc; Emily N. Schwarzkopf et al., *Command Types Used in Police Encounters*, 8 L. ENFORCEMENT EXECUTIVE F. 99 (2008). Instructions and warnings play an important role in preventing escalation and ensuring compliance. A person who is clearly told that force will be used if they do not comply, and given a clear path to avoid force, is more likely to comply. See, e.g., Dept. of Justice, Commentary, supra ("Implicit in this requirement is the concept that officers will give the subject an opportunity to submit to such command unless danger is increased thereby.").

Most state statutes and case law do not expressly require warning prior to the use of force. Some state statutes demand that the officer make his intent to arrest and the reason for the arrest known to the arrestee when he or she makes an arrest. See, e.g., 11 DEL. C. § 467(b)(1). Despite this lack of support at the state-law level, law-enforcement agencies typically require that a warning

be given where feasible, tracking the language used in *Garner* and in the lower federal courts. Agency policies reflect this need to provide warnings and this Section reflects consensus among agencies. See, e.g., Chicago Police Dept. General Order G03-02-01, The Use of Force Model (2012), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-cec11383d806e05f.html; Fort Worth Police Dept., General Order Revision (June 30, 2008); New Orleans Police Dept. Operations Manual, Chapter 1.3 (Dec. 6, 2015), http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf/ ("Officers shall use verbal advisements, warnings, and persuasion, when possible, before resorting to force"); New York City Police Dept., Deadly Physical Force, Procedure No: 203-12, (8/01/2013), http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-12-deadly-physical-force.pdf; U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 3 (2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf (requiring warnings "if feasible" before use of force); see also Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. 211 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759 (describing how most large agencies encourage or require the use of verbal warnings before using deadly force, but somewhat fewer do so regarding non-deadly types of force). Similarly, many agencies prohibit the use of warning shots. See, e.g., COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, CALEA STANDARDS FOR LAW ENFORCEMENT AGENCIES 1.3.3 ("Generally, warning shots should be prohibited due to the potential for harm. If permitted, the circumstances under which they are utilized should be narrowly defined."); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 4 (stating that "[w]arning shots are inherently dangerous" and recommending limitations on their use).

CHAPTER 8

GENERAL PRINCIPLES FOR COLLECTING AND PRESERVING RELIABLE EVIDENCE FOR THE ADJUDICATIVE PROCESS

§ 8.01. General Principles for Evidence Collection, Analysis, and Preservation

Agencies should adopt policies to ensure that all evidence is collected, analyzed, and retained in a manner that is impartial, consistent, and thorough and that is designed to minimize any contamination or alteration of information.

Comment:

a. Accuracy. In order to promote the goals of public safety and policing articulated in these Principles, agencies should seek to ensure the successful apprehension and conviction of the guilty, while clearing those who are not. Evidence collection is critical to this task. It facilitates drawing the most accurate conclusions about the underlying factual questions raised in criminal investigations. Agencies should strengthen the quality of evidence collection, and of any factual conclusions, through sound policy, officer training, and supervision.

b. Impartiality. Officers conducting investigations are charged with discovering the truth. They should maintain the appearance and the practice of impartiality in their investigations. They should not presume guilt or innocence but instead should remain neutral and objective. In particular, they must be at least as concerned with ruling out innocent suspects as with identifying criminal wrongdoers.

c. Consistency. These Principles govern not only officers working for policing agencies, but any officials who investigate crimes, or who collect, analyze, or retain evidence in criminal investigations. Such persons are referred to in these Principles as "investigators." Crime-scene-evidence collectors include not only uniformed officers but also other individuals such as arson investigators, crime-scene investigators, coroners, criminalists, detectives, hospital personnel, forensic scientists, medical examiners, and photographers. After evidence is collected, other individuals play a role in analyzing and retaining the evidence, including staff at crime laboratories. The nature and process of crime-scene investigation varies dramatically across and within jurisdictions. There is the potential for inconsistent policies and procedures, miscommunications, errors, and biases. These Principles call for sound and uniform procedures and rules upon which all investigators should rely. Chapter 9 provides specific guidance for the collection of forensic

evidence, which is defined in that Chapter as scientific or technical evidence for use in litigation. High quality evidence collection practices are essential, however, whether or not the evidence is considered as forensic evidence. That is the goal of this Chapter.

d. Thoroughness. Investigators should develop conclusions about an investigation only after assessing alternatives carefully, and always in recognition that any conclusions are contingent and subject to modification in light of new evidence. Investigators effectively are scientists and should act as such. Evidence collection and evaluation, including decisions not to pursue leads, should be documented in a manner that facilitates re-evaluation. Officers should pursue leads diligently as to evidence that might shed light on a suspect's guilt or innocence, but also across a range of other types of evidence, including evidence that can help to assess the credibility of witnesses, the manner in which the crime took place, and the identities of possible alternative suspects, as well as evidence that might shed light on an alibi. Investigations should not be closed prematurely, for example, upon a suspect's arrest or confession. Instead, all evidence should be evaluated carefully, including, when possible, by soliciting the views of officers who are independent from the investigation and can offer outside suggestions.

e. Rights. Evidence collection should be conducted in a manner that is compatible with individual rights. Individual-rights protections are discussed separately in Chapters 2 and 3 on search and seizure, Chapter 10 on eyewitness-identification procedures, and Chapter 11 on police questioning.

f. Dignity and respect. Similarly, consistent with the discussions of fairness and procedural justice throughout these Principles, efforts to obtain reliable evidence should be conducted in a manner that avoids unnecessary harm to persons or property and treats people with dignity and respect.

REPORTERS' NOTES

1. Accuracy of evidence gathering. The overarching goal of police evidence gathering is to ensure that accurate evidence is collected to identify culprits and to clear innocent suspects. Toward that goal, agencies have long adopted techniques designed to collect evidence in as reliable a manner as possible, to safeguard the integrity of evidence so that it can later be relied upon, and to disclose that evidence so that legal actors are well informed. New technologies and scientific research have made available improved techniques for evidence collection, but they have also introduced new challenges. For example, DNA technology has made it possible to collect highly

probative evidence concerning the identity of culprits, but it also requires special expertise in evidence collection to prevent contamination.

In Chapter 9, we further detail the need for repeatable, reproducible, and accurate work with regard to forensic evidence of a scientific or technical nature. Although scientific standards need not necessarily apply to evidence that is not of a scientific or technical nature, agencies nevertheless should aim to collect all evidence in a manner that assures it is not contaminated, altered, or less than accurate. In Chapter 9, describing accuracy in the context of forensic tests, we state that "accurate" means that, with known probabilities, an examiner obtains correct results both (1) for samples from the same source (true positives) and (2) for samples from different sources (true negatives). The same concept of accuracy applies to any form of evidence collection and analysis, where one is concerned not just with matching samples to sources, but rather a broader range of conclusions that may either result in false positive, false negative, or entirely inconclusive determinations. We also note that many types of evidence may have scientific or technical aspects to them, for which the principles set out in this Chapter and in other Chapters also may apply. For example, eyewitness accounts implicate a large body of scientific research and eyewitness memory is tested using lineup procedures, as discussed in Chapter 10.

2. Constitutional rulings. Constitutional law regulates certain egregious mishandling of crime-scene-evidence gathering. For example, constitutional criminal procedure bars the failure to disclose exculpatory evidence and the outright fabrication of evidence by law enforcement. The U.S. Supreme Court has long held that it is a violation of the Due Process Clause to fabricate evidence or knowingly use perjured testimony. Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). In addition, officers and prosecutors must supply "any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995); Brady v. Maryland, 373 U.S. 83 (1963). As a result, agencies and prosecutors are treated as part of a joint enterprise and are held accountable jointly for violations of the Due Process Clause. Lower courts routinely have entertained civil damages suits by individuals alleging that law enforcement withheld exculpatory evidence. See, e.g., Gregory v. City of Louisville, 444 F.3d 725, 739 (6th Cir. 2005); Pierce v. Gilchrist, 359 F.3d 1279, 1300 (10th Cir. 2004); Atkins v. County of Riverside, 151 Fed. Appx. 501, 505-506 (9th Cir. 2005); Hunt v. McDade, 2000 WL 219755, at *4 (4th Cir. Feb. 25, 2000); In re Brown, No. 19-0877, 2020 WL 7413728 (Tex. Dec. 18, 2020). These disclosure obligations encompass providing adverse information concerning police officers (including information concerning internal investigations) who may be witnesses in criminal litigation.

In addition, the U.S. Supreme Court has found that highly unreliable evidence-collection practices, for example, in the area of eyewitness identifications, may violate the Due Process Clause. The Court's ruling in Manson v. Brathwaite, 432 U.S. 98, 114 (1977), set out a due-process test using a series of factors that can permit eyewitness identifications in which police used suggestive procedures to be admitted into evidence. In 2012, the Court did rule that state action must occur to trigger this due-process inquiry, but the justices did not revisit the *Manson v. Brathwaite* test itself. Perry v. New Hampshire, 565 U.S. 228 (2012). Subsequent scientific

research, discussed in Chapter 10, has shed light on the shortcomings of this due-process test and has provided a set of best practices that can improve the accuracy of eyewitness evidence. See also NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT 104 (2014).

The U.S. Supreme Court has not clearly recognized a freestanding right of a convict to claim innocence, which might allow a convict to challenge wholly unreliable evidence gathering or analysis by law enforcement. Nevertheless, innocence claims are litigated in state and federal court, providing an added incentive for police agencies to ensure that evidence of innocence is uncovered before and not after a conviction. See Herrera v. Collins, 506 U.S. 390, 401, 403–404 (1993) (declining to recognize, except hypothetically, freestanding constitutional actual-innocence claim in capital case); House v. Bell, 547 U.S. 518 (2006) (continuing to recognize actual-innocence claim hypothetically); Osborne v. District Attorney's Office, 557 U.S. 52, 69 (2009) (recognizing actual-innocence claim hypothetically in noncapital case); see also Brandon L. Garrett, *Claiming Innocence,* 92 MINN. L. REV. 1630, 1670-1675 (2008) (describing state-law remedies for post-conviction claims relying on newly discovered evidence of innocence).

3. Police procedures. Traditional police manuals contained detailed information concerning the constitutional law of search and seizure but often lacked the same attention to rules designed to promote reliability in investigations. A 1990s study of such manuals in six states found that "none of the training materials addresses the importance of investigating, recording, or reporting exculpatory facts to avoid punishment of a possibly innocent arrestee [, but rather they] reflect a psychological set in which the arrestee's guilt is presumed, and the only use of notes and reports in the criminal process is to ensure conviction." Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 18 (1993). In practice, police may not have policies or practices that strongly encourage documentation of exculpatory evidence. See id. at 30 (concluding that in the arrest-report process, "[m]ost police probably do not generally report exculpatory evidence."). Moreover, other actors who participate in investigations, such as crime-scene units and laboratories, often have inconsistent policies and practices, or lack them altogether. The lack of consistent and uniform standards and oversight can result in errors ranging from fraud to honest mistakes made because of haste, inexperience, or lack of a scientific background. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 56-57 (2009).

Over the past two decades, however, the situation has improved significantly. Modern efforts to create comprehensive policies on the gathering, documentation, and disclosure of evidence are altering a traditional lack of standards or regulation concerning the evidence-gathering function in police investigations. Detailed policies and procedures now reflect the common concern that appropriate evidence-collection procedures ensure accuracy, and that the integrity of evidence be safeguarded. See, e.g., FORENSIC SERVS. DIV., OREGON STATE POLICE, PHYSICAL EVIDENCE MANUAL, http://www.crime-scene-investigator.net/Phys_Evid_Manual_OR.pdf ("It is important that evidence be collected, handled, and stored in a way that will ensure integrity."). One impetus for change has been the advent of modern DNA testing, which since 1989 has led to hundreds of exonerations (i.e., official decisions to reverse a conviction based on new evidence of innocence).

See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 168-170 (2011). There is no comparable body of DNA exonerations elsewhere in the world. Over the past several decades, there also have been thousands of additional exonerations that did not rely on DNA testing. See National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx. These exonerations have underscored how eyewitnesses can misidentify innocent suspects, forensic evidence can be unreliable and flawed, confessions can be false, and informants can lie on the stand. They also have resulted in scholarship studying wrongful convictions and new legislation regulating subjects including eyewitness-identification procedures and videotaping of interrogations. States also have relaxed rules of finality to make it easier to obtain access to evidence like DNA testing post-conviction, and to reopen convictions based on new evidence of innocence. Garrett, *Claiming Innocence*, supra.

Today, a host of police policies and guidelines reflect the growing effort to ensure accurate and impartial evidence collection. A New Jersey field manual puts it well: "The importance of physical evidence in a case cannot be underestimated. The credibility and integrity of evidence are predicated directly upon the proper handling of the evidence from its initial observance through presentation in court." INVESTIGATIONS BRANCH, OFF. OF FORENSIC SERVS., NEW JERSEY STATE POLICE, EVIDENCE FIELD MANUAL 4 (Jan. 2014), http://www.njsp.org/divorg/invest/pdf/013014_evidencefieldmanual.pdf. The International Association of Chiefs of Police (IACP) has taken an active role in promoting the consideration of ways to improve the "accuracy and thoroughness" of police investigations. INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS 10 (Aug. 2013). The IACP has recommended improved training and supervision in order to improve the quality of investigations and evidence gathering. Id. at 11. Additional policies are directed toward accurate and effective crime-scene investigations as well, particularly given the rise in the ability to conduct forensic analysis of crime-scene evidence. See TECHNICAL WORKING GROUP ON CRIME SCENE INVESTIGATION, CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT 17-32 (2000). Such work may be conducted by officers working for police departments, in conjunction with crime-lab analysts, technicians, and others. See JOSEPH PETERSON & IRA SOMMERS, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 22 (2010).

In its Code of Police Ethics, the IACP makes clear the critical imperative here: "The law enforcement officer shall be concerned equally in the prosecution of the wrong-doer and the defense of the innocent. He shall ascertain what constitutes evidence and shall present such evidence impartially and without malice." INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT CODE OF ETHICS, https://www.theiacp.org/resources/law-enforcement-code-of-ethics. This imperative is reflected in state law and in the policies or codes of ethics of an increasing number of policing agencies. See, e.g., id., adopted 37 TEX. ADMIN. CODE § 1.113; AUSTIN POLICE DEP'T POL'Y MANUAL, Article 10 (2020), https://www.austintexas.gov/sites/default/files/files/Police/General_Orders.pdf; Narragansett Police Dep't, Policy 100.3, Article 10 (2019), https://www.powerdms.com/public/NSETTPD/tree/documents/371277; Federal Heights Police Dept., Directive 10.2 (2004), at http://www.fedheights.org/vertical/Sites/%7B30BDEC4F-3AAB-430C-A5CC-E2BE80

97AC8C%7D/uploads/code_of_ethics_10_2.pdf. These Principles require that the aspiration of the Code of Ethics be reflected in detailed policy, training, and supervision concerning police evidence collection.

§ 8.02. Documenting Evidence

Agencies should have written policies requiring that officers thoroughly, accurately, and intelligibly document evidence that is collected.

Comment:

a. Documenting evidence. Agencies cannot fulfill their commitment to reliability in investigations without documenting the collection of evidence and having policies in place to ensure that is done properly. Human memory is fallible, and even trained and professional observers like police officers will recall conversations and events imperfectly. Therefore, evidence should be documented as contemporaneously as is possible. These Principles, in a number of Chapters, stress the need to document the collection of evidence by memorializing evidence in writing and through photographs. In a variety of different contexts, constitutional law, statutes, and court rules require documentation of evidence collection.

b. Recording evidence. In addition to the general principle that evidence should be documented, these Principles stress the importance of documenting evidence through a recording, when possible. A recording that creates a video and/or audio record can create a more reliable record than handwritten notes or memory. Interrogations and witness interviews should be recorded, but so should other evidence-gathering efforts such as eyewitness-identification procedures. This should be universally true absent exigent circumstances. Policies should state how recording should be conducted and take into account privacy or security concerns, for example, by enabling officers to anonymize or mask the identity of confidential witnesses.

c. Exculpatory and impeachment evidence. In rulings such as Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 473 U.S. 667 (1985), and Kyles v. Whitley, 514 U.S. 419 (1995), the U.S. Supreme Court established that the prosecution team is responsible for disclosing to the defense any evidence that is material and exculpatory, including evidence that would impeach the credibility of witnesses, and regardless whether or not officers have brought that favorable evidence to prosecutors' attention. Those constitutional rulings create a mandatory minimum legal standard, but one that is not highly informative to officers, who cannot be sure

before any trial what evidence may or may not later be material. Nor can decisions later be made to disclose evidence that has not been documented accurately in the first instance. For that reason, officers should err on the side of collecting and documenting all such evidence.

d. Policy, training, and supervision. Agencies should reinforce through policies, training, and supervision the obligation of all law-enforcement officers to document evidence collection and record evidence in a manner consistent with these Principles. Additionally, policies should set out the procedures and the practices to be followed when documenting and recording evidence in order to ensure consistent and accurate work and provide clear guidelines to investigators and other actors. Such policies should describe not only how evidence should be documented and recorded initially but also how documents and data should be retained and preserved for future use. Policy and training should reinforce the obligations to seek the truth and to document evidence with care.

REPORTERS' NOTES

1. Documenting evidence. Investigators should document carefully all evidence that they collect, in writing and in reports, but preferably also by recording it using electronic and automated methods. Traditionally, evidence was recorded by hand, in notebooks, and only later was some of that information reduced to typed police reports. Today, evidence far more readily can be recorded and documented contemporaneously. Chapter 10 emphasizes the need to record eyewitness identification procedures and Chapter 11 underscores the need to record interrogations. Officers should err on the side of collecting, documenting, and disclosing all such evidence and they should record evidence when it is possible and feasible to do so. The obligation to engage in accurate and complete evidence collection is not only a legal obligation flowing from constitutional, statutory, and court rules, but also is an ethical obligation for professionals. This obligation should be reflected in policy and codes of conduct.

2. Exculpatory and impeachment evidence. Constitutional rulings impose consequences for egregious failures in the investigative process. The U.S. Supreme Court has held that the police and prosecutors have a joint obligation under the Due Process Clause to provide the defense with exculpatory and impeachment evidence. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995). Prosecutors must obtain from police and are obliged to disclose to the defense, material exculpatory evidence, including evidence that would impeach the credibility of witnesses. However, evidence that is concealed or never documented in the first instance may never come to light. Moreover, chronically underfunded defense counsel may have scant resources to conduct any independent investigation. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1624 (2005) ("[B]road discovery partially compensates for restricted defense counsel; it helps make up for the deficiency in adversary process of constrained defense advocacy.") It is not known how often exculpatory evidence simply is not documented or

not disclosed. Post-conviction reversals occur for failure to disclose exculpatory evidence. Errors in those cases likely represent only the tip of a much larger iceberg.

The obligation of agencies to collect evidence impartially extends more broadly than constitutional and state-law rules. The International Association of Chiefs of Police (IACP) Code of Police Ethics makes clear the obligation to "ascertain what constitutes evidence" and to "present such evidence impartially and without malice." INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT CODE OF ETHICS, https://www.theiacp.org/resources/law-enforcement-code-of-ethics. Police manuals typically set out in detail the procedures for collecting and processing crime-scene evidence. See, e.g., FORENSIC SERVS. DIV., OREGON STATE POLICE, PHYSICAL EVIDENCE MANUAL (2014) (setting out procedures for processing crime-scene evidence and submitting it for forensic analysis). This training is important for all officers, even in agencies that have specialized crime-scene units, because typically non-specialist patrol officers are the first to arrive at and secure a crime scene. Frank Horvath & Robert Meesig, *The Criminal Investigation Process and the Role of Forensic Evidence: A Review of Empirical Findings*, 41 J. FORENSIC SCI. 963, 966 (1996); see generally Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 71 TEX. L. REV 1051 (2013) (describing the importance of police evidence gathering). Patrol officers can be "rather blasé" about processing forensic or crime-scene evidence and prefer to "complet[e] their preliminary report so that they may resume patrol activities." JOSEPH L. PETERSON ET AL., FORENSIC EVIDENCE AND THE POLICE: THE EFFECTS OF SCIENTIFIC EVIDENCE ON CRIMINAL INVESTIGATIONS 97-98 (1984), https://www.ojp.gov/pdffiles1/nij/grants/231977.pdf. Specialized crime-scene units, with scientific oversight, are far superior. See Chapter 9. But policies and training are needed for all officers who respond.

3. Procedures for documenting evidence. The ideal method of documenting evidence concerning live events is with audio and video recording. The recording of evidence—including during interviews, interrogations, and police encounters—is increasingly ubiquitous. Chapter 11 specifically discusses the recording of police questioning and sets out how written policies can set out procedures for such recording. The IACP recommends recording "all interviews involving major crimes" and prefers video recordings. INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS 18 (Aug. 2013), https://www.theiacp.org/resources/national-summit-on-wrongful-convictions-building-a-systemic-approach-to-prevent-wrongful; see also INT'L ASS'N OF CHIEFS OF POLICE, INTERVIEWING AND INTERROGATING JUVENILES MODEL POLICY (May 2012); INT'L ASS'N OF CHIEFS OF POLICE, ELECTRONIC RECORDING OF INTERROGATIONS AND CONFESSIONS MODEL POLICY (Feb. 2006). Many states now require that evidence be recorded during custodial interrogations. Brandon L. Garrett, *Confession Contamination Revisited,* 101 VA. L. REV. 395 (2015) (describing legislation in 15 states and the District of Columbia, with five additional states requiring recording due to judicial rulings, with still others doing so pursuant to policy); see, e.g., James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Memorandum Regarding New Policy Concerning Electronic Recording of Statements 1 (May 12, 2014), http://archive.azcentral.com/ic/pdf/DOJ-policy-electronic-recording.pdf. It has become easier to record evidence with the

advent of body cameras, which have brought evidence recording outside of police stations and into the field. The existence of body cameras in some jurisdictions should make the recording of evidence easy and commonplace.

The procedures for using recording devices should be set out carefully in written rules. For example, procedures should explain when a recording device may be turned off (e.g., if a witness needs to take a break), and how to document the reason why the recording device was turned off. This avoids any confusion or dispute about any gaps in the record. Agencies should set out in policy how to mask the identity of confidential witnesses whose interviews or lineup identifications are recorded in order to protect their identities. Some agencies, for example, mask confidential witnesses' identities by altering the sound and blocking their face in the video. Similar written policies should be set out for other areas. Other types of questioning and evidence gathering, including crime-scene investigations, eyewitness-identification procedures, and witness interviews, can be recorded. These Principles reflect the view that important forms of evidence gathering should be recorded when possible, and, when that is done, written policies should set out the procedures for doing so.

§ 8.03. Disclosure of Evidence

Except when information must be redacted for confidentiality, privacy, and safety purposes, agencies should share all relevant evidence with prosecutors, in an ongoing fashion, regardless of the status of an investigation or criminal case.

Comment:

a. Relevance as the standard for disclosure. Prosecutors have constitutional, statutory, and ethical obligations to disclose information to the defense. Consistent with §§ 6.05 and 6.06 (which limit agency access to police databases to legitimate law-enforcement purposes and appropriate personnel), agencies should provide prosecutors with all relevant information so that prosecutors can fulfill their roles. When in doubt about relevance, information should be disclosed to prosecutors. It is the prosecutor's job, not the agency's, to decide when information is exculpatory, material, or relevant in a criminal case.

Information that should be disclosed to prosecutors includes not only substantive facts such as witness statements and forensic evidence, but also information about the processes used in collecting such evidence. Thus, information about police misconduct during an investigation should be disclosed. The use of undercover agents or an algorithm in a particular case also should be disclosed. In the case of algorithms, legal actors also may need access to its code and information concerning how it is constructed and validated. As required under § 2.05, even if such

information is considered proprietary, agencies should seek it from developers and provide it to the prosecutors in appropriate cases. Further, such disclosures should be prompt, such that prosecutors can disclose information in earlier stages, in order to permit fair and informed plea negotiations. Constitutional requirements require, as noted, that the prosecution team be responsible for sharing favorable evidence with the defense, regardless of whether officers have shared that information with prosecutors or not. Discovery rules set out in statutes or court rules also may create obligations to disclose discovery in criminal cases.

Occasionally, disclosure may need to be made by agencies directly to a third party. For instance, relevant statutes or agency policy may require release of body-camera footage or police reports of arrests to the press. Again, when in doubt about the relevance of given information in such situations, agencies should opt for disclosure.

b. Ongoing disclosure obligations. If evidence comes to light when a case is closed or after a conviction, police retain an ongoing obligation to evaluate that evidence and disclose it to the prosecutors. This obligation extends not only to traditional evidence, in the form of a witness or a document, but also to evidence that is a product of new technology, such as a new type of forensic test or a new database search, which allows new information to be drawn from old evidence.

c. Exceptions. Exceptions to disclosure rules—generally the concern of the prosecutors rather than policing agencies—may limit disclosure of evidence when it might affect significant privacy, confidentiality, or safety concerns. In such cases redactions, or, in rare instances, non-disclosure to the defense, may be warranted. For example, if agencies collect health information or tax information that is statutorily protected, legal rights may be implicated by disclosure. Similarly, discovery rules may include certain exceptions to protect sensitive information, which if consistent with constitutional obligations, must be followed. As described in detail in Chapter 6, the privacy interests of members of the public may also be harmed by full disclosure of information; if so, some form of redaction or disguising of identifiable data may be necessary. Finally, as discussed in § 12.01, certain witnesses, including some informants, may face danger if their identity is disclosed to individuals outside the agency. Even in such situations, however, agencies should recognize that constitutional, legal, and ethical obligations to disclose information can override these safety interests. Policing agencies should make full disclosure to prosecutors in order to enable prosecutors to follow a policy of carefully making such decisions regarding redaction or nondisclosure.

One reason sometimes given for not disclosing information is that it is deemed proprietary by a corporation. For reasons of fairness to defendants, as well as to protect defendants' constitutional rights and fulfill ethical obligations of prosecutors, the proprietary nature of information is not a valid exception to the disclosure requirement. If a database includes information from a third-party provider that is relevant to a criminal investigation, it must be disclosed to the prosecutor. If the manner in which a policing technology operates is relevant to whether legal actors can assess its reliability, then that method, even if it was created by a private vendor, must be disclosed to legal actors consistent with an agency's professional, ethical, and constitutional obligations.

d. Policy and training. Policy and training should support the obligation to disclose evidence to prosecutors. Training and practices that encourage greater recording of evidence, less reliance on handwritten notes, and less reliance on the memory of an officer, should be encouraged. Agency policies also should set out rules for disclosure of recorded evidence as part of discovery, and for storage of archived records.

REPORTERS' NOTES

1. Discovery law. U.S. Supreme Court rulings and state law regulate discovery in criminal cases, but they do not detail how agencies should best ensure the flow of reliable and complete information to criminal-justice actors. Prosecutors, judges, defense lawyers, and fact-finders all depend on agencies to ensure they receive reliable and complete information in criminal cases. Recent years have seen efforts to improve agency policies and practices to better manage the flow of information to criminal-justice actors, as well as changes in state law designed to improve the regulation of criminal discovery.

The Supreme Court has held that the police and prosecutors have a joint obligation under the Due Process Clause to provide the defense with exculpatory and impeachment evidence. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995). Despite such constitutional rulings, the concealment of exculpatory evidence continues to occur, including in a series of high-profile exonerations that resulted from post-conviction DNA testing. Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010); Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 168-170 (2011). The full extent of the problem of inadequate discovery in criminal cases cannot be readily known. Simply put, concealed evidence may never come to light, even through post-conviction litigation.

Many academics, prosecutors, criminal-defense lawyers, and judges point to the need for sound policy and training on the front end of the criminal-justice system to ensure that the system is provided with accurate and complete information as it goes about determining guilt or

innocence. See *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644 (2002); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090 (2010); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 715 (2006).

In fact, in recent years many states have changed their rules for discovery to accomplish the aims of the criminal-adjudication system in ensuring accurate determinations of guilt or innocence. These changes have been motivated in part by the wrongful convictions that resulted when evidence of innocence had been concealed in criminal cases. For example, in Texas, the Michael Morton Act, which substantially changed the framework for criminal discovery, was named after and enacted in response to a high-profile case of DNA exoneration in which evidence of innocence had been concealed from the defense. Jonathan Silver, *How Michael Morton's Wrongful Conviction Has Brought Others Justice*, TEXAS TRIBUNE, Aug. 13, 2016. Morton, convicted of his wife's murder, spent 25 years in prison, during which time the prosecution had evidence that another man had committed the crime. Id. In response, Texas enacted comprehensive criminal-discovery reform. Id.; see also TEX. CODE CRIM. PROC. ANN. art. 39.14.

Other states have responded to instances of inadequate discovery and wrongful conviction by enacting legislation providing for open-file discovery and an iterative and documented discovery process. See, e.g., MINN. R. CRIM. P. 9.01; OHIO R. CRIM. P. 16; Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 263 (2008); for an overview, see, e.g., WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.2(b) (5th ed. 2009); see also AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE TRIAL (1st ed. 1970).

2. The role of policing agencies. State law on discovery is highly varied, but whatever the content of those laws, prosecutors have an ethical duty to fully disclose information collected during an investigation. To carry out that ethical duty, they depend on law enforcement. For an overview of state discovery rules, see, e.g., WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.2(b) (5th ed. 2009). As noted, jurisdictions increasingly have enacted legislation or adopted rules involving some form of "open-file" discovery in which the complete investigative file is made available to the defense. Some rules provide for more openness and completeness than others. Some of the most comprehensive practices, like under the Michael Morton Act in Texas, call for detailed representations in open court, early on in criminal litigation, so that all parties know exactly what evidence has been collected and what must be shared with the defense. TEX. CODE CRIM. PROC. ANN. art. 39.14; see also Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1384-1386 (2012); Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1 (2015). Such comprehensive discovery procedures are preferable because they ensure that timely sharing of information occurs, with a clear record of

what information exists. When necessary, protective orders should be available to shield confidential witnesses and sensitive information.

Even when such discovery procedures are enacted, however, their impact will be undermined unless agencies adopt robust policies that ensure that all of the relevant discovery is included in the file that is shared with the defense and train officers about those policies. See Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771-836 (2017). Otherwise, officers may not ensure that relevant and important information is documented and placed in the file. A particular concern is that without strong policies dictating disclosure, unconstitutional or otherwise unlawful action by police officers may not be included in discovery material.

In some jurisdictions, collective-bargaining agreements or other legal rules have prevented the disclosure of information concerning officer misconduct to legal actors or the public. Under this Principle, rules should not prevent disclosure of such information, given its potential relevance in criminal cases and other types of legal proceedings. It should also be noted that under these Principles, agencies have an independent obligation to report critical incidents to state decertification agencies. See § 14.03.

Given that the disclosure of information in criminal cases usually is a joint endeavor of prosecutors and the police, prosecutors cannot satisfy their legal and ethical obligations if investigators and agencies do not share information with them fully. In addition to their formal legal obligations, prosecutors have ethical obligations, including, under the American Bar Association's Model Rules, to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR. ASS'N 2010); see also Barry Scheck & Nancy Gertner, *Combatting Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40, https://www.nacdl.org/Article/May2013-CombattingBradyViolationsWithA. Similarly, defense lawyers have ethical obligations to vigorously represent their clients, and they cannot do so without adequate information. That is why the International Association of Chiefs of Police and many policing agencies make clear in policy and codes of ethics the obligation to fully disclose accurate information to prosecutors during criminal investigations. Policies and training should reflect those shared ethical obligations.

Prompt compliance with disclosure obligations is particularly important in cases resolved through early-stage process or plea bargaining. In such cases, it is essential for police to document and disclose complete information in order to ensure that any resolution, whether negotiated or not, is informed fully by the facts. Courts have taken inconsistent approaches toward that question in the wake of the U.S. Supreme Court's decision in United States v. Ruiz, 536 U.S. 622, 631-632 (2002), which holds that the *Brady* rule does not apply during plea bargaining. See, e.g., Gerard Fowke, *Note, Material to Whom?: Implementing Brady's Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575, 576 (2013). The better course is to provide prompt discovery on all evidence, including exculpatory and impeachment evidence, during all relevant stages of the criminal process.

Modern policies and training adopt a comprehensive approach to the disclosure of evidence, which includes the use of checklists and information systems designed to track evidence and ensure ongoing disclosure. N.Y. CITY BAR ASS'N, REPORT BY THE CRIMINAL COURTS COMMITTEE AND CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING THE ADOPTION OF A *BRADY* CHECKLIST 1 (2011); see also Christina Parajon, *Comment, Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose*, 119 YALE L.J. 1339, 1348-1350 (2010). Modern policies and training also ensure that the flow of information is ongoing and does not cease upon arrest.

3. Exceptions to disclosure. These Principles recognize that limited exceptions exist to these disclosure obligations and that such exceptions address important situations in which legal rights to confidentiality, privacy concerns, or safety concerns necessitate nondisclosure. When the exceptions apply, and do not themselves raise constitutional, legal, or ethical concerns, agencies must ensure that the nonaffected information is disclosed without compromising the interests undergirding the exceptions. Where, for example, the privacy of members of the public would be harmed by full disclosure of information, some form of redaction or disguising of the identifiable information can obviate the privacy concern. Legal rights also may be implicated by disclosure if agencies collect health information or tax information that is statutorily protected; indeed agencies must maintain policies in order to safeguard such statutorily protected information from disclosure, unless it is relevant in court and there is an overriding constitutional need to disclose it. Further, these Principles consistently recognize that the safety of certain witnesses, including some informants, may be endangered if their identity is disclosed to the public, although their identity may be disclosed to certain legal actors or to law-enforcement supervisors.

4. The role of technology. New forms of technology raise new opportunities for more convenient electronic discovery, but also new challenges. To understand the reliability of digital evidence or new forensic tests, legal actors may require information about the validation of the technology, how it operates, and how searches or analyses are conducted. In the same way that legal actors would need to inquire into how an expert witness conducted forensic work, legal actors must understand how technology works and how human operators use it. Disclosures to legal actors must permit them to fully understand the evidence, as well as receive the necessary access in order to evaluate the reliability of the evidence.

Unfortunately, in the past, many policing technologies have been a "black box" to which little access is provided to legal actors; indeed law enforcement itself may lack sufficient access to evaluate the technology. See, e.g., Jack Karp, *Facial Recognition Technology Sparks Transparency Battle*, LAW360, Nov. 3, 2019. Sometimes this has been because policing agencies purchase technology from third-party vendors who retain rights and deem their product to be proprietary. Further, law-enforcement-created databases have often been limited so as to bar, for example, judicial or defense access. ERIN MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA, 146-147 (2015). Doing so can make the reliability of the evidence entirely unknown to legal actors.

Public safety can suffer as a result. For example, defense lawyers may request that a database search be conducted because it might exculpate their client or point to the guilt of a third party. Such a search may have real public-safety benefits, but unless the policing agency adopts

the principle that disclosure is the norm, that information may never be known. See Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981 (2014). There have been high-profile examples of exonerations that have occurred long after conviction where, for years, agencies refused to conduct fingerprint or DNA searches. Ethan Bronner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, N.Y. TIMES, Jan. 3, 2013; Thomas Fuller, *He Spent 36 Years Behind Bars. A Fingerprint Database Cleared him in Hours*, N.Y. TIMES, Mar. 21, 2019. In response, some states have enacted rules permitting access to DNA tests post-conviction, but in general, the rules surrounding defense access to forensic and other police databases are often ill-defined or restrictive. BRANDON GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 164 (Foundation Press 2013). Such rules are not fair, they sacrifice interests in reliable evidence, and they harm public safety.

§ 8.04. Preservation and Retention of Evidence

Agencies should adopt policies setting out the circumstances and manner in which evidence is to be retained and preserved, both before and after adjudication, taking into account factors such as the nature of the offense, the potential probative value of the evidence, the interests of the defense and others, and storage costs.

Comment:

a. Preservation. It is important to preserve all probative evidence. The U.S. Supreme Court has held that willful destruction of evidence by law enforcement violates the Due Process Clause. Arizona v. Youngblood, 488 U.S. 51 (1988). In order to further the purposes of accurate and just adjudication, however, it is essential to go further and preserve all potentially probative evidence. In this regard, the mental state of the officer in failing to preserve evidence is irrelevant.

b. Retention. It also is important that investigators and agencies not only preserve evidence when they initially collect it, but also make arrangements to retain evidence, including after adjudication is final. Evidence retention is important in the event that a case is reopened and the evidence requires analysis in the future. The federal government, and more than half of the state governments, have enacted laws that impose obligations, sometimes at the election of the defense, to preserve evidence after a criminal conviction is final. The manner of retention also should be set out in policy so that it is clear who has custody of evidence and so that preserved evidence can be located readily. Further, these policies should set out requirements to ensure that evidence is preserved under conditions that prevent it from being contaminated.

c. Considerations. Agencies should adopt policies that set out in advance their priorities and the relevant considerations for determining whether to retain and preserve evidence. These policies should require, at a minimum, that evidence be retained in the more serious criminal cases; in contrast, it may be a lower priority to collect, much less retain, evidence from crime scenes in minor cases. An important consideration is the probative value of the evidence. However, it should be emphasized that new technology can make seemingly nonprobative evidence highly probative, as occurred with the advent of microscopic DNA testing that made it possible to test evidence that might have been discarded in the past. Further, the potential for future litigation in the matter should be considered. Agencies should retain evidence in cases in which defendants request that such retention, or those in which the interests of others, such as the press or victims, could be implicated. Storage costs are a relevant consideration, particularly if special measures must be taken to prevent degradation of the evidence. Each of these considerations should be reflected in policy in order to provide guidance to law enforcement, lawyers, and the public.

REPORTERS' NOTES

Under the U.S. Constitution, an agency's failure to preserve forensic evidence in a usable form for the purpose of forensic testing is not a violation of due process unless it is done in bad faith. Arizona v. Youngblood, 488 U.S. 51, 56-58 (1988). But it can be difficult to make showings of bad faith, because doing so requires an inquiry into the subjective motivations of officers. Indeed, ironically, the defendant in *Youngblood* was later exonerated by DNA testing of the poorly preserved evidence. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 196 (2011). Further, there have been growing concerns that in some jurisdictions, evidence from rape kits in sexual-assault investigations has not been carefully preserved and retained to permit forensic testing. It is important that agencies err on the side of retaining evidence, because new technologies may develop that make it possible to analyze evidence when it previously was not possible.

In response to concerns about unpreserved evidence, as well as advances in forensic testing, many agencies and states have enacted evidence-retention laws and policies. See, e.g., "Sexual Assault Victims' DNA Bill of Rights." CAL. PENAL CODE § 680(3) (2011) ("Law enforcement agencies have an obligation to victims of sexual assaults in the proper handling, retention and timely DNA testing of rape kit evidence or other crime scene evidence and to be responsive to victims concerning the developments of forensic testing and the investigation of their cases."); D.C. CODE § 22-4134 (2019) (requiring law enforcement to "preserve biological material that was seized or recovered" in cases resulting in a conviction or juvenile adjudication).

Evidence preservation and retention begins with policing agencies, which collect the evidence in the first instance. Uniform standards are needed governing the retention and

preservation of evidence by agencies. NAT'L INSTITUTE FOR SCIENCE & NAT'L INSTITUTE FOR JUSTICE, BIOLOGICAL EVIDENCE PRESERVATION: CONSIDERATIONS FOR POLICYMAKERS (2015), https://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8048.pdf.

Evidence-preservation statutes, enacted in more than half of the states, require that evidence be preserved after trial. See, e.g., COLO. REV. STAT. § 18-1-1103 (2009); D.C. CODE § 22-4134 (2019); 725 ILL. COMP. STAT. 5/116-4 (2019); 18 U.S.C.A. § 3600A (2018). Such statutes should be observed carefully by policing agencies, particularly because many of these statutes do not provide strong remedies for violations that result in the destruction of evidence. See Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1257-1258 (2005). But agencies also should have their own policies on evidence preservation. The coverage of state statutes is highly uneven. Many statutes limit preservation to certain types of evidence, such as biological evidence; to only certain types of cases, such as death-penalty cases; or to limited time periods, such as just while a defendant remains in custody. Thus, even in states with evidence-retention statutes, clear agency-level policy remains highly important. See TECHNICAL WORKING GROUP ON CRIME SCENE INVESTIGATION, CRIME SCENE INVESTIGATION: A GUIDE FOR LAW ENFORCEMENT 17-32 (2000).

§ 8.05. Human Factors and Evidence Collection

Agencies should develop policies and procedures to minimize the negative effects of human factors that can reduce accuracy in evidence collection.

Comment:

a. Human factors. The term "human factors" refers generally to the application of psychological and physiological principles to workplace processes and systems. In particular, cognitive biases, i.e., systematic errors in thinking that affect decisions and judgments, can affect the reliability of experts. Whenever people make observations and reach conclusions, they can be affected both by the useful shortcuts and heuristics that make work more efficient, and by those that can be counterproductive and lead to errors. It is particularly important to ward off bias in areas in which decisionmaking criteria are not clear, and in which outside information can influence the decision.

b. Policies and procedures. In police investigations, one concern is that human factors can contribute to a tunnel vision that focuses attention on one theory or suspect, to the exclusion of others. Studies also demonstrate that people have a tendency, termed "confirmation bias," to place weight on evidence that supports their own pre-existing beliefs. Emotions can impact police work as well, including reactions of anger, punitive impulses, or conscious or implicit racial or gender

biases. It is crucially important that agencies seek to minimize any negative impact of such human factors on casework. Policies and procedures can minimize the negative impacts of such human factors. For example, standard procedures can require that evidence, theories, and suspects be carefully documented and investigated. Witness accounts can be tested objectively, through corroboration, but also through science-informed techniques like the lineup procedures discussed in Chapter 10. Investigative work can be reexamined or verified by officers who are independent of an investigation, as a matter of standard practice. Agencies should attend to the manner in which human factors can negatively affect accuracy, and develop policies and practices in response.

REPORTERS' NOTES

The problem of human factors that can affect police investigations negatively has received growing attention due to scientific research as well as evidence that officers make errors leading to wrongful convictions. Cognitive biases affect all human behavior, and many shortcuts that we rely on are extremely useful and time-saving devices. Officers may face large caseloads that place great demands on their time and that make efficiency a high priority. However, a growing body of evidence has shown how cognitive biases can affect the way officers perform their work in negative ways that damage accuracy. Policies and practices can aim to minimize the negative role that such human factors can play.

For example, officers analyzing evidence from crime scenes can be "vulnerable to cognitive and contextual bias." NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 8 (2009). Officers' prior views about a suspect's guilt may affect how they evaluate evidence. Steve D. Charman et al., *Cognitive Bias in the Legal System: Police Officers Evaluate Ambiguous Evidence in a Belief-Consistent Manner,* 6 J. OF APPLIED RESEARCH IN MEMORY AND COGNITION 193 (2017). Officers also can share information that can bias other officers; for example, sharing the results of forensic testing can cause officers to place undue weight on other evidence in a case, such as an eyewitness identification. Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, *The forensic confirmation bias: Problems, perspectives, and proposed solutions*, 2 J. OF APPLIED RESEARCH IN MEMORY AND COGNITION 42, 43 (2013). Officers' own biases about a case may also affect witnesses, such as when an officer may unconsciously convey to an eyewitness which person in a lineup is the suspect.

There are techniques available to avoid such biases that agencies should explore and implement in policy and through training. In general, policies and practices can aim to build impartiality into the system, by removing potentially biasing information from the process, or by bringing in independent or outside views to bear on the investigative work. Blinded lineups, discussed in Chapter 10, make use of an officer who does not know which person is the suspect, making it impossible to provide any suggestion, intentionally or not, to an eyewitness. Blind proficiency testing or verification in forensic analysis can provide an additional level of independent review of conclusions, and are discussed in Chapter 9. As developed in the forensic-

evidence context in § 9.05, procedures can be instituted through policy to improve the flow of information to officers, including procedures that selectively blind them to irrelevant and potentially biasing information. Itiel E. Dror, *A Hierarchy of Expert Performance*, 5 J. OF APPLIED RESEARCH IN MEMORY AND COGNITION 121, 127 (2016).

CHAPTER 9
FORENSIC-EVIDENCE GATHERING

§ 9.01. General Principles for Forensic Evidence

Agencies should ensure, to the best of their abilities, that the methods used to collect, analyze, present, and preserve forensic evidence are sufficiently repeatable, reproducible, and accurate. As much as is practicable—to the extent permitted by legal rules and court orders—forensic-evidence work should be conducted independent of law enforcement, and the results should be made available to the prosecution and the defense on equal terms.

Comment:

a. Definition of "forensic evidence." Forensic evidence can refer generally to any evidence used in court, but these Principles use the phrase "forensic evidence" to refer specifically to scientific or technical evidence for use in litigation. Other evidence is referred to simply as "evidence," and is discussed in Chapter 8. The scientific or technical practices included in the field of forensic science span a broad range of disciplines and vary widely with regard to techniques, methodologies, reliability, level of error, research, general acceptability, and published material. Some of the disciplines are laboratory-based (e.g., nuclear and mitochondrial DNA analysis, toxicology, and drug analysis). Others largely are based on expert interpretation of observed patterns (e.g., fingerprints, writing samples, and toolmarks). Some activities require the skills and analytical expertise of individuals trained as scientists (e.g., chemists or biologists). Other activities are conducted by scientists as well as by individuals trained in law enforcement (e.g., crime-scene investigators, blood-spatter analysts, and crime-reconstruction specialists), medicine (e.g., forensic pathologists), or laboratory methods (e.g., technologists). Still other practices include digital technology, such as biometric databases, and algorithms designed by outside providers. The reference to "agencies" in this Chapter includes not only police departments, but any other organizations engaged in collecting and evaluating forensic evidence, including crime laboratories.

b. Scientific standards. Basic scientific standards should apply to the use of forensic evidence, whether it is scientific or technical evidence, or a combination. In general, scientific standards seek to ensure accuracy through the use of consistent procedures that yield repeatable and reproducible results. "Repeatable" means that, with known probability, an examiner will obtain the same result when analyzing samples from the same sources. "Reproducible" means that, with a

known probability, different examiners obtain the same result when analyzing the same samples. "Accurate" means that, with known probabilities, an examiner obtains correct results both: (1) for samples from the same source (true positives); and (2) for samples from different sources (true negatives). When these Principles note that evidence must be "sufficiently" accurate, repeatable, and reproducible, they do not mean to set any particular threshold levels that agencies must adhere to. Indeed, those threshold levels may differ depending on the uses to which evidence is being put.

c. Uses of forensic evidence. These Principles use the terms "repeatability," "reproducibility," and "accuracy," rather than a more general concept of reliability. The term "reliability" typically is understood in the legal system as a concern about whether evidence should be admissible in court. For example, in the case of admissibility of proffered expert testimony, Rule 702(c) of the Federal Rules of Evidence requires that expert testimony be based on "reliable principles and methods." These Principles are not primarily concerned with the admissibility of evidence in court. These Principles eschew use of the term "reliable" because they are directed primarily to agencies, which should aim for the highest standards regarding collection, analysis, and retention of evidence, regardless of how courts define "reliability." Courts often are unfamiliar with scientific concepts and assume (despite much evidence to the contrary) that the parties can ferret out inaccuracy through the adversarial process.

Repeatability, reproducibility, and accuracy should matter at all stages of an investigation, from the initial search for evidence, to evidence collection, analysis, and subsequent preservation of the evidence. For example, poor evidence collection may prevent *any* analysis at all, regardless of whether a court proceeding is anticipated. Similarly, the preservation of evidence in a way that avoids deterioration may be important well after the initial adjudicatory proceeding is complete. Further, the sufficiency of evidence, in terms of repeatability, reproducibility, and accuracy, will depend on what the forensic method is being used to accomplish. A forensic method may be quite accurate as a means of excluding potential suspects or of generating potential leads, but not accurate if it is used to identify a specific individual.

d. Evidence collection. The decision to collect crime-scene evidence and the manner in which it is collected traditionally have been influenced by an officer's or evidence technician's perceptions as to the seriousness of the crime. Those perceptions often can be quite personal. Such decisions involve policy choices and should be governed by written policy that is informed by scientific standards and research. Further, because evidence collection increasingly requires

specialized crime-scene technicians—or oversight by trained scientists familiar with the types of forensic evidence that can be collected and how to collect it properly to avoid contamination or degradation—agencies require sufficient resources for quality crime-scene investigations, and should coordinate their work with scientists who may work in separate laboratories.

e. Analysis. The analysis of forensic evidence similarly must follow scientific standards. Traditionally, many forensic techniques were not tested empirically, which is to say that their repeatability, reproducibility, and accuracy had not been confirmed through empirical testing. Instead, forensic techniques were said to be reliable based on the experience of analysts using them over time. Experts could not necessarily explain how they conducted their analyses, and often they lacked objective criteria for doing so. They could explain their conclusions only by stating that their opinions were based on their experience and training. Different experts might reach different conclusions when examining the same evidence.

A range of forensic methods currently in use still take this form, based largely on the subjective judgment of the analyst. Those methods include firearms and toolmark comparisons. In contrast, modern forensic methods can and have been validated. Some of those methods still rely on the judgment of the examiner in individual cases, but the use of the methods have been subjected to empirical testing to confirm their value. Latent fingerprint comparison is one example; although the method depends on the judgment of the examiner in individual instances, two recent studies have documented the performance of groups of examiners under realistic conditions. Other forensic analyses, like nuclear DNA testing and drug testing, largely rely on automated processes that also have been validated empirically. Empirical validation should be required for every forensic method. Otherwise, there is the risk that the supposedly valuable technique is not actually so. The research community requires resources to conduct empirical testing to assess the foundational validity of forensic techniques.

f. Preservation. Following the collection and analysis of forensic evidence, agencies must preserve that evidence in case there is a need for later analysis, for example in cold cases or closed cases that are reopened. Preservation also is important because new methods for conducting forensic analysis may be developed, or new, independent analyses may produce different results. Agencies should set out policies for the preservation of evidence, prioritizing cases in which doing so is most important. Agencies require resources to preserve evidence carefully in criminal cases.

g. Independence and oversight. Ideally, individuals involved in collecting, analyzing, presenting, and preserving forensic evidence, typically in a crime laboratory, should conduct their work to the extent feasible independent of law enforcement, and subject to scientific oversight. Independence and scientific oversight are necessary to achieve the quality standards set out in these Principles. Some degree of evidence-collection work necessarily will be conducted by law enforcement, but that work should be supervised by professionals who possess a scientific background. Some amount of communication between law-enforcement and forensic-evidence professionals is also appropriate and inevitable. However, independence can preserve the benefits of those communications while avoiding bias through directive or task-irrelevant communications. Oversight, in the context of algorithmic evidence, biometric evidence, and uses of artificial intelligence, also should require that such technologies be made accessible to independent researchers in order to assess the reliability and fairness of such evidence. Further, there should be a strong presumption that any such technologies need to be fully interpretable and transparent, meaning that the processes are comprehensible and accessible to people, including with the assistance of experts who can examine the underlying technologies. If technologies are not fully interpretable and transparent, and cannot be vetted by independent experts or researchers, or evaluated by law enforcement, lawyers, the court, or factfinders, then the use of such technologies should be strongly discouraged in criminal cases. There is not strong evidence that non-interpretable technology performs sufficiently well such that its use is justified over fully interpretable models.

h. Equal access. Relatedly, the mechanics and results of forensic tools and laboratories should be accessible equally to law enforcement, the prosecution, and the defense. Forensics is not a weapon in the quiver of the police and prosecution, to be shared grudgingly with the defense. Rather, forensics are a tool to be utilized by all participants in a search for objective truth. To be sure, local discovery rules may not provide for equal access to all sides. Further, in some circumstances, a judge may order that specific evidence not be disclosed in discovery. These Principles reflect the view that as a matter of scientific and ethical principle, forensic professionals should strongly prefer to share information equally with all sides, absent some external legal constraint upon doing so.

i. Policy and practice. Agencies should promote these objectives through written policies, training, and supervision. Many agencies do not have written policies regarding the collection, analysis, disclosure, and preservation of forensic evidence; and among the agencies that do have

policies, many still do not make their policies public. Similarly, although accredited crime laboratories must meet certain standards, those standards often have not met scientific criteria for assessing performance. Examiners and officers should abide by clearly documented standards and procedures. Compliance with written policies should not be optional; a failure to comply should result in consequences for the personnel involved, as well as disclosure to defense lawyers, prosecutors, and courts. Agencies should conduct appropriate reporting and review of the use of forensic techniques.

REPORTERS' NOTES

1. Definition of "forensic evidence." Although "forensic evidence" can refer to a broad category of any evidence used in court, these Principles use the term to refer specifically to scientific or technical evidence so used. See *Forensic Evidence*, BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "forensic evidence" as "[e]vidence used in court; esp., evidence arrived at by scientific or technical means, such as ballistic or medical evidence"). The field of "forensic science" is "the application of scientific or technical practices to the recognition, collection, analysis, and interpretation of evidence for criminal and civil law or regulatory issues." Exec. Off. of the President, President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 21 (2016) (PCAST Report). Authorities often use "forensic evidence," "scientific evidence," and "forensic science" interchangeably to refer to evidence derived from the application of scientific or technical knowledge. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 797 (2007).

2. Organizations involved in forensics. There are a variety of organizations that can be involved in the collection and analysis of forensic evidence. In the case of forensics, such organizations commonly include crime laboratories, which may assist with the collection, analysis, presentation, and preservation of evidence. In some jurisdictions, that laboratory function may be fairly independent, while in others, all or part of the function may be housed within a police department. Most crime laboratories operate as divisions of police departments. See SANDRA GUERRA THOMPSON, COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES 181-183 (2015). Crime laboratories may operate at the local, regional, and state levels. Further, both policing agencies and crime laboratories may rely on individual consultants and outside vendors when they conduct forensic analyses. In addition, professional organizations, accrediting bodies, forensic-science commissions, and scientific organizations play a role in forensic science.

3. The importance of forensic evidence. Forensics provide an increasingly valuable and important source of evidence in criminal investigations. The U.S. Supreme Court acknowledged that forensic and DNA evidence has "the potential to significantly improve both the criminal justice system and police investigative practices . . . to exonerate the wrongly convicted and to

identify the guilty." Dist. Atty's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 55 (2009). Given that forensic evidence can have such a significant impact on the outcome of a trial and the rights of criminal defendants, it is vital that the evidence be collected, analyzed, and preserved with care. As stated in the Oregon State Police Physical Evidence Manual, "the value of properly collected physical evidence followed by examination and interpretation by the forensic laboratory cannot be over-emphasized"; accordingly, it is important that evidence be "collected, handled, and stored in a way that will ensure integrity." Or. State Police Forensic Servs. Div., *Physical Evidence Manual* (8th ed. 2013), http://www.crime-scene-investigator.net/Phys_Evid_Manual_OR.pdf.

4. Repeatability, reproducibility, and accuracy. These Principles do not focus on the term "reliable" as used in the requirement in Rule 702(c) of the Federal Rules of Evidence, but rather the terms "repeatability," "reproducibility," and "accuracy." That is because these Principles are directed primarily to agencies, which should aim for the highest standards regarding collection, analysis, and retention of evidence. Scientific standards should offer guidance in assessing repeatability, reproducibility, and accuracy. Agencies should base their decision to employ forensic techniques on how consistently experts achieve the same results when using a particular technique. Agencies also should provide careful documentation of the forensic analyses, so that the results can be reproduced. Finally, agencies should report information regarding the accuracy of work done. A forensic examiner can report error rates established in studies, or through routine proficiency testing of experts designed to use realistic cases to measure performance. PCAST Report, supra, at 56. Without measures of the performance of experts, agencies do not have a way of knowing how accurate their work is. Similarly, without measures of the performance of a forensic method, agencies have no way of knowing how accurate it is. In the past, agencies often have lacked such information about the repeatability, reproducibility, and accuracy of many forensic methods.

Forensic evidence has not always been used in a repeatable, reproducible, or accurate fashion. As a consequence, poor forensics have played a role in a large number of wrongful convictions of innocent people. Nat'l Rsch. Council, Comm. on Identifying the Needs of the Forensic Sci. Cmty., *Strengthening Forensic Science in the United States: A Path Forward* 4 (2009) (2009 NRC Report). One study of cases in which DNA evidence exonerated persons post-conviction found that invalid forensic testimony was a contributing factor in 60 percent of the cases. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009); see also Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009). Exonerations involving false or flawed forensic science have attracted deserved public attention. See, e.g., RADLEY BALKO & TUCKER CARRINGTON, THE CADAVER KING AND THE COUNTRY DENTIST: A TRUE STORY OF INJUSTICE IN THE AMERICAN SOUTH (2018).

Entire methods, such as the FBI's bullet-lead comparison technique, have been discontinued due to lack of scientific validity. Nat'l Rsch. Council, Nat'l Acad. of Scis., *Forensic Analysis: Weighing Bullet Lead Analysis* (2004). Other methods have been found by leading scientific bodies to be scientifically unsupported, and yet they still are in use; bite-mark analysis and firearms comparisons are examples. PCAST Report, supra. Forensic experts often have made unsupported and false claims at trial, such as that there was a zero-error rate in conducting latent fingerprint

comparisons. Simon Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Examinations*, 95 J. CRIM. L. CRIMINOLOGY 985 (2005). Or they have used statistics to support disciplines for which no statistical research has been conducted. Brandon L. Garrett, *Constitutional Regulation of Forensic Evidence*, 73 WASH. & LEE L. REV. 1147, 1183 (2016). The problem is extremely serious. A large-scale FBI review of cases involving testimony concerning microscopic hair comparison concluded that 96 percent of 2,900 cases reviewed involved flawed testimony, including 33 of 35 death-penalty cases. FBI/DOJ Microscopic Hair Comparison Analysis Review, at https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review. Nor are DNA testing methods immune from error or entirely free from some element of subjective interpretation. ERIN MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015).

5. Use of forensic evidence. Whether forensic evidence is sufficiently reliable to be used may depend on whether it is used solely to generate leads, as opposed to identifying particular suspects. Microscopic hair comparison can be used to indicate that the culprit may have had dyed-blond hair or to definitely exclude suspects who do not have dyed or blond hair. However, it would be invalid to claim, based on microscopic examination, that a hair had come from a given suspect. See Garrett & Neufeld, supra. Another important concern is that a forensic technique not be used to generate leads in a way that might prevent subsequent and more accurate testing. For example, some field DNA-testing kits consume the evidence, making later laboratory testing impossible. Heather Murphy, *Coming Soon to a Police Station Near You: The DNA "Magic Box,"* N.Y. TIMES, Jan. 21, 2019. Agencies should not conduct testing in the field, or use untrained officers, if doing so would delay or prevent subsequent testing in more accurate and controlled laboratory conditions.

6. Constitutional regulation of forensic evidence. Constitutional criminal procedure provides very little guidance concerning the appropriate use of forensic evidence. Brandon L. Garrett, *Constitutional Regulation of Forensic Evidence*, 73 WASH. & LEE L. REV. 1147, 1183 (2016). The U.S. Supreme Court repeatedly has held that the police and prosecutors, together, have an obligation under the Due Process Clause to provide the defense with exculpatory and impeachment evidence. Brady v. Maryland, 373 U.S. 83 (1963). That obligation is notably underdeveloped in the context of forensic evidence. Garrett, *Constitutional Regulation*, supra, at 1179. The rule provides an important statement of principle—that material exculpatory and impeachment evidence should be disclosed—but it provides little guidance to forensic professionals concerning what evidence should be documented or disclosed and how to best implement a system of disclosure that works in practice.

The Sixth Amendment's Confrontation Clause also regulates the use of forensic evidence in court, but it similarly provides an inadequate safeguard of the rights of an accused insofar as forensic evidence is concerned. The right to confront a witness at trial has limited practical benefit, as most criminal cases are plea-bargained and few criminal cases proceed to a trial. When cases are tried, cross-examination may not uncover underlying flaws in the forensics. Garrett, *Constitutional Regulation*, supra, at 1150. Cross-examination provides inadequate protection against flawed forensics, particularly when the defense may not have adequate documentation

concerning the methods used or the limitations of those methods, or access to its own independent experts. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 73-74 (2009).

Finally, the U.S. Supreme Court has held that an agency's failure to preserve evidence in a manner that permits forensic testing is a violation of due process only if done in bad faith. Arizona v. Youngblood, 488 U.S. 51, 56-58 (1988). The defendant must prove that the evidence possessed exculpatory value apparent before it was destroyed, and that the defendant would be unable to obtain comparable evidence by other, reasonably available means. California v. Trombetta, 467 U.S. 479, 489 (1984). Such "bad faith," "reasonably available means," and "materiality" showings are extremely difficult to make. Indeed, the defendant in *Youngblood* later was exonerated by DNA testing due to an advance in technology. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 196 (2011).

Sub-constitutional regulation of evidence reliability also often has been proven inadequate. The U.S. Supreme Court's ruling in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and subsequent revisions to Federal Rule of Evidence 702 have deepened and expanded the trial judge's responsibilities and control over scientific evidence. *Daubert* clearly stated that the burden of proof lay with the proponent of expert testimony. 1 MOD. SCI. EVIDENCE § 1:9 (2017-2018). However, neither federal nor state courts have with any consistency or clarity acted to impose standards ensuring the application of scientifically valid reasoning and reliable methodology in criminal cases. That is not surprising. The Supreme Court itself described the *Daubert* standard as "flexible." That means that, beyond questions of relevance, *Daubert* offers appellate courts no clear substantive standard by which to review decisions by trial courts. 2009 NRC Report, supra, at 11. It is extremely uncommon for courts to reject forensic evidence in criminal cases. 1 MOD. SCI. EVIDENCE § 1:35 (2017-2018). When courts have done so, it often has been evidence introduced by the defense. Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1564 (2018).

7. Need for research and standards. The legal system is poorly equipped to address fully the challenges posed by forensic evidence. There are many reasons for that. Those include the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial-court decisions, the limitations of the adversarial process, and the common lack of scientific expertise among judges and lawyers who must try to comprehend and evaluate forensic evidence. Judicial review, by itself, cannot solve the foundational problems with forensics, 2009 NRC Report, supra, at 53, though it certainly could play some role. Indeed, despite the shift in legal standards for admissibility, judges continue to permit evidence at trial regarding forensic techniques that have not been demonstrated to be reliable. Garrett & Fabricant, supra, at 1568. The National Research Council of the National Academy of Sciences' Committee on Identifying the Needs of the Forensic Science Community concluded that apart from nuclear DNA analysis, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." 2009 NRC Report, supra, at 7. That Report identified substantial problems

with the existing system of crime laboratories and forensic sciences and called for research and standard-setting to place a range of forensic disciplines on a sound scientific footing.

There is a real need to develop valid scientific standards regarding the collection, analysis, and preservation of forensic evidence. Standards provide the foundation against which performance, reliability, and validity can be assessed. Adherence to standards reduces bias, improves consistency, and enhances the validity and reliability of results. 2009 NRC Report, supra.

Professional organizations have established sanctions for experts who violate their ethical standards, and in doing so have provided an additional source of regulation if particular experts make serious and willful errors. However, the sanctions available to such organizations generally are limited. The most extreme sanction is the loss of a license. Often the sanction is no more than exclusion from membership in the relevant organization. 1 MOD. SCI. EVIDENCE § 2:14 (2017-2018). "[I]t is nearly impossible to ascertain the frequency with which organizations attempt to sanction members because of their expert testimony." Id.; see also Int'l Ass'n for Identification, *International Association for Identification Code of Ethics*, https://theiai.org/docs/code_of_ethics.pdf; Ass'n of Firearm & Tool Mark Exam'rs, *AFTE Code of Ethics*, https://afte.org/about-us/code-of-ethics; Am. Nat'l Standards Inst., *Guiding Principles of Professional Responsibility for Forensic Service Providers and Forensic Personnel*, https://anab.qualtraxcloud.com/ShowDocument.aspx?ID=6732.

Agencies, as consumers of forensic science, should insist through policy and practice that only scientifically valid methods are used, and that any limitations of a method be included as part of any conclusions reported. There is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods. 2009 NRC Report, supra, at 8. This is a serious problem. To be sure, few crime laboratories have an in-house research function. They cannot themselves be expected to conduct basic research on forensic methods. However, agencies can support research efforts by sharing materials and data with the scientific-research community. The National Institute of Standards and Technology (NIST) has supported a wide array of research into forensic techniques, as have forensic grants and work by scientific researchers. Those efforts have resulted in improved and more objective forensic methods that agencies can adopt. Agencies also can qualify the language they use to report conclusions. They can follow national standards adopted by organizations such as the Organization of Scientific Area Committees for Forensic Science (OSAC) convened by NIST, and the recommendations in scientific reports by groups such as the National Academy of Sciences and the American Association for the Advancement of Science (AAAS).

Individual agencies or jurisdictions also can create scientific advisory boards to provide oversight and guidance to policing agencies and crime laboratories. Several states have created such bodies, as have individual crime laboratories. See, e.g., Va. Dep't of Forensic Sci., *Scientific Advisory Committee*, http://www.dfs.virginia.gov/about-dfs/scientific-advisory-committee/; D.C. CODE § 5–1501.11 (West 2018) (creating science advisory board). For example, the Texas Forensic Science Commission makes recommendations to state laboratories, investigates the validity of forensic techniques in use, and investigates allegations of professional negligence or misconduct by

forensic professionals. See TEX. CODE CRIM. PROC. ANN. art. 38.01; Juan Hinojosa & Lynn Garcia, *Improving Forensic Science Through State Oversight: The Texas Model*, 91 TEX. L. REV. 19, 20 (2012); Brandi Grissom, *Bill, Budget Expand Authority of Forensic Science Commission*, TEX. TRIB. (May 25, 2013), https://www.texastribune.org/2013/05/25/reforms-expand-forensic-science-commission-authori. Such bodies can play a role in approving crime-laboratory policies and procedures, as well as in conducting audits and ensuring quality control.

Forensic laboratories should move toward written standardization in their policies, including in their performance and ethics codes. In 2014, 75 percent of crime labs had written standards for performance expectations, up from 72 percent in 2009. Matthew R. Durose et al., Bureau of Just. Stats., U.S. Dep't of Just., *Census of Publicly Funded Forensic Crime Laboratories, 2009* 2 (2012). An estimated 94 percent of crime labs had a written code of ethics in 2014. Today, over 20 states have forensic lab manuals published online. The FBI and standards organizations like NIST also make available to the public model policies and manuals. Nat'l Inst. of Just., U.S. Dep't of Just., *Crime Scene Investigation: A Guide for Law Enforcement* (2000), https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/april2000/twgcsi.pdf; Nat'l Forensic Sci. Tech. Ctr., *Crime Scene Investigation: A Guide for Law Enforcement* (2013), https://www.nist.gov/sites/default/files/documents/forensics/Crime-Scene-Investigation.pdf. Those changes are an important improvement, but many crime laboratories and other agencies involved in forensics work do not make their policies available to the public. Sandra Guerra Thompson & Nicole Cásarez, *Three Transformative Ideals to Build a Better Crime Lab*, 34 GA. ST. U. L. REV. 1007 (2018). Such standards should be shared with outside entities that review the work of a lab. 2009 NRC Report, supra, at 201.

Finally, it is important that national scientific bodies and academics conduct basic research into validity and reliability of forensics methods, as individual laboratories lack the resources to do this on their own. Matthew R. Durose et al., Bureau of Just. Stats., U.S. Dep't of Just., *Census of Publicly Funded Forensic Crime Laboratories, 2014* 4 (2016); Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725 (2011); Jennifer L. Mnookin, *The Uncertain Future of Forensic Science*, 147 DAEDALUS 99 (Fall 2018). There has been a notable federal effort to fund such research in recent years, including through the National Institute of Justice (NIJ) and the National Institute of Standards and Technology (NIST), which supports the Organization of Scientific Area Committees for Forensic Science (OSAC). The OSAC is developing standards for forensic disciplines. NIST supports the Center for Statistics and Applications in Forensic Evidence (CSAFE), a research consortium extending across five universities. That research can and should inform the work that agencies conduct.

8. Independence. Leading scientific organizations, such as the National Academy of Sciences, have called for the independence from law enforcement of crime laboratories and forensic-evidence-related work. The National Research Council of the National Academy of Sciences' Committee on Identifying the Needs of the Forensic Science Community, in its 2009 report, explained:

> Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed. Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting.

2009 NRC Report, supra, at 23. The goal is not just budgetary independence, but rather accountability for the scientific standards and quality of the work. Law-enforcement communication, priorities, and involvement can affect outcomes negatively in forensic work. Those contacts can cause forensic examiners to "face pressure to sacrifice appropriate methodology for the sake of expediency." Id. at 24. The forensic evidence function should be in service of the broader goals set out in these Principles, and should be in service of law enforcement, prosecutors, courts, and the defense on equal terms.

A central feature of independence and accountability is that all forensic methods used are subject to scientific review. The need for vetting of methods, as well as quality controls, extends to all forensic evidence. For so-called "black box" methods, in which the technology, such as an artificial-intelligence-based system, is not transparent or interpretable without specialized knowledge or sometimes even with it, the need for oversight is particularly important. In the context of algorithmic evidence and uses of artificial intelligence, it is important that such technologies be, to the maximum extent feasible, accessible to independent researchers in order to assess the reliability and fairness of such evidence. Further, there should be a strong presumption that any such technologies be fully interpretable and transparent. Judges, defense lawyers, prosecutors, and law enforcement all need to appreciate fully the strengths, limitations, and operation of such technologies. They may not be in a position to evaluate such technologies without retaining experts, while independent researchers may have that expertise. In recent years, technologies ranging from field DNA kits to facial-recognition technology (FRT) have been adopted by law-enforcement agencies, without the assurances provided by independent review of reliability and fairness, or the interpretability and transparency that could permit legal actors to adequately understand the results.

Most crime laboratories are not independent. The most recent federal survey of approximately 300 crime laboratories revealed that 79 percent of all laboratories responding were located within law-enforcement/public-safety agencies, and 57 percent "would only examine evidence submitted by law enforcement officials." Durose et al, supra. The National Academy of Sciences report highlighted that independence allows the lab director to have an equal voice in making critical decisions for the lab, set priorities regarding expenditures, and reduce cultural pressures to serve law enforcement. 2009 NRC Report, supra, at 184. The National Academy of Sciences recommended that federal funding assist state and local jurisdictions in removing forensic laboratories and facilities from the administrative control of law enforcement. Id. at 24.

Of course, even if a crime laboratory is independent, communication and cooperation between law enforcement and forensics professionals is appropriate and essential. However, care

should be taken that such communications do not bias the forensic work. Procedures and protocols should be in place to minimize the role that potentially biasing communications can play. It is possible for there to be close cooperation between crime labs and law enforcement, while preserving the integrity of the science. Policies and procedures to create independence and minimize the role of bias are particularly important for forensic disciplines that involve more subjective exercise of judgment and use of case-specific information. There is evidence that large numbers of deaths— more than half of police killings in the United States— have been mislabeled and not counted as police-violence-related deaths, due to medical examiners' conclusions in death certificates. As the New York Times noted in describing this research, "forensic pathologists regularly consult with detectives and prosecutors and in some jurisdictions they are directly employed by police agencies." Tim Arango & Shaila Dewan, *More Than Half of Police Killings Are Mislabeled, New Study Says*, N.Y. TIMES, Sept. 30, 2021.

Functional and financial independence is no substitute for quality control and accountability of a crime laboratory. Instead, oversight through quality assurance and independence go hand in hand. Independence can facilitate the goal of scientific oversight, see § 9.04, by making clear that the mission is to produce high quality forensic evidence, and not solely to provide a service for law enforcement.

§ 9.02. Forensic-Evidence Collection

Agencies should collect forensic evidence in an impartial, consistent, and thorough manner, designed to maximize accuracy. In doing so, agencies should rely on:

(a) the participation of, and guidance from, scientists and crime laboratories;

(b) specialists in conducting crime-scene-evidence collection; and

(c) written evidence-collection policies.

Comment:

a. Sound collection of forensic evidence. Failure to collect, or properly collect, forensic evidence can result in loss or contamination of that evidence. At the crime scene, the assumptions of investigators can affect decisionmaking about what to collect and how to collect it. It is crucial that evidence collection be conducted in a manner informed by scientific methods so that evidence is not lost or altered. Scientists and crime laboratories should be involved in guiding, if not also conducting, evidence collection and preservation.

b. Crime-scene specialists. Currently, crime-scene-evidence collectors can include uniformed officers, detectives, crime-scene investigators, criminalists, forensic scientists, coroners, medical examiners, hospital personnel, photographers, and arson investigators. Crime-

scene units and investigators with specialized training in crime-scene investigations, who possess a grounding in scientific principles and research will perform work that is more consistent and accurate. Accordingly, they should be used whenever possible.

c. Scientific oversight boards. Agencies (or even better yet, jurisdictions) should create scientific-advisory and oversight boards to formalize the participation of and guidance from scientists. Doing so can ensure that scientific standards are adopted and followed within policing agencies and crime laboratories. Such bodies should routinely audit and assess the quality of the actual work performed by agencies, and not just review written policies and procedures.

d. Written policies. Agencies and crime laboratories should adopt written policies regarding evidence collection that are based on input from scientists and scientific organizations. Such policies should set out procedures for evidence collection. They also should be updated periodically to reflect new research and technology.

REPORTERS' NOTES

The "most fundamental" issue affecting the use of forensic science is that "[t]race evidence cannot be used unless the police are aware of its existence and usefulness and know how to collect and preserve it." MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE 23 (2001). The manner in which forensic evidence is collected should be consistent with scientific standards. It is crucial that scientists and crime-lab professionals participate in the development of policies and guidelines governing evidence gathering and management, and in the process of evidence gathering and management itself. Scientific and forensic organizations have rules of conduct concerning evidence gathering and management. See, e.g., National Forensic Science Technology Center (NFSTC), *Crime Scene Investigation: A Guide for Law Enforcement* (2014); Sue Ballou et al., *The Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers* (NIST, 2013).

Due to resource constraints, evidence collection is not always performed by trained professionals. Frank Horvath & Robert T. Meesig, *A National Survey of Police Policies and Practices Regarding the Criminal Investigation Process: Twenty-Five Years After Rand* 76 (2001), https://www.ncjrs.gov/pdffiles1/nij/grants/202902.pdf. ("[I]n most agencies evidence-related duties are not assigned predominantly to any one type of individual or position. Rather, they are more likely to be shared among patrol officers . . . investigators . . . and evidence technicians[.]"). The primary engines of evidence collection typically are patrol officers, who may be the most junior, least trained, and most overtasked personnel in the hierarchy. Jennifer E. Laurin, *Remapping the Path Forward: Toward A Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1081 (2013). According to one survey, 52 percent of U.S. crime labs engaged in crime-scene response activities, and both county labs (62 percent) and municipal labs (71 percent) were more likely than state labs (44 percent) to be directly involved in crime-scene investigations in 2009. Matthew R. Durose et al., Bureau of Justice Statistics, U.S. Dep't of

Justice, *Census of Publicly Funded Forensic Crime Laboratories, 2014* 7 (2016). Often police agencies gather evidence at crime scenes.

The lack of standards, training, and oversight in crime-scene work can result in mistakes made because of haste, inexperience, or lack of a scientific background, as well as more serious quality-control failures and misconduct. Nat'l Research Council, Comm'n on Identifying the Needs of the Forensic Scis. Cmty., *Strengthening Forensic Science in the United States: A Path Forward* 56-57 (2009). Guidance from scientists and crime laboratories can help agencies prioritize when and whether to collect evidence for forensic analysis. A recent study sponsored by the National Institute of Justice revealed that across four urban jurisdictions, some physical evidence was collected in nearly all homicide investigations initiated during the study period, but in only 30 percent of assault investigations, and only 20 percent of burglary investigations. Peterson and Sommers found that biological evidence—quintessentially associated with sexual-assault investigations—was collected in only 54 percent of investigations. Joseph Peterson & Ira Sommers, *The Role and Impact of Forensic Evidence in the Criminal Justice Process* 22 (2010).

In the past, much of the work in promulgating and encouraging best practices for evidence collection has fallen to individual policing agencies or to crime laboratories, but often those practices and policies have not been well coordinated. Thanks to Combined DNA Index System (CODIS) regulations, crime laboratories face their own legal requirements for documenting and certifying the integrity of evidence they receive. Laurin, supra, at 1086; Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, 270 NAT'L INST. JUST. J. 18, 22 (2012). Policing agencies may have different procedures for those tasks. There should be more coordination between policing agencies and crime labs to ensure integrity in evidence collection. See, e.g., Jan S. Bashinski & Joseph L. Peterson, *Forensic Sciences, in* LOCAL GOVERNMENT POLICE MANAGEMENT 488, 503-504 (2003) (advocating for coordination); John K. Roman et al., *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 11 (2008) (describing how collaboration is critical and describing the breakdown in evidence collection in some jurisdictions because of poor coordination); RICHARD SAFERSTEIN, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE 6-8 (7th ed. 2001) (advising coordination but noting the lack thereof in many agencies). Uniform standards for evidence collection, retention, and preservation could bolster investigation practices and significantly reduce the chances of wrongful arrest, prosecution, and conviction. Working collectively with other law-enforcement agencies in a jurisdiction would further enhance this recommendation and perhaps reduce the resource burden. International Association of Chiefs of Police & U.S. Dep't of Justice, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 15 (2013). As described in the Reporters' Notes to § 9.01, agencies and, preferably, jurisdictions also can establish scientific oversight bodies to produce such uniform standards, as well as provide oversight regarding written policies but also the quality of the work performed, in order to accomplish the quality-control goals of these Principles.

§ 9.03. Policies for Forensic Testing

Agencies should adopt policies for determining when and whether evidence should be submitted for forensic testing, and should set priorities to ensure that, when feasible, probative evidence is tested in a prompt manner.

Comment:

a. Policies for evidence submission. Resources for forensic testing are not unlimited, and not all evidence can or should be tested scientifically. For those reasons, agencies should develop policies regarding when evidence should be tested. Those policies should be informed by scientists who can advise on what types of analyses are the most probative. Those policies also should be informed by police and community priorities concerning what types of investigations should be prioritized in the use of laboratory and scientific resources.

b. Prompt testing. Evidence may be submitted for testing, but its testing may be subjected to laboratory delays. Agencies should identify evidence that could benefit particularly from forensic testing in order to prioritize testing of such evidence. For example, agencies might prioritize testing in particularly important cases to avoid delaying the development of potentially probative evidence. Agencies also might prioritize testing to ensure that evidence does not degrade. If certain types of criminal-offenses cases are prioritized, the standards for selecting which cases receive priority in testing otherwise should be consistent and generally applicable.

REPORTERS' NOTES

Most crime-scene evidence is not tested using forensic analyses, and while forensic resources must be prioritized, far too often evidence has been lost or not tested in important cases in which it could play a useful role. Joseph Peterson et al., Nat'l Inst. of Justice, *The Role and Impact of Forensic Evidence in the Criminal Justice Process* 9 (2010) (describing how "a major finding of the study was that most evidence goes unexamined[.]"). Forensic evidence can go untested for a variety of reasons. There may be no probative evidence to test or the case may be solved through other means. However, there are cases in which crime-scene evidence that could be valuably tested is not, due to neglect or insufficient laboratory resources. One study, for example, found that 40 percent of unanalyzed rape and homicide cases were estimated to have DNA evidence that could be tested. Kevin J. Strom et al., *2007 Survey of Law Enforcement Evidence Processing: Final Report* 4-5 (2009). Evidence may not be collected from a crime scene in the first place; large percentages of cases, including sexual-assault cases, do not have physical evidence collected. Peterson, supra.

There have been exonerations of innocent people who were convicted because laboratory analysts failed to test forensic evidence that could have cleared them by the time of their trials. This issue has become an important policy concern nationwide. One example is the case of Marlon Pendleton, who spent 10 years in prison before DNA exonerated him; the lab analyst had testified incorrectly at the time of trial that there was insufficient evidence to test. Innocence Project, *Marlon Pendleton Celebrates 12 Years of Freedom*, http://www.innocenceproject.org/cases/Marlon-Pendleton (last visited July 31, 2019).

Resources are not unlimited; but this only underscores the need for policy on prioritization of forensic testing. For example, agencies may adopt rules providing that analysis of complex DNA mixtures is done only in the most serious felony cases, when such time-consuming work is justified. Some agencies have failed to process evidence from cases—such as sexual-assault kits—based not on any public policy, but due to simple neglect. Clear rules are needed as to when to submit evidence for forensic testing. Policies can require an initial examination to reveal whether the evidence is of sufficient quality to conduct testing. Even then, in higher-priority cases, agencies may require a second analyst to confirm that the evidence is not of sufficient quality.

Additionally, resources should be made available to reduce backlogs. Federal funding is available for those purposes, particularly in DNA testing in sexual-assault cases. DNA testing constitutes only one-third of the work requested of public crime laboratories, but despite federal grant support, it continues to account for much of the backlog in case processing. Matthew R. Durose et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Census of Publicly Funded Forensic Crime Laboratories, 2009* 4 (2012). Funding should be more effectively directed toward backlog reduction in priority cases.

§ 9.04. Quality Controls and Performance Testing

(a) Agencies should ensure the ongoing use of quality controls for forensics work, including accreditation, certification, blind testing of forensic analysts, and routine audits of cases.

(b) When errors in testing or analyzing forensic evidence are detected, agencies should correct the errors and notify the affected parties of the errors.

Comment:

a. Accreditation. The accreditation process involves having a professional scientist periodically evaluate whether an agency's forensic crime laboratory meets scientific standards. Accreditation is an important step in ensuring that a laboratory meets minimal standards with respect to the procedures and management systems it adopted. In some but not most states, accreditation is required by law. However, accreditation does not ensure that a laboratory uses

foundationally valid methods. Nor does accreditation ensure that a laboratory performs reliable and consistent casework—typically it involves review of procedures and protocols but not casework. Thus, although all forensic laboratories should be accredited, additional steps are warranted.

b. Certification. Another form of quality assurance is a requirement that individual forensic practitioners be certified to conduct all of the types of examinations they perform. This requires that a certification examination be developed and made available by government agencies or accrediting or professional organizations. Many certifications currently in use do not provide sufficient assurance that accurate work is done by an expert. The certification process should be based on rigorous standards, including regular and stringent tests of proficiency. Professionals should not be permitted to evaluate evidence based solely on their experience and judgment, i.e., without independent certification.

c. Quality controls. All agencies should adopt quality controls designed to ensure that equipment is calibrated properly and operates accurately, and that individual professionals assess evidence in a valid and reliable manner. The term "quality assurance" is sometimes used to refer to this broader concept, while the term "quality controls" is sometimes used to refer more narrowly to the acts of running control samples and calibrating equipment. We use the broader concept here in referring not only to equipment maintenance but also to evaluating staff performance. Such controls include supervision of the procedures used when handling evidence. For example, there should be procedures for (a) ensuring against contamination, (b) ensuring that a proper chain of custody is kept, and (c) carefully documenting steps taken in analyzing evidence. Such controls also can include blind testing, as discussed in Comment *d*, and reviewing the work in actual cases by selecting cases at random, as discussed in Comment *e*.

d. Blind testing. Forensic methods require that a human examiner exercise judgment. It is therefore important that agencies regularly assess how well their human examiners utilize their experience, skill, and judgment in making decisions. Blind testing, in which the person being tested does not know that a test is occurring, is one way to ensure quality control. Such testing should reflect the challenges of forensic casework, it should be conducted in a manner such that analysts do not know that they are being tested, and it should utilize standard testing procedures. It is not sufficient simply to examine whether professionals follow procedures; testing should examine the accuracy of their work.

e. Routine audits. If the process for supervising forensic staff does not include checks on the quality of their casework then there is no way to know how well they are performing. Agencies can take measures to test evidence regularly, either by human examiners or by an automated process. Ideally, agencies would select cases at random so that staff would not know in advance which work would be reviewed. Routine audits can be used to ensure that processes are working correctly and that errors are averted.

f. Duty to correct errors. When forensic testing and reporting errors occur, some standards organizations require only that some type of undefined action be taken to address the consequences of errors. Given the consequences of forensic errors, that requirement is too vague. Instead, policy and practice should require that agencies take some action to correct an error. That action should include providing notice of the error to the relevant lawyers and court.

REPORTERS' NOTES

1. Absence of quality controls. In the past, quality controls in crime laboratories have been inadequate, if not sorely lacking. The National Academy of Sciences summarized the state of affairs: "Forensic science facilities exhibit wide variability in capacity, oversight, staffing, certification, and accreditation across federal and state jurisdictions." Nat'l Research Council, Comm'n on Identifying the Needs of the Forensic Scis. Cmty., *Strengthening Forensic Science in the United States: A Path Forward* 14 (2009) ("2009 NRC Report"). There is a lack of "rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight." Id. at 6. The result has been a series of quality-control crises, in which entire laboratories have been shut down or audited in a range of jurisdictions around the country due to lack of standardization, failure to disclose probative results, rampant errors, and outright fraud. A number of labs have had to conduct substantial retrospective audits due to such quality-control failures. Id. at 44-45. Wrongful convictions have resulted from those failures. Id. Too many laboratories "lacked quality control measures that would have detected the questionable evidence." Id.

2. Accreditation. Accreditation is an essential part of quality control. Accreditation means that the laboratory adheres to an established set of standards for quality and for procedures. An accredited laboratory has in place a management system that defines the various processes by which it operates, monitors that activity, and responds to deviations from acceptable practices in a routine and thoughtful manner. Id. at 195. Accreditation also requires testing of individual examiners. The National Commission on Forensic Science strongly recommends that all forensic-science service providers (FSSPs) become accredited. Doing so can promote compliance with industry best practices, promote standardization, and improve the quality of services provided. Nat'l Comm'n on Forensic Sci., *Universal Accreditation* 1 (2016), https://www.justice.gov/archives/ncfs/page/file/624026/download. The American Bar Association similarly has recommended that "[c]rime

laboratories and medical examiner officers should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence." 2009 NRC Report, supra, at 194.

Accreditation has become far more common among crime laboratories in the United States. Sometimes that is voluntary; sometimes it is mandated by the state. Nearly nine in 10 (88 percent) of the nation's 409 publicly funded forensic-crime laboratories were accredited by a professional science organization in 2014, which was up from 82 percent in 2009 and 70 percent in 2002. Matthew R. Durose et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Census of Publicly Funded Forensic Crime Laboratories, 2014* 7 (2016). Eighty-three percent of crime labs were accredited under an international standard in 2014. International accreditation programs are based on the International Organization for Standardization (ISO) and have more rigorous requirements than non-international standards. Id. at 1-2. Since 2009, the proportion of crime labs with an ISO-based-accreditation standard increased from 27 percent to 83 percent. Id.

3. Certification. Sound quality control also requires that forensic practitioners be certified in all categories of testing in which examinations are performed, provided a certification examination is available. Nat'l Comm'n on Forensic Sci., *Views of the Commission: Certification of Forensic Science Practitioners* 2 (2016). The certification of individuals complements the accreditation of laboratories. In other realms of science and technology, professionals, including nurses, physicians, professional engineers, and some laboratorians, typically must be certified before they can practice. The same should be true for forensic scientists who practice and testify. 2009 NRC Report, supra, at 208. The professional forensic-science community supports the concept of certification, including the Technical Working Group on Forensic Science Education and the International Association for Identification (IAI). Id. at 209. Analyst certification is more common today. In 2014, 72 percent of crime labs employed at least one externally certified analyst. The proportion of crime labs employing one or more analysts with external certification increased from 60 percent in 2009 to 72 percent in 2014 (up 20 percent). Durose et al., supra, at 6. Seventy-eight percent of municipal crime labs employed one or more externally certified analysts in 2014, compared to 70 percent of state and 63 percent of federal crime labs. Id. Between 2009 and 2014, state-operated crime labs experienced the largest increase in the proportion of labs employing one or more externally certified analysts. Id. at 5-6.

4. Testing. Blind testing can provide an integral part of an effective quality-assurance program. It is one of many measures used by laboratories to monitor performance and to identify areas in which improvement may be needed. A testing program is a method of verifying that the laboratory's technical procedures are valid and that the quality of work is being maintained. There are several types of tests, sometimes called proficiency tests. The primary distinction among them is whether the examiner is aware that he or she is being tested (an open or declared test) or does not realize that the sample presented for analysis is a test sample and not a real case (a blind test). Tests can be generated externally, by another laboratory (sometimes called an interlaboratory test), or internally. Another type of testing involves random case reanalysis, in which an examiner's completed prior casework is randomly selected for reanalysis by a supervisor or another examiner.

2009 NRC Report, supra, at 207. Blind testing can determine the performance of individual analysts, monitor laboratories' continuing performance, and identify problems in laboratories and initiate remedial actions. Those may be related to, for example, individual staff performance or systemic issues, such as the calibration of instrumentation, or the effectiveness and comparability of new tests or measurement methods. Id. at 207.

In 2014, 98 percent of crime labs conducted testing of staff, which was similar to 2009 (97 percent) and 2002 (97 percent). As in previous years, nearly all (95 percent of) crime labs evaluated the technical competence of employees through declared or open examinations. The percentage of crime labs that conducted random case reanalysis in 2014 (35 percent) was similar to that reported in 2009 (34 percent), but a decrease from 2002 (54 percent). The proportion of crime labs conducting blind testing decreased from 27 percent in 2002 to 10 percent in both 2009 and 2014. Durose et al., supra, at 4. All U.S. Department of Justice Forensic Service Providers are required to participate in a testing program applicable to the area(s) in which they conduct forensic analyses. Nat'l Comm'n on Forensic Sci., *Recommendation to the Attorney General: Proficiency Testing* (2016).

Much of the existing testing is not rigorous enough. Although many forensic-science disciplines have engaged in testing for the past several decades, several courts have noted that testing in some disciplines is not sufficient. 2009 NRC Report, supra, at 206 (citing court cases). It is important for tests to be representative of the challenges of forensic casework. It is equally important for test takers to utilize standard operating procedures when performing testing. Test results can be a valuable tool in guiding new research. Test providers should be willing to share their data in the aggregate. They also should strive to collect demographic data and method/process information, and should employ standard report wording to enable a meaningful review of the population's results as an indicator of the strength of the proficiency test or the competence of the forensic community as it relates to that test (e.g., methodology or technology used). Nat'l Comm'n on Forensic Sci., *Recommendation to the Attorney General: Proficiency Testing* (2016).

Moreover, some organizations have not viewed it as their responsibility to correct all errors, including by notifying legal actors that errors were made. Errors include inaccurate results, failures to follow procedures, and nonconformities, as well as misconduct by staff. The quality-control process is intended to help a lab identify problems. In response to errors, one important international standard, ISO 17025, recommends only that the lab "address the consequences." Int'l Org. for Standardization, ISO 17025:2017, 8.7.1.a (2017). An agency, however, should do far more than address consequences of an error in some undefined way. An agency should adopt an explicit rule that staff must remediate the error, nonconformity, or misconduct. That must include notifying counsel and the court in order to ensure justice.

§ 9.05. Minimizing Human Factors in the Evaluation of Forensic Evidence

Agencies should develop policies and processes to minimize the negative effects of human factors that can undermine the accuracy of forensic evidence.

Comment:

a. Human factors. The term "human factors" refer generally to the application of psychological and physiological principles to workplace processes and systems, as discussed and defined in § 8.05, in the context of evidence collection generally. In the forensic evidence context in particular, cognitive biases, i.e., systematic errors in thinking that affect decisions and judgments, can negatively affect the work of scientific and technical experts. It is particularly important to ward off bias in areas in which decisionmaking criteria are not clear, and in which outside information can influence the decision. In the area of forensic science, cognitive biases can result in the failure to test evidence, and they can affect the conclusions reached during forensic analyses. For example, information about an investigator's theory of the case can bias forensic analysts towards finding results consistent with that information. It is crucially important that agencies attend to the sources of bias and seek to minimize the impact of bias on casework.

b. Defining task-irrelevant and task-relevant information. Standard procedures should define what information a forensic expert should or may make use of when conducting analysis, and what information is not informative for such analysis. Forensic experts should not receive unnecessary information about a case. They generally do not need to know the suspect's criminal history or what other evidence investigators have gathered in order to conduct a forensic examination. Conversely, they may need to know the type of surface from which evidence was collected or who may have come into contact with the evidence.

c. Sequential unmasking. Some information that is needed for one part of an analysis is not relevant for other stages of the analysis. To prevent information from biasing their work, agencies should give examiners only the information that they need and only at the time that they need it. Agencies should ensure that examiners review information sequentially so that they do not receive information that may affect their judgments, such as information about a suspect's criminal record. Other procedures that order an examiner's work can help reduce cognitive biases. For example, examiners can adopt a process by which they examine crime-scene evidence before they examine evidence from potential suspects. Such processes can also can avoid the danger of circular reasoning, in which persons may naturally tend to focus on similarities at the expense of differences when comparing evidence side by side.

d. Blinding. When feasible, a forensic expert, in verifying a conclusion reached by another forensic expert, should not know what conclusion the other expert reached. By requiring the use

of a blinding process, agencies can ensure that an expert's verification is independent. In addition, by randomly assigning cases to analysts, agencies can ensure that analysts do not seek out cases in a way that can bias outcomes.

REPORTERS' NOTES

It is now well understood that all forensic techniques can involve some degree of judgment and interpretation and therefore are vulnerable to cognitive bias. Exec. Office of the President, President's Council of Advisors on Sci. and Tech. (PCAST), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 8 (2016) ("PCAST Report") ("The findings of forensic science experts are vulnerable to cognitive and contextual bias."). See, e.g., I.E. Dror, D. Charlton & A.E. Péron, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications,* 156 FORENSIC SCI. INT'L 74, 77 (2006) ("Our study shows that it is possible to alter identification decisions on the same fingerprint, solely by presenting it in a different context."). PCAST noted that because so little had been done by the forensic-science community to study the bias issue, the full magnitude of the problem could not be known. PCAST Report, supra, at 9.

Studies have identified how common procedures in forensics can and do bias results. See, e.g.: Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 SCI. & JUST. 204, 204-208 (2011); Larry S. Miller, *Procedural Bias in Forensic Examinations of Human Hair*, 11 LAW & HUMAN BEHAV. 157, 158-159 (1987); Paul Bieber, *Fire Investigation and Cognitive Bias*, Wiley Encyclopedia of Forensic Science, 2014, onlinelibrary.wiley.com/doi/10.1002/9780470061589.fsa1119/abstract. Contextual bias can occur when experts receive information about the facts of a case that change the way they approach their work.

In a well-known example, several FBI analysts mistakenly attributed a fingerprint from a subway bombing in Madrid, Spain, to a lawyer in Portland, Oregon. The FBI's subsequent inquiry concluded that circular reasoning and bias led to this error. PCAST Report, supra, at 46; U.S. Dep't of Justice, Office of the Inspector Gen., *A Review of the FBI's Handling of the Brandon Mayfield Case* (2006). This sort of problem occurs because of what is called "confirmation bias." Human observers tend to focus on similarities rather than differences, leading them to confirm a hypothesis. For example, when observing a suspect and latent print side by side, observers may tend to focus on features that appear to match, and to discount differences.

Cognitive psychology has much to offer by way of methods that can be used to minimize the inevitable effects of biasing information on human observers. For example, one type of sequential approach is to examine the latent print from the crime scene first, before turning to a suspect. The PCAST Report recommends that approach: "Examiners should be required to complete and document their analysis of a latent fingerprint before looking at any known fingerprint and should separately document any additional data used during their comparison and evaluation." PCAST Report, supra, at 10; see also Dan E. Krane et al., *Sequential Unmasking: A*

Means of Minimizing Observer Effects in Forensic DNA Interpretation, 53 J. OF FORENSIC SCIS. 1006-1007 (2008).

Poor procedures also can make crime-scene analysts "vulnerable to cognitive and contextual bias." Nat'l Research Council, Comm'n on Identifying the Needs of the Forensic Scis. Cmty., *Strengthening Forensic Science in the United States: A Path Forward* 4 (2009). When evaluating whether a latent print at a crime scene came from a particular suspect, for example, it would be inappropriate for the fingerprint examiner to be influenced by whether the suspect made incriminating statements or had a convincing alibi, or whether other forensic evidence implicated the suspect. Those are matters to be considered by police, prosecutors, and jurors. That kind of information is irrelevant to a scientific assessment of the latent print, and thus should not be allowed to influence the examiner's assessment. Nat'l Comm'n on Forensic Sci., *Ensuring that Forensic Analysis is Based Upon Task-Relevant Information* 2 (2015), https://www.justice.gov/archives/ncfs/page/file/641676/download. Information is task-irrelevant if it is not necessary for drawing conclusions about the propositions in question, or if it assists only in drawing conclusions from something other than the physical evidence designated for testing or assists only in drawing conclusions by some means other than an appropriate analytic method. Id.

The decision to collect crime-scene evidence also often is influenced by the officer's or technician's personal perceptions as to the seriousness of the crime. See Joseph L. Peterson et al., *Forensic Evidence and the Police: The Effects of Scientific Evidence on Criminal Investigations* 97-98 (1984) (concluding from statistics on cities' evidence collection that police investigators "will usually go to greater lengths collecting information to attempt to solve personal crimes than they will for property crimes"). Manuals typically offer guidance on how evidence should be collected, but not on which types should be collected. Evidence intake forms and initial communications with investigators also can result in forensics experts receiving unnecessary information that can skew their findings., Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. APPLIED RESEARCH IN MEMORY & COGNITION 42, 43 (2013).

Managing the flow of information in a crime laboratory can help to address those problems. Evidence intake forms can be designed to ensure that only relevant information is provided. Communications between experts and investigators can be minimized or prohibited, as is done in some laboratories. Itiel E. Dror et al., *Context Management Toolbox: A Linear Sequential Unmasking (LSU) Approach for Minimizing Cognitive Bias in Forensic Decision Making*, 60 J. FORENSIC SCI. 1111 (2015). Specialization within an agency can help to minimize bias by tasking different people with receiving evidence, communicating with law enforcement, and deciding what tests should be performed—and then handing that evidence off to a person who performs the discrete testing task. In so doing, the expert who tests the evidence is "blind" to the other information about the pending criminal investigation. Itiel E. Dror, *A Hierarchy of Expert Performance*, 5 J. OF APPLIED RESEARCH IN MEMORY AND COGNITION 121-127 (2016).

§ 9.06. Disclosure of Forensic Evidence

Agencies should ensure that all forensic records, including conclusions and underlying bench notes, are:

(a) documented in reports that

(1) use consistent, accurate, and straightforward terminology,

(2) include complete and thorough explanations of methods and results,

(3) distinguish data from interpretations, opinions, and conclusions,

(4) disclose relevant laboratory-wide data, including protocols and procedures, proficiency results, and quality reports, and

(5) disclose all known limitations, measures of uncertainty, and error rates; and

(b) disclosed to the prosecution and defense on equal terms and on an ongoing and timely basis, to the extent permitted by legal rules and court orders.

Comment:

a. Documentation. Agencies should document and retain all steps taken in forensic analysis. That work may involve very different tasks, including making measurements, reaching judgments and conclusions, and searching through databases. Each step taken should be documented, recorded in a routine form, and explained in a manner that would allow another expert to understand how the relevant conclusions were reached. Agencies should make the documentation available to defense lawyers and to prosecutors, as well as to courts.

b. Complete and thorough reports. Reports generated as the result of a scientific analysis should be complete and thorough. In the past, forensic examiners often issued only brief certificates of analysis or other summary lab reports. They tended to report results using technical terms that are not clearly understandable to lawyers or other non-forensic specialists. Forensic laboratory reports too often have contained little to no documentation as to how those results were reached or what they mean. Agencies should ensure that the conclusions expressed in reports, at a minimum, describe the materials used, the methods and procedures followed, and the conclusions reached, together with the limitations of those conclusions.

c. Distinguish data. Forensic examiners should take care to set out which of their forensic findings rely on or present data, and which findings reflect their own evaluation, interpretation,

and judgment of data. Examiners have often presented conclusions that have included objective measures, but also interpretative judgments, in a way that makes the reports difficult to evaluate critically. Nor should an examiner's own personal judgments be sufficient to reach forensic results, unless the examiner can demonstrate that those judgments are repeatable, reproducible, and accurate. Agencies should ensure that the empirical bases for any judgments be disclosed, along with the uncertainty in any such measurements, as discussed in Comment *d*.

d. Limitations, uncertainty, and error rates. Forensic reports should identify the sources of uncertainty in the procedures used and conclusions drawn, along with estimates of the level of confidence in the results. Thus, any standard deviations, or the amount of variation in values, should be reported. Similarly, with regard to error rates, any standard deviations, or the amount of variation in values, should be reported, as should information not only about false-positive errors, but also about false-negative errors and erroneous, inconclusive determinations.

Agencies also should report information regarding the performance of their forensic professionals. As part of a sound, quality program, agencies should test the accuracy and performance of systems and individual examiners. One method of doing so is to conduct routine proficiency tests, which can measure the accuracy and performance of a particular examiner. Ideally, agencies should conduct rigorous and blind testing, so that people do not know that their performance is being tested at the time they are performing the work. The results of such in-house proficiency testing should be included routinely as a part of standard forensic reports, as it bears upon the accuracy of that particular person's work and that of the lab.

Agencies should also disclose information regarding the quality of laboratory or system-wide casework, as it bears on the accuracy of the entire laboratory or system. Although it may not be practicable to provide as much detail as might be expected in a research paper, there should be sufficient content to allow a nonscientist reader to understand what has been done and to permit informed, unbiased scrutiny of the conclusion. If error rates are not known, then that is also important information that should be disclosed.

e. Appropriate conclusions. Agencies should ensure that the conclusions expressed in reports and in testimony are not overstated. The conclusions that an examiner formulates should reflect accurately the limitations of the methods used, and any error rates or uncertainty in those methods. Traditionally, many forensic practitioners not only have used terminology that is difficult

for a layperson to understand, but have offered definitive and highly conclusory statements in their reports and testimony that were not supported by scientific research or the methods used.

f. Consistent reporting standards. Reporting standards that are adopted as agency policy should set out uniform language for reporting in written reports and in testimony. Ideally, standards for reporting language should follow standards that are commonly used across jurisdictions and are based on national standard-setting.

g. Disclosure. To the extent permitted by law, examiners should provide ongoing disclosure of forensic reports and laboratory case notes to the prosecution and the defense on equal terms. Specific discovery rules, constitutional rules, court orders, or other laws may constrain the ability of forensic professionals to provide such disclosures in particular jurisdictions or cases. Still, the preference for full and evenhanded disclosure ensures that actors in the legal system can understand and make sound use of forensic evidence. Forensic professionals also should make themselves available out of court to explain their analyses to prosecutors and defense counsel, so that those actors can understand the processes followed and conclusions reached. Absent legal barriers, the disclosure obligation is an ethical and scientific obligation of forensic professionals. Such ongoing disclosure should continue after a conviction, to permit the use of forensic evidence that might support appellate or post-conviction relief.

REPORTERS' NOTES

1. Generally. It is essential that forensic professionals properly document and report their work. Documentation, in the crime-scene-investigation context, is defined as "the recording of information/data at crime scenes. Forms of documentation may include, but are not limited to, notes, photography, video, sketches, measurements, analysis/testing results, etc." N.Y. State Crime Lab. Advisory Comm., *NYCLAC Special Project on Report Standardization* 13 (2018), http://www.criminaljustice.ny.gov/forensic/forms/nyclac-report-standardization-project-march2018.pdf. Documentation, however, is equally important after the collection stage, when information and data then is analyzed. Professionals should record and report each step in their analyses, so that lawyers, judges, and jurors can understand the work that was done, and the conclusions reached, so that other experts can reproduce the results.

2. Reporting. The reporting of forensic results traditionally has not conformed to sound scientific methods. Instead, forensic reports often have been conclusory. They have reflected personal opinions and judgments, without any information about the level of uncertainty in such opinions and judgments. They have not always included clear, documented results to help actors in the legal system understand what was done and what the results meant. Some reports contain only identifying and agency information, a brief description of the evidence being submitted, a

brief description of the types of analysis requested, and a short statement of the results (e.g., "The green, brown plant material in item #1 was identified as marijuana"). Agencies commonly fail to include a description of the methods or procedures used, much less their limitations. Most agencies do not discuss in their forensic-laboratory reports measurement uncertainties or confidence limits—although that is a particularly urgent need when technical and scientific analysis is performed. Lawyers cannot be expected to understand the methods that a forensic examiner used, their limitations, and what conclusions the examiner reached, based on these cursory lab reports.

Scientific disciplines outside of forensics have standards, templates, and protocols for data reporting. That is because scientists have an ethical responsibility to assist nonscientists in understanding their findings and expert opinions before those findings and expert opinions are used as decision aids. Loene M. Howes et al., *Forensic Scientists' Conclusions: How Readable are They for Non-Scientist Report-Users?*, 231 FORENSIC SCI. INT'L 102 (2013). The same standards, templates, and protocols used in other scientific disciplines can and should also be used in forensics. The American Statistical Association (ASA) has set out guidelines for reporting forensic evidence. The ASA guidelines state that all statements and opinions should "accurately convey the strengths and limitations of forensic findings." Am. Stat. Ass'n, *American Statistical Association Position on Statistical Statements for Forensic Evidence* 1 (Jan. 2, 2019), at https://www.amstat.org/asa/files/pdfs/POL-ForensicScience.pdf. That simple principle can guide all forensic reporting. Elaborating on that principle, the ASA emphasizes that in order to make any statements regarding a probability, there "must be data from a relevant population." Id. at 3. Without such data, statistical statements lack empirical support. Forensic examiners often make probabilistic claims based on their own "subjective sense of how probable the evidence is . . ." Id. In such situations, the ASA strongly counsels against ever suggesting that evidence came from the same source. Even with strong statistical evidence, there is uncertainty in measurement and the possibility that evidence may have come from a different source. Such uncertainty must be measured and disclosed. Without any such statistical evidence and any information about uncertainty, probabilistic claims are particularly problematic. Any claim should instead be set out in "a comprehensive report by the forensic scientist," which "should report the limitations and uncertainty associated with measurements, and the inferences that could be drawn from them." Id. For forensic methods that lack statistical support, the ASA recommends acknowledging the lack of a statistical or empirical basis in reports, and then clearly describing what comparisons were made and what steps were followed. Id. at 5.

3. Documentation. Proper reporting begins with documentation at the crime scene. The initial responding officer at a crime scene should produce clear, concise, documented information encompassing his or her observations and actions. That documentation is vital in providing information to substantiate investigative considerations. Tech. Working Grp. on Crime Scene Investigation, *Crime Scene Investigation: A Guide for Law Enforcement* 17-32 (2000). Documentation should continue at the laboratory. Laboratories should, as some do, make public their procedures for the careful documentation of each method they use. Va. Dep't of Forensic Sci., *Virginia Department of Forensic Science Quality Manual* 17 (2018), https://www.dfs.virginia.gov/wp-content/uploads/2018/08/100-D100-DFS-Quality-Manual.pdf. At the very least, sufficient

documentation is needed to reconstruct the analysis, if necessary. Another expert should be able to understand what was done.

Fingerprint analysis provides an example. Documentation should make clear what features were relied upon when a decision was made that the prints in question had a common source. By documenting the relevant information gathered during the analysis, evaluation, and comparison of latent prints, and the basis for the conclusion, the examiner creates a transparent record of the method. This provides courts with additional information on which to assess the reliability of the method in a specific case.

Currently, there is no requirement at many agencies for forensic examiners to document which features within a latent print support their reasoning and conclusions. Exec. Off. of the President, President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 143 (2016). Automated systems, such as the Mideo System at some labs, can create a digital record of what features were identified and compared, together with any changes made during the process in what was identified and relied upon to reach conclusions. Still better are systems that record the entire examination and decisionmaking process.

A wide variety of terms have been used by forensic examiners in reports and in court testimony to describe their findings and conclusions, and the degrees of association between evidentiary material (e.g., hairs, fingerprints, fibers) and particular people or objects. Such terms include but are not limited to "match," "consistent with," "identical," "similar in all respects tested," and "cannot be excluded as the source of." The use of such terms can affect how the trier of fact perceives and evaluates evidence. Yet, the forensic-science disciplines have not reached agreement or consensus on the precise meaning of any of those terms. Although some disciplines have developed vocabulary and scales to be used in reporting results, they have not become standard practice. This imprecision in vocabulary stems in part from lack of basic research in many fields of forensic science and the corresponding limitations in interpreting the results of forensic analyses. Nat'l Rsch. Council, Comm. on Identifying the Needs of the Forensic Sci. Cmty., *Strengthening Forensic Science in the United States: A Path Forward* 185 (2009) (2009 NRC Report).

Thus, it is crucial that examiners "prepare reports and testify using clear and straightforward terminology, clearly distinguishing data from interpretations, opinions, and conclusions and disclosing known limitations that are necessary to understand the significance of the findings." Nat'l Comm'n on Forensic Sci., *Recommendation to the Attorney General: National Code of Professional Responsibility for Forensic Science and Forensic Medical Service Providers* 3 (2015), https://www.justice.gov/archives/ncfs/file/795311/download. The U.S. Department of Justice has issued its own uniform standards for reporting and for testimony regarding several forensic disciplines. In general, those standards include probabilistic language, they caution against making any claims regarding error rates of zero, and they bar the use of potentially misleading terms like "reasonable scientific certainty." See, e.g., U.S. Dep't of Just., Approved ULTR for the Forensic Firearms/Toolmarks Discipline (2019), at https://www.justice.gov/olp/page/file/1083671/

download. The ASA, as noted, has made recommendations concerning reporting forensic findings. The OSAC groups also are producing recommendations specific to particular forensic disciplines.

Forensics reports also should disclose the error rates for a given technique. The insistence by some forensic practitioners that their disciplines employ methodologies that have perfect accuracy and produce no errors has made reporting highly misleading. For example, although DNA analysis is considered the most reliable forensic tool available today, laboratories nonetheless can make errors working with DNA—errors such as mislabeling samples, losing samples, or misinterpreting the data. 2009 NRC Report, supra, at 47. Testing outcomes often are less straightforward than the forensic conclusions advanced in the laboratory report. Regardless of the declarant's intent, a report that provides forensic "outcomes" may well exaggerate forensic reliability or conceal forensic ambiguities. Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 498 (2006). All forms of potential error should be included in such documentation. Those will include research regarding known or potential rates of error. They should include errors due not just to possible false identifications (false positives) but also errors due to false nonidentifications (false negatives) and false inconclusive results (in which the evidence was not indeterminate, but should have resulted in a conclusion).

4. Full and equal disclosure. The law has done little to assist with the quality of documentation or adequate disclosure of forensic evidence. The U.S. Supreme Court repeatedly has held that the police and prosecutors, together, have an obligation under Brady v. Maryland, 373 U.S. 83 (1963), to provide the defense with exculpatory and impeachment evidence. But *Brady* requires production only of reports that are material to the preparation of the defense. Consequently, if the prosecution receives an expert's report, the report is discoverable only if it is deemed to be "material." The problem lies not with the materiality standard, but rather with the person who applies that standard. Leaving the decision to the prosecutor to determine "materiality" can lead to nondisclosure and needless litigation. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 808 (1991). Federal Rule of Criminal Procedure 16 does provide that expert disclosures, in the form of a written summary of testimony, and an inspection of any scientific test of experiment, be provided by prosecutors to the defense, but written summaries of testimony are only required if it is a witness that the government plans to call at trial. FED. R. EVID. 16(F)-(G).

Systemic deficiencies could be averted by best practices requiring full-file disclosure and discovery of forensic evidence to both sides, the defense and the prosecution, and not just the bare result, but rather comprehensive documentation of the work performed. Unfortunately, that is not currently the law or the practice in most jurisdictions. Brandon L. Garrett, *Constitutional Regulation of Forensic Evidence*, 73 WASH. & LEE L. REV. 1147, 1181 (2016). The Confrontation Clause of the U.S. Constitution similarly is an inadequate guard against undisclosed unreliability or error. As noted above, cross-examination of forensic analysts may not provide a meaningful way to challenge forensic analysis. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 73-74 (2009) ("In the case of forensic science, meaningful confrontation likely requires a good deal more than disclosure of the results reached by the prosecution's analysts and their

methodology. At a minimum, defendants probably need access to independent experts, to the underlying databases on which the state relies, and—where feasible—to samples and materials that will allow them to carry out their own tests.").

Thus, it is essential that agencies themselves ensure that forensic evidence is carefully documented and then disclosed both to prosecutors and to the defense, in clear and comprehensive reports.

§ 9.07. Forensic-Evidence Preservation

(a) Agencies should have minimum standards to ensure that forensic evidence is properly preserved and retained for a defined period of time.

(b) Before discarding or destroying forensic evidence, when feasible, notice should be provided by the evidence custodian to the court, prosecution, victim(s), criminal defendant(s), and legal counsel, along with an opportunity to respond.

Comment:

a. *Preservation standards.* Agencies should adopt standards regarding the preservation and retention of evidence. Case outcomes can be harmed by the loss of evidence that could have been instrumental in proving guilt or innocence. The standards for preserving and retaining evidence should apply at all stages of forensics work—from crime-scene evidence collection, to analysis, to retention after analysis is complete. Agencies should make their preservation and retention policies public so that legal actors understand how evidence is retained, and under what circumstances it will be discarded or destroyed. The standards should also specify procedures for documenting the chain of custody and for obtaining access to evidence, including through disclosures that are the subject of § 9.06.

b. *Disposing of evidence*. In addition to providing notice that evidence will be discarded or destroyed, the custodian of the evidence should provide parties and counsel the ability to petition to preserve the evidence, when it is feasible to do so. Written policy should set out the length of time that evidence ordinarily will be retained. If evidence cannot be tested without consuming it, and it must be tested promptly, then it would not be feasible or reasonable to provide such notice. If, however, there is sufficient time to do so, then notice should be provided. Providing notice according to some type of schedule, or providing common notice in a single list of cases in which evidence will otherwise be discarded, could make doing so more practicable.

REPORTERS' NOTES

1. Preservation of evidence. Scientific research organizations have developed best practices for the proper retention, preservation, cataloging, and retrieval of evidence applicable to criminal investigations. See, e.g., Tech. Working Grp. on Biological Evidence Pres., *Biological Evidence Preservation: Considerations for Policymakers* (2015), https://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8048.pdf. There is a need for better oversight of police and laboratory evidence-preservation procedures. See Latta & William P. Kiley, *Property and Evidence Control—The Hidden (and Ticking) Time Bomb*, CALEA UPDATE MAG., June 2007, http://www.calea.org/calea-update-magazine/issue-94/property-and-evidence-control-hidden-and-ticking-time-bomb. There have been widespread problems with poor evidence storage in police property rooms, clerks' offices, and crime-laboratory storage facilities. Agencies have lost evidence, had evidence contaminated through negligent storage, and discarded or destroyed evidence in cases in which it could have helped to identify the culprit. In addition, agencies have conducted forensic analysis using poor methods that can contaminate, alter, or consume evidence in a way that prevents subsequent, more accurate analysis.

Serious criminal cases have been harmed by failure to preserve evidence. Retention of biological evidence can be particularly important in sexual-assault cases; law enforcement should be attentive to its utility in other types of criminal investigations as well. Joanne Archambault, Nat'l Ctr. for Victims of Crime, *Model Policy Materials: Evidence Retention, Disposition, and/or Removal*, 10-12 (2015); see also Cristina Martin, *DNA Storage Banks: The Importance of Preserving DNA Evidence to Allow for Transparency and the Preservation of Justice*, 91 CHI.-KENT L. REV. 1173, 1176 (2016).

U.S. constitutional law prohibits bad-faith destruction of important evidence in criminal cases, but it does not set out best practices for the retention and preservation of evidence. In the past, such rules often were informal. Police warehouses or crime laboratories would dispose of evidence when they ran out of storage space or whenever a conviction was finalized. As a result, potentially crucial evidence could not be tested when there was a need to reopen a cold case, or during post-conviction proceedings. In Dist. Attorney's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 73 (2009), the U.S. Supreme Court recognized a limited procedural due process right to obtain evidence of innocence if provided for by state statute. But the Court concluded that formally extending substantive due process rights to the area of forensic-evidence preservation would take the "matter outside the arena of public debate and legislative action" and place it in the federal courts, where there is "no reason to suppose that [the courts'] answers to [the question of evidence preservation] would be any better than those of state courts and legislatures, and good reason to suspect the opposite."

To permit better policy across a jurisdiction, the National Institute of Standards and Technology (NIST) recommends that jurisdictions create state commissions to establish and enforce evidence-preservation standards. Individual agencies should not have to develop such systems on their own. Those standards should include guidelines for annual audits and inventories of stored evidence, and tracking systems for stored evidence. Tech. Working Grp. on Biological

Evidence Preservation, *Biological Evidence Preservation: Considerations for Policy Makers* 5-7 (2013). State lawmakers, agencies, and courts can and have adopted evidence-retention and evidence-preservation policies that go beyond constitutional standards. Id. Indeed, as of 2009, "forty-six States and the Federal Government have already enacted statutes dealing specifically with access to evidence for DNA testing." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009).

Of the states that have preservation-of-evidence statutes, most provide some type of preservation for either specific felony offenses or for all felony offenses broadly. Among enumerated crimes, the two most common categories include (1) violent felony offenses like capital murder, murder, aggravated murder, and manslaughter and (2) sexual offenses like rape, sodomy, and sexual assault. Nine states preserve evidence for all criminal cases: California, CA. PENAL CODE § 1417.9(a) (West 2016); Iowa, IOWA CODE § 81.10(10) (2016); Massachusetts, MASS. GEN. LAWS ch. 278A, § 16(a) (2016); Minnesota, MINN. STAT. § 590.10(1) (2016); Mississippi, MISS. CODE ANN. § 99-49-1(3)(a) (2016); Nebraska, NEB. REV. STAT. § 29-4125(1) (2016); New Hampshire, N.H. REV. STAT. ANN. § 651-D:3(I) (2016); Rhode Island, R.I. GEN. LAWS § 10-9.1-11(a) (2016); and Wisconsin, WIS. STAT. § 968.205(2) (2016). Some states also specify the status of the case, namely, whether it is in the investigative process, if the individual has been incarcerated, if the individual is on probation or on supervised release, whether the sentence is completed, or whether the individual dies. In North Carolina, biological evidence obtained in criminal investigations of homicide or rape is preserved so long as the crime remains unsolved. N.C. GEN. STAT. § 15A-268(a6)(4) (2016). In Colorado, biological evidence in felony cases will be preserved for the life of the convicted defendant. COLO. REV. STAT. § 18-1-1102(1) (2016). In Texas, biological evidence is retained until the defendant completes any term of supervision. TEX. CODE CRIM. PROC. ANN. art. 38.43(c)(2)(C) (2016). The federal government requires preservation of biological evidence if a defendant is incarcerated for a federal offense. 18 U.S.C. § 3600A(a) (2012). The federal preservation statute does not provide guidelines for retention when a case remains unsolved or the statute of limitations has run.

2. Notice. Even when states do have statutes regarding preservation of evidence, there often is not a notice requirement before evidence is destroyed, and there often are not remedies for a failure to provide notice. Fewer than half of the states (and the District of Columbia) have requirements that provide notice or an ability to petition prior to disposition. Sixteen states require notice be provided to the defendant or incarcerated individual, and that individual has the right to petition the court to preserve the evidence: Alaska, ALASKA STAT. § 12.36.200(d) (2016); Arkansas, ARK. CODE ANN. §§ 12-12-104(c)–(d) (2016); Connecticut, CONN. GEN. STAT. § 54-102jj(c) (2016); Illinois, 725 ILL. COMP. STAT. 5/116-4(c)-(d) (2016); Maryland, MD. CODE ANN. CRIM. PROC. § 8-201(k) (West 2016); Mississippi, MISS. CODE ANN. § 99-49-1(6) (2016); Montana, MONT. CODE ANN. § 46-21-111(1)(b) (2016); Nebraska, NEB. REV. STAT. § 29-4125(2) (2016); New Hampshire, N.H. REV. STAT. ANN. § 651-D:3(II) (2016); North Carolina, N.C. GEN. STAT. § 15A-268(b) (2016); Oklahoma, OKLA. STAT. tit 22, § 1372(C) (2016); Oregon, OR. REV. STAT. § 133.709 (2016); Rhode Island, R.I. GEN. LAWS § 10-9.1-11(b) (2016); South Carolina,

S.C. CODE ANN. § 17-29-340 (2016); Texas, TEX. CODE CRIM. PROC. ANN. art. 38.43(d) (2016); and Wisconsin, WIS. STAT. § 165.81(c) (2016) & WIS. STAT. § 968.20(3) (2016). Twenty-eight states either do not have a statute for biological-evidence preservation or do not provide any requirement of notice or ability to petition the court for preservation (No Statute: Alabama, Delaware, Idaho, Indiana, Kansas, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wyoming) (No Notice or Petition Requirement: Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Nevada, New Mexico). Five states and the District of Columbia require notice be provided to the defendant or incarcerated individual prior to disposition, but do not have a right to petition to maintain it: Arizona, ARIZ. REV. STAT. ANN. §§ 13-4221(D)–(E) (2016); California, CAL. PENAL CODE § 1417.9(b)(1) (West 2016); Colorado, COLO. REV. STAT. § 18-1-414(2)(a) (West 2016); District of Columbia, D.C. CODE § 22-4134(b) (2016); Minnesota, MINN. STAT. § 590.10(1) (2016); and Ohio, OHIO REV. CODE ANN. § 2933.82(B)(6) (West 2016). Virginia requires notice but only for felonies, not misdemeanors. VA. CODE ANN. § 19.2-270.4(A) (2016). The federal government has three possible avenues for disposition of biological evidence, only one of which requires that notice be given to the defendant and that the defendant have a right to petition to maintain the evidence. 18 U.S.C. § 3600A(c) (2012).

The Technical Working Group on Biological Evidence Preservation also recommends notice to "all relevant parties to respond to early disposition" and allows for a response that the evidence should be retained. Tech. Working Grp. on Biological Evidence Preservation, Nat'l Inst. of Standards and Tech. & Nat'l Inst. of Justice, *Biological Evidence Preservation: Considerations for Policy Makers* 14 (2013). As noted, it may sometimes not be feasible to notify parties if there is a pressing need to consume evidence in order to test it promptly. However, discarding or destroying evidence should not occur without notice. Doing so can be made feasible by issuing a common notice for sets of cases, according to predetermined schedules.

CHAPTER 10
EYEWITNESS IDENTIFICATIONS

§ 10.01. General Principles for Eyewitness Identification Procedures

Agencies should be cognizant of the scientific research regarding eyewitness perception and memory, and the limits of eyewitness evidence.

Comment:

a. Eyewitness identifications. Officers use a variety of different procedures to ask an eyewitness to identify a culprit, including: (1) showups; (2) photo arrays; (3) live lineups; and (4) mugshots and computer presentations of photos in which there is no designated suspect. In a showup, which usually occurs at or near the crime location and shortly after the crime occurred, officers present a single, live suspect to a witness. In photo arrays, officers present the eyewitness with a series of photographs, one of which is the suspect, and the others called "fillers," or known non-suspects. Live lineups are less commonly used, in which the suspect and fillers are presented in person to an eyewitness. Additional procedures may be used in which officers do not have a suspect. If so, officers may show mugbooks or sets of photographs to see if the eyewitness can identify a suspect, or they may ask the eyewitness to help prepare a composite image or drawing of a culprit. This Chapter refers to these various procedures generally as "eyewitness identification procedures," but refers to specific procedures when necessary.

b. Scientific research. A substantial body of basic research examines how humans perceive images and form visual memory. That research has been complemented by applied research in the area of eyewitness identification. All of that research has resulted in a large body of knowledge concerning how to test visual memory accurately, including face identification, and a set of best practices that are recommended to test and preserve the memory of an eyewitness. Many traditional identification methods still used by agencies were not designed carefully or based on research. Such traditional methods can alter or deteriorate the memory of an eyewitness, including because those methods may be highly suggestive. Poor eyewitness identification procedures can result in situations in which the eyewitness cannot make an identification, or in false identifications and wrongful convictions of innocent persons.

c. Procedures for eyewitness identifications. Agencies should use clear, written procedures for eyewitness identifications, developed with care and attention to the shortcomings of such identifications, as demonstrated by scientific research.

Eyewitness identification procedures can themselves affect the memory of an eyewitness, and subpar procedures can outright alter the memory of an eyewitness. Constitutional rulings on the subject preceded the body of scientific research that has resulted in a set of best practices for eyewitness identification procedures. As a result, those rulings do not provide a well-informed constitutional floor. At best, they counsel against highly unnecessary and suggestive conduct by officers during identification procedures.

Agencies should focus on practices informed by scientific research. That scientific research has resulted in consensus on a series of best practices. Certain other practices are not currently the subject of scientific consensus, and should be considered a matter of policy choice by agencies. Further, scientific research continues to advance and produce insights that can improve procedures for eyewitness identifications. Agencies that conduct eyewitness identifications should be responsive to developments in research and also in technology.

REPORTERS' NOTES

Eyewitness identifications are a staple of criminal investigations. But their reliability has been called into question by decades of scientific research and an explosion of information about just how potentially unreliable such identifications can be. As the National Academy of Sciences explained in a landmark 2014 report summarizing the scientific research in the area of human visual memory, "it is well known that eyewitnesses make mistakes, and their memories can be affected by various factors including the very law enforcement procedures designed to test their memories." NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 1 (2014). In particular, the hundreds of DNA exonerations in recent years, the vast majority of which involved eyewitness misidentifications, have brought home the malleability and fragility of eyewitness memory. Id. When this occurs, "not only are innocent people wrongfully incarcerated, but perpetrators go free (perhaps to victimize others), and public confidence in our criminal justice system is gravely shaken." 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS 12 (2019). Research examining what transpired in misidentifications that resulted in innocent persons being convicted has revealed the role that poorly designed and suggestive agency procedures can play. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63-68 (Harvard University Press, 2011).

Unfortunately, there is wide variability among agencies on the subject of eyewitness evidence. Many agencies have policies that are decades out of date, or they have no written policies at all. See, e.g., Police Executive Research Forum, A National Survey of Eyewitness Identification

Procedures in Law Enforcement Agencies 46-47 (2013), at http://policeforum.org/library/eyewitness-identification/NIJEyewitnessReport.pdf.

That said, false identifications and unsound lineup procedures are not a new problem. As the U.S. Supreme Court has put it: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228 (1967). In 1977, in adopting its current due process rule regulating eyewitness identification evidence, the Court emphasized how "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

At the time *Manson* was decided, however, little was known about what precisely had an impact upon the reliability of eyewitness identifications. As a result, the Supreme Court's existing framework does not comport with scientific research. Although the Supreme Court's due process test to assess eyewitness evidence asks whether police used suggestive identification procedures, any such suggestiveness can be excused based on a set of "reliability" factors. *Manson,* 432 U.S. at 114. The "reliability" factors adopted by the Court in *Manson*, having been already set out in its earlier ruling in Neil v. Biggers*,* 409 U.S. 188 (1972), ask that the judge examine: (1) the eyewitness's opportunity to view the defendant at the time of the crime; (2) the eyewitness's degree of attention; (3) the accuracy of the description that the eyewitness gave of the criminal; (4) the eyewitness's level of certainty at the time of the identification procedure; and (5) the length of time that had elapsed between the crime and the identification procedure. Id. The Court did not assign any particular weight to these various factors.

The Supreme Court more recently has held that when unreliability in eyewitness identifications is not due to intentional police action, it is not regulated under the Due Process Clause at all. Perry v. New Hampshire, 132 S. Ct. 716 (2012). The Justices in *Perry* stated that the Court did "not doubt either the importance or the fallibility of eyewitness identifications," but held that state legislation, evidence law, and safeguards such as expert testimony and jury instructions should be relied on to ensure the accurate presentation of eyewitness evidence. Id. at 728-729.

A large body of scientific research has called into question the validity of many of the Supreme Court's so-called "reliability" factors. For scholarly criticism in light of the social-science research, see, e.g., Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures,* 41 VAL. U. L. REV. 109 (2006); Suzannah B. Gambell, *The Need To Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189 (2006).

Several state courts have departed from the federal due process rule, relying on the research that has developed in the intervening decades. See, e.g., State v. Ramirez, 817 P.2d 774, 780-781 (Utah 1991) (altering three "reliability" factors to focus on effects of suggestion); State v. Marquez, 967 A.2d 56, 69-71 (Conn. 2009) (adopting detailed criteria for assessing suggestion); Brodes v.

State, 614 S.E.2d 766, 771 & n.8 (Ga. 2005) (rejecting use of eyewitness certainty); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting five-factor "refinement" of federal due process test).

The Supreme Court's acquiescent approach to eyewitness identification, and the current state of research, increase the need for laws and policies that adhere to our best understanding of the reliability of eyewitness testimony and the factors that in fact heighten or diminish reliability in any given case. And in fact, several state courts have rejected the *Manson* test entirely based on that scientific research. State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012); Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); Young v. State, 374 P.3d 395 (Alaska 2016). The New Jersey Supreme Court in its *Henderson* decision endorsed the use of pretrial hearings to examine eyewitness identification evidence, together with detailed jury instructions on the issue. State v. Henderson, 27 A.3d 872 (N.J. 2011). In contrast, the Oregon Supreme Court has endorsed review of the reliability of eyewitness evidence under its evidence rules. State v. Lawson, 291 P.3d 673 (Or. 2012). The Massachusetts Supreme Judicial Court has recommended more concise jury instructions on eyewitness identification evidence. Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); see also Young v. State, 374 P.3d 395 (Alaska 2016). The Third Circuit Task Force on Eyewitness Identifications similarly emphasizes lessons drawn from basic science concerning perception and memory, in setting out its recommendations. 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS 13 (2019). Each of these judicial efforts has made it all the more important that agencies adopt best practices to ensure accuracy at the time that eyewitness identification procedures are conducted.

Scientific evidence concerning human perception, vision, and memory provides a framework that should inform the collection and use—both pretrial and at trial—of eyewitness evidence, including through jury instructions and presentations by expert witnesses. As the National Academy of Sciences (NAS) has put it, "the best guidance for legal regulation of eyewitness identification evidence comes not . . . from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers." See NRC, IDENTIFYING THE CULPRIT, at 30; see also Final Report of the President's Task Force on 21st Century Policing 2.4 (May 2015) (recommending adoption of identification procedures "that implement scientifically supported practices that eliminate or minimize presenter bias or influence").

In scientific terms, the law should take account of both *estimator* variables and *system* variables. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. OF PERSONALITY & SOC. PSYCHOL. 1546-1557 (1978) (first coining the terms "estimator" and "system variables"); 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS 13-14 (2019). Both types of variables can affect the memory of an eyewitness. Estimator variables are factors relating to the conditions of the crime-scene viewing, such as the lighting, the eyewitness's eyesight, familiarity with the perpetrator, or race. Studies have shown that individuals display an "own race" bias, or a greater difficulty identifying persons of a different race. See NRC, IDENTIFYING THE CULPRIT, at 96. Estimator variables cannot be

controlled by law enforcement. In contrast, *system variables* are factors associated with the procedures that officers use to obtain identifications by an eyewitness. System variables can be controlled by law enforcement.

More than three decades of scientific research into eyewitness memory has begun to have an impact on how police conduct eyewitness identifications, as well as how judges regulate eyewitness evidence in the courtroom. That research informs the specific principles recommended in this Section. It also should inform the overall approach toward police investigations relying on eyewitness evidence, as well as subsequent judicial use and review of such evidence. Scientific research can inform each step of the process, from collection to use of eyewitness evidence in the judicial system. Although scientific consensus exists on the use of a range of crucial best practices, there is a lack of consensus on certain other factors and practices, making any recommendations on those topics more provisional and qualified. When further research is needed, these Principles note the appropriate qualifications.

We note that the same protections against suggestion are important for "earwitness" identifications, in which a witness is asked whether a suspect's voice can be recognized. Indeed, sometimes both face and voice recognition identification procedures are conducted. The same principles apply regardless of which memory task is involved in the procedure in question.

Although the procedures described here apply to identifications by human eyewitnesses, facial-recognition technology is increasingly used to identify faces from video or images. Jose Pagliery, *FBI Launches a Face Recognition System*, CNN Money (Sept. 16, 2014), http://money.cnn.com/2014/09/16/technology/security/fbi-facial-recognition. Such algorithms also can raise questions regarding reliability, as can the interpretation of the results of such technologies by human experts. John Nawara, Note, *Machine Learning: Face Recognition Technology Evidence in Criminal Trials*, 49 U. LOUISVILLE L. REV. 601, 604-607 (2011). As with the procedures for human eyewitnesses, agencies should evaluate the reliability of any technology adopted to use face recognition to identify faces or other biometric information.

§ 10.02. Eyewitness Identification Procedures

Police agencies should adopt standard, written eyewitness identification procedures to regulate the use of showups, lineups, photo arrays, and any other eyewitness identification techniques they employ, whether in the field or the station. Agencies should ensure that the specific procedures they use to test the memory of an eyewitness are informed by extant research. Those procedures should include:

(a) direction to conduct any identification as early as possible in the course of an investigation;

(b) instructions to explain the procedure to the eyewitness in easily understood terms;

(c) procedures for fairly selecting non-suspect or "filler" persons or images to display to the eyewitness;

(d) procedures for presenting persons or images to the eyewitness in a nonsuggestive manner;

(e) procedures for documenting any identification or nonidentification by the eyewitness; and

(f) procedures that employ sequential or simultaneous presentation of photos in photo lineups.

Comment:

a. Written policy. Traditionally, eyewitness identification procedures were not governed by written police policies. Rather, this was the type of task that officers would learn informally and on the job. Agencies did not have standardized instructions or procedures. Some agencies still do not have written eyewitness identification policies, and that problem remains a pressing one. This Section sets out each of the key elements of identification procedures, based on current scientific research. This Section also indicates areas that still are the subject of disagreement and ongoing research in the scientific community, such as presentation of photographs sequentially rather than simultaneously.

b. Timing. The memory of an eyewitness degrades over time. It is crucial that officers conduct eyewitness identification procedures as promptly as possible.

c. Procedures. The procedures for conducting an eyewitness identification should be clear and easily understood by witnesses. Standard procedures will ensure uniformity and avoid any misunderstanding by, or suggestion to, the eyewitness, even if inadvertent. It is important, for example, to convey that the culprit may or may not be present, because a witness may assume they have been asked to identify the culprit. Procedures should also be blind or blinded, as stated in § 10.05. The confidence of an eyewitness should be recorded, and the entire procedure should be recorded, as stated in § 10.08.

d. Fillers. The more fillers presented in an eyewitness identification procedure, the more reliable a test of the eyewitness's memory the procedure is. Typical rules require that five fillers be presented along with a suspect. Some agencies require that six or more be included, which

provides a still more rigorous test. It is also permissible that, among the individuals or photographs included in a lineup, none is a suspect.

An unfair or biased lineup, in which the suspect stands out, can lead to errors. Rules should clearly set out how to select fillers. Such rules should require that police, after obtaining a description from the eyewitness, should select fillers who each fairly reflect the eyewitness's description of the suspect. The fillers should not make the suspect stand out in a manner that is suggestive. It may be necessary, for example, to mask a portion of the fillers' faces, if the suspect has a tattoo that the fillers would lack.

Only a single suspect should be present in any given lineup procedure. If there is more than one suspect, then additional and separate lineup procedures should be conducted for each additional suspect.

e. Documenting identifications. Eyewitness identification procedures should be documented, preferably by use of a video and audio recording, unless exigent circumstances make doing so impossible. Procedures should also be developed to mask the identity of eyewitnesses appearing in a recording, when there are investigative needs to do so. It is important that the procedure be documented, with the statements and identification decisions by the eyewitness written down. It is important to contemporaneously document the confidence of the eyewitness, because that confidence may change quite a bit based on feedback after the lineup.

f. Uniform policy and training. It is also important that agencies use standard eyewitness identification procedures, including with clear, written policies and training on their administration. The modern approach, treating eyewitness identifications as an experiment and a test of human memory, depends upon standard protocols and procedures. Absent consistent and clear procedures, there can be no uniformity or consistency of results, and eyewitnesses may themselves be confused or misled during an eyewitness identification procedure. As with all areas of agency policy, written policy must be implemented through sound training and supervision, not just in the academy, but in service. Supervision should include discipline for officers who fail to adhere to written policy and training on eyewitness identification procedures. Such supervision and training is important not just for officers who routinely conduct lineups, but for all officers who conduct investigations relying on eyewitness memory. For example, an officer's field interview with an eyewitness, designed to elicit a description of a possible suspect, can play a crucial role in any subsequent identification procedures.

g. Right to counsel. Based on U.S. Supreme Court rulings interpreting the U.S. Constitution, defendants have a right to have counsel present at in-person lineups after an indictment, but they do not have a right to counsel at photo arrays, which are the most common method employed for eyewitness identification procedures. United States v. Wade, 388 U.S. 218, 228 (1967); United States v. Ash, 413 U.S. 300, 321 (1973). Nevertheless, police should notify counsel and permit counsel to be present during any identification procedures, in order to ensure the fairness of the procedures and to permit independent observation of the procedures.

h. Research on "sequential" or "simultaneous" is not decisive. There is a choice whether to present photos simultaneously (all at the same time) or sequentially (one at a time), and research on this issue at present is inconclusive. Many policing agencies view the sequential lineup as the more conservative option, because evidence suggests that it can prevent additional "comparison shopping" among images. Studies show that sequential lineups do reduce false identifications. Police more concerned with the cost of false identifications may choose that option. Sequential lineups also may reduce correct identifications. Some recent research suggests that for many eyewitnesses, the choice of procedure does not significantly impact results. Still, there is a live scientific debate about which type of presentation of images is the most accurate.

i. Written policy on presentation of photographs. Agencies should adopt a policy regarding the question of whether to conduct sequential or simultaneous presentation methods during eyewitness identification procedures, and should not leave this decision to the discretion of officers. In practice, some eyewitnesses may ask to view a sequential lineup a second time, which agencies commonly refer to as a second "lap." If permitted to do so, a sequential procedure is in effect much like a simultaneous one. As a result, the differences between the procedures may not turn out to be crucial in practice. In any event, the choice of which type of procedure to use, sequential or simultaneous, cannot be fully answered based on the scientific research, and thus requires a considered policy decision by the agency.

REPORTERS' NOTES

Traditionally, many agencies did not have formal policies or practices concerning eyewitness identification procedures. Often any training that was conducted was highly informal. Michael S. Wogalter, Roy S. Malpass & Dawn E. McQuiston, *A National Survey of U.S. Police on Preparation and Conduct of Identification Lineups*, 10 PSYCHOL., CRIME & L. 69 (2004) (survey of 220 agencies finding that over half reported no "formal training" on eyewitness identification procedures). Surveys indicate that many law-enforcement agencies continue to lack written policies

on the subject of eyewitness identifications; other agencies adopt written policies, but ones that do not comport with best practices. See, e.g., Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* 46-47 (2013), at http://policeforum.org/library/eyewitness-identification/NIJEyewitnessReport.pdf (reporting in a national survey of over 600 agencies that 77 percent lacked written policy for showups and 64 percent reported no written policy for lineups or photo arrays); Brandon L. Garrett, *Eyewitness Identifications and Police Practices in Virginia,* 3 VA. J. OF CRIM. L. 1 (2014) (study of Virginia law-enforcement policies, of which few complied with state model policy on lineup procedures); but see Brandon L. Garrett, *Self-Policing: Dissemination and Adoption of Police Eyewitness Policies in Virginia,* 105 VA. L. REV. ONLINE 101 (2019) (describing, five years later, widespread adoption of state model policy). Without standard policies and procedures, it can be far more difficult to assess what happened during an eyewitness identification procedure. Moreover, it is difficult to ensure standard quality of the identifications if no standardized protocols are observed.

The National Academy of Sciences Committee Report made quite clear its recommendation that blind or blinded lineups be used by law enforcement. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 3 (2014). Section 10.05 develops the importance of conducting lineups in that fashion. See also 2019 Report of the Third Circuit Task Force on Eyewitness Identifications 14 (2019).

Policies should explain how to select "filler" photographs that fairly resemble the description of the suspect and the suspect, so that the suspect does not stand out in the photo array. Resources should be made available to police agencies so that they have access to archives of photographs and are then able to have a sufficiently wide selection of photographs for use in photo arrays. A move toward computerized selection of photographs and administration of photo arrays may improve the fairness of the photographs selected. In addition, policies should discourage the use of multiple viewings, which can raise the risk of error. See State v. Henderson, 27 A.3d 872, 900-901 (N.J. 2011) (stating that "law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once."); see also 2019 Report of the Third Circuit Task Force on Eyewitness Identifications 14 (2019).

Agencies should adopt standard instructions for eyewitnesses. Those instructions should inform the eyewitness that a culprit may or may not be present in the lineup. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. That instruction is crucial because an eyewitness otherwise may expect that the culprit will be present and that there is a correct choice that should be made. As discussed in § 10.04, showups should be limited in their use. Such an instruction can still be given before conducting a showup, and agencies should have standard instructions and procedures to avoid undue suggestion in showup procedures. See NRC, IDENTIFYING THE CULPRIT, supra, at 108. As discussed in § 10.08, the confidence of the eyewitness should be documented, preferably through a recording of the entire eyewitness identification procedure.

Standard procedures should use terminology that is easily understandable by eyewitnesses. See NRC, IDENTIFYING THE CULPRIT, supra, at 107; 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS 15-16 (2019). There are a number of state statutes and

model policies that provide useful models for agencies. See, e.g., N.C. GEN. STAT. § 15A-284.52 (West 2007); OHIO REV. CODE ANN. § 2933.83 (West 2010); The Commission On Accreditation For Law Enforcement Agencies, Inc., CALEA Standards For Law Enforcement Agencies: 42.2.11 Line-Ups, International Association of Chiefs of Police, Model Policy: Eyewitness Identification (2010), at http://www.theiacp.org/PublicationsGuides/ModelPolicy/ModelPolicyList/tabid/487/Default.aspx; Virginia Department of Criminal Justice Services, Model Policy on Lineups/Eyewitness Identification 2-39 (2013). In addition, police should make routine accommodation in policy and in practice for non-English speakers or others requiring accommodation, due to hearing or linguistic impairment or other disability. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. A move to computerized presentation of images can similarly ensure that clear, standard instructions and procedures are consistently used.

We note that while voice, or "earwitness" identification procedures are not the focus of these Principles, the same types of procedures should be adopted when a voice identification is conducted. Agencies should develop clear and consistent written procedures for presentation of voices to a witness, as well as fairly selected "filler" voices.

Many jurisdictions have adopted all or some portions of these recommendations. To date, 22 states have adopted legislation regarding eyewitness identification procedures. Of those, 17 states (California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin) have enacted statutes directly requiring that law-enforcement officials adopt written procedures for eyewitness identifications. Some of those states regulate the particular procedures to be used, focusing on the key features of a sound policy as outlined above, including blind or blinded lineups, clear written instructions, and documenting the confidence of an eyewitness. See CAL. PEN. CODE § 859.7 (2018); CO. REV. STAT. § 16-1-109 (2016); CONN. GEN. STAT. § 54-1p (West 2012); FLA. CODE ANN. § 92.70 (West 2017); GA. CODE ANN. § 17-20-2 (West 2016); 725 ILL. COMP. STAT. § 5/107A-5 (West 2003); KANSAS SB 428 (2016); LA. CODE CRIM. PRO. 251-253 (2018); MD. CODE ANN., PUB. SAFETY § 3-506 (West 2007); N.C. GEN. STAT. § 15A-284.52 (West 2007); NEB. R.S. § 81-1455 (2016); N.R.S. 171.1237 (2011); N.H. R.S.A. Ch. 595-C (2018); OHIO REV. CODE ANN. § 2933.83 (West 2010); OK. S.B. 798 (2019); TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2011); UTAH CODE ANN. § 77-8-4 (West 1980); VA. CODE ANN. § 19.2-390.02 (West 2005); VA. CODE ANN. § 9.1-102.54; 13 V.S.A. § 5581; W. VA. CODE ANN. § 62-1E-1 (West 2013); WIS. STAT. § 175.50 (West 2005). Additional states (Nevada and Rhode Island) have passed statutes recommending further study, tasking a group with developing best practices, or requiring some form of written policy. NEV. REV. STAT. § 171.1237 (West 2011); R.I. GEN. LAWS § 12-1-16 (West 2012); 2010 LEG. REG. SESS. (Vt. 2010).

Many other jurisdictions have adopted model policies, and still others have had legislation introduced and considered on this subject. Several state courts have also issued rulings regulating lineup practices (e.g., New Jersey's Supreme Court has required documentation of identification procedures). State v. Delgado, 902 A.2d 888 (2006). Many more jurisdictions and departments also have voluntarily adopted guidelines or policies regulating eyewitness identifications. See, e.g.,

John J. Farmer, Jr., Attorney General of the State of New Jersey, "Letter to All County Prosecutors: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures" (April 18, 2001), available at http://www.state.nj.us/lps/dcj/agguide/photoid.pdf; CALEA Standards for Law Enforcement Agencies: 42.2.11 Lineups, at http://www.calea.org/content/standards-titles; International Association of Chiefs of Police, Model Policy: Eyewitness Identification (2010).

Traditionally, agencies used simultaneous eyewitness identification procedures, whether those procedures were live or involved photographs. The move to photo arrays made it far more feasible to present images one at a time. Research had suggested that sequential presentations eliminated "comparison shopping" by eyewitnesses who would scan across images to locate the one most similar to their recollection. Many agencies, concerned with preventing wrongful convictions, switched to sequential presentation of images in photo-array procedures. However, more recent research suggests that the differences between the procedures are harder to assess and that it is not a straightforward choice. See NRC, IDENTIFYING THE CULPRIT, supra, at 117. More research is needed on this question.

For a detailed discussion of the current research on this question and the ongoing debate in the scientific community over the preferable approach, see NRC, IDENTIFYING THE CULPRIT, supra, at 117-118; see also, e.g., Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 457, 459-460, 462-464, 468 (2001) (recommending use of the sequential procedure to reduce use of "relative judgment"); Laura Mickes et al., *Receiver Operating Characteristic Analysis of Eyewitness Memory: Comparing the Diagnostic Accuracy of Simultaneous Versus Sequential Lineups*, 18 J. EXPERIMENTAL PSYCHOL. APPLIED 361, 374-375 (2012) (recommending further empirical research).

In sum, scientists have increasingly questioned how great the difference is between simultaneous and sequential procedures. There is some evidence that the sequential procedure is the more conservative approach, particularly in terms of reducing false identifications. At the same time, it may reduce the number of correct identifications. The practical difference between the two procedures may be particularly small when agencies typically permit a witness to take a "second lap" and look at a sequential series of photos again. Selecting the right approach requires a policy choice by the policing agency, considering research but also practical considerations. See NRC, IDENTIFYING THE CULPRIT, supra, at 119.

This question whether to adopt a sequential or simultaneous procedure highlights that, as in any scientific area, research continues to advance. Agencies, understandably, cannot revise their policies as quickly as science advances. One advantage of computerized presentations of images to eyewitnesses is that the program can readily be changed to adjust presentation methods. Funds should be made available for development and implementation of convenient computerized presentations, such as tablet-based eyewitness identifications.

Agencies should proceed cautiously regarding this topic of sequential versus simultaneous presentation. However, this scientific debate is a sign of engagement and hard work by researchers.

It should not be taken as a reason not to adopt important protections, such as blind or blinded procedures, clear instructions, or recording, all of which have been endorsed by consensus in the scientific community.

§ 10.03. Threshold for Conducting Eyewitness Identifications

Policing agencies should not conduct eyewitness identifications unless they have:

(a) a substantial basis to believe that the suspect committed the crime and should therefore be presented to the eyewitness, and

(b) a substantial basis to believe that the eyewitness can reliably make an identification.

Comment:

a. Sufficient suspicion. Police should not place a suspect in an eyewitness identification procedure without a strong basis for doing so, including reasonable cause or suspicion that the suspect actually is responsible for the crime. Preferably, the officers should have evidence of guilt independent of the eyewitness's belief that he or she can make an identification. In addition, officers, consistent with § 10.05, should not convey to the eyewitness any of that basis for suspecting a person, because that would constitute highly suggestive conduct. Live identification procedures must be conducted within the limits of any applicable rules on seizing persons.

b. Basis to conduct identification procedure. The decision to conduct an eyewitness identification procedure should not be undertaken lightly, or without adequate cause and evidentiary support. The strong basis to conduct such a procedure should include a basis to believe that the eyewitness can make an accurate identification. Officers should inquire into the circumstances concerning the eyewitness's initial viewing of the suspect. Officers should not ask an eyewitness who lacks the ability, or who expresses an inability, to recall the appearance of the culprit to make an identification. In addition, officers, consistent with § 10.05, should not make any suggestions to the eyewitness that the eyewitness can make a successful identification.

c. No trawling. Officers normally should not conduct eyewitness identification procedures if they do not have a suspect. Officers should not engage in forms of "trawling," which is the use of mugshot presentations of large sets of images of individuals for whom there is no cause for suspicion related to the incident in question. The risks of eyewitness error are too great to justify placing large numbers of innocent individuals at risk of having their images erroneously identified.

REPORTERS' NOTES

We do not know how often eyewitness identifications are conducted, but according to one estimate, they may be conducted in many tens of thousands of cases a year. Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (January 1989). Yet, human facial recognition poses real challenges for individuals. Scientific research has documented how even under optimal viewing conditions, eyewitnesses can have great difficulty identifying strangers and even non-strangers.

Constitutional rulings do little to address the preliminary question that agencies face: whether to conduct an eyewitness identification procedure at all. The few lower courts to have considered the issue are divided on whether police must have probable cause under the Fourth Amendment to place an individual in a live (but not a photo-array) eyewitness identification procedure. Biehunik v. Felicetta, 441 F.2d 228, 230 (2d Cir. 1971); but see, e.g., Wise v. Murphy, 275 A.2d 205, 212-215 (D.C. 1971); State v. Hall, 461 A.2d 1155 (N.J. 1983). Mug-shot arrays or composite images, or photo arrays, are not regulated under the Fourth Amendment at all, since they do not involve a "seizure" of a person, but rather the person's image.

The U.S. Supreme Court held that when officers do not engage in intentional conduct during an eyewitness identification, officers are not regulated under the Due Process Clause at all. Perry v. New Hampshire, 132 S. Ct. 716 (2012). Some state courts have adopted different rules, stating that reliability review does apply regardless of whether there was police action. See, e.g., State v. Chen, 27 A.3d 930, 937 (N.J. 2011).

In United States v. Wade, the Supreme Court held that, once indicted, a person has a right under the Sixth Amendment to have a lawyer present at a lineup. 388 U.S. 218, 235-236 (1967). However, that right does not extend to photo-array procedures, which are far more commonly used today than live or in-person lineups. U.S. v. Ash, 413 U.S. 300, 321 (1973); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009) (a "large percentage of jurisdictions in the U.S. use only photographs and never use live lineups").

It is essential, though, for agencies to determine whether an eyewitness and an identification procedure using that eyewitness are likely to be reliable. Unfortunately, many crimes occur under suboptimal viewing conditions. For example, research suggests that the presence of a weapon at a crime scene and heightened stress both can make it more difficult later to recall accurately the face of a suspect. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 93-94 (2014). In addition, eyewitness identification procedures often occur after the passage of time.

It is particularly important to resolve whether a witness is capable of making an eyewitness identification before proceeding with an identification procedure, because once an eyewitness is asked to make an identification and does so, confidence in the identification will predictably increase over time. An eyewitness may appear highly confident and reliable in court, even if the eyewitness was highly uncertain and tentative during an eyewitness identification procedure at a

police station. This phenomenon is termed "confidence inflation." Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603-647 (1998).

Officers thus should carefully inquire into the viewing conditions under which an eyewitness saw the suspect, as well as the passage of time since the viewing occurred. Id. at 98. Officers should be trained to interview possible eyewitnesses in order to elicit as much information as possible and without asking leading questions that might suggest information to the witness. Research on cognitive interviewing can inform such training. Ronald P. Fisher & R. Edward Geiselman, *The Cognitive Interview Method of Conducting Police Interviews: Eliciting Extensive Information and Promoting Therapeutic Jurisprudence*, 33 INT'L. J. L. & PSYCHIATRY 321, 321 (2010); Ronald Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL., PUB. POL'Y & L. 732, 735 (1995). Such interviews not only can produce descriptions of suspects, but they can inform an understanding of what factors may have affected the memory of an eyewitness, such as whether a weapon was present, or whether the event was highly stressful. See *Henderson*, 27 A.3d at 904-905 ("When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit.").

Similarly, one safeguard before proceeding with an identification procedure is to test the face-memory ability of an eyewitness. Different people have differing abilities to remember the faces of strangers. Agencies can, as a matter of policy and practice, assess the face-memory ability of an eyewitness prior to deciding whether to conduct an identification procedure. One such test is the Cambridge Face Memory Test. See Cambridge Face Memory Test, at http://www.bbk.ac.uk/psychology/psychologyexperiments/experiments/facememorytest/startup.php.

Finally, agencies should be cognizant that eyewitnesses may seek to identify offenders on their own. The U.S. Supreme Court has held that when unreliability in eyewitness identifications is not due to intentional police action, it is not regulated under the Due Process Clause. However, agencies should seek to prevent situations in which eyewitnesses themselves, without the supervision of officers, search online and on social media, or in physical locations, in order to try to locate suspects. In doing so, they may be affected by suggestive circumstances, and police cannot control the viewing conditions or aim to prevent misidentifications. For those reasons, agencies should discourage such trawling activities and question eyewitnesses to ascertain and to document whether or how they have engaged in any such trawling. Agencies have not always been cognizant of the widespread and online dissemination of mugshot images. Eumi Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 Rutgers L. Rev 557 (2011). In addition to the privacy concerns raised by such dissemination, it also has the potential to contaminate eyewitness memory, if such mugshot repositories make it easier for eyewitness to try to locate suspects online.

§ 10.04. Showup Procedures

Agencies should minimize the use of showup procedures and should adopt standard procedures for conducting prompt showups in a neutral manner and location.

Comment:

a. Minimizing showups. Showup procedures, in which a single image or live person is presented to an eyewitness, even if conducted promptly after an incident, are especially problematic because they are inherently suggestive. This is because by definition they involve a lone subject, rather than an array with fillers that can test the accuracy of an eyewitness. They create greater risks of error, including both identification of an innocent person and nonidentification of a guilty person. As such, showups should be used only rarely, and only within a very short amount of time after an incident.

Officers should instruct eyewitnesses not to look for culprits among members of the community and not to search through social media to locate images of potential culprits. Such viewings can in effect result in a showup, in which the eyewitness looks at a single image of a person. Instead, officers should instruct eyewitnesses to provide any relevant information to officers, so that officers can obtain images of suspects and decide whether to conduct an eyewitness identification procedure.

b. Procedures for showups. Agencies should ensure that if and when showups are conducted, standard and clear instructions are used. A showup should be conducted in a neutral location, without any additional suggestion beyond the fact of the solo presentation of the suspect. The eyewitness should be told that the culprit may or may not be present even when the eyewitness is shown only a single person. The eyewitness should be told that he or she does not have to make an identification and that the investigation will continue regardless of what choice is made.

c. When to conduct showups. Exigent circumstances may support the need to conduct a showup identification immediately after an incident, including the need to rule out or identify a person near a crime scene. Such exigency should be interpreted narrowly. Agencies should seek out technology—such as software with image archives—that could permit the quick creation of photo arrays in order to present those images to witnesses in the field rather than resort to using a showup. Facial-recognition software, if properly used, can provide a means to construct fair lineups for use in eyewitness identification procedures.

d. In-court identifications. When an eyewitness is permitted to identify a defendant in court, that identification is in effect a showup, since there are no fillers present, and it is obvious where the defendant is sitting, at counsel table. Agencies should ensure through policy and practice that an eyewitness is never asked for the first time to make an identification in court, but rather,

that an eyewitness identification procedure has been conducted previously. Judges should restrict the use of in-court identifications, and instead ensure that agencies conduct proper eyewitness identification procedures out of court, and then permit the eyewitness to testify concerning those procedures, rather than conduct an additional in-court identification.

REPORTERS' NOTES

Showup procedures are inherently suggestive, since they involve the presentation of a single witness to a suspect. As the U.S. Supreme Court has noted, "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967). Research confirms that showups pose special risks concerning accuracy. A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464-465 (1996); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A MetaAnalytic Comparison*, 27 LAW & HUM. BEHAV. 523, 538 (2003). One reason why showups are much less reliable is that they are not nearly as strong a memory test; there are no fillers present and the choice is a simple "yes" or "no." Without any fillers present, in a showup an error will result in the identification of an innocent suspect, as opposed to a filler who is known to be innocent.

In *Stovall*, however, the Supreme Court rejected any per se rule against the use of showups. Showups are legally permitted when conducted shortly after a crime. During that brief time period, an eyewitness's memory will be more recent and perhaps more accurate. Showup identifications are traditionally justified, despite their inherent suggestiveness, by the need to rule out or identify a fleeing felon or person located near a crime scene shortly after the commission of the crime. However, during that brief period, investigators may not have time to adequately investigate a potential suspect, nor inquire sufficiently into the viewing conditions.

Showups are commonly used. In one survey, 62 percent of agencies reported using showups. Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* 48 (March 2013). There is evidence that some agencies overuse showup procedures and conduct showups when it is unnecessary to do so. Procedures for the permissibility and conduct of showups were traditionally lacking. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 28 (2014) ("While some law enforcement agencies use a standard procedure with written instructions when conducting a showup, there is no indication that such procedures are used uniformly.").

There is also troubling evidence that showups, which are already inherently suggestive, can be conducted even more suggestively than necessary. For example, officers may place the suspect with proceeds of the crime or in restraints, or officers may make suggestive remarks to the eyewitness. Some officers also have shown single photographs of suspects to an eyewitness, which is completely unnecessary, since at that point officers could use that photograph to construct a photo array. (Such a procedure occurred in Simmons v. United States, 390 U.S. 377 (1968).) Showups have been unnecessarily conducted, either using photographs or a live individual, in the days and

weeks after an incident, not just in the immediate hours after a crime. Clear rules should govern when showup identifications are permitted. When showups are permitted, it is important that there be standard procedures and a clear set of standard instructions used. See NRC, IDENTIFYING THE CULPRIT, supra, at 107 ("the committee recommends the development and use of a standard set of instructions for use with a witness in a showup."). Several courts have further regulated showup procedures. See, e.g., State v. Dubose, 699 N.W.2d 582, 593-594 (Wis. 2005) ("We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array."); see also Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 383-384 (N.Y. 1981). These Principles recommend that state courts and lawmakers further regulate showups to permit consistent rules across a jurisdiction for their use.

The U.S. Supreme Court has held that single viewings of a suspect, which would otherwise constitute a showup, are not regulated by the Due Process Clause when officers did not intend to conduct an eyewitness identification procedure. Perry v. New Hampshire, 132 S. Ct. 716, 718 (2012). In that case, for example, the witness was detained near the crime scene, and the eyewitness looked out of her apartment, saw him there, and made an identification. Id. Officers can take measures to avert such unintended eyewitness viewing, including by not unnecessarily detaining a suspect within view of possible eyewitnesses, by instructing potential eyewitnesses not to search for suspects on their own in person or online, and by instead assuring potential eyewitnesses that any leads will be investigated and any images of possible culprits will be displayed in a proper eyewitness identification procedure. There have been cases in which witnesses searched on social media for images of the culprit and made identifications as a result. New Jersey v. Chen, 27 A.3d 930 (N.J. 2011). Officers cannot control the conditions in which such identifications are made and cannot prevent suggestive circumstances from resulting in errors, except by giving strong instructions to eyewitnesses not to engage in such searches.

Judges should not permit courtroom identifications, which are not a test of an eyewitness's memory, and instead should rely on a recounting of the earlier confidence of the eyewitness at the time of the identification procedure. In-court identifications are, in effect, showup identifications. There are no fillers and there is no test of the eyewitness's memory. In-court identifications are dramatic but unreliable.

Agencies should ensure through policy and practice that an eyewitness is never asked for the first time to make an identification in court, but rather, that an eyewitness identification procedure has been conducted previously. In-court identifications are highly suggestive, and several courts have restricted the use of such identifications. The Massachusetts Supreme Judicial Court and Connecticut Supreme Court have ruled that no in-court identification is permitted if an out-of-court identification was suppressed as unduly suggestive. Commonwealth v. Johnson, 45 N.E.3d 83, 92 (Mass. 2016) ("Where the suggestiveness does not arise from police conduct, a suggestive identification may be found inadmissible only where the judge concludes that it is so

unreliable that it should not be considered by the jury. In such a case, a subsequent in-court identification cannot be more reliable than the earlier out-of-court identification, given the inherent suggestiveness of in-court identifications and the passage of time."); State v. Dickson, 141 A.3d 810 (Conn. 2016). For the argument that courts should not use "independent source rules" to permit an in-court identification following suggestive out-of-court identifications, nor should they typically permit them at all, see Brandon L. Garrett, *Eyewitnesses and Exclusion,* 65 VAND. L. REV. 451 (2012). For a ruling limiting in-court-identification use for first-time identifications, see Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014). That court explained, "Where, as here, a prosecutor asks a witness at trial whether he or she can identify the perpetrator of the crime in the court room, and the defendant is sitting at counsel's table, the in-court identification is comparable in its suggestiveness to a showup identification." Id. at 166; see also United States v. Archibald*,* 734 F.2d 938, 941, modified, 756 F.2d 223 (2d Cir. 1984) ("Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant . . ."). Other courts have adopted a burden-shifting approach toward in-court identifications. See State v. Hickman, 330 P.3d 551, 568 (Or. 2015) ("Courts considering the admissibility of first-time in-court identifications generally have placed the burden of seeking a prophylactic remedy on the defendant") (citing United States v. Brown, 699 F.2d 585, 594 (2d Cir. 1983), and U.S. v. Domina, 784 F.2d 1361, 1369 (9th Cir. 1986)).

§ 10.05. Blind or Blinded Procedures

For all identification procedures other than showups, agencies should adopt procedures in which the person administering the identification procedure does not know which person is the suspect. There are two options:

(a) blind procedures, in which the person who administers the procedure does not know the suspect; or

(b) blinded procedures, in which the person who administers the procedure cannot see which persons or photographs the suspect is examining. This can be accomplished with techniques such as the use of folders, or computerized presentation of images, that shield the images from the person administering the procedure.

Comment:

a. Blind procedures. A central concern with eyewitness identification procedures is that they can affect or alter the memory of the eyewitness. Officers can do so unintentionally. Indeed, just by asking an eyewitness to participate in an identification procedure, officers create an expectation that a suspect will be present and presented to the eyewitness. An eyewitness naturally will be looking to the officer for guidance, reinforcement, and feedback. Instructing an eyewitness

that the officer administering the procedure does not know which is the suspect makes clear at the outset that there cannot be any such guidance, reinforcement, or feedback. As a result, blind or blinded procedures are a crucial protection. Such procedures can minimize the chance that police suggest the desired selection to an eyewitness viewing a live or a photo-array identification procedure. Scientists have long recommended that such procedures be used as an essential feature of the experimental method, to prevent experimenter-expectancy bias.

b. Blinded procedures. Subsection (b) provides alternatives to using an unrelated officer; for smaller agencies, it may be impractical to obtain a second officer unfamiliar with an investigation. To address this practical concern, an eyewitness identification procedure can be "blinded," even if the administrator is not himself or herself "blind" and unfamiliar with the suspect. One extremely inexpensive way to accomplish blinding is to place the images in folders and shuffle them, so that the eyewitness can examine the images in folders without the administrator being able to see which images are being viewed. A number of jurisdictions and state model policies incorporate this "folder shuffle" method for blinding eyewitness identifications, particularly to facilitate blinded identification procedures among smaller departments that cannot spare officers unfamiliar with investigations. Using computerized presentation of images also can remove the administrator from the process of presenting images to the eyewitness, and can minimize opportunity for suggestion.

REPORTERS' NOTES

The use of a blind or blinded method is extremely important to the use of any technique designed to test evidence. The use of blinding is "central to the scientific method" because it "it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find." See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 107 (2014). Thus, blinding is essential to any objective factfinding and is central to any type of experiment.

This recommendation is based upon decades of research in a number of fields on the ways in which the expectations of an administrator can bias subjects, including through inadvertent means of communication. "Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array." Id. at 73. "The 'blinded' procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system." Id.

It is particularly important to ensure blinding in the context of eyewitness evidence, because eyewitnesses are particularly suggestible. Eyewitnesses naturally may look to law

enforcement for guidance and reassurance, and they may be highly motivated to try to reach the answer that an officer thinks is the correct answer. Officers themselves may be motivated to assist the eyewitness in reaching the answer believed to be correct. As the National Academy of Sciences has put it, "[t]he 'blinded' procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system." See id. at 73; see also Final Report of the President's Task Force on 21st Century Policing 2.4 (May 2015) (recommending adoption of procedures "that implement scientifically supported practices that eliminate or minimize presenter bias or influence").

Some in law enforcement have raised concerns regarding the costs of conducting blind procedures. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. One common practical concern raised regarding the use of blind procedures is that smaller jurisdictions may not be able to spare an additional officer unfamiliar with an investigation. There is a ready, practical, and cost-effective alternative available for such agencies. The folder-shuffle method is an inexpensive and practical solution. In addition, agencies can use computerized administration of eyewitness identification procedures. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. Using folder-shuffle methods or computerized presentation can minimize the costs of using blind or blinded methods.

By using blind or blinded methods, agencies can avoid the risks of error created by suggestiveness. And because constitutional rules focus on undue suggestiveness, blind or blinded methods can avert constitutional challenges to eyewitness identification evidence. Indeed, agencies can avert any cross-examination or state-evidence-law challenge to eyewitness evidence by showing that no suggestion could have occurred during an eyewitness identification procedure that was blind or blinded. See NRC, IDENTIFYING THE CULPRIT, supra, at 107.

§ 10.06. Obtaining and Documenting Eyewitness Confidence Statements

Agencies should ask eyewitnesses to express verbally how confident they are in their identification at the time it is made and should document that verbal representation.

Comment:

a. Documenting confidence. It is crucial to document, preferably using a recording following § 10.08, the confidence of an eyewitness at the time of an initial eyewitness identification procedure. The reason why is that confidence can change over time. The confidence of an eyewitness is comparatively more reliable at the time of the initial identification procedure than subsequently, such as in the courtroom. Although eyewitness memory and confidence are both malleable, they do not naturally improve over time. Absent documentation of the confidence of an eyewitness, there may be no record that the confidence of an eyewitness has been artificially enhanced over time, for example, by suggestion, reinforcement, or feedback.

b. Qualitative statements. Although scientists might prefer that confidence be recorded using a numerical scale, few agencies have followed such an approach, due to a concern that quantitative scores might be misunderstood in the courtroom. Instead, the approach has been to record confidence by asking an eyewitness to express it in his or her own words. It is important that the confidence statement not be anchored by any suggestions from the administrator. For example, an eyewitness should not be given a constrained set of pre-selected responses, or be simply asked if he or she is absolutely sure or not. An officer should ask an eyewitness to report his or her confidence and the officer should document it verbatim.

c. Recording. Recording or videotaping entire identification procedures also can ensure that a confidence statement is recorded accurately. Whether recorded or not, however, police should be trained carefully not to provide any suggestion or encouragement prior to the lineup procedure, which would make the confidence statement a less reliable indicator.

REPORTERS' NOTES

At trial, a confident eyewitness can be extremely powerful to jurors. That confidence may not correspond to reliability, however. For example, the eyewitness may not in fact have been sure at the time of the earlier eyewitness identification procedure, and high confidence exhibited at trial may be inflated. "At trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability." Perry v. New Hampshire, 132 S. Ct. 716, 731-732 (2012) (Sotomayor, J., dissenting).

Although courts sometimes have focused unduly on the confidence of an eyewitness in the courtroom, the confidence of an eyewitness at the time of an eyewitness identification procedure can provide important information about the reliability of an identification. John Wixted & Gary Wells, *The relationship between eyewitness confidence and identification accuracy: A new synthesis*, 18 PSYCHOL. SCI. PUB. INT., 10-65 (2017).

For that reason, leading scientific groups have recommended strongly that the confidence of an eyewitness be carefully documented, in a manner in which that confidence is not influenced by the officer conducting the procedure. Such a confidence statement should permit the eyewitness to express confidence without any influence or suggestion. Although a numerical score might be more objective, agencies have favored asking the witnesses to express confidence in his or her own words. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 107 (2014) ("the administrator should obtain level of confidence by witness' self-report (this report should be given in the witness' own words) and document this confidence statement verbatim."); see also 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS 16 (2019) ("The Task Force . . . recommends that after a show-up, lineup, or photo array, witnesses be given no feedback, and that a verbatim statement of confidence be recorded by the blind administrator."). The procedures outlined here

are cumulative: the confidence statement is only reliable evidence if the procedure itself was blind or blinded and conducted properly, and if there has not been any suggestion to otherwise affect the confidence of the eyewitness. Wixted & Wells, supra.

Courts have long treated the confidence of an eyewitness as a marker of the eyewitness's reliability, but in a manner not supported by scientific research. For example, in Manson v. Brathwaite, the U.S. Supreme Court emphasized the eyewitness's level of certainty as a factor that should be considered when evaluating the reliability of an eyewitness identification once it has been determined that there was undue suggestion. 432 U.S. 98, 114 (1977). Although confidence at the time of an eyewitness identification procedure can provide evidence of reliability—as opposed to confidence at the time of a court procedure, which is not reliable—confidence at the time of an eyewitness identification is not a reliable indicator if officers have engaged in suggestion.

Suggestion, including signaling or bias in the lineup, or reinforcement or feedback, can increase the confidence of an eyewitness in predictable ways. Such false confidence is not to be credited. And yet, the Supreme Court's "reliability" test in *Manson* does exactly that: it excuses undue suggestion by allowing a judge to point to the resulting confidence of an eyewitness. For that reason, scientists have condemned that test as itself unreliable. See NRC, IDENTIFYING THE CULPRIT, supra, at 6 ("the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors."); see also Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009).

The experience from known wrongful-conviction cases bolsters the concern among researchers that confidence statements provide useful information, but only if an eyewitness identification procedure is conducted properly to eliminate suggestion. Among persons exonerated by DNA testing, not only did mistaken eyewitness identifications occur in three-quarters of the cases, but—almost without exception—those mistaken eyewitnesses testified at trials that they had complete confidence that they had chosen the culprit, despite earlier uncertainty expressed at the time of their identifications. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63-68 (2011).

Careful documentation of confidence at the time of an eyewitness identification is particularly important given the malleability of confidence and the changes in a witness's confidence that may occur during the preparation for a trial. As the National Academy of Sciences put it, "confidence levels expressed at later times are subject to recall bias, enhancements stemming from opinions voiced by law enforcement, counsel and the press, and to a host of other factors that render confidence statements less reliable." See NRC, IDENTIFYING THE CULPRIT, supra, at 74.

Thus, the recommendation is that police ask about eyewitness confidence in an open-ended way, without leading or suggesting (for example) that an eyewitness must be 100 percent certain. The recommendation is also that police ask an eyewitness to describe confidence in their own words. Doing so avoids forcing an eyewitness into rigid boxes, such as "completely sure, not sure," and the like, which similarly may lead the eyewitness or affect confidence. More research may

develop improved methods for assessing eyewitness accuracy and confidence in the future. See NRC, IDENTIFYING THE CULPRIT, supra, at 79. For example, the time that an eyewitness takes to make an identification may be associated with accuracy, but further research is necessary to examine that possibility.

§ 10.07. Reinforcement or Feedback

Officers should not provide feedback, encouragement, or reinforcement to eyewitnesses before, during, or after an identification procedure.

Comment:

a. Avoiding suggestion. An overarching goal of these Principles is to avoid suggestion so that an eyewitness's memory is assessed in a reliable manner. Suggestion in the form of feedback or reinforcement from officers can powerfully affect an eyewitness. Consistently applied, clear and neutral verbal instructions can help to prevent any such feedback. If officers depart from that script and make additional encouraging or confirming remarks, the memory of the eyewitness can be affected or even altered. It can be quite understandable and natural for an officer to desire to congratulate or support an eyewitness who is able to make an identification. That is why it is important that policies forcefully bar any such feedback or reinforcement.

b. Preventing reinforcement or feedback. Blind or blinded procedures can minimize the opportunity for suggestive comments, feedback, or reinforcement to occur, before, after, or during an eyewitness identification, as discussed in § 10.05. Policy and training should reflect the need to minimize interaction with an eyewitness, and particularly the type of encouraging remarks or conduct that might contaminate the eyewitness identification by providing feedback.

c. Trial preparation. Following an eyewitness identification, the eyewitness then may have additional conversations with officers and with prosecutors. In particular, as part of the preparation for hearings or a trial, the eyewitness may be given information about the defendant. That information can powerfully affect the eyewitness's confidence that the correct identification was made. Officers and lawyers should encourage cooperation and participation of witnesses without disclosing information that might affect the memory of a witness. However, because such information may be communicated, the effect of such interactions on memory makes it all the more important that a careful confidence statement be taken at the time of the initial eyewitness identification procedure.

REPORTERS' NOTES

Eyewitness memory is highly malleable. Suggestion can powerfully affect the reliability of an eyewitness, and suggestion can occur before, during, and after an eyewitness identification procedure. Scientific research has shown that the accuracy and confidence of an eyewitness can be affected by feedback or reinforcement provided by officers before, during, or after the procedure. See, e.g., Nancy K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 LAW & HUM. BEHAV. 262, 271 (2011); A. B. Douglass & Nancy K. Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect,* 20 APPLIED COGNITIVE PSYCHOL. 859-869 (2006); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 630-631 (1998).

Blind or blinded procedures seek to eliminate the possibility of reinforcement or feedback during an eyewitness identification procedure, because the officer does not know which person is the suspect and cannot provide any cues even inadvertently; that is the purpose of such procedures. However, blind procedures, together with an accurate record of an eyewitness identification procedure, will not necessarily prevent suggestion in the form of reinforcement or feedback that occurred before or after that procedure. For example, if an eyewitness is told that the culprit has been arrested and is present in a photo array, even if the eyewitness identification procedure is videotaped, the suggestion already will have occurred and may affect the eyewitness's memory and decisionmaking. Similarly, if an eyewitness is congratulated on making the correct choice and given other confirming information after the procedure, that eyewitness will be predictably more confident at the time of any hearing or trial. Carl M. Allwood, Jens Knutsson & Pär A. Granhag, *Eyewitnesses Under Influence: How Feedback Affects the Realism in Confidence Judgements*, 12 PSYCHOL., CRIME & L. 25-38 (2006).

This Section recognizes that as part of trial preparation, officers and prosecutors must discuss many aspects of the case with an eyewitness. That process inevitably will cement the eyewitness's confidence, including based on the simple fact that a case is going forward based in part on the identification evidence. However, even as part of that preparation process, agencies should, through policy and training, counsel against reinforcement or feedback to the eyewitness.

§ 10.08. Recording Eyewitness Identification Procedures

As a matter of standard practice, eyewitness identification procedures should be recorded when feasible.

Comment:

a. Recording procedures. A video and audio recording creates a record of the eyewitness identification procedure, documenting the sorts of issues discussed in these Principles, including the procedures that were followed, the confidence of any witness who makes an identification, and

additional important information, such as the length of time or the ease with which the eyewitness made the identification. Such information may be quite probative in court, either to bolster the accuracy and reliability of an identification, or to identify flaws in an eyewitness's identification. It may not be feasible, unless the officers have body cameras, to record show-up identifications conducted in the field. Recording station-house identifications typically will be feasible, so long as the police station has the necessary equipment.

REPORTERS' NOTES

The National Academy of Sciences, in its report, strongly recommended recording eyewitness identification procedures. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 74 (2014); see also 2019 REPORT OF THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS 19 (2019) ("the Task Force recommends that video recording of show-ups, lineups, and photo arrays be implemented by all law enforcement departments."). There are few practical obstacles to doing so in the case of photo-array identification procedures. Field identifications, such as showups, also can be recorded, but doing so may not always be as feasible; police body cameras can make such recordings feasible in the field.

This recommendation is consistent with statements in these Principles that evidence should be recorded. It is particularly important to record eyewitness identification evidence, because many subtle features of the eyewitness identification can provide extremely important information. These features include: any extraneous, reinforcing comments made by officers; the precise time taken to make an identification; how the photographs are presented; the body language of the officers; and the words the eyewitness uses to express confidence in an identification.

One practical consideration with electronic recording of identifications is that in some cases, the confidentiality of an eyewitness should be safeguarded. In such situations, law enforcement should use procedures, such as covering the face of the eyewitness, or masking, in the video and perhaps also in the audio, to protect eyewitnesses from potential retaliation.

Judicial review of eyewitness identification evidence can be usefully informed by recordings. A recording can demonstrate that an identification procedure was conducted blind and in the appropriate manner, and it can show vividly how confident an eyewitness is. On the other hand, a recording can demonstrate that an identification was not conducted properly or that an eyewitness was uncertain. There should be no judicial presumption of regularity of adherence to eyewitness identification procedures if law-enforcement officials failed to adhere to a policy requiring video recording of eyewitness identification procedures and it was feasible to record such a procedure.

CHAPTER 11
POLICE QUESTIONING

§ 11.01. Objectives of Police Questioning

The goal of police questioning should be to obtain accurate and reliable information, while seeking to eliminate undue coercion, and treat persons with dignity and fairness.

Comment:

a. Accuracy. Law enforcement has a strong interest in obtaining accurate and reliable evidence using police questioning. Police questioning can produce highly probative evidence, including incriminating statements and witness statements, which can be the most important evidence in criminal investigations. However, police questioning also can produce unreliable evidence. The central goal of interviews and interrogation—of a suspect or others—is to secure accurate information. The use of procedures and methods designed to elicit accurate information, test information's accuracy, and carefully document information through recording, can ensure police questioning furthers its appropriate goal. Such safeguards are essential; the problem of false confessions is well known. Not only can physical coercion and torture lead individuals to implicate themselves and others falsely, but it is now equally understood that psychological pressure can do the same. Scientific research has shed light on the ways in which psychological pressure can induce false confessions, and that research—as well as innovations by law-enforcement agencies—provides methods to minimize the risk of obtaining false or unreliable confession statements. Individuals are different and may react to a police interview in very different ways. If officers begin questioning, they should keep an open mind and seek to corroborate the individual's story to assess its veracity.

These Principles do not always track constitutional rulings. Constitutional rulings recognize the dangers of "involuntary" confessions, but do not provide significant protection against false confessions, and largely do not address the reliability of confessions. Traditional constitutional standards require heightened attention to questioning conducted when a suspect is placed in "custody." As discussed in the next Section, these Principles do not rest on this distinction. However, these Principles recognize that the more serious an offense, the greater the law-enforcement interest, such that more sustained questioning may be appropriate.

b. Coercion. These Principles reflect the view that agencies should minimize the coercion that is placed on individuals during police questioning. By coercion, these Principles mean pressure placed upon individuals to cooperate with police questioning in a responsive way. (This Chapter is not intended to provide guidance regarding cooperating witnesses, incentivized witnesses, and police informants, all of which are the subject of a separate set of Principles.) Although neither witnesses nor suspects should be unduly coerced, these Principles focus on the questioning of suspects. Though there typically is less reason to place pressure on witnesses who are not suspected of wrongdoing because they less often are reluctant to share information with law enforcement, to the degree that officers seek to persuade reluctant witnesses, the same principles apply. Coercion can produce false-confession evidence and false statements, implicating accuracy concerns. In addition, while effectiveness alone would not justify undue coercion, less coercive techniques have been used by agencies with great success, and there is no evidence that they are less effective. Coercion also harms the legitimacy interests described next, because applying undue pressure to individuals during police questioning harms individual dignity.

The following Principles identify methods aimed at minimizing the coercion used during interviews and interrogations. Although these Principles reflect the values important to constitutional rulings concerning the Fifth Amendment, they do not track constitutional standards, which typically do not address the degree of coercion that police may use during questioning.

c. Legitimacy. An important goal of police questioning, as with policing generally, is legitimacy, including whether members of the public support and cooperate with the police. Legitimacy requires treating individuals with dignity, and it harms the dignity of individuals to subject them to undue pressure to incriminate themselves. As a society, we abhor the use of torture to secure information from citizens. We equally abhor the use of undue psychological coercion to secure information from citizens. Thus, in addition to the goal of obtaining accurate information useful in criminal investigation—and minimizing coercion—it is important that agencies conduct interrogations in a manner that is fair and respectful of dignity. The use by agencies of unduly coercive or deceptive techniques can undermine the legitimacy of law enforcement.

d. Characteristics of persons being questioned. As is further developed in § 11.05, vulnerable populations—including but not limited to juveniles and persons with mental-health needs—should be questioned with particular care, and to the minimal extent possible. Doing so serves each of the three interests described above: accuracy, minimizing coercion, and legitimacy.

Before questioning, officers should assess the characteristics of the person to be questioned, in order to identify such vulnerable individuals. Policy, training, and additional resources, such as the collaboration of mental-health professionals, can assist officers in making such assessments.

e. Types of questioning. Officers speak to witnesses in circumstances ranging from informal information gathering from cooperative witnesses in the field to questioning of suspects at a police station. These Principles recognize that all police questioning has as its common goal the accurate, minimally coercive, and legitimate investigation of criminal matters. As a result, while interviews of suspects are the focus of these Principles, there is no a firm dividing line between relatively more informal interviews—often conducted outside the police station, of persons who may be witnesses or potential suspects—and interrogations, conducted in a more formal manner and typically in a room at a police station. Each of those types of questioning is vitally important to the preparation of many criminal cases. Information from witnesses as well as suspects can provide crucial information to officers and agencies.

A detailed body of constitutional law applies to police questioning of suspects. One important area of constitutional law—the *Miranda* doctrine—draws a line by asking whether a person is deemed to be in "custody." See Miranda v. Arizona, 384 U.S. 436, 444 (1966). A determination that an individual is in custody, broadly speaking, establishes an obligation to: (1) provide a set of warnings before a custodial interrogation begins, and (2) honor requests for counsel. Constitutional law has very little to say about noncustodial questioning by officers, other than requiring any statement to have been "voluntarily" obtained. The focus in constitutional law on the issue of "custody" can be quite formalistic, and remote from the concerns that motivate these Principles. For example, an innocent person who is not considered to be in custody still may face great pressure to confess falsely. A vulnerable person, such as a juvenile or mentally ill person, may receive unfair treatment that implicates concerns of legitimacy, even if not considered a suspect and not formally deemed to be in custody during the questioning. That said, the concerns with accuracy, coercion, and legitimacy may well be greater in the settings in which more formal custodial questioning occurs. No matter in what form or setting questioning occurs, police professionals ought to have an abiding interest in getting it right. Thus, these Principles do not take as their starting place the line between custodial and noncustodial interviews. Rather, the focus is on obtaining accurate statements with minimal coercion applied by officers in their questioning of a suspect.

To be clear, individuals may face pressure to cooperate and answer questions, due simply to the inherent authority and power of law enforcement, and the role that police officials play in the criminal justice system, This may be the case even if police do not seek to impose any additional pressure. Officers should be mindful that many features of the criminal system, including both the costs of non-cooperation and the benefits of cooperation, can place great pressure on individuals during police questioning.

f. Policy, training, and supervision. To ensure that police questioning yields accurate information, while minimizing coercion, law-enforcement agencies should have in place sound policy, appropriate training, and adequate supervision. Written policies should describe in advance how police questioning should be conducted, consistent with § 1.06, and those policies should be as detailed as is necessary to ensure compliance with these Principles. Training should provide officers with techniques to carry out these policies. Supervisors should review transcripts or video of questioning carried out by officers in order to improve training and to provide guidance to officers.

REPORTERS' NOTES

Police questioning is indispensable to criminal investigations. It can include relatively informal police questioning of witnesses, as well as more formal interrogation of suspects, as discussed in § 11.04. A confession can help to solve a crime that otherwise might have gone unsolved. If a suspect volunteers details about a crime that were not made public, that can provide officers with very probative evidence of guilt. Moreover, many suspects volunteer their guilt quite readily. Careful and professional questioning of non-suspect witnesses can elicit further information that may prove crucial to understanding and solving a crime. These Principles focus primarily on suspects, and not witnesses, because the concerns with coercion and legitimacy are heightened when suspects face pressure to potentially incriminate themselves. However, it is important that sound practices also be used when witnesses, including fully cooperative witnesses, are questioned.

Police interrogation methods have evolved in important ways. That torture or use of physical coercion can cause false confessions has been long known. Well-known false confessions in America date back to Colonial times, to the Salem Witch trials of 1692. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 4 (2010). While use of the third degree has been forbidden for decades by law enforcement, training and policy still commonly permit, if not encourage, the use of a high degree of psychological coercion of suspects. The leading interrogation training manual emphasizes the use of detailed methods designed to secure confessions using psychological techniques, including threats, promises, and deception of suspects. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATIONS AND CONFESSIONS (5th ed. 2013). In recent decades, it has

become better understood that such forms of psychological coercion similarly can produce false confessions. See, e.g., Steve A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 968-974; See Richard J. Ofshe & Richard J. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 984 (1997). Many of the wrongful convictions overturned in recent decades involved psychological, as opposed to physical, coercion. Over time, concerns have grown that psychological techniques can manipulate suspects into falsely confessing. For an overview, see RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 181 (2008).

False confessions are an important cause of wrongful convictions. False confessions have led to over 60 exonerations in cases involving DNA testing and many more cases not relying upon DNA evidence to exonerate. The individuals often spent a decade or more in prison before obtaining their exoneration. Almost without exception, those exonerees were said to have confessed in detail, offering inside information that only the culprit could have known; in retrospect, it is evident that their confession statements were contaminated and that law enforcement must have disclosed those details. See Brandon L. Garrett, *Confession Contamination Revisited,* 101 VA. L. REV. 395 (2015). In addition, the National Registry of Exonerations includes over 200 exonerations that involved confessions, the majority of which were non-DNA exonerations. The National Registry of Exonerations, Joint Project of Mich. Law & Nw. Law, Exonerations by Contributing Factor, at https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx. Agencies have had substantial civil-damages awards imposed in cases in which contaminated confessions led to wrongful convictions. See, e.g., Warney v. State, 16 N.Y.3d 428 (N.Y. 2011); Jerry Markon, *Wrongfully Jailed Man Wins Suit*, WASHINGTON POST, May 6, 2006, B01.

Researchers have documented distinct types of false confessions caused by psychological coercion. Some individuals comply due to pressure placed on them by officers. Others internalize what they are told and actually become convinced of their guilt even though they are innocent. Saul M. Kassin & Katharine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996). Researchers also have raised concerns that innocent individuals face special risks during interrogations. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?,* 60 AM. PSYCHOL. 215, 216, 223 (2005) (describing how innocent individuals may place more trust that law enforcement will ultimately clear them and as a result, place themselves at risk of falsely confessing). Researchers have described the dangers of false confessions for many years. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 523-537 (2003).

An additional problem is that even false confessions can appear to be extremely reliable, and as a result, they can play a powerful role in criminal cases. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1084 (2010). Confession evidence is extremely compelling before a jury. In well-known cases, jurors have convicted individuals even despite DNA testing that excluded them, on the strength of confession statements. Id. The power of confession evidence may be so strong that it also enhances perceptions of the strength of other evidence in a case. Jeff Kukucka & Saul M. Kassin, *Do Confessions Taint Perceptions of*

Handwriting Evidence? An Empirical Test of the Forensic Confirmation Bias, AM. PSYCHOLOGIST (2014). Indeed, once a confession has been secured—false or otherwise—officers may cease investigating other leads and attorneys may be highly motivated to secure a plea.

Constitutional rulings do not provide significant protection against false confessions; they largely do not even address the reliability of confession statements. Rather, they try to rule out police questioning practices that implicate concerns with coercion as well as with legitimacy. See, e.g., Brown v. Mississippi, 297 U.S. 278 (1936); Haynes v. Washington, 373 U.S. 503 (1963); Frazier v. Cupp, 394 U.S. 731 (1969). Nonetheless, the concern with accuracy has been present in some rulings as well. In its ruling in Miranda v. Arizona, the U.S. Supreme Court cited the well-known false-confession case of George Whitmore and how he had confessed due to "brainwashing, hypnosis, [and] fright." 384 U.S. 436, 455 n.24 (1966). More recently, the Supreme Court has cited examples of false confessions uncovered by DNA testing in capital cases. Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) ("in recent years a disturbing number of inmates on death row . . . [including] at least one mentally retarded person [Earl Washington, Jr.] who unwittingly confessed to a crime that he did not commit.").

It has been common among American police interrogators to use the "Reid method," see FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 347 (5th ed. 2013). That method emphasizes a set of psychological techniques designed to confront and accuse a suspect, and then maximize the pressure placed on the suspect to incriminate themselves, while appearing to minimize the consequences for the suspect in doing so. The techniques tend to rely on "some form of deception," ranging from "rationalization" of the person's actions to outright "evidence fabrication." Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After 50 Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 BOSTON U. L. REV. 1157, 1161 (2017).

However, these traditional interrogation methods have been evolving in the United States. A leading interrogation training provider, Wicklander-Zulaski & Associates, no longer trains on the Reid Method. Eli Hager, *A Major Player in Law Enforcement Says it Will Stop Using a Method that is Linked to False Confessions*, Marshall Project, March 9, 2017. The federal High-Value Detainee Interrogation Group (HIG), which includes members of the Central Intelligence Agency, Federal Bureau of Investigation, and other federal law enforcement, has developed interrogation best practices that similarly focus on questioning that is designed to build rapport and "draw out what the detainee knows as opposed to only focusing on the intelligence the team would like to obtain." High-Value Detainee Interrogation Group, Interrogation Best Practices 2 (August 26, 2016), at https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view. Police departments, including in Dallas, Philadelphia, and Los Angeles, have begun to use the approach developed by the HIG.

In response to concerns about several high-profile false confessions, U.K. interrogators also developed an alternative: the PEACE model (for Planning and Preparation; Engage and Explain; Account; Closure; and Evaluation). Slobogin, supra, at 1161-1162. The PEACE interrogation methods used in the United Kingdom, and now in Australia, Denmark, New Zealand, Norway,

Sweden, and other countries, adopts an "investigative interviewing" approach, geared toward obtaining rapport with a suspect and maximizing the amount of information gathered from that suspect. See, e.g., JAMES TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS 218 (2016). Christian A. Messner, Christopher E. Kelly & Skye A. Woestehoff, *Improving Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 213 (2015), citing John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOL. 325 (1993); REBECCA MILNE & RAY BULL, INVESTIGATIVE INTERVIEWING: PSYCHOLOGY & PRACTICE (1999); Thomas M. Williamson, *From Interrogation to Investigative Interviewing: Strategic Trends in Police Questioning*, 20 PSYCHONOMIC BULL. REV. 812 (1993). This model is characterized by the use of noncoercive tactics and open-ended questions. Colin Clarke & Rebecca Milne, *National Evaluation of the PEACE Investigative Interviewing Course*, Police Research Award Scheme (2001); Stavroula Soukara et al., *What Really Happens in Police Interviews of Suspects? Tactics and Confessions*, 15 PSYCHOL. CRIME & L. 492 (2009); David W. Walsh & Rebecca Milne, *Keeping the PEACE? A Study of Investigative Interviewing Practices in the Public Sector*, 13 LEGAL & CRIMINOL. PSYCHOL. 39 (2008). Other alternatives include the approach developed for counterterrorism efforts by the High-Value Detainee Interrogation Group Research Unit. Slobogin, supra.

This Section does not require that agencies adopt any one model of police interrogation, but it rejects the most coercive and deceptive techniques and discourages using methods that have been shown to produce false confessions. The larger thrust of these Principles, that agencies should be most concerned with obtaining accurate information in a fair and dignified manner, is more compatible with training and processes used by approaches, such as the PEACE approach, that depart from the Reid method.

Related to, but separate and apart from, the accuracy-based concern with false confessions, the legitimacy and dignitary concern with physical and psychological coercion is equally important and longstanding. Torture, or use of physical force to secure information from a person, has long been forbidden under the Fifth Amendment. As the U.S. Supreme Court has put it in its rulings, the Fifth Amendment's self-incrimination clause reflects the view that: "important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." Blackburn v. Alabama, 361 U.S. 199, 206-207 (1960). The concern with coercion dates back long before the Fifth Amendment was drafted. Justice Hugo Black famously wrote that "The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations." Chambers v. Florida, 309 U.S. 227, 237-238 (1940). The 1931 National Commission of Law Observance and Enforcement examined the problem of police use of torture and noted that: "the third degree is especially used against the poor and uninfluential." IV Nat'l Comm'n on L. Observance & Enf't, Report on Prosecution 159 (1931). The U.S. Supreme Court has long been concerned with the state using interrogations to coerce individuals "whether by physical force or by psychological domination . . ." In re Gault, 387 U.S. 1, 47 (1967).

Legitimacy concerns are also raised by use of deception, which may undercut credibility of law enforcement in other contexts. Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817 (1997).

However, constitutional rulings do not address adequately the concern with psychological coercion during police questioning, and, as a result, these Principles directly counsel minimizing coercion rather than relying on language in constitutional rulings. The U.S. Supreme Court's Fifth Amendment "voluntariness" test provides a remedy for undue coercion during custodial interrogations. Arizona v. Fulminante, 499 U.S. 279, 303 (1991). However, that test is multi-factored and highly case-specific, and it does not provide clear guidance to law enforcement. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 3 (2015). Courts have upheld, for example, extremely lengthy interrogations. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2046-2047 (1998). Courts have found as voluntary confessions that are now known to have been false. Garrett, *The Substance of False Confessions*, supra; Drizin & Leo, supra, at 944-945, 963-971. Indeed, the Supreme Court has itself noted that the voluntariness test does not provide clear guidance to law enforcement. Dickerson v. United States, 530 U.S. 428, 444 (2000) ("[T]he totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."); Haynes v. Washington, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw"). For that reason, these Principles address the problem of undue coercion directly, and without relying on the constitutional voluntariness test.

Whether a person is deemed to be in "custody" while being "interrogated" can trigger a range of constitutional protections, such as the Fifth Amendment right to remain silent and the Sixth Amendment right to counsel. One goal of these Principles is to move beyond the unwieldy concept of "custody."

The test for whether a person is deemed in custody is not clear. The U.S. Supreme Court recently explained that: "As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." Howes v. Fields, 132 S. Ct. 1181, 1189-1190 (2012). Yet, despite this seeming connection to coercion, the Court's cases often are quite divorced from it. In some cases, the Court engages in a formalistic inquiry about whether it believes a person would feel free to leave, even if the questioning took place behind closed doors at a police station. See Oregon v. Mathiason, 429 U.S. 492 (1977) ("Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."). At other times, the Court relies on an objective "totality of the circumstances" test. *Howes*, 132 S. Ct. at 1189-1910. The Court has held that relevant factors include: "the location of the questioning, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." Id. The individual characteristics of the person being questioned are also relevant, including whether the person is a juvenile. J.D.B. v. North Carolina, 564 U.S. 261 (2011). In other cases, the Court has held that age and experience with law enforcement were not relevant circumstances. Yarborough v. Alvarado, 541 U.S. 652

(2004). The Court has held that questioning during traffic stops does not constitute custodial interrogation. Berkemer v. McCarty, 468 U.S. 420, 437-438 (1984). Yet, the Court also has said that people who are in prison are not necessarily in "custody" when questioned. *Howes*, 132 S. Ct. at 1190 (reasoning that "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest.").

As the language from those tests and the outcomes in those cases suggest, the U.S. Supreme Court's Fifth Amendment "totality of the circumstances" test does not provide very useful guidance to law enforcement. The distinctions set out in the cases are not intuitive. They create opportunities for gaming the system, rather than a clear set of best practices for interviews and interrogations. Thus, in rulings such as Salinas v. Texas, 133 S. Ct. 2174 (2013), the U.S. Supreme Court has been highly tolerant of police questioning of individuals deemed not to be in "custody," without providing warnings under *Miranda* and the accompanying constitutional protections. Informal questioning is a valuable and important practice, but, like formal questioning of suspects, it too should be governed by careful principles and policy.

The rulings in constitutional litigation are geared toward determining whether evidence will be admissible at a criminal trial, are not focused primarily on what is desirable as a matter of sound policy and practice, and often have very little to do with reliability or coercion. These Principles, by contrast, encourage officers to follow procedures designed to ensure that rights are respected and reliable information is obtained, no matter what the interview or interrogation setting. Constitutional law sets a floor and must be followed, but these Principles are intended to address concerns, often neglected by constitutional law, regarding reliable confessions, statements obtained with minimal coercion, and ensuring legitimacy and treatment of individuals with dignity.

§ 11.02. Recording of Police Questioning

Written policies should set out the procedures for the recording of questioning, and for the disclosure and the retention of recorded evidence, and should provide that:

(a) absent exigent circumstances, officers should record questioning of suspects in its entirety;

(b) officers should record questioning of witnesses whenever feasible; and

(c) in situations in which recording is not conducted, officers should document questioning, taking notes contemporaneously when possible, and memorializing conversations immediately thereafter.

Comment:

a. Recording questioning of suspects. A suspect, or a person who police have reason to believe committed a crime being investigated, may be questioned in a manner that is inherently

more accusatory and coercive than the manner in which police question a witness, or a person who police believe has information about a crime. Police may not know whether a person is a witness or also a suspect when they initiate questioning, and when in doubt, they should therefore err on the side of providing the procedures available to suspects. Unless exigent circumstances make it impossible, questioning of suspects should be recorded, in its entirety, including the provision and waiver of *Miranda* rights. This is essential to ensure a complete record and to prevent any doubt about what happened outside the record. Video recording is preferable. Exigent circumstances might include equipment failure combined with a pressing public-safety need to conduct questioning without delay. Recording may be less feasible in the field, though body-worn cameras may be available for recording purposes. Cost considerations also are relevant, both for police and legal actors, particularly if recording is extended beyond questioning of suspects.

Suspects should be told that they are being recorded. For some suspects who are not willing to speak if recorded, procedures should make available the option of not recording or using methods to redact video or audio to mask the identity of the witness. Policy and procedure should make available and define such special precautions to officers. Video cameras should be positioned so that the field of view includes both the officer and the person being questioned. Policies, at the agency level or preferably at the state level, should provide procedures for recording interrogations. Such policies should provide clear instructions for stopping and starting the recording. Governments should make resources available to agencies to purchase and maintain equipment needed to record the questioning of individuals.

b. Recording questioning of witnesses. Questioning of witnesses may sometimes be conducted in less formal settings, but such questioning should be recorded whenever feasible. Witnesses should be told that they are being recorded. As with suspects, there may witnesses who are not willing to speak if recorded and there may be safety and security concerns that counsel redacting video or audio to mask the identity of the witness. Policy and procedure should make available and define such special precautions to officers. When such a recording is not conducted, officers should take notes contemporaneously to provide as accurate and timely a record as possible of what transpired. If there is not a recording, any reporting or memorialization of those conversations similarly should occur immediately after questioning.

c. Disclosure. Agency policies should set out rules for disclosure of recordings to lawyers in discovery and for storage of archived records.

d. Retention. As discussed elsewhere in these Principles, clear policies should set out the rules for retention of recorded statements. Such evidence should be retained in a manner designed to be usable in the future, and should not be dependent on technology that is proprietary or likely to be obsolete in a way that might hamper future access.

REPORTERS' NOTES

A large body of high-profile exonerations of innocent persons have occurred in cases in which false confessions were obtained during interrogations that were not recorded. Absent a recording, officers asserted that suspects had volunteered "inside" information or details about a crime that only the culprit and the investigators had known. With the benefit of DNA testing, the public learned years later that the suspects were in fact innocent and that such details must have come from police. The problem is known as "confession contamination." BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 21-44 (2011).

Recording police questioning assists law-enforcement agencies and furthers the important goal of documenting evidence and ensuring the conviction of those who commit wrongdoing. Orin Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L. J. 700, 715 (2010) ("To create a record of the event, the officer might record a suspect's confession.").

Video recordings also empower judges to better assess the reliability of interrogation evidence, both to reject false claims of police overreaching and to examine potential wrongful convictions. Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 503 (Winter 1998); Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in The Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions,* 85 TEMP. L. REV. 759 (2013). Agencies have reported positive experiences with recording interrogations because it provides powerful documentation that interrogations are conducted professionally and non-coercively. Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOL. 215, 220-221, 228-234 (2009). Fears that "few would allow themselves to be interviewed or interrogated" if it were known that interviews and interrogations are recorded have not been realized in jurisdictions in which recording has been introduced. NATHAN J. GORDON & WILLIAM L. FLEISCHER, ACADEMY FOR SCIENTIFIC INVESTIGATIVE TRAINING, EFFECTIVE INTERVIEWING & INTERROGATION TECHNIQUES 209 (2d ed. 2006). That said, some flexibility with reluctant witnesses may be important. In addition, it may be increasingly feasible to conduct video recording in the field, as body-worn cameras are utilized more widely by agencies.

In response to the problem of false confessions, and to better document professionally conducted questioning, law-enforcement agencies themselves have shifted to requiring recordings. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs,* 31 LAW & HUM. BEHAV. 381, 382 (2007). Most prominently, videotaping evidence during interviews and interrogations is increasingly ubiquitous. Doing so provides a

complete record of who said what during an interrogation. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications,* 37 J. AM. ACAD. PSYCHIATRY & L. 332, 337 (2009) ("Interrogators help create the false confession by pressuring the suspect to accept a particular account and by suggesting facts of the crime to him, thereby contaminating the suspect's postadmission narrative . . . . If the entire interrogation is captured on audio or video recording, then it may be possible to trace, step by step, how and when the interrogator implied or suggested the correct answers for the suspect to incorporate into his postadmission narrative."); see also Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 311 (2003) (arguing that due process requires recording interrogations).

State statutes increasingly have required recording at least some categories of police questioning. ANN. CAL. PENAL CODE § 859.5 (West 2014) (requiring recordings for juveniles suspected of murder; exception for "exigent circumstances"); CONN. GEN. STAT. § 54-10 (West 2014) (requiring recordings for suspects of capital or class A or B felonies; statements made during or after unrecorded interrogations presumptively inadmissible); D.C. CODE § 5-116.01 (2009) (requiring police to record all custodial investigations); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2009) (requiring police to record interrogations in all homicide cases); 705 ILL. COMP. STAT. ANN. 401.5(b-5) (expanding range of felonies for which recording is required for juvenile suspects); 725 ILL. COMP. STAT. ANN. 103-2.1(b-5) (expanding range of felonies for which recording is required for adult suspects); ME. REV. STAT. ANN. tit. 25, § 2803-B (2009) (mandating recording "interviews of suspects in serious crimes"); MD. CODE ANN., CRIM. PROC. § 2-402 (2009) (requiring that law enforcement make "reasonable efforts" to record certain felony interrogations "whenever possible"); MICH. COMP. LAWS ANN. §§ 763.8, 763.9 (West 2013) (requiring recordings for individuals suspected of major felonies); MO. REV. STAT. ch. 590.700 (Vernon 2013) (requiring recording for certain felonies); MONT. CODE ANN. § 46-4-408 (West 2009) (requiring the recording of all custodial interrogations); NEB. REV. STAT. ANN. §§ 29-4503, 29-4504 (West 2008) (requiring recording for interrogations relating to certain offenses and providing for jury instructions in the event of failure to do so); N.M. STAT. ANN. § 29-1-16 (West 2006) (requiring recordings of all custodial interrogations); N.C. GEN. STAT. § 15A-211 (2009) (requiring complete electronic recording of custodial interrogations in homicide cases); OHIO REV. CODE ANN. § 2933.81 (Baldwin 2010) (providing for a presumption of voluntariness for recorded statements made in response to interrogation); OR. REV. STAT. § 133.400 (West 2009) (requiring the recording of interrogations of suspects for aggravated murder, crimes requiring imposition of a mandatory minimum sentence, or adult prosecution of juvenile offenders); WIS. STAT. ANN. §§ 968.073, 972.115 (West 2009) (requiring recording of felony interrogations and permitting jury instruction if interrogation not recorded); 13 V.S.A. § 5581 (2014) (requiring recording of entire interrogations in homicide and sexual-assault investigations, with a burden on prosecutors to show by a preponderance of the evidence that an exception justified failure to comply); see also TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2007) (rendering unrecorded oral statements inadmissible unless the statements contain "assertions of facts or circumstances that are found to be true . . . .").

Many state courts also have required recordings of police questioning. See Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) ("[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process. . . ."); State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006) ("[E]lectronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so."); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[A]ll questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); State v. Cook, 847 A.2d 530, 547 (N.J. 2004) ("[W]e will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations."); In re Jerrell C.J., 699 N.W.2d 110, 123 (Wis. 2005) ("[W]e exercise our supervisory power to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."); see also Commonwealth v. DiGiambattista, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out failure to record interrogation and calling unrecorded admissions "less reliable"); State v. Barnett, 789 A.2d 629, 663 (N.H. 2001) ("immediately following the valid waiver of a defendant's *Miranda* rights, a tape recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety"); N.J. Supreme Court Rule 3:17 (following *Cook,* requiring electronic recording of custodial interrogations).

The recording of police questioning is required or recommended in many respected quarters. The U.S. Department of Justice has a memorandum setting out a policy for recording interrogations. See Memorandum from James M. Cole, Deputy Attorney Gen., Dep't of Justice, Policy Concerning Electronic Recording of Statements 1 (May 12, 2014), http://archive.azcentral.com/ic/pdf/DOJ-policy-electronic-recording.pdf (creating a presumption that statements by individuals in federal custody, following arrest but prior to a first court appearance, will be electronically recorded). The International Association of Chiefs of Police recommends recording "all interviews involving major crimes" and prefers video recordings. International Association of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 18 (August 2013); see also International Association of Chiefs of Police, Interviewing and Interrogating Juveniles Model Policy (May 2012); International Association of Chiefs of Police, Electronic Recording of Interrogations and Confessions Model Policy (February 2006). Scholars have advocated videotaping interrogations for some time. Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL'Y 400, 427 (2012); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 520-535.

Although these Principles take no position on the admissibility of unrecorded statements, others have. The Alaska Supreme Court has ruled that judges should suppress unrecorded statements unless failure to record is excused by good cause. Stephan v. State, 711 P.2d 1156 (Alaska 1985). The Restatement of the Law, Children and the Law, calls for the exclusion of unrecorded statements in court. Restatement of the Law, Children and the Law § 14.23, Reporters'

Notes (AM. L. INST., Tentative Draft No. 1, 2018) (citing authority including State v. Scales, 518 N.W.2d 587, 592-593 (Minn. 1994); In re Dionicia M., 791 N.W.2d 236, 241 (Wis. 2010); State v. Barnett, 789 A.2d 629 (N.H. 2001); IND. R. EVID. 617; WIS. STAT. ANN. §§ 938.195, 938.31; WIS. STAT. ANN. §§ 968.073, 972.115; TEX. FAM. CODE ANN. § 51.095; MONT. CODE ANN. § 46-4-409(1); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (same)). See also Thomas Sullivan, *Video Recording of Custodial Interrogation: Everybody Wins*, 95 J. CRIM. L. & CRIMINOL. 1127 (2005) (proposed model statute presumptively excluding unrecorded interrogation statements). Many state statutes also retain exceptions for exigent circumstances, such as for equipment malfunctions. See, e.g., N.C. GEN. STAT. ANN. § 15A-211(e); VT. STAT. ANN. tit. 13, § 5585(c)(1); N.J. CT. R. 3:17(b); IND. R. EVID. 617(a); WIS. STAT. ANN. § 972.115(2)(a); MONT. CODE ANN. § 46-4-409(1). Others create an exception for a spontaneous statement that could not be recorded in time. See, e.g., ARK. R. CRIM. P. 4.7(b)(2); CONN. GEN. STAT. ANN. § 54-1*o*(e); 725 ILL. COMP. STAT. ANN. 5/103-2.1(b-10); IND. R. EVID. 617(a); N.C. GEN. STAT. ANN. § 15A-211(g); N.J. CT. R. 3:17(b); N.M. STAT. ANN. § 29-1-16(C); MONT. CODE ANN. § 46-4-409(1); MO. ANN. STAT. § 590.700(3); OR. REV. STAT. ANN. § 133.400(2); TEX. CRIM. PROC. CODE ANN. art. 38.22, § 5; WIS. STAT. ANN. § 972.115(2)(a). Some statutes include a "good cause" provision like that stated in this Section. See, e.g., N.M. STAT. ANN. § 29-1-16(F); N.C. GEN. STAT. ANN. § 15A-211(e); OR. REV. STAT. ANN. § 133.400(2); WIS. STAT. ANN. § 968.073(2). This Section also adopts the approach of Restatement of the Law, Children and the Law § 14.23 (Am. L. Inst., Tentative Draft No. 1, 2018), except that it extends the same rule to adult interrogations and not just to juvenile interrogations.

Through their grant programs, governments should make resources available to agencies to purchase and maintain the equipment needed to record questioning of individuals. The equipment needed to record police questioning is increasingly inexpensive; however, resources also should be made available to facilitate the storage of data from recordings, as well as to reproduce those recordings in a form that is easily accessible to attorneys and judges.

§ 11.03. Informing Persons of Their Rights Prior to Questioning

Officers should inform suspects—whether in formal custody or not—of any right to refrain from speaking with the officers or right to counsel, and ensure that any waivers of those rights are knowingly and voluntarily made. Any invocation of rights must be respected, and if there is any uncertainty as to whether rights are being invoked, officers should take the time to clarify that. Waivers of rights should be documented using appropriate agency forms, and should be recorded in accordance with § 11.02.

Comment:

a. Constitutional rights. The Fifth and Sixth Amendments to the U.S. Constitution require that officers provide warnings to suspects in custody before questioning them, and the U.S.

Supreme Court has held that no statement can be admitted unless the suspect has waived those rights. However, *Miranda* protections that apply during police questioning have been undermined in a range of Supreme Court decisions. As a result, this Section adopts the view that if constitutional safeguards are to be meaningful, care must be taken when securing waivers of rights.

b. Best practices. When in doubt about whether constitutional law requires obtaining a waiver or not, it is the better practice to err on the side of providing warnings, and clearly documenting any waivers of rights by an individual, *before* an interview or interrogation commences. Officers must ensure that any waiver of rights is voluntary, well-informed, and understood. Officers must make the meaning of the rights clear to suspects. In doing so, additional warnings may be necessary. Officers must take special care when questioning individuals who are members of vulnerable populations. See § 11.05 (Questioning of Vulnerable Individuals). After providing a standard statement of available rights, officers must ask questions to secure an affirmative waiver of rights. If a suspect invokes his or her rights, officers must respect that invocation promptly. Any ambiguity concerning an invocation should be promptly clarified to ensure that the rights of a person are carefully respected.

c. Right to counsel. Under the Fifth and Sixth Amendments of the U.S. Constitution, a person has the right to request an attorney during an interrogation. Agencies must take measures to ascertain if an individual already is represented by counsel, and if so to cease questioning in order to ensure that counsel is notified or present. If questioning a person who has, or has requested, counsel, officers must document and—when possible—obtain written verification that the person initiated the communication despite being aware of the right to have counsel present.

d. Documentation. Officers should record the process of informing persons of their rights, the persons' responses, and any subsequent questioning, as described in § 11.02.

REPORTERS' NOTES

This Section emphasizes that agencies must ensure that suspects only waive their rights after a meaningful opportunity to consider whether or not to do so. The focus here is not on revisiting constitutional-law requirements, but rather on making them meaningful by ensuring that all suspects, including those of varying ages, learning ability, mental health, and language skills, can understand what is transpiring, and exercise free will as to whether they wish to be questioned.

The U.S. Supreme Court ruled in several cases regarding how a waiver should be obtained and the need to ensure that a waiver is informed. For example, while the Court has said that "[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to

remain silent and the right to counsel," the Court has held that a waiver of rights may be "implied" from silence, even after several hours of a suspect remaining silent in the face of police questioning. Berguis v. Thompkins, 560 U.S. 370, 383 (2010). In addition, the Court has permitted "a good-faith *Miranda* mistake" to excuse an officer's failure to provide the warnings, in a departure from its rules that typically impose an objective standard of care. Missouri v. Seibert, 542 U.S. 600, 611 (2004) (plurality opinion). Such standards and distinctions are complex and have been criticized as not faithful to the *Miranda* ruling itself. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L. J. 1 (2010). In any event, these rulings are not intended to define a comprehensive set of best practices for law enforcement. That makes it all the more important that agencies ensure that officers take care to inform suspects of their rights to not answer questions and to counsel.

It is important to ensure that if someone is a suspect, that person is advised of his or her rights in a clear and careful fashion, the process is documented, and assertions of rights are respected. Agencies should err on the side of advising persons of the right to remain silent and of the right to counsel. Agencies also should err on the side of notifying counsel.

Further, agencies should restrict the use of tactics in which waivers are not obtained promptly and before questioning proceeds. The concern shared by many observers is that interrogators deemphasize warnings, making them seem like an irrelevant afterthought, in order to see that such warnings are disregarded by the subject. Richard A. Leo & Welsh White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda,* 84 MINN. L. REV. 397-472 (1999).

§ 11.04. Conducting Police Questioning

When questioning individuals, officers should:

(a) minimize the length of questioning;

(b) avoid leading questions and disclosing details that are not publicly known;

(c) avoid threats of harm to the individual or others or, conversely, avoid making promises of benefits to the individual or others;

(d) avoid the use of deceptive techniques that are likely to confuse or pressure suspects in ways that might undermine accuracy of evidence;

(e) ensure the individual has access to basic physical and personal needs, including food, water, rest, and restrooms; and

(f) not question the individual in an environment that is unduly uncomfortable.

Comment:

a. General. As stated in § 11.01, the objectives of police questioning are to obtain accurate information while minimizing coercion and respecting legitimacy, dignity, and fairness values. Any police questioning inherently involves some degree of coercion; the goal should be to minimize such coercion in order to improve the accuracy of the information obtained and to protect the rights and the dignity of individuals. Although the U.S. Constitution requires that a confession be voluntary and not overbear a person's will (considering the totality of the circumstances), constitutional law provides little clear guidance to officers regarding their conduct in questioning suspects. This Section adopts the view that officers have an obligation, independent of any obligation imposed by the Constitution, to assess an individual's potential vulnerability to both suggestion and coercion. Members of vulnerable populations, such as juveniles and individuals with mental-health issues, should be questioned with an even greater degree of care. The need to question with care and respect, and to minimize undue coercion, is still greater for witnesses who are not suspects, and who are not being accused of criminal involvement.

b. Length of questioning. Interrogations should be limited to the minimum amount of time required to obtain the information needed. In general, interviews and interrogations should not be conducted for more than three hours in one sitting. Shorter periods may be appropriate for vulnerable suspects, such as juveniles. Officers also should be attentive to the time of day and whether the suspect may be sleep deprived, as sleep deprivation creates risks for suggestiveness and false confessions.

c. Avoiding the use of leading questions. An interviewer or interrogator normally should not lead the subject, but rather should ask open-ended questions designed to elicit the most accurate and detailed information possible. An interview should be conducted in a manner that encourages a productive exchange of information. Officers should make in advance a checklist of key nonpublic facts, as part of the investigative file, which should not be disclosed during the investigation. During questioning, officers should ask only open-ended questions concerning itemized key facts that the culprit of the crime would be expected to know. Asking leading questions concerning facts that are important in an investigation can contaminate the record, because it cannot be later assessed whether the suspect could have volunteered that information. Taking care to avoid disclosing those key facts will provide powerfully probative evidence of the reliability of any statement, if a person volunteers key nonpublic facts without prompting.

d. Threats of harm. Threats of harm should not be employed. For example, officers should not, in an effort to pressure a witness, threaten loss of child custody or arrest of a relative. Although some courts have admitted interrogations and confession statements despite threats of harm that officers make, such threats, whether directed at an individual or others such as family members, may cause unnecessary distress and render a statement unreliable. Because they also are implicit threats of harm if a statement is not forthcoming, promises of benefits such as leniency, to the individual or to others, also should not be used as inducements.

e. Deception. Deceptive tactics should be avoided to the extent that they risk the accuracy of evidence, contribute to the possibility of false confessions, create a less reliable record, and harm the legitimacy of investigations. Although some types of mild use of deception, such as expressing sympathy for the defendant's situation, may not raise such concerns, officers should avoid deceptive practices that are likely to confuse or pressure suspects in ways conducive to false confessions.

Courts conducting a constitutional analysis consider deception as one factor in the totality of the circumstances inquiry. Although courts often have tolerated some forms of deception, including lies about the evidence available to the police, agencies and police training increasingly counsel against use of severe forms of deception, and in particular the use of false evidence, during interrogations. Scientific research has demonstrated that deception, or any misrepresentation or misinformation, can have a significant impact on one's beliefs and memory. Use of false evidence, such as fictional accounts that lead suspects to believe that DNA conclusively ties them to the crime, that an eyewitness has identified them as the perpetrator, or that another suspect has called them a fellow conspirator, are especially likely to increase both the risk of false confessions and of the police receiving unreliable information from a guilty suspect; they also can be highly coercive, and can harm the legitimacy of investigations.

f. Deprivation of food, water, and restroom access, and other unduly coercive practices. Deprivations of food, water, and restroom access, among many types of actions and environments that persons would find uncomfortable or harmful, are highly inappropriate. Such conduct should never occur, either for suspects or for witnesses. Persons who belong to vulnerable populations may have still greater sensitivity to environmental conditions and additional care should be taken with them. The named types of unduly coercive practices are illustrative; this Section does not constitute an exhaustive list. Nor does this list highlight still more abusive and obviously coercive practices such as the use of physical torture, which should not be permitted.

REPORTERS' NOTES

The U.S. Supreme Court's "voluntariness" test assessing coercion during custodial interrogations is not adequate to, or even intended to, inform sound police practices or assess or safeguard the reliability of interrogations. Dickerson v. United States, 530 U.S. 428 (2000). The topics addressed in this Section relate to concerns sometimes expressed by the courts, but rarely addressed in a clear way.

To provide an example, the U.S. Supreme Court has not regulated with any care the length of interrogations. The Court has noted that "there is no authority for the proposition" that an interrogation that is three hours long "is inherently coercive." Berguis v. Thompkins, 560 U.S. 370, 387 (2010). In contrast, policing experts recognize that length of interrogations must be carefully monitored. Even the Inbau and Reid treatise recommends that interrogations not typically last more than three hours (now "three or four" hours). FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 422 (4th ed. 2001) The Fifth Edition states that "for the ordinary suspect" a "properly conducted interrogation that lasts 3 or 4 hours" would not constitute "duress." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 347 (5th ed. 2013). For those reasons, this Section counsels minimizing the length of police questioning. In addition, researchers have examined how sleep deprivation caused by lengthy interrogations can increase the susceptibility of suspects to police pressure and suggestion. Mark Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 48, 56 (1996) (studying effects of sleep deprivation).

This Section counsels avoiding asking leading questions. That is particularly crucial as to key pieces of information, in order to ensure that the individual can provide that information without prompting. The interrogation training materials, originally written by Fred Inbau and John Reid, and now in their Fifth Edition, are emphatic on this point: it is crucial not to ask leading questions that potentially contaminate confession evidence. Inbau and Reid have called it "highly important" to "let the confessor supply the details of the occurrence." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 367 (4th ed. 2001). Thus, "[w]hat should be sought particularly are facts that would only be known by the guilty person." Id. at 369. The current Fifth Edition slightly modifies that language but makes the point equally emphatically. See FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 315, 355 (5th ed. 2011) ("It is highly important . . . that the investigator let the confessor supply the details of the occurrence, and to this end, the investigator should avoid or at least minimize the use of leading questions" and "the lead investigator should decide and document on the case folder what information will be kept secret."). A further best practice involves holding back key facts and ensuring that they are carefully documented in the officers' files as important and not to be released to the public. As noted, if those facts are then disclosed by the suspect voluntarily and without prompting, the statement can provide particularly probative evidence of guilt. See also Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1066-1067 (2010) (describing police training on avoiding contamination).

Use of non-leading questions to solicit information in an open-ended way is the basis for what are called Cognitive Interviewing techniques, which have been researched and found to produce improvements in the recollection of witnesses. The Cognitive Interview was developed several decades ago by Ron Fisher and Ed Geiselman in response to requests from law enforcement for improved methods to interview witnesses. RON P. FISHER & ED R. GEISELMAN, MEMORY ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW (1992). These techniques focus on permitting the witness to provide as much information as possible. They are based on principles designed to retrieve information from memory with completeness and accuracy. A series of laboratory experiments and field tests have documented that these techniques produce more complete and accurate information about events, whether in policing situations, eyewitness recall, or events in corporate environments. See, e.g., Amona Memom, Christian Meissner & Joanne Fraser, *The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years*, 16 PSYCHOL. PUB. POL'Y & L. 340 (2010). Such techniques may be far preferable not just for interrogations, but for interviews, including with witnesses who want to cooperate but who might have difficulty recalling events, as all witnesses will. Jillian R. Rivard et al., *Testing the Cognitive Interview with Professional Interviewers: Enhancing Recall of Specific Details of Recurring Events*, 28 APPL. COGN. PSYCHOL. 917 (2014).

Psychologists have long recommended that a range of unduly coercive and deceptive techniques be discontinued during interrogations. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations,* 34 LAW & HUM. BEHAV. 3 (Feb. 2010). Legal scholars also have called for the end to techniques such as deception. See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L. J. 791 (2006); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327 (2011).

Deception during interrogation can take many forms. Officers may use relatively innocuous forms of deception, such as phony pleasantries, or they may concoct rationalizations that they hope will coax a confession ("It might have been self-defense"), or they can resort to more complex deception, such as false evidence ploys. Courts evaluate these techniques under a totality of the circumstances test, which tends to grant officers a great deal of leeway in interrogation settings. As a result, judicial rulings have been fairly deferential to the use of deception. See, e.g., Illinois v. Perkins, 496 U.S. 292, 297 (1990) (referring to deception as "strategic," and not "ris[ing] to the level of . . . coercion to speak"); State v. Rettenberger, 984 P.2d 1009, 1015 (Utah 1999) (deception must be "sufficiently egregious to overcome a defendant's will so as to render a confession involuntary"). See generally, Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U. L. Rev. 601, 612-614 (2006) (reporting cases upholding police lies about "witnesses against the defendant, earlier statements by a now-deceased victim, an accomplice's willingness to testify, whether the victim had survived an assault, 'scientific' evidence available, including DNA and fingerprint evidence, and the degree to which the investigating officer identified and sympathized with the defendant"). Generally, only deception that clearly is likely to cause a false confession finds disfavor in the courts. See, e.g.,

People v. Thomas, 8 N.E. 308, 317 (N.Y. Ct. App. 2014) ("The various misrepresentations and false assurances used to elicit and shape defendant's admissions manifestly raised a substantial risk of false incrimination"). For the same reason, deception is less likely to be tolerated when the suspect is a particularly vulnerable suspect. See, e.g. Ex parte Hill, 557 So.2d 838, 841 (Ala. 1989).

Despite the courts' generally lenient approach to interrogation, law enforcement agencies do not commonly use highly-deceptive techniques. For example, Saul Kassin and Richard Leo's survey of officers found that, while on average police "appeal to the suspect's self-interest," "offer sympathy, justification or excuses," or "pretend to have evidence of guilt" in roughly 10% of interrogations, the most common techniques by far simply involve isolation of the suspect and confrontation with actual evidence, during questioning that lasts on average of 1.6 hours. See Saul M. Kassin and Richard A. Leo, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 Law & Hum. Behav. 381 (2007). In the vast majority of interrogations, no special technique is needed to gain a confession. See Brent Snook at al., *The Next Stage in the Evolution of Interrogations: The PEACE Model*, 18 Can. Crim. L. Rev. 219, 236 (2014) (finding the confession rate to be similar whether manipulative questioning or a non-deceptive confrontation technique was used).

Further, police training discourages the use of the more manipulative techniques. The leading treatise on interrogation techniques counsels that deception "represents a continuum of false representations, ranging from demeanor and attitude to outright lies concerning the existence of evidence." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 351 (5th ed. 2013). Although that treatise sanctions some forms of deception, it also cautions that certain fabrications, including the presentation of false evidence, combined with other incentives, makes it "much more plausible that an innocent person may decide to confess," and concludes that fictitious evidence should only be presented to the suspect "as a last resort effort." Id. at 352. Further, the treatise emphasizes, such false evidence ploys should never be used with juveniles or those with diminished mental capacity: "These suspects may not have the fortitude or confidence to challenge such evidence and, depending on the nature of the crime, may become confused as to their own possible involvement.'' Id.

A large body of scientific research emphasizes that misrepresentation of reality to subjects can alter beliefs, behavior, emotional states, event memories, physiological states, and visual memories. As Professor Kassin and his colleagues have stated, "generations of behavioral scientists" have accepted the scientific conclusions that people are "highly responsive to reinforcement" and that false information affects memory and behavior. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations,* 34 LAW & HUM. BEHAV. 3 (Feb. 2010). Thus, "[s]cientific evidence for human malleability in the face of misinformation is broad and pervasive." Id. See also Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 20-year Investigation of the Malleability of Memory*, 12 Learning & Memory 361 (2005).

In an interrogation setting, deception can affect reliability in a number of different ways. Forensic literature on confessions has shown how deception can cause innocent suspects to believe that they did something wrong or that they will be able to prove their innocence once interrogation

is over. Virtually all of this research finds that deceptive techniques such as minimizing the impact of a confession significantly increases the risk of false confessions. For just a few examples from the body of experimental work on this topic, see Saul Kassin & K.L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychological Science 125-128 (1996); Melissa B. Russano, Christian A. Meissner, F.M. Narchet, & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychological Science, 481–486 (2005); Julia Shaw & Stephen Porter, *Deception Can Create False Memories Constructing Rich False Memories of Committing Crime*, 26 Psychological Science 291 (2015); Robert A. Nash & Kimberley A. Wade, *Innocent but Proven Guilty: Using False Video Evidence to Elicit False Confessions and Create False Beliefs*, 23 Applied Cognitive Psychology 624 (2009).

Police deception may interact with other factors to increase the risk of inaccuracy even further. For example, deception may have greater impact during lengthy interrogations, or for vulnerable persons. As a result, psychologists long have recommended that unduly coercive and deceptive techniques, particularly the use of false evidence ploys, be discontinued or curtailed during interrogations. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations,* 34 LAW & HUM. BEHAV. 3 (Feb. 2010); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327 (2011). Legal scholars also have called for the end to deceptive techniques. See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L. J. 791 (2006); Julia Simon Kerr, *Public Trust and Police Deception*, 11 NORTHEASTERN U. L. REV. 625 (2019); Welsh White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581 (1979). For the contrary argument, that police deception could result in fewer confessions by guilty persons, see Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1209 (2001).

Independently of its effect on accuracy, deception during interrogation can be coercive and undermine the legitimacy of law enforcement. The relatively mild forms of deception, such as showing false sympathy or providing rationalizations for the suspect to ponder, probably are not coercive in any meaningful sense. But the false evidence ploy might lead a suspect, especially an innocent one, to believe there is no choice but to confess, including on the ground that police who are willing to manufacture evidence may be capable of much worse. Further, that technique is particularly likely to taint law enforcement. See United States v. Orso*,* 266 F.3d 1030, 1039 (9th Cir. 2001) ("[M]isrepresenting a piece of the evidence . . . [is] reprehensible."); *State v. Register*, 476 S.E.2d 153, 158 (S.C. 1996) ("The misrepresentation of evidence by police is a deplorable practice."). Some commentators have argued that any form of deception during interrogation is ultimately misguided, because it creates a culture of deceit within the police organization and reduces the ability of the police to obtain cooperation from a distrustful citizenry. See Gohara, supra; Margie Paris, *Lying to Ourselves*, 76 Or. L. Rev. 817 (1997).

Finally, although interrogation techniques have long been touted as enabling officers to serve as human lie detectors, they have not been proven to do anything of the sort. Any so-called

behavioral analysis or reliance on nonverbal or verbal cues from a suspect to detect deception should be used sparingly. Researchers have documented for some time that officers are not actually better than laypeople at detecting deception, and they perform no better than chance. See Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 500-501 (1999); Christian A. Meissner & Saul M. Kassin, "*He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 472 (2002).

These Principles emphasize, however, that in addition to the concern with the accuracy of certain highly coercive questioning methods, there is the separate concern that police questioning should ensure legitimacy, respect for dignity, and fairness.

§ 11.05. Questioning of Vulnerable Individuals

(a) Officers should assess carefully a person's background, age, education, language access, mental impairment, and physical condition, in order to determine vulnerability to coercion and suggestion.

(b) Officers should minimize the need to question vulnerable people and members of vulnerable populations, such as minors, people with mental illness, people with developmental disability, and people affected by substance-related impairment. If they do question vulnerable individuals, they should do so with minimal coercion and the utmost care.

(c) Hearing-impaired and sight-impaired individuals should be provided with necessary assistance prior to the reading of rights or any questioning.

(d) Persons of limited English proficiency should be provided with translators prior to the reading of rights or any questioning.

(e) A minor age 14 or younger may give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

Comment:

a. Vulnerable individuals. Vulnerable populations, such as juveniles, people with mental illness, people with developmental disability, people with substance-related impairments, and hearing-impaired individuals or persons of limited English proficiency, should be questioned with caution. Officers should take steps to ask about the abilities and limitations of a particular person, in order to identify vulnerable individuals, including members of vulnerable populations. If the

officer is aware that the person is a vulnerable individual, or a member of a vulnerable population, additional steps should be taken to explain warnings using simplified language. Agencies have adopted enhanced warnings for minors and other members of vulnerable populations. An officer can assess a person's understanding of warnings simply by asking the person to repeat them in his or her own words. If a waiver occurs, any subsequent questioning should then proceed cautiously and with careful attention to these Principles, including by greatly limiting the length of the questioning.

b. Hearing-impaired and non-English-speaking individuals. Hearing-impaired and persons of limited English proficiency should be provided with necessary assistance or translators prior to the reading of rights or any questioning.

c. Minors under age 14. Minors are at heightened risk for false confessions and coercion. The U.S. Supreme Court has long observed that minors, due to developmental immaturity, are more vulnerable to coercion. As a result, confessions by minors has long been viewed by the courts with "special caution." In re Gault, 387 U.S. 1, 45 (1967). Minors waive their rights at very high rates. The U.S. Supreme Court has recognized the emotional and developmental differences between adults and minors, and the implications that those have for the conduct of juvenile interviews in general and interrogations in particular. Those differences must be taken into account when an officer conducts an interview or interrogation of a minor. In addition, a substantial body of scientific research, including neurological research, documents how minors, as well as young adults, are generally more impressionable and vulnerable to suggestion than adults and may be more susceptible to intimidation by the situation and the presence of police officers.

Restatement of the Law, Children and the Law § 14.22 (Tentative Draft No. 1, 2018) states that "a juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel." The Restatement qualifies the statement with "[u]nless otherwise provided by statute." These Principles set out best practices, rather than restating existing law. Therefore, while the Restatement acknowledges that certain statutes may disregard the child's lack of capacity in establishing the legal consequences of a waiver, these Principles reject such qualification. If a juvenile is not competent to waive his or her rights, we do not believe a statute to the contrary changes that fact.

d. People with mental illness and people with intellectual disability. While officers are not psychiatrists or psychologists, a good-faith effort should be made to identify people with mental

illness and people with intellectual disability. Doing so may be more challenging than identifying non-English speakers or minors. Officers should receive training on how to proceed when there is evidence that an individual has mental-health issues. Officers should be encouraged to consult with mental-health professionals before proceeding. Questioning of people with mental illness or intellectual disability should be short, and conducted using short, simple words and sentences. Officers should be sensitive to the tendency of such individuals to defer to authority figures.

e. People affected by substance-related impairments. A good-faith effort should similarly be made to identify persons affected by temporary or long-term effects of substances, including alcohol and drugs. Such individuals should receive any needed monitoring and medical treatment before questioning proceeds.

REPORTERS' NOTES

The questioning of members of vulnerable populations should proceed quite differently, from beginning to end, than the questioning of other, non-vulnerable individuals. Although judicial rulings have long expressed concerns with the questioning of individuals such as intellectually disabled persons and juveniles, no clear or consistent guidance has been offered to law enforcement from the courts. As a preliminary matter, individuals who belong to such populations should be identified. Screening instruments should be developed to assist in doing so, and resources should be made available to law enforcement, such as consulting mental-health professionals or social workers experienced with juveniles or other populations, as should resources to accommodate non-English speakers and the hearing impaired.

Persons that belong to vulnerable populations may not understand what they are told by officers during provision of warnings or during questioning, particularly when legal or technical language is used. This includes comprehending the *Miranda* warnings. Jessica Owen-Kostelnik, et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality,* 61 AM. PSYCHOL. 286 (2006). Thus, particularly for minors, intellectually disabled individuals, and mentally ill individuals, officers should read, in addition to their standard warnings, simplified *Miranda* warnings that require only a grade- and individual-appropriate comprehension level. They should ensure that any waiver is obtained clearly and definitively. Officers should tailor their questions to the person's age, maturity, level of education, and mental ability. Written materials cannot be relied upon fully for persons, such as juveniles, who enter the criminal-justice system with lower-than-average reading ability. Officers should avoid police or legal jargon when speaking to members of vulnerable populations; use short, simple words and sentences; and use non-leading questions that elicit a narrative response. The admonition in § 11.04 about minimizing deception is particularly pertinent here. Officers should not make promises or threats when speaking to members of vulnerable populations. See also Restatement of the Law, Children and the Law § 14.21 (AM. L. INST., Tentative Draft No. 1, 2018) (describing requirement of a knowing,

intelligent, and voluntary waiver by juveniles). Courts should carefully evaluate not only age, but the intelligence of a minor, as well as other circumstances. See, e.g., id., Reporters' Notes to § 14.21 (surveying cases). As a result, great care should be taken to ensure a knowing, intelligent, and voluntary waiver of rights.

Research on minors in particular has shown that minors are far more likely to conform to authority, including officers, and comply when asked to do so, whether the officers are being truthful or not. Phillip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level,* 37 CHILD DEV. 967 (1966); BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 58 (2012). As one survey observed: "Archival analyses of false confessions, surveys, and laboratory experiments have shown that juveniles are at increased risk of falsely confessing." Christian A. Meissner, Christopher E. Kelly & Skye A. Woestehoff, *Improving Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 214 (2015). Substantial research has documented the risk that juveniles will falsely confess due to their increased likelihood of complying with authority without understanding the consequences of their decisions. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003); Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession and Individual Differences: A National Study among Icelandic Youth*, 41 PERSONAL. & INDIVID. DIFFER. 49 (2006); Ingrid Candel et al., *"I hit the shift-key and then the computer crashed": Children and False Admissions*, 38 PERSONALITY & INDIVID. DIFFER. 1381 (2005); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141 (2003).

As a result, judicial rulings have long reflected concern about interrogations of minors. The U.S. Supreme Court in J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), held that a minor's age must be considered in examining whether the juvenile should have been deemed in police custody. Questioning by school resource officers or other government officials also may be considered as a factor that indicates to a minor that it is a custodial situation. In re Welfare of G.S.P., 610 N.W.2d 651 (Minn. Ct. App. 2000). In rulings concerning life without parole, the Supreme Court has found states cannot impose mandatory life-without-parole sentences on juvenile offenders, noting the particular danger that minors may confess falsely. Miller v. Alabama, 132 S. Ct. 2455 (2012). Courts have held that police stations are inherently coercive for some minors. Jeffley v. State, 38 S.W.3d 847, 857 (Tex. Ct. App. 2001); United States v. IMM, 747 F.3d 754, 767 (9th Cir. 2014). All of those rulings support minimizing the questioning of juveniles, and approaching any such questioning, and particularly interrogations, with great sensitivity.

The Restatement of the Law, Children and the Law, provides as follows:

§ 14.20 Rights of a Juvenile in Custody; Definition of Custody

(a) A juvenile in custody has the right to the assistance of counsel and the right to remain silent when questioned about the juvenile's involvement in criminal activity by a law enforcement officer.

(b) A juvenile is in custody if, under the circumstances of the questioning:

> (1) a reasonable juvenile of the suspect's age would feel that his or her freedom of movement was substantially restricted such that the juvenile was not at liberty to terminate the interview, and
>
> (2) the officer is aware that the individual being questioned is a juvenile or a reasonable officer would have been aware that the individual is not an adult.

Restatement of the Law, Children and the Law § 14.20 (AM. L. INST., T.D. No. 1, 2018).

Officers should make every effort to notify parents or guardians prior to any questioning of a minor or juvenile. Parents should be offered the opportunity to be present whenever a minor is questioned, taken into custody, or charged. Parents should consult with the minor's attorney before making any recommendations that their child speak to law enforcement. However, a parent's consent is neither necessary nor sufficient for the minor's waiver of these rights.

While officers should be able to identify non-English speakers, hearing-impaired individuals, and many, if not most, minors, identifying people with mental illness and people with intellectual disability can sometimes pose a real challenge for officers who are not trained mental-health professionals. Yet, many of those individuals known to have confessed falsely possessed such mental-health problems. It has been long known that such individuals are more vulnerable to police coercion, but few agencies have responded to such awareness with appropriate policies and training. Finlay & Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation,* 40 MENTAL RETARDATION 14 (2002). One noteworthy agency that has done so is Florida's Broward County Sheriff's Office. See Broward County Sheriff's Office, G.O. 01-33 (Nov. 17, 2001) (detailed policy concerning interrogation of suspects with developmental disabilities, including guidelines for interrogation and post-confession analysis).

A person with an intellectual disability is defined as having "significantly subaverage general intellectual functioning, existing concurrently [at the same time] with deficits in adaptive behavior and manifested during the developmental period, that adversely affects . . . educational performance," under the Individuals with Disabilities Education Act (IDEA). Such disability can be difficult to recognize without visual cues, since some people are mildly affected. See The Arc, Introduction to Intellectual Disability, at http://www.thearc.org/page.aspx?pid=2448.

Mental illness refers to a wide range of mental disorders or health conditions. Severe mental illness, for example, is defined as a mental, behavioral, or emotional disorder, diagnosable currently or diagnosed within the past year, that meets criteria in the current Diagnostic and Statistical Manual of Mental Disorders, and that results in a "serious functional impairment, which substantially interferes with or limits one or more major life activities." See National Institute of Mental Health, Serious Mental Illness (SMI) Among U.S. Adults, at https://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml. Such serious mental illnesses can include schizophrenia, paranoid or psychotic disorders, bipolar disorders, post-traumatic stress disorders, and others. Such individuals may be found competent in a criminal case and found not criminally insane, but such standards are not designed to inform whether reliable information can fairly be obtained from such individuals.

Finally, persons affected by substances, whether alcohol or drugs, may require monitoring or medical treatment, and should not be questioned while impaired. Many individuals suffer co-occurrence of substance abuse and mental-health needs. For an overview of a wide range of screening and assessment instruments used in the area of co-occurring mental and substance-abuse disorders, see Substance Abuse and Mental Health Services Administration, *Screening and Assessment of Co-Occurring Disorders in the Justice System* (2015).

Many agencies do not have detailed policies on police questioning of members of vulnerable populations. Resources should be made available to develop such written policies, as well as training and supervision directed specifically at questioning of members of vulnerable populations.

CHAPTER 12
INFORMANTS AND UNDERCOVER AGENTS

§ 12.01. General Principles for Informants and Undercover Agents

(a) Agencies should adopt written rules and policies that govern the use, approval, reward, and oversight of informants and undercover agents. These rules and policies should take into account:

(1) the degree of tolerable risk to the safety of informants, undercover agents, and the public;

(2) the permissible level of intrusiveness involved in the use of informants and undercover agents;

(3) the value and reliability of information obtained;

(4) whether the informant is represented by counsel;

(5) the nature and magnitude of incentives expected from government; and

(6) the potential for and consequences of criminal activity such use might foster.

(b) Agencies should document information regarding the foregoing factors and how they influence decisions to use informants and undercover agents, and should document all informant agreements.

Comment:

a. Uses of informants and undercover agents. Informants and undercover agents can provide extremely valuable evidence during criminal investigations. Informants may be particularly valuable when it is necessary to secure inside information regarding ongoing criminal enterprises. Traditionally, however, informants and undercover agents have been used in a wide range of circumstances, from petty cases to organized crime cases, and often without clear rules, policies, or resulting oversight. This Chapter reflects the need for written rules and policies regarding the use of informants and undercover agents given the range of risks their use creates.

b. Definition of "informants." For purposes of this Chapter, informants are defined as persons who provide police with information in return for a covertly arranged tangible benefit. Thus, the typical eyewitness who provides information without such an expectation, or an anonymous tipster who provides information in response to a publicly announced reward, is not

an informant. Similarly, this Chapter does not cover expert witnesses who testify with the expectation of public remuneration from government.

The benefits informants receive may come in the form of a more lenient outcome in their criminal case, forbearance from arrest or prosecution, a financial payoff, benefits directed to a third party such as a relative, or some other type of concrete assistance. Such agreements to provide benefits to informants often have been informal, with the terms of the arrangements not discussed fully or explicitly, but rather assumed in whole or in part based on past experiences with law enforcement or prosecutors. Such arrangements should be made formal, explicit, and should be documented in written form.

Agencies may categorize informants in a number of ways, including:

(1). confidential informants—informants whose identity is protected, for safety and investigative reasons, even from some law-enforcement and legal actors. Although many types of informants have their identities kept confidential to a greater or lesser degree, agencies may provide a heightened level of confidentiality to some informants;

(2). incarcerated informants or "jailhouse informants"—individuals who cooperate while in custodial settings; and

(3). cooperating defendants—individuals who cooperate once they become criminal defendants and who are represented by counsel.

While recognizing the terms, this Chapter does not use them in any definitional sense because the categories they describe are of degree rather than kind. For example, all informants may have their identities kept confidential to some degree, and further, some information about their identities will be available within law enforcement and may ultimately be disclosed in court. Similarly, informants who are in jail may face special pressure to cooperate and may be strongly incentivized to do so, but so may a range of other persons, including those not in jail but facing criminal charges. Some informants may not initially be facing criminal charges, but if charged, they will be represented by counsel, and their Sixth Amendment right to counsel must be respected. To varying degrees these factors all play a part in the Principles that follow.

c. Definition of "undercover agents." In addition to informants, this Chapter covers the use of "undercover agents" (or "undercover officers"). They are members of a policing agency who operate covertly. The use of undercover agents raises issues similar to the use of informants with

regard to matters such as intrusiveness, legitimacy, and involvement in ongoing criminality. The topic of undercover agents is treated separately in § 12.07 because, in contrast to informants, undercover officers are trained members of policing agencies who are remunerated in the course of formal employment.

d. Competing values in the uses of informants, generally. Informants can provide important evidence during criminal investigations. This is particularly the case with regard to ongoing criminal enterprises, which often only can be investigated effectively by securing inside information from the participants themselves. However, the use of informants implicates a range of important concerns, among them: (i) public safety, including ongoing criminal activity engaged in by informants; (ii) individual safety of the informants themselves and others; (iii) intrusiveness, in terms of the reach of some informants into the community, in observing private activities and sharing positions of trust with community members; and (iv) reliability, if incentivized informants provide false or misleading statements. In addition, the right to counsel is implicated if the informant is or ought to be represented by counsel.

e. Public safety. The use of informants can provide valuable information, but it can also compromise law-enforcement efforts to protect public safety. For example, informants who are part of ongoing criminal enterprises, or who continue to be involved in criminal activity, pose an ongoing risk to the public if their use furthers, rather than halts, criminal activity. Great care therefore must be exercised over the use of informants regarding the potential for and the consequences of resulting criminal activity. Investigations of national-security matters raise special dangers regarding public safety, as well as informant safety, potential for intrusiveness, and reliability, especially because fewer constitutional restrictions apply; as a result, more detailed policies and oversight are needed, and have been promulgated at the federal level, regarding such uses of informants.

f. Informant safety. Informants themselves may be at risk when participating in criminal investigations and aiding law enforcement. They may be asked to take investigative steps that are far riskier than those requested of the average cooperating witness. Further, many informants are themselves members of vulnerable populations; they may be young, unaware of their rights, or suffering from substance-abuse or mental-health issues. When the government uses informants in seeking to obtain information during criminal investigations, people who already are vulnerable can be placed at an especially high risk. Those safety consequences should also be assessed carefully.

g. Intrusiveness. The use of informants can be intrusive. When informants are private citizens whose relationship with law enforcement is typically not well known, they can be in a position to observe a wide range of private behavior and gain access to information that people would not expect to be shared with law enforcement. Some of that information may be valuable for purposes of criminal investigations, but other information may be highly personal, and gathering it may be quite intrusive, even if there is law-enforcement benefit.

Informant witnesses can provide valuable information, but their use also can contribute to community distrust of law enforcement. Informants may hold positions of trust with individual members of the community and with community groups, and their use may undermine community trust as a result. Informants may be privy to a wide range of information that people would assume would be kept private. There have been real concerns that activist, religious, and other types of community groups, as well as the press, have had their free-expression and associational rights infringed and chilled through the use of informant surveillance.

h. Reliability. Informant evidence often is needed in investigations in which other, more direct, and potentially more reliable, evidence is lacking. If there were clear-cut evidence of guilt, there typically would be no need for law enforcement to provide incentives to an informant. However, too often there has been insufficient screening of informant evidence to ensure its reliability. Ensuring reliability is a dynamic process; certainty about reliability may change over time as information concerning the informant and the case develops.

Informants may be incentivized to provide information, but not necessarily accurate information. Verifying the accuracy of the information provided by informants can be difficult given the settings in which they gather information. Surveillance conducted by and recordings made by informants may not reflect fully the context of the words or actions captured. And informants may be the sole or primary source of the information or context needed to assess the reliability of the information they provide. An officer can even fabricate the very existence of an informant, if colleagues are not able to verify the informant's identity or existence. Incentivized informants have provided false information during investigations and criminal trials, and such information sometimes contributes to wrongful convictions.

All types of informant evidence can raise significant accuracy concerns, but informants who are incarcerated or face incarceration pose heightened accuracy concerns. This is because the benefits they receive or hope to receive from providing information—in the form of reduced

sentences, improved conditions of incarceration, or early release—are particularly tempting. Incarcerated informants also have ready-made access to a population already accused of crimes, the members of which are especially susceptible to wrongful accusations. Other types of informants, due to their backgrounds, the circumstances of their cooperation, or the substance of their information, also may raise heightened concerns regarding accuracy.

i. Policy and practice. This Chapter details what written policies and practices should include regarding the use, approval, reward, and oversight of informants, as well as undercover officers. This Section begins by stating that agencies should promote the objectives of this Chapter through written policies, training, and supervision of the use of informants. This is a change from past practices, in which the criteria for selecting informants, the types of incentives that could be provided, the level of confidentiality provided, the documentation of evidence concerning informants, and the general parameters concerning agreements with informants, often were not set out in policy. As these Principles consistently emphasize, officers should abide by clearly documented standards and procedures. See § 1.06. Prosecutors, independently or in cooperation with law enforcement, also may negotiate with, and provide benefits to, informants and may receive information from informants during criminal investigations. To the extent that prosecutors use informants or cooperate in the use of informants, these Principles are intended to address their conduct. See § 1.01 (defining application of these Principles from a functional perspective).

j. Tracking use of informants. In the past, agencies have had or maintained very little information about how often, or in what ways, informants were used, what incentives they received, and what information they provided. Such information should be documented. In particular, written agreements should reflect what incentives have been offered or provided to informants. More broadly, information concerning the use of informants is necessary in order to evaluate their value and reliability. Because of a simple lack of data regarding informant use, and because the full costs of informant criminality are not documented or assessed, there is reason for concern that agencies may overvalue the use of informants and undervalue the risks of using them. In addition, absent any systematic recordkeeping, agencies may not be aware of the use of individuals who should not be trusted to provide reliable information.

Sound information documenting the use of informants is important to agencies themselves, as well as to other legal actors. For example, such information may provide constitutionally required impeachment evidence in court. Agencies should track the use of informants, the value

and reliability of the evidence they provide, the benefits or leniency that informants receive in exchange for their cooperation, and the criminal activity that is tolerated in exchange for that information. Agencies should thus assess periodically the full costs and benefits of incentivizing criminal informants and consider their policies toward such use. Further, agencies should develop mechanisms to ensure the exchange of information between agencies regarding informants. For example, an agency might use an informant without knowing that another agency has found that informant to be unreliable in the past.

REPORTERS' NOTES

The greatest benefit that law enforcement receives from using informants is evidence that could not otherwise be obtained during criminal investigations, particularly with regard to ongoing criminal enterprises. Informants typically will not be needed to investigate crimes for which there are other types of evidence; using them in such situations may reflect inattention on the part of agencies, especially in light of clear risks to public safety that arise from informant use. Those risks include that informants themselves may conduct purchases or engage in other criminal transactions in order to uncover criminal enterprises. Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1092-1093 (1951); Michael F. Brown, *Criminal Informants: Some Observations on Use, Abuse, and Control*, 13 J. POLICE SCI. & ADMIN. 251 (1985). Judge Learned Hand summarized the reasons for using informants:

> Courts have countenanced the use of informants from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly.

United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951). Informants of various types can provide not only inside access to information, but also both substantive and procedural benefits for law enforcement. As Alexandra Natapoff explains, "[i]nformant deals . . . make law enforcement activities easier and cheaper. By using informants, investigators often can avoid the need for search warrants, wire taps, and other time-consuming procedures that require court authorization." ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 31 (2009).

However, the use of informants is not limited to situations in which serious criminal organizations or accomplices are investigated. Informant use remains common in policing in the United States, in a wide range of investigations. Federal agencies, which often focus on organized crime and complex investigations, have long used informants. In fact, "[s]ince the inception of the FBI in 1908, informants have played major roles in the investigation and prosecution of a wide variety of federal crimes." U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES: CHAPTER THREE: THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL

INFORMANTS (2005). The U.S. Drug Enforcement Administration "had over 18,000 confidential sources assigned to its domestic offices" from October 2010 through September 2015. U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE PROGRAM (2016). Confidential sources may include witnesses performing investigative activities who do not receive a covertly arranged tangible benefit, but they may also include "informants," as defined here. Id. at 3. The U.S. Sentencing Commission reports that federal defendants received credit for their cooperation, as defined under the U.S. Sentencing Guidelines, within every category of federal offense in 2018, including homicide, kidnapping, and child pornography. U.S. Sent. Comm'n, Table 30: § 5K1.1 Substantial Assistance Departure Cases (2018). Informants also are frequently used and rewarded at the state and local level, especially to investigate street crimes, gun offenses, and low-level drug offenses, and to obtain warrants. See, e.g., ACLU, AN EXPLORATORY STUDY OF THE USE OF CONFIDENTIAL INFORMANTS IN NEW JERSEY (2011), available at https://www.aclu-nj.org/files/1113/1540/4573/0611ACLUCIReportBW.pdf; Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221 (2000).

Policing agencies also use a variety of terminology to describe informants, which reflects the variety of types of investigations in which they are used and the different rules or practices in place concerning their use. As noted, this Chapter eschews definitional use of any of those terms, which do not necessarily reflect clearly defined categories. For example, although "jailhouse" informants refers to informants who are in custody, and although their use does pose heightened reliability concerns, similar reliability concerns may be raised by other informants, such as those facing criminal charges who are not in custody. The definition of "informants" here encompasses all witnesses who expect or receive a covertly arranged tangible benefit in order to ensure that the use of all such witnesses is done with care. Draft legislation regarding informants has adopted similarly broad definitions, including regarding what can constitute a benefit. See, e.g., Washington Engrossed Substitute Senate Bill (ESSB) 5038 (2017) ('"Benefit' means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony, information, or statement, but excludes a court-issued protection order. 'Benefit' also excludes assistance that is ordinarily provided to both a prosecution and defense witness to facilitate his or her presence in court including, but not limited to, lodging, meals, travel expenses, or parking fees.").

Many current agency policies govern only limited categories of informants, which can as a result create real gaps in policy. For example, the U.S. Department of Justice has a policy regarding the use of informants deemed "confidential," but not regarding other types of informants (although cooperation credit for these other types may be provided under rules set out in the U.S. Sentencing Guidelines, as noted). U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDELINES FOR THE USE OF CONFIDENTIAL INFORMANTS (2001). The use of informants can raise public-safety, reliability, intrusiveness, and other concerns, and, as a result, all uses of informants should be governed by a carefully considered policy.

National-security investigations raise distinct issues, as there may be a need for informants at the federal level to assist with domestic-terrorism investigations. The U.S. Department of Justice (DOJ) first drafted guidelines requiring vetting and overseeing such informants in 1976, and it has revised the guidelines since then. The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (2006) applies to the Federal Bureau of Investigation's use of informants, and The Attorney General's Guidelines Regarding the Use of Confidential Informants (2002) applies to all other DOJ law-enforcement agencies and federal prosecuting offices. Still, the U.S. Government Accountability Office (GAO) has called for improved compliance with those policies to better improve documentation and oversight of informants. GAO, Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies, GAO-15-242SU (Washington, D.C.: Mar. 6, 2015).

Law enforcement also can obtain inside information about ongoing criminal enterprises by using undercover agents, which are separately discussed in § 12.07. Undercover agents raise many of the same issues regarding safety, reliability, and intrusiveness as do informants. But in comparison to undercover agents, who "must devote substantial time and resources to infiltrating criminal organizations while exposing themselves to significant harm," active criminal informants "can expedite that process significantly." Michael L. Rich, *Brass Rings and Red-Headed Stepchildren: Protecting Active Criminal Informants*, 61 AM. U. L. REV. 1433, 1439 (2014). Indeed, "[i]n some cases, these informants can remove the need for undercover work entirely by continuing their involvement in the organization and obtaining evidence of criminal activity directly." Id. at 1440. However, informants do not act as professional and trained members of law enforcement; undercover agents can be more directly supervised and held accountable under agency policies.

Interests implicated by informant use. Offsetting the benefits of the use of informants are a set of interests implicated by their use. Policy in this area seeks to balance concerns for public safety, informant safety, intrusiveness, and reliability, due to the risk of incentivizing false testimony.

First, using informants can result in risks to public safety. Many common uses of informants involve official toleration of informant crime, including in the form of ongoing criminal activity. By their nature, many informant deals involve leniency for past and sometimes current wrongdoing by informants, which means that culpable defendants escape accountability and victims never may receive full vindication or restitution. Moreover, as discussed in greater detail in § 12.05, informants often are able to continue criminal activities by virtue of their ongoing relationships with government handlers. See U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (2005). The extent to which the government is willing to tolerate crime by its own informants has been the subject of several congressional inquiries. See, e.g., *House Report 108-414, Everything Secret Degenerates: The FBI's Use of Murderers as Informants*, Committee on Gov't Reform, 108th Congress (2004); U.S. House Judiciary Committee, *Oversight Hearing on Law Enforcement Confidential Informant Practices*, Washington, DC (July 19, 2007); H.R. 1857, The Confidential Informant Accountability Act,

115th Congress (2017). Further, "that violent and destructive offenders may be permitted to remain at large is frightening to law-abiding citizens." NATAPOFF, supra, at 43.

Second, informants themselves may be placed in positions that endanger their safety. The pressures exerted on informants to cooperate with the government can disadvantage and injure especially vulnerable classes of informants, including children, college students, and other young adults, and people with substance-abuse or mental-health issues. See, e.g., Sarah Stillman, *The Throwaways*, NEW YORKER (Aug. 27, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways; *Confidential Informants*, CBS NEWS: 60 MINUTES (Dec 6, 2015), https://www.cbsnews.com/news/confidential-informants-60-minutes-lesley-stahl. Vulnerable informants may risk injury or even death in the hopes of receiving leniency for relatively minor offenses. It is self-evident that policing agencies should ensure that people who come forward with information receive protection when they cooperate under circumstances that pose a danger to their own safety.

Third, the use of informants implicates concerns about intrusiveness. Informants—private citizens—may gather information regarding a wide range of activity and information in their communities. Although some of that information may be useful to law enforcement, some may not. Intrusiveness is still more problematic when informants have positions of trust with individuals. Informants may also hold positions of trust with groups or organizations, including a wide range of community groups that are not criminal enterprises. Concerns for privacy and liberty also are heightened when informants are used in contexts in which political or religious association and other First Amendment–protected activities are at stake. Gary Marx, *Undercover: Police Surveillance in America* (Univ. of Cal. Press, 1988); Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018). "The secrecy that attends informant use is in tension with some fundamental aspects of American criminal justice. Our penal system promises transparency and public access to information in ways that are important not only to the adjudication of specific cases but to the democratic process itself." NATAPOFF, SNITCHING, at 94. "The idea that criminal processes, records, and results should be public, or what the Court has referred to as the 'right to gather information,' is part of a larger democratic commitment to public accountability and responsiveness." Id.

Fourth, the use of informants can raise reliability concerns. The risk of wrongful conviction is one of the best-known costs of informant use: "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993); United States v. Levenite, 277 F.3d 454, 461 (4th Cir. 2002) (noting that compensated testimony "create[s] fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial's legitimacy"); State v. Patterson, 886 A.2d 777, 789 (Conn. 2005) ("an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate the falsely accused. Consequently, the testimony of such an informant . . . is inevitably suspect"); see also Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652 (2004).

Constitutional regulation of informants. The U.S. Constitution imposes some limited constraints on the use of informants, but those constraints do not for the most part address squarely any of the harms discussed, nor do they require or work to encourage the practices set out in this Chapter regarding sound policy.

Under the Fourth Amendment, the U.S. Supreme Court has permitted the use of recordings by informants to obtain statements without knowledge of the speaker, and the Court has found no self-incrimination rights implicated by a voluntary statement to an informant. See, e.g., Lee v. United States, 343 U.S. 747 (1952); Hoffa v. United States, 385 U.S. 293 (1966); United States v. White, 401 U.S. 745 (1971). Moreover, the government may deploy jailhouse informants to obtain information against individuals without constraint from the Fourth, Fifth, or Sixth Amendments, as long as the target has not yet been charged. Illinois v. Perkins, 496 U.S. 292 (1990). Once the suspect has been charged formally, the Sixth Amendment right to counsel may be violated if an informant is engaged to elicit self-incriminating comments. Massiah v. United States, 377 U.S. 201 (1964); see also Brewer v. Williams, 430 U.S. 387 (1977) (finding the Sixth Amendment right triggered after arraignment on outstanding arrest warrant); United States v. Henry, 447 U.S. 264 (1980). Still, the Supreme Court has held that when statements to an informant were spontaneous and unsolicited, then no such constitutional protection applies. Kuhlman v. Wilson, 477 U.S. 436, 459 (1986). Moreover, any error in admission of such testimony may be found to be harmless error. Arizona v. Fulminante, 499 U.S. 279, 307 (1991). Other constitutional criminal-procedure rights may be implicated by active criminal informants; for example, there may be available a "relatively limited" defense of entrapment. United States v. Russell, 411 U.S. 423, 435 (1973).

The reliability issues posed by informant use are not addressed well by constitutional criminal-procedure rules. In general, the U.S. Supreme Court has emphasized that cross-examination may bring out any unreliability in informant statements. *Hoffa*, 386 U.S. at 311 ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."); CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 525 (4th ed. 2007). The intrusiveness issues raised in this Chapter similarly are not addressed well by constitutional criminal-procedure rules; they do not address, for example, the potential chilling effects on community groups and expression.

Nor are the public-safety risks clearly addressed by constitutional criminal procedure. The Supreme Court has held that the government generally does not have an obligation to minimize known risks to a person absent a "special relationship," such that government's assistance or role in "creating the danger to the victim," as well as its failure to protect, creates a "shock to the conscience." DeShaney v. Winnebago County, 489 U.S. 189 (1989); Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005). Thus, if members of the public, or the informant, are harmed by ongoing criminal activity that law enforcement may have been in a position to prevent, liability still may not exist. Courts have held that even if a witness has an established relationship with law enforcement, and the agency has notice of threats of harm to the witness and offered to provide

protection, there is no liability for third-party violence. Rivera v. City of Providence, 402 F.3d 27 (1st Cir. 2005).

Due-process rules regarding the disclosure of exculpatory and impeachment evidence apply to informant testimony. In Giglio v. United States, the U.S. Supreme Court held that "nondisclosure of evidence affecting credibility" of a witness falls within the due-process rule that prosecutors may not suppress "material evidence." Giglio v. United States, 405 U.S. 150, 153-154 (1972) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963) (internal quotation marks omitted)). However, the Court has not mandated any particular best practices concerning maintaining and documenting information about the use of informants or other incentivized witnesses, nor best practices concerning discovery. More broadly, the Court has held that *Giglio* disclosure obligations apply when defendants go to trial, but not when they plead guilty. United States v. Ruiz, 536 U.S. 622 (2002). Because approximately 95 percent of all felony convictions in the U.S. are the result of a plea, the effect of this ruling is to exempt the majority of informant-related impeachment evidence from discovery. Further, the Court has held that agencies need not disclose the identities of informants who provided information used to support probable cause. McCray v. Illinois, 386 U.S. 300 (1967). Indeed, the identity of an informant even may be kept confidential at trial. Roviaro v. United States, 353 U.S. 53 (1957).

Commentators have long criticized the overuse and under-regulation of police informants, and have called for additional constitutional protections in the area. Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents and Informers*, 1976 AM. B. FOUND. RES. J. 1195, 1195-1196; James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. DAVIS L. REV. 1, 3 (1988); Welsh S. White, *Regulating Prison Informers Under the Due Process Clause*, 1991 SUP. CT. REV. 103, 103-106; Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755, 782-785 (1990); Evan Haglund, Note, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1440-1441 (1990). However, existing constitutional law provides only limited regulation in the area and very little guidance to policing agencies.

In short, constitutional regulation is unlikely to be enough, either to provide remedies for unsound uses of informants, or to inform sound policing practices in the area. As is true throughout these Principles, a regulatory approach is necessary—one that calls for written policies governing the sound use of informants. A growing number of jurisdictions, through legislation or judicial rulings, require disclosures by prosecutors to the defense concerning informants; documentation of their use; reliability review by judges before trial; and that judges instruct jurors concerning reliability of informants. See, e.g., Tarrant County Criminal District Attorney's Office Jailhouse Informant Procedure (2016) (creating central index of jailhouse informants); CONN. GEN. STAT. ANN. § 54-86o-p (requiring data collection, tracking, and reliability hearings for jailhouse informants); FLA. R. CRIM. P. 3.220(b)(1)(M) (requiring the state to disclose material information affecting the credibility of an informant, whether in or out of custody, including any incentives for cooperation); 725 ILL. COMP. STAT. § 5/115-21 (2003) (requiring reliability hearings for in-custody

informants); NEB. REV. STAT. ANN § 29-4701-06 (requiring each prosecutors' office to maintain records of any case in which informant statement or testimony is used, and disclose relevant information to the defense concerning the testimony or statement by a jailhouse informant); TEX. CODE CRIM. PRO. art. 2.024 (requiring tracking of use of testimony of persons in custody and any benefits offered or provided to such a person); TEX. CODE CRIM. PRO. art. 38.075 (requiring corroboration of an in-custody informant's testimony before it can be used to support a conviction); TEX. CODE CRIM. PRO. art. 39.14 (h-1) (requiring state to disclose information relevant to the credibility of an in-custody informant); Okla. Sen. Bill 1385 (effective Nov. 2020) (requiring creation of statewide informant-tracking database); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (Strubhar, J., concurring) (approving lower-court "reliability hearing" regarding informant evidence); D'Agostino v. State, 823 P.2d 283 (Nev. 1992) (holding that before "jailhouse incrimination" testimony is admissible, the trial judge must examine whether "the details of the admissions supply a sufficient indicia of reliability"). While reflecting some of these efforts to better define practices concerning informant evidence, this Chapter adopts a more comprehensive approach than any such statute, policy, or judicial ruling.

§ 12.02. Assessing the Propriety of Using an Informant

An agency's initial decision to use, and to continue to use, a particular informant should be based on careful review of:

(a) safety concerns, regarding the public and the informant, in light of ongoing and potential criminal activities;

(b) the intrusiveness of the use of the informant;

(c) the value of the information sought or provided by the informant;

(d) the reliability of the information provided by the informant, both at present and in the past;

(e) the informant's background and ongoing conduct, including criminal history and prior relationships with law enforcement;

(f) whether the informant is represented by counsel;

(g) adequate, independent supervisory approval; and

(h) verification to ensure the informant's existence.

Comment:

a. Initial review. In the past, agencies entered relationships with informants in informal ways, not governed by policy, and without careful internal review. An informal contact with a person may be appropriate if it is only to acquire limited information, such as a tip. But for

informants, as defined in this Chapter, careful regulation is warranted. The focus of this Section is the initial pre-screening of an informant, but an agency's use of an informant should be subject to ongoing review, particularly as the use of the informant and the accompanying risks evolve over time.

b. Value and nature of informant information. The value of the informant should be weighed—at the time an agency decides to use the informant and on an ongoing basis—against each of the concerns identified in § 12.01: (1) public safety; (2) informant safety; (3) intrusiveness; and (4) reliability. The value of the information obtained by an informant necessarily will depend on its nature and the purpose for which it is being used. Some informant information can be corroborated independently. Of greatest concern is substantial information that cannot be corroborated. As part of its decision to rely on the informant, a law-enforcement agency should consider whether the criminal investigation itself is of sufficient importance, and the information or informant sufficiently reliable, to justify relying on the informant, and whether there are alternative means of obtaining such information.

c. Vetting the informant. A law-enforcement agency should carefully review an informant's background and ongoing conduct before relying on the informant. The agency should examine the informant's prior relationships with law enforcement, and concerns raised by such prior relationships. The requisite degree of review may depend on the use to which the informant is put. If law enforcement is providing a small benefit to an informant for a relatively minor tip or lead, which can be verified independently as to its reliability, then the level of screening necessary is minimal. On the other hand, if law enforcement anticipates an ongoing relationship for a more serious criminal investigation, and greater benefits are provided to the informant, then comparatively more intensive and ongoing vetting should occur.

The background of the informant is relevant to each of the four concerns identified in § 12.01 regarding the use of informant-provided evidence: (1) public safety; (2) informant safety; (3) intrusiveness; and (4) reliability.

d. Public safety. An important part of the initial decision to rely on an informant involves consideration of what criminal activity will occur as a result. Relying on an informant might help to investigate and end criminal activity, but it also might facilitate ongoing criminal activity. Section 12.05 provides rules regarding ongoing criminal activity by informants.

e. Informant safety. In deciding to use, and to continue using, an informant, a law-enforcement agency should consider carefully the risks to the informant's safety. Informants who are members of vulnerable populations may be at particular risk. See § 12.01.

f. Intrusiveness. In deciding to use an informant, a law-enforcement agency should consider the degree of intrusiveness such use entails, and any privacy interests implicated. The privacy interests potentially implicated include those of individuals, as well as various groups, religious organizations, and the press. A policing agency should not assume that the intrusive use of an informant will go undetected in the community in which the informant is operating. Whether or not it is detected, any unnecessary intrusion should be minimized or avoided altogether, particularly because it is inevitable that an informant will gather private information unrelated to criminal activity.

g. Reliability. Law-enforcement officials should consider at the outset and on a continuing basis whether the informant is a source of sufficiently reliable information. See § 12.04 (detailing what a reliability review should entail). Information about the informant's prior relationships with law enforcement may shed light on his or her reliability, as may information about the informant's ongoing activities and access to information. Other factors that should be considered include whether the information provided by the informant can be corroborated, what type of information is provided, and to what uses law enforcement intends to put any evidence provided by the informant. A jailhouse informant who offers to obtain a cellmate's confession may pose particular reliability concerns.

h. Screening and supervision of confidential informant use. A special concern arises with regard to the use of informants whose identity is not shared within an agency—so-called "confidential informants." The danger is that their existence may be wholly fabricated. For that reason, policing officials must, at a minimum, disclose the identity of confidential informants to supervisors, who in turn should verify the informant's existence.

REPORTERS' NOTES

1. The need for policy regarding prescreening of informants. There are a wide range of relationships that police have with informants, from informal relationships with people in the community—including incentivized persons—to formal, ongoing relationships. The type of screening that should occur regarding an informant should depend on how formal the relationship is, the type of information that an informant provides to law enforcement, and how that information will be used. The screening of an informant, therefore, requires a multifactor inquiry based on the

type of informant, the type of criminal investigation, the information provided by the informant, the manner in which the informant will be used, and the interests implicated by the anticipated uses of the informant. Further, the screening of an informant should be an ongoing process, as the nature of the relationship and the information being obtained evolves.

Many existing policies focus on judicial supervision of the use of informants, rather on screening in the first instance by law enforcement. Thus, states have enacted legislation requiring that police collect and prosecutors disclose information regarding jailhouse informants. See, e.g., TEX. CODE CRIM. PRO. art. 39.14(h-1) (requiring state to disclose information relevant to the credibility of an in-custody informant). What is needed are rules requiring that law enforcement make sound decisions in the first instance regarding whether to rely on an informant. The same prescreening should be conducted for informants employed by private actors; agencies cannot delegate to others the obligation to assess whether or not to rely on an informant.

Some existing law-enforcement policies and regulations reflect the range of informant relationships and the potential interests implicated by using an informant, but they do not require adequate screening of all informants in advance. Some statutes and policies focus on particular uses or types of informants, such as the use of jailhouse informants or confidential informants. For example, the Federal Bureau of Investigation conducts "suitability reviews" for informants labeled as "confidential," engaging in a multifactor inquiry that considers the potential importance of the information sought, the public-safety dangers of relying on the informant, the potential vulnerability of the informant, and costs to privacy, among other relevant factors. See U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES: CHAPTER THREE: THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2005). The Federal Bureau of Investigation (FBI) policy applies to comparatively more formal uses of informants; indeed, it includes a separate category for long-term informants who have been registered for more than six years. Id. Another model is provided by the International Association of Chiefs of Police (IACP), which sets out a detailed list of information that should be assessed when screening confidential informants, but which is useful for informants in general. The IACP lists identifying criteria to be included in the screening report, including:

- Age, sex, and residence
- Employment status or occupation
- Affiliation with legitimate businesses and illegal or suspicious enterprises
- Extent to which potential information, associations, or other assistance could benefit a present or future investigation
- Risk of adversely affecting an existing or future investigation
- Extent to which provided information can be corroborated
- Prior record as a witness
- Criminal history, to include whether the informant is the subject of a pending investigation, is under arrest, or has been charged with a crime
- Risk to the public or as a flight risk

- Substance-abuse concerns
- Relationship to anyone in law enforcement
- Any prior or current service as a confidential informant with this or another law-enforcement organization.

IACP L. ENF'T POL'Y CTR., CONFIDENTIAL INFORMANTS: CONCEPTS & ISSUES PAPER 1 (2017), available at https://www.theiacp.org/sites/default/files/all/c/ConfidentialInformantsPaper2017.pdf.

These Principles adopt the view that statutes and model policies should provide comprehensive guidance to law enforcement for all types of informants, and not just particular subcategories. At the same time, this Chapter recognizes that in extending such policy considerations to all types of informants, there must be a recognition that some limited or informal uses of informants will not implicate the same considerations as more extended or particularly concerning uses, such as that of informants who are incarcerated or who are facing incarceration.

2. Factors to be considered when prescreening informants. Informant use implicates public-safety concerns, which should be considered at the outset and on a continuing basis. The FBI confidential-informant policy asks "whether the person is reasonably believed to pose a danger to the public or other criminal threat." Office of Inspector General, supra. Law enforcement should consider the risk of ongoing criminality and weigh it against the importance of the information received. If the use of the informant permits crime to continue at little or insufficient return, then the decision should be made not to use the informant.

An informant's safety also should be considered. In recent years, lawmakers have taken action to address concerns regarding informant safety. For example, in 2017, the North Dakota Legislature passed "Andrew's Law" following the death of Andrew Sadek, a student at North Dakota State College of Science, who died after working undercover for police in exchange for receiving a reduced sentence on a drug charge. The law adopted in response provides that law-enforcement officers "may not enter an informant agreement with a student enrolled in an institution under the control of the state board of higher education." Id. at § 29-29.5-03. The law also states that "[a] law enforcement agency may not use a juvenile fifteen years of age or younger as a confidential informant." N.D. CENT. CODE § 29-29.5-02(1) (2017). And, a juvenile over the age of 15, but under the age of 18, may not be used as a confidential informant unless the juvenile is married, emancipated, serving in the active-duty armed forces, or subject to criminal charges, with certain other restraints. Id. at § 29-29.5-02(2). Other states and municipalities ban the use of certain juveniles as informants. San Diego County, California, prohibits the use of informants under 13 years of age without the consent of all of the following persons: (1) "[t]he juvenile's parent or legal guardians"; (2) "[t]he juvenile's attorney, if any"; (3) "[t]he court in which the juvenile's case is being handled, if applicable"; and (4) "[t]he Chief Probation Officer or the authorized designee." SAN DIEGO CNTY. PROBATION DEP'T: POL'Y MANUAL § 501.5 (2016), available at https://www.sandiegocounty.gov/content/dam/sdc/probation/Policies/Policy%20501%20Informants.pdf. Some police departments ban outright the use of juvenile informants under the age of 13 years. See, e.g., CSU POLICE DEP'T, SAN LUIS OBISPO: POL'Y MANUAL § 608.3.1 (2019), available at https://afd.calpoly.edu/police/police-administration/policies/600/608-confidential-informants.pdf (noting that

even the use of informants "between the ages of 13 and 18-years is only authorized by court order"). However, as an American Civil Liberties Union report notes, "[t]here is currently no absolute ban on using children as [confidential informants]." AM. C.L. UNION, DR. DELORES JONES-BROWN & DR. JON M. SHANE, AN EXPLORATORY STUDY OF THE USE OF CONFIDENTIAL INFORMANTS IN NEW JERSEY (2011), available at https://www.aclu-nj.org/files/1513/1540/4573/0611ACLUCIReport.pdf. The report urges that "[u]nder no circumstances should a juvenile below the age of 16 be used as a CI. If a juvenile is used, then a parent or guardian must sign a consent waiver." Id.

A model for best practices concerning internal vetting and review, as well as disclosure to the informants themselves, comes from a Florida statute known as "Rachel's Law." It provides that law-enforcement agencies must:

> (a) Inform each person who is requested to serve as a confidential informant that the agency cannot promise inducements such as a grant of immunity, dropped or reduced charges, or reduced sentences or placement on probation in exchange for serving as a confidential informant.
>
> (b) Inform each person who is requested to serve as a confidential informant that the value of his or her assistance as a confidential informant and any effect that assistance may have on pending criminal matters can be determined only by the appropriate legal authority.
>
> (c) Provide a person who is requested to serve as a confidential informant with an opportunity to consult with legal counsel upon request before the person agrees to perform any activities as a confidential informant. However, this section does not create a right to publicly funded legal counsel.
>
> (d) Ensure that all personnel who are involved in the use or recruitment of confidential informants are trained in the law-enforcement agency's policies and procedures. The agency shall keep documentation demonstrating the date of such training.
>
> (e) Adopt policies and procedures that assign the highest priority in operational decisions and actions to the preservation of the safety of confidential informants, law-enforcement personnel, target offenders, and the public.

FLA. STAT. § 914.28 (2019). Further, the statute requires that law-enforcement agencies using confidential informants "establish policies and procedures addressing the recruitment, control, and use of confidential informants." Id. Policies and procedures must also be put in place "to assess the suitability of using a person as a confidential informant." Id. The statute requires that law-enforcement agencies using confidential informants "establish written security procedures" that, among other things, provide for certain secure records of the identity of confidential informants and recordkeeping of those who access such information.

The use of informants can implicate concerns about individual privacy, group privacy, associational and speech rights, and whether the informants hold positions of trust in their communities. Each of these concerns should be weighed carefully when considering whether to use an informant. Thus, the FBI, as part of its suitability reviews for confidential informants,

considers "whether the person is a public official, law enforcement officer, union official, employee of a financial institution or school, member of the military services, a representative or affiliate of the media, or a party to, or in a position to be a party to, privileged communications (e.g., a member of the clergy, a physician, or a lawyer)." Office of Inspector General, supra.

Finally, reliability should be considered as part of the vetting around the use of informants. See § 12.03. Due to reliability concerns, agencies may decide not to rely on entire categories of informants. For example, the use of incarcerated informants can create an environment in which inmates are incentivized to fabricate statements for their own benefit. Clear policy may be necessary to deal with such incentives. See, e.g., Dodd v. State, 993 P.2d 778, 783 (Okla. Crim. App. 2000) ("[c]ourts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony."). In addition to any categorical rules, there must be careful prescreening of potential informants that fall within a permitted category.

3. Confidential informants. Although all informants discussed in this Chapter are to some extent confidential, in that their cooperation with law enforcement is not fully public, some informants are kept more confidential than others. This is true even within a law-enforcement agency itself. If an informant is on the more confidential end of the spectrum, there are greater risks to public safety, as well as greater concerns regarding reliability and intrusiveness. Office of Inspector General, supra ("[W]hen the FBI formalizes a relationship with a confidential informant, both the investigative benefits and the risks are substantial."). For these reasons agencies should, in policy and procedure, ensure that potentially confidential informants are subject to rigorous screening and their use is delineated carefully. Citing a wide range of hazards that stem from the use of confidential informants, including regarding their reliability, the IACP recommends that certain screening reports be prepared before utilizing confidential informants. IACP L. ENF'T POL'Y CTR., CONFIDENTIAL INFORMANTS: CONCEPTS & ISSUES PAPER 1 (2017), available at https://www.theiacp.org/sites/default/files/all/c/ConfidentialInformantsPaper2017.pdf. The IACP also recommends that these reports be reviewed annually as a "check[] on the worth of CIs and the manner in which they are being managed by their handlers." Id. at 3. The agency must "define the roles and responsibilities of all individuals in the chain of command, from the chief executive to the handler." Id. Some of those individuals must then be in charge of developing and maintaining the "master CI files," creating some sort of "indexing system," and "[a]ccess to CI files." Id. Further, "[t]ight security of CI files is imperative for officer and CI safety and to ensure the integrity of the entire CI management system." Id. The IACP describes the need to restrict access to these files. Id. As a matter of internal regulation, agencies should require that officers disclose and verify the identity of confidential informants to supervisors, to prevent fabricating the existence or the use of confidential informants. For that reason, the Los Angeles Police Department similarly requires that: "[a] commanding officer shall require that the identity of informants be disclosed to him/her." L.A. POLICE DEP'T, L.A. POLICE DEPARTMENT MANUAL: POLICY § 544.30, available at http://www.lapdonline.org/lapd_manual/volume_1.htm#544.

§ 12.03. Assessing the Reliability of Evidence from Informants

The decision to use evidence provided by an informant should be made on a continuing basis, after careful scrutiny of such information. Such scrutiny should be documented, and should include an assessment of:

(a) the reliability of the information provided, determined by the nature of information in question, the type of crime, the specificity of the information, and the extent to which the information is corroborated; and

(b) the credibility of the informant, evaluated based on the circumstances under which the information was provided; the incentives provided to the informant; the informant's prior relationship with law-enforcement agencies, and prior criminal history; the informant's membership in a vulnerable population; and any other information bearing on reliability.

Comment:

a. Reliability review. All too frequently, information provided by informants has been relied on without ensuring that the information is reliable. Particularly when informants provide information about ongoing criminal enterprises, it may be difficult for law enforcement to corroborate such evidence. That inherent challenge makes it all the more important that agencies conduct due diligence regarding both the information provided and the sources of that information. Thus, the decision to rely on evidence provided by an informant during an investigation should be made only after due diligence regarding both the informant (see § 12.02) and the evidence provided by the informant. The degree of evaluation required should depend on the type of information provided and the purposes to which it is put. Informal reliance on a lead that can be corroborated promptly will not require the same degree of scrutiny as more substantial evidence, the truth of which cannot easily be verified. As a result, efforts should be made to corroborate independently the reliability of information shared by an informant. The information relied upon by an agency to assess and determine reliability should itself be documented. See § 12.04 (regarding documentation of informant information).

b. Information reliability. In assessing the reliability of informant-provided information, investigators should look to the specificity of that information and whether the information can be corroborated, as well as the circumstances under which the information was obtained. In order to

do so, investigators should evaluate the extent to which the information contains inside details that could only be known and relayed by a person involved with the alleged offense. If the information can be obtained from a source other than the defendant—such as the media, court records, community members, or other inmates—then an informant may be relaying information learned in some way other than from the supposed target. This risk is greatest around supposed inculpatory statements by a target, offered by an informant in order to obtain leniency.

c. Noncontamination of evidence. As part of reliability review, law-enforcement agencies should ensure that investigative information is not disclosed to informants. Disclosure of such investigative information can compromise a reliability review, making it difficult to ascertain whether the informant is providing valuable or useful information or simply is parroting back information disclosed by law enforcement.

d. Credibility of the informant. An informant's credibility should be assessed in an ongoing fashion. A number of considerations are relevant to evaluating the credibility of an informant, including: the circumstances under which the informant initially provided information to an officer; any benefits or incentives the informant is receiving in exchange for cooperation; any prior testimony or cooperation by the informant, including any prior recantations; whether the informant remains involved in criminal activity; and the seriousness of the informant's prior or ongoing criminal conduct. It also may be relevant whether the informant suffers from substance-abuse issues, mental-health issues, or other challenges that would call the informant's reliability or suitability into question. Any information relevant to credibility must be documented and disclosed to legal actors. See § 12.04.

e. Incarcerated informants. As is well understood, informants who are incarcerated—or who are facing incarceration—present particular reliability concerns given their incentive to avoid incarceration. Although this may be a matter of degree as much as kind regarding informant incentives, agencies should consider carefully whether such "jailhouse" informants ever should be used. If a law-enforcement agency does decide to use information provided by an incarcerated informant, it should perform a more stringent review of the reliability of that information.

REPORTERS' NOTES

The use of informants raises a range of reliability concerns, given that informants by definition receive covert benefits that incentivize them to provide information, but not necessarily

to provide accurate information. Informants have a wide range of motivations to lie or provide unreliable evidence. As one scholar explains:

> Informant lies come in several forms. A jailhouse informant may fabricate a fellow prisoner's admission. Accomplices may admit to participating in a crime but minimize their own involvement while inflating the roles played by others. Some may admit guilt but fabricate the involvement of others. Others may lie about the identity of participants out of loyalty or fear or to conform their stories to the narratives law enforcement already constructed.

Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 765-766 (2016). For these reasons, even if the decision is made, after vetting, to rely on an informant, ongoing review of the reliability of their statements should be conducted.

The situation is complicated because agencies often rely on informants when they lack access to more direct or reliable sources of information. Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 83 (1994) (noting informants particularly used to investigate "invisible crimes" in which there is no victim or the victim is unlikely to report). They also are relied upon to obtain types of evidence that raise special reliability concerns, such as "oral communications by a defendant or a coconspirator." Roth, supra. "Testimony about such admissions is suspect not only because of the accomplice witness' bias and the opportunity for contamination, . . . but also because of the nature of the testimony itself, which relies on the cooperator's memory of what the defendant said." Id. "[Another] category of particularly troubling evidence that accomplice witnesses frequently offer is background 'other act' evidence." Id. at 771. In addition, informants in federal cases often are used to establish drug amounts that otherwise are difficult to corroborate. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 936 (1999) (documenting prosecutorial fears that informant drug numbers are "fictitious").

There is ample evidence that informant have provided false evidence, leading to false arrests and wrongful convictions. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 122 (2006); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 743-744 (2016); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). False convictions due to the use of informants have occurred in a wide range of high-profile cases, including in capital cases. Clifford S. Zimmerman, *Toward a New Vision of Informants*, 22 HAST. C.L.Q. 81, 91-95 (1994); Nw. Univ. Sch. of Law, Ctr. on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent 51 Innocent Americans to Death Row* (2005). The threat of wrongful conviction may be heightened for people with prior criminal records or for those who are housed in jails. Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking A Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 523 (2009).

The use of jailhouse informants has attracted special attention for their role in wrongful convictions, particular in murder and death-penalty cases. Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1419 (2007) ("The truthfulness of jailhouse informants is permanently suspect, unless the conversation with the defendant is recorded, and the confession actually captured on tape."); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543-544 (2005). One well known jailhouse-informant scandal involved the "unconstitutional use of informants in Orange County's jails." James Queally, *State Ends Four-Year Investigation into O.C. Jail Snitch Scandal*, L.A. TIMES (Apr. 19, 2019, 8:02 PM). The state investigation into practices in Orange County, California, revealed that its "sheriff's deputies had been housing informants near high-profile defendants to obtain confessions and elicit other information, which violated [the defendants'] constitutional right to have an attorney present." Id. The U.S. Department of Justice also investigated the Orange County Sherriff's Department. Press Release, U.S. Dep't of Just., Off. Pub. Affairs, Justice Department Opens Investigation of Orange County, California, District Attorney's Office and Sherriff's Department (Dec. 15, 2016). Following the Orange County scandal, "[s]everal states [ ] moved to toughen regulations on the use of [jailhouse] informants . . . ." Dave Collins, *Lying Prisoners: New Laws Crack Down on Jailhouse Informants*, ASSOCIATED PRESS (Sept. 14, 2019).

Law-enforcement officials' use of informants who are treated as confidential also can raise reliability concerns regarding whether they have been vetted by others within an agency, or even whether they actually exist. In some jurisdictions, the bulk of search-warrant applications have been based on confidential informants. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 657 & nn.56-57 (2004). In 2019, the city of Lowell, Massachusetts, settled a federal civil lawsuit brought by three individuals arrested for drug-trafficking that claimed a "former narcotics detective failed to properly vet confidential informants who may have planted drug evidence." Robert Mills & Lauren Peterson, *City of Lowell to Settle Confidential Informant Lawsuit for $750G*, SUN, July 11, 2019.

Reliability review. In order to satisfy constitutional obligations regarding disclosure of potential impeachment and exculpatory evidence, and to ensure the reliability of informant-provided information, both informants and the information they provide should be vetted with a degree of care that is proportional to the degree of law-enforcement engagement with the informant and the use to which the information is put. By vetting the reliability of information, agencies can ensure that investigations rely on sound information long before any pretrial judicial review or criminal trial occurs. However, informal information or preliminary use of informant information in the form of a tip or a lead properly may be subject to less vetting and reliability review. See, e.g., Alabama v. White, 496 U.S. 325, 328 (1990) ("[a]lthough it is a close case . . . under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [the] car"). Under these Principles, anonymous tipsters are not considered informants, because they receive a publicly announced benefit, and not a covert one. However, the U.S. Supreme Court's rulings regarding anonymous tips recognize a

principle that also is relevant for informants: information must be assessed on a continuum regarding the reliability of the source and the information provided, including whether any of its details can be corroborated. Florida v. J.L., 529 U.S. 266, 270 (2000). In the context of informant evidence, when law-enforcement officials conduct reliability reviews, they should be doing so not just to obtain the legally required reasonable suspicion or probable cause, or to secure evidence of guilt; they also should be assessing the value and reliability of both the source and the particular information provided.

A growing number of jurisdictions have adopted rules requiring the documentation and disclosure of information bearing upon the reliability of informants, as well as in-court review of their reliability. See CAL. PENAL CODE § 1111.5 (stating that a jury or judge may not convict based on uncorroborated testimony of an in-custody informant); CAL. PENAL CODE § 1127a (providing model jury instructions concerning incentivized witnesses); CONN. GEN. STAT. ANN. § 54-86o-p (requiring data collection, tracking, and reliability hearings for jailhouse informants); 2019 CT. P.A. 19-131 (providing for the disclosure of whether or not the prosecutor intends to introduce testimony of a jailhouse witness, requiring a judge to conduct a pretrial hearing regarding reliability of such witnesses, and requiring prosecutors to track the use of jailhouse-witness testimony); FLA. R. CRIM. P. 3.220(b)(1)(M) (requiring the state to disclose material information affecting the credibility of an informant, whether in or out of custody, including any incentives for cooperation); 725 ILL. COMP. STAT. § 5/115-21 (2003) (requiring reliability hearings for in-custody informants); NEB. REV. STAT. ANN § 29-4701-06 (requiring each prosecutors' office to maintain records of any case in which informant statement or testimony is used and disclose relevant information to the defense concerning the testimony or statement by a jailhouse informant); TEX. CODE CRIM. PRO. art. 2.024 (requiring tracking of use of testimony by informants in custody and any benefits offered or provided by such a person); TEX. CODE CRIM. PRO. art. 38.075 (requiring corroboration of an in-custody informant's testimony before it can be used to support a conviction); TEX. CODE CRIM. PRO. art. 39.14(h-1) (requiring state to disclose information relevant to the credibility of an in-custody informant); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (Strubhar, J., concurring) (approving lower-court "reliability hearing"); D'Agostino v. State, 823 P.2d 283 (Nev. 1992) (holding that before "jailhouse incrimination" testimony is admissible, the trial judge must examine whether "the details of the admissions supply a sufficient indicia of reliability"); State v. Charles, 263 P.3d 469 (Utah Ct. App. 2011) (reversing and remanding based on a trial judge's failure to instruct the jury to weigh informant testimony with greater care); Fla. Jury Instructions, Weighing the Evidence 3.9 (cautioning jurors when evaluating the testimony of informants); Utah CR415 In-Custody Informant Model Jury Instructions.

Reliability-review policies and practices can complement rules that have been adopted for in-court review of informant evidence. For example, Texas law provides that jailhouse-informant testimony may not be used "unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed." TEX. CODE CRIM.

PRO. art. 38–075 (2009). Illinois requires that courts hold pretrial reliability hearings before jailhouse-informant testimony can be used. 725 ILL. COMP. STAT. ANN. 5/115-21(d) (2019).

Agencies should not disclose important law-enforcement information to informants, because doing so can compromise reliability reviews of the information that informants provide. Such disclosures make it difficult to ascertain whether accurate details that an informant reported provide true corroborative information, or whether in fact the informant merely was repeating back details conveyed by law enforcement. Informants have reported that they use information obtained from law enforcement to fabricate evidence, to tailor their stories so as to fit the government's theory of the case, and to render their narratives more plausible and valuable. See *Report of the 1989-1990 Los Angeles Grand Jury: Investigation of the Involvement of Jailhouse Informants in the Criminal Justice System in Los Angeles County* (1990); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 936 (1999). To be sure, informants also can use information obtained from public records or from others in a custodial or community setting in order to falsely bolster their accounts. The difficulty in assessing the true sources of informant evidence should be considered carefully as part of any reliability review.

§ 12.04. Documentation and Disclosure of Informant Evidence

(a) At a minimum, agencies should ensure documentation of:

(1) the informant's name, age, demographic information, and prior criminal history;

(2) all current and previous arrangements with the informant, including any incentives offered;

(3) all statements made by the informant, including the substance thereof and the time and place they were made;

(4) information regarding any prior use of the informant or the informant's testimony, including any prior cooperation agreements, benefits provided or offered, erroneous statements, recanted previous statements, and violation of agency guidelines for informants;

(5) whether the informant suffers from substance-abuse issues, mental-health issues, or other characteristics that would make the informant especially vulnerable or unreliable; and

(6) whether the informant was formerly or is currently involved in criminal activity.

(b) All conversations with informants should be recorded, when feasible, and otherwise should be documented as close to contemporaneously as possible.

(c) Agencies should share documentation of information concerning informants with prosecutors in an ongoing fashion, regardless of the status of an investigation or criminal case.

Comment:

a. Documentation. Some of the work of informants is inherently difficult to document. Nonetheless, the safe and reliable use of informants requires careful documentation when feasible, given safety and practicality concerns. This makes it incumbent upon law enforcement to document carefully what it can, in writing or through video or audio recordings. Too often, the work that agencies have done with informants has been informal and poorly documented.

b. Informant information. As a first step, agencies should make a record of each person whom they rely upon as an informant, including name, age, demographic information, and prior criminal history. As part of documenting the identity of an informant, officers should ensure that they know the criminal history of that informant. All of this should occur as part of the prescreening described in § 12.02.

c. Informant agreements. All informant agreements should be reduced to writing. See § 12.01. Agencies often have entered into informal or oral agreements with informants, leading to a range of serious problems, including a lack of information about the scope of the agreements. Informants themselves may not adequately understand the agreement. Absent documentation, an informant can deny or distort the nature of an agreement.

Written informant agreements should reflect the complete agreement reached. Whenever a law-enforcement agency enters into an agreement with an informant, it should document all relevant terms of the agreement, including any incentives that the informant will receive, any prior use of the informant or prior testimony the informant has provided, and the informant's identity. Such agreements should be documented contemporaneously so that there is a clear record of their terms and the existence thereof. Such agreements should be signed by both parties. Such documentation also will ensure that agencies can comply with their constitutional duties and will aid agencies in assessing the reliability of informant evidence. If the agreement with an informant changes, as it might for long-term informants, those changes too should be documented.

d. Informant statements. Consistent with the focus in these Principles on reliability, agencies always should seek to carefully document informant evidence. All statements by informants or conversations between law enforcement and informants should be documented and, when feasible, recorded. The need to document informant evidence is particularly great given reliability concerns. Documenting information that informants obtain in the field may pose practical and safety challenges, but when feasible, officers may use hidden recording devices or surveillance to produce more reliable information. When law-enforcement officers have conversations with informants at agency facilities or other secure locations, it should be routine to record those conversations. Although it may not be feasible to obtain full recordings in the cases of certain sensitive or more confidential informants—whose identities are protected even from some within law enforcement—it may be possible to make recordings by using only audio or by masking the voices or appearances of the informants. Similarly, in cases raising national-security concerns, recordings may pose heightened risks and may not be feasible. In such instances, however, careful and contemporaneous documentation, including concerning the safety reasons for concluding a recording is not feasible, can help ensure that agencies comply with their constitutional duties, and will aid them in assessing the reliability of informant evidence. Further, subsequent conversations may be feasibly recorded, in order to document the evidence and clarify any uncertainties in the prior, unrecorded conversations.

e. Prior use of informants. Agencies should document their prior use of informants. An informant may be a known quantity in an agency, and he or she may have given prior statements or provided information in prior cases, including formal courtroom testimony. Law-enforcement officers should be familiar with the performance of informants on past occasions. Evidence that an informant has recanted statements, or that information the informant provided in the past proved unreliable, is important to document. Such documentation can help ensure that agencies comply with their constitutional duties, as well as aid them in assessing the reliability of informant-provided evidence.

f. Vulnerable populations. Some informants may be members of vulnerable populations and therefore pose a special risk of danger to themselves. Members of vulnerable populations also may be at a special risk of being influenced more easily by suggestions made by law-enforcement officials, and therefore are more likely to provide unreliable information. Any information

regarding an informant's vulnerability, or any other information bearing on the reliability of an informant, should be documented.

g. Databases. Agencies should maintain databases to track information about informants, including their identities, their prior use by law-enforcement officials, any prior testimony they have provided, and other characteristics that can be tracked. Such a database can help an agency answer questions concerning the reliability of a given informant. Agencies similarly should track and document use of confidential informants, using (when necessary) identifying numbers or other methods to anonymize identifying information. For informants not formally labelled as confidential, but whose use raises additional safety or confidentiality concerns, agencies should create additional procedures to maintain the security of their identities and records.

h. Disclosure. Agencies have an obligation to carefully document any agreements they have with informants so that they can disclose such agreements to prosecutors. Prosecutors have disclosure obligations under criminal discovery rules. Prosecutors also have disclosure obligations in connection with probable-cause assessments in warrant affidavits, which are shared with the defense and with the court. For this reason, agencies must disclose to prosecutors any agreements with and benefits conferred on informants.

It is important to note that there should be ongoing disclosure to prosecutors of all information regarding arrangements with informants, including any incentives that they have or will receive, any prior testimony they have provided and the contents thereof, their use in prior investigations, and their identities. At the earliest time that it becomes relevant, this information should be available to prosecutors. Doing so enables prosecutors to carry out their ethical and constitutional duty to weigh whether they should disclose such information to the defense, as well as the probative value of evidence provided by informants. Such information may be provided on a redacted basis, due to concerns for informant safety, or submitted in camera for judicial review before disclosure to the defense.

REPORTERS' NOTES

The uses of informants, ranging from informant identity, to agreements with informants, to the information provided by informants, traditionally have been documented in a highly informal manner. "Historically, many communications that occurred during the[] proffer sessions were not memorialized by government agents, especially preliminary sessions when prosecutors anticipated that the informant would be less than fully forthcoming." Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 753-754 (2016). There

continues to be wide variation among the practices used by law enforcement and prosecutors' offices to reduce arrangements made with informants to written agreements.

Far from promoting sound documentation of informant-provided and informant-related evidence, constitutional rules requiring the disclosure of written and formal arrangements may have had the opposite effect of encouraging informal and oral arrangements. R. Michael Cassidy, *''Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1132 (2004) (stating that "[t]he Court's decision in Giglio[v. United States, 405 U.S. 150 (1972)] has created an incentive for prosecutors to make representations to an accomplice witness that are vague and open-ended, so that they will not be considered a firm 'promise' mandating disclosure. . . . Such indefinite agreements have the added advantage of allowing prosecutors to argue to the jury that no specific promise has been made to the witness").

The lack of documentation of informant-related and informant-provided evidence has led to a wide range of problems. These include poorly understood, informal, and concealed arrangements with informants, as well as poorly recorded and uncorroborated statements by informants. In cases of persons later exonerated by post-conviction DNA testing, informants had sometimes falsely denied at criminal trials that they had reached arrangements with the prosecution. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 129 (2011). In various instances, an informant has claimed to have overheard details about a crime that only the culprit could have known; but without a recording of the informant's interview(s) with law enforcement, it could not be determined whether those details had been disclosed to the informant by law enforcement. Id. at 131. There is evidence that informants delivered statements carefully crafted to incorporate the prosecution's evidence and theories. Id. at 134 ("The most enterprising jailhouse informants did not just know specific facts about the crime. They knew the facts that the prosecutors had been unable to prove any other way. Their statements were neatly tailored to fit the prosecution strategy at trial."). Such cases highlight the importance of recording, when possible, informant interviews and statements.

Agreements regarding the use of informants should be reduced to writing at the time the agreement is reached. Prosecutors often reach agreements with informants, but not necessarily with the involvement of law enforcement, and without making a written record. In recent years, "some offices (notably the U.S. Department of Justice) have changed that practice and now strongly recommend to prosecutors that notes be taken during all proffer sessions so that, among other reasons, they will be available to the defense at any trial at which the cooperator testifies." Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 754 (2016). To this day, "[m]ost prosecutors' offices and law enforcement agencies, however, do not electronically record proffer sessions with potential informants." Id. at 754. There is a need for coordination between law enforcement and prosecutors regarding the use of informants, and the documentation of agreements reached with informants. Both policing agencies and prosecutors' offices should have policies in place concerning the respective roles of law enforcement and prosecutors in entering into and documenting informant agreements.

Constitutional rulings regarding documentation and disclosure of informant-related and informant-provided evidence. Constitutional requirements mandate, as a matter of due process, that material information regarding the credibility of a witness be disclosed to the defense at a criminal trial, but they do not mandate any particular set of practices either for the documentation or the disclosure of such evidence. In *Giglio*, the U.S. Supreme Court held that when "reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general rule" that "suppression of material evidence justifies a new trial[,] irrespective of the good faith or bad faith of the prosecution." Giglio v. United States, 405 U.S. 150, 153-154 (1972) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)) (internal quotation marks omitted). Most recently, in Wearry v. Cain, the Supreme Court found that concealed information undermining the credibility of an incentivized jailhouse informant witness, "[b]eyond doubt . . . suffice[d] to undermine confidence in Wearry's conviction." 577 U.S. 385 (2016). Further, while the outright fabrication of testimony by an informant would violate due process, such intentional lies may be quite difficult to prove. See Napue v. United States, 260 U.S. 265 (1959) (holding that it violates due process for the government to knowingly introduce fabricated testimony). The careful documentation of evidence can help to ensure that constitutional disclosure requirements are met, as well as help to detect any outright fabrication of evidence by an informant. Further, when these due-process rules do not clearly apply in cases that are resolved through a guilty plea, agency practices are a crucial safeguard. See, e.g., Markus Surratt, *Incentivized Informants,* Brady*,* Ruiz*, and Wrongful Imprisonment: Requiring Pre-Plea Disclosure of Material Exculpatory Evidence*, 93 WASH. L. REV. 523, 531 (2018).

The Supreme Court has held that an informant's identity may be kept confidential unless the identity of the informant is important to the defense case. In Roviaro v. United States, the Court recognized "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of the law." 353 U.S. 53, 59 (1957). However, this "informer's privilege" is qualified, and a court may override the privilege and order disclosure of the informant's identity if disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." Id. at 60-61.

The need for documentation of informant-related evidence. When constitutional rulings do not mandate any particular set of documentation regarding informant background, statements, or testimonial histories, it is all the more important that agencies do so. See Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What To Do About It*, WM. & MARY L. REV. 1067, 1080-1081 (2008) (explaining that open-file policies, which are not mandated by the U.S. Constitution, often omit prior testimonial history and that this information thus is often not passed on to the defense). Large-scale scandals have resulted in situations in which the same informant repeatedly provided false information in exchange for leniency. In one high-profile case, Lesley Vernon White admitted to having provided false testimony in dozens of cases in California in exchange for leniency and other benefits. Robert Reinhold, *California Shaken over an Informer*, N.Y. TIMES, Feb. 17, 1989. In other situations, information concerning the use of an informant was documented, but it was concealed. Such was

the case in Orange County, California, in which prosecutors maintained a secret informant database that contained exculpatory information, the revelation of which led to civil-rights investigations. Dahlia Lithwick, *You're All Out: A Defense Attorney Uncovers a Brazen Scheme to Manipulate Evidence, and Prosecutors and Police Finally Get Caught*, SLATE (May 28, 2015). Some commentators have argued that exchange of complete information regarding prior testimony by an informant should be constitutionally mandated, due to the importance of such information in regard to potential impeachment of witnesses at trial. See Dodds, supra, at 1080-1081 (discussing a possible expansion of the *Brady* materiality requirement to include an informant's prior testimonial history).

A special problem arises from the widely shared implicit understanding that informants will be rewarded for producing information, even when the government has not expressly promised them any benefit. Informants, especially experienced ones, often proactively collect information or fabricate evidence in the absence of an agreement with the government, and then collect rewards after the fact. The informants then can testify truthfully that they were not promised a benefit, which is misleading to juries that do not understand such implicit arrangements. Russell D. Covey, *Suspect Evidence and Coalmine Canaries*, 55 AM. CRIM. L. REV. 537, 573 (2018). The government also can assert truthfully that the informant was not their agent, thereby evading the constraints of Massiah v. United States, 377 U.S. 201 (1964), which prohibits the governmental use of informants to deliberately elicit evidence from charged suspects. Raeder, *See No Evil*, supra, at 1436. A rule that any use of an informant must be accompanied by an arrangement documented in writing can help to prevent such conduct.

In addition to documenting the identity of informants, this Section calls for the documentation of prior testimony by informants. Recantations are common among informants. Documented prior statements and testimony provide important impeachment or post-conviction evidence. "Murder cases most often involve recantations by supposed eyewitnesses, including co-defendants and the actual criminals, they also include a *significant number of recantations by jailhouse snitches or other informants or witnesses who claim the defendant confessed to them*." SAMUEL R. GROSS & ALEXANDRA E. GROSS, NAT'L REGISTRY OF EXONERATIONS, WITNESS RECANTATION STUDY: PRELIMINARY FINDINGS, May 2013 6 (2013), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1090&context=other (emphasis added). One study found that "official misconduct is more common in recantation exonerations (73%) than in non-recantation exonerations (51%)." Id. at 9. "[A] very high percentage of recantation exonerations involve perjury or false accusations . . . ." Id. In the Gross and Gross study, "[a]lmost all of the recanting witnesses . . . lied in their accusations rather than making honest mistakes." Id. For example, Cameron Todd Willingham was "executed in Texas for the 1991 deaths of his three young children, who perished in a house fire. Jailhouse informant Johnny Webb, who testified that Willingham confessed to him, later recant[ed] his testimony." Katie Zavadski & Moiz Syed, *30 Years of Jailhouse Snitch Scandal*, PROPUBLICA (Dec. 4, 2019).

Types of documentation. The need to carefully document informant-provided evidence is particularly heightened given concerns about the reliability of such evidence. When feasible,

documentation should include the recording of informants' statements. "To enable the defendant to challenge the veracity of the witness effectively, and a jury to assess his credibility, all interviews with potential trial witnesses should be electronically recorded either by audio or videotaping." Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 861 (2002). Due to the concern that absent a recording it is far more difficult to corroborate statements by informants or investigate their reliability, scholars have recommended that agencies and jurisdictions move toward recording of informant-provided evidence. See, e.g., Robert Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519 (2009). An Oregon statute provides that custodial interviews conducted by law enforcement within law-enforcement agencies should be recorded electronically "if the interview is conducted in connection with" certain stated crimes, although there is an exception when "the state demonstrates good cause for the failure to electronically record the interview." OR. REV. STAT. § 133.400 (amended effective Jan. 2020). The statute enumerates what may be considered "good cause" and specifically addresses situations in which "[e]lectronically recording the custodial interview would jeopardize the safety of any person or the identity of a confidential informant." OR. REV. STAT. § 133.400(7)(b)(D). For purposes of the statute, law-enforcement facilities include "a courthouse, building or premises that is a place of operation for a municipal police department, county sheriff's office or other law enforcement agency at which persons may be detained in connection with a juvenile delinquency petition or criminal charge." OR. REV. STAT. § 133.400(7)(c). If recording is not possible, then near-contemporaneous documentation is essential. For example, the Los Angeles Police Department requires that at least two officers be present when meeting with an informant and that both officers be capable of understanding the informant's language. L.A. POLICE DEP'T, L.A. POLICE DEPARTMENT MANUAL: POLICY § 544.30, available at http://www.lapdonline.org/lapd_manual/volume_1.htm#544.

Although this Section calls for recording informant interviews and carefully documenting their use, different rules are needed to protect the identities of informants whose identities are at least in part confidential, particularly when the reason for doing so is out of a concern for informant or public safety. The New York Police Department provides in its patrol guide that police officers *may not* record conversations with informants who are considered confidential. *Body-Worn Cameras: Frequently Asked Questions about Body Cameras: When are Officers Required to Record Video?*, NYPD, https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page (last visited June 2, 2020) ("Officers may not record sensitive encounters, such as speaking with a confidential informant"). Although such a broad rule may not be necessary, agencies should set out procedures for ensuring confidentiality, when appropriate, while also ensuring that evidence is carefully documented.

Informant databases. As a best practice, agencies should track the use of all informants, including informants treated as confidential, and maintain that data over time. A range of individual agencies at the local, state, and federal level already do that. In the New York City Police Department, "once informants are approved for use they are photographed, fingerprinted

and entered into a closely guarded registry. Any officer who deals with them is required to log the contact in the registry, with a record of any payments made." Alan Feuer & Al Baker, *Officers' Arrests Put Spotlight on Police Use of Informants*, N.Y. TIMES, Jan. 27, 2008. In its own database, "[t]he FBI tracks the productivity of [confidential informants] by aggregating their 'statistical accomplishments,' i.e., the number of indictments, search warrants, Title III applications, and other contributions to investigative objectives for which the [confidential informant] is credited." U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES: CHAPTER THREE: THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2005). Such tracking systems "create[] a database of relevant information for prosecutors who can then evaluate the reliability of their witnesses and avoid wrongful convictions before they happen." Alexandra Natapoff, *The Shadowy World of Jailhouse Informants: Explained*, APPEAL (July 11, 2018), https://theappeal.org/the-shadowy-world-of-jailhouse-informants-an-explainer.

A database can facilitate implementation of documentation and disclosure requirements. Some jurisdictions already have adopted such database systems. In 2019, Connecticut enacted legislation that created "the nation's first statewide system to track the use of jailhouse informants, including any benefits offered in exchange for their testimony." Dave Collins, *Lying Prisoners: New Laws Crack Down on Jailhouse Informants*, HARTFORD COURANT (Sept. 16, 2019). The statute provides for a series of jailhouse-informant-related disclosures, including: information about the criminal history of such witnesses; cooperation agreements and any benefits offered; all statements made; any past recantations of such testimony; and information about any prior testimony by the witness. Id. In 2020, the Oklahoma state legislature passed similar legislation creating a statewide database to track jailhouse informants. See Okla. Sen. Bill 1385 (effective Nov. 2020). That act also creates a reporting requirement, wherein "the District Attorneys Council shall publish an annual report of aggregate, de-identified data regarding the total number of cases tracked [in the database] . . . and the number of cases added during the previous fiscal year . . . ." Id.

Careful auditing of informant databases can help identify more systemic issues regarding the use of informants. The U.S. Department of Justice's audit of U.S. Drug Enforcement Administration (DEA) practices found the DEA's database of confidential sources to be "unreliable" and "incomplete." U.S. DEP'T OF JUSTICE, OFF. INSPECTOR GEN., AUDIT DIVISION, THE DRUG ENFORCEMENT ADMINISTRATION'S PAYMENTS TO CONFIDENTIAL SOURCES: EXECUTIVE SUMMARY 6-7 (2005) (lacking descriptions of the justification of payments, for example). The Justice Department made 12 recommendations in its report, including that the DEA "add a module to an existing database system to track confidential source impeachment information" and "account for all payments made to a confidential source by the DEA, not just payments using DEA-appropriated funds." Id. at 8. In a 2015 audit, the Justice Department again "found that the DEA did not adequately oversee payments to its sources, which exposes the DEA to an unacceptably increased potential for fraud, waste, and abuse." U.S. DEP'T OF JUSTICE: OFF. INSPECTOR GEN, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE PROGRAM i (2016). The 2015 audit showed that "the DEA did not

appropriately track all confidential-source activity; did not document proper justifications for all source payments; and, at times, did not adequately safeguard traveler information." Id. at iii.

The U.S. Constitution requires the government to disclose impeachment material regarding informants, namely, any information that would cast doubt on the person's credibility. Many states specify exactly what that material must include, such as the informant's previous statements, his or her criminal history, benefits received or promised, any testimony in prior cases, and recantations. Tracking systems help ensure that such information is fully collected and properly disclosed. Certain states require disclosure to the defense of past recantations by informants or witnesses. For example, Illinois requires the disclosure of "whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation." 725 ILL. COMP. STAT. ANN. § 5/115-21(c)(5) (2019); see also Conn. Sen. Bill 1098 (effective Oct. 2019) ("Whether at any time the jailhouse witness recanted any testimony subject to the disclosure and, if so, the time and place of the recantation, the nature of the recantation and the name of any person present at the recantation"); NEB. REV. STAT. § 29-4704(1) (2019) ("Any occasion known to the prosecutor in which the jailhouse informant recanted testimony about statements made by another suspect or defendant that were disclosed to the jailhouse informant and any transcript or copy of such recantation."); Okla. Sen. Bill 1385 (effective Nov. 2020) (requiring disclosure of a range of information, including recantations by jailhouse-informant witnesses); see also Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000) (instituting new rules for jailhouse-informant testimony that require prosecutors to, before trial, provide information including other cases in which the informant testified and any recantations).

§ 12.05. Involvement by Informants in Criminal Activity

(a) Agencies should establish clear boundaries regarding the involvement of informants in criminal activity, including the extent to which it is permissible. Such involvement should be restricted to acts that are of substantial value to agency efforts to achieve public safety, and should be based on advance, written authorization.

(b) Any involvement of informants in criminal activity should be conducted in a manner that minimizes harm to the public and the informant.

(c) All criminal activity by informants, whether authorized or not, should be reported by informants to the agencies with which they work. Agencies should monitor and document such activity.

Comment:

a. Crimes by informants. Agencies should ensure that their goal in using an informant is to prevent the commission of crimes, and that such use does not unduly facilitate ongoing criminal activity or delay an end to that activity. In some circumstances, using informants in ongoing criminal activity may be unavoidable, and even quite valuable, in order to ensure an investigation's success. However, given the public-safety risks of using informants who are engaged in ongoing criminal activity, law-enforcement agencies should adopt written procedures to limit such use. It should be limited to high-value investigations and to acquiring information that could not otherwise be obtained. Authorization for an informant to engage in otherwise illegal activity should be sought by an officer, in advance, from supervisors within the agency. Authorization should provide clear, written instructions, setting out the parameters of the use of the informant, and authorizing such conduct only for a defined period of time.

b. Harm-minimization. In the past, the involvement of informants in criminal activity, including serious crimes, has been too often tolerated, and has not been governed by clear policies. The result has been harm to public safety and the safety of informants, as well as injury to the legitimacy of agencies. Written policy governing the use of informants who are engaged in criminal activity should include substantive limits to ensure that the risk of injury to officers and the public is reduced to the fullest extent possible. See § 1.04 (Reducing Harm). There should be clear boundaries delineating what criminal activities will be tolerated.

c. Monitoring and supervisory approval. In order to minimize criminal activity by informants, law-enforcement policies governing the use of informants should require that all criminal activity by informants be monitored and documented. Informants should be required to report all criminal activities. Policies governing the monitoring of informants should include, whenever possible, a requirement that an officer obtain approval from a supervisor, in advance, of any ongoing criminal involvement by the informant. Requiring supervisory approval can help ensure that such use is carefully restricted and minimized, consistent with the overall goal of public safety and security. In addition, agencies should track the crimes committed by informants on whom they systematically rely—past and present, authorized and unauthorized. A database may facilitate such tracking and permit evaluation over time as to whether it is consistent with public safety to allow a particular informant to participate in ongoing criminal activity.

REPORTERS' NOTES

The use of informants often necessarily includes their involvement in ongoing criminal activity, and, for that reason, ongoing review, documentation, and clear boundaries are essential to limit public-safety risks.

Criminal conduct by informants may be far more common than is widely appreciated. See Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1081 (2011) ("Many handlers give free rein to informants to do as they please in committing new crimes, with some actually aiding informants in gathering the resources to engage in criminal conduct"). For example, at the federal level, "the U.S. Department of Justice's 2005 report indicates that 10 percent of the [Federal Bureau of Investigation's] informant files contained evidence that the informant was committing unauthorized crimes about which the government knew." ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 32 (2008); see also Brad Heath, *Exclusive: FBI Allowed Informants to Commit 5,600 Crimes*, USA TODAY (Aug. 4, 2013, 6:12 AM), https://www.usatoday.com/story/news/nation/2013/08/04/fbi-informant-crimes-report/2613305 ("The FBI gave its informants permission to break the law at least 5,658 times in a single year"). This statistic accounts for just those crimes that the government has learned of and documented.

The U.S. Department of Justice, Office of the Inspector General, Report concluded that serious misconduct has occurred when informants were mishandled, and "[f]ederal criminal prosecution of FBI informants can result from the informant's unauthorized criminal conduct or from situations in which the informant exceeds the scope of his authority to engage in 'otherwise illegal activity.'" U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., SPECIAL REPORT (2005). Similar concerns have been raised at the state and local levels. See, e.g., George Hunter, *Detroit Police Rein in Use of Paid Informants*, DETROIT NEWS (Dec. 25, 2015, 11:45 PM), https://www.detroitnews.com/story/news/local/detroit-city/2015/12/25/detroit-police-informants/77914176 (providing an example at the local level, when outcry followed news that Detroit police officers had allowed and even incentivized informants to sell drugs). Although a number of police departments forbid informants from committing additional crimes, other municipalities do not have any outright prohibitions on such conduct. Taslitz, supra, at 1080; see also ORANGE CNTY. SHERIFF-CORONER DEP'T, ORANGE COUNTY SD POLICY MANUAL § 608.5, available at https://www.ocsd.org/civicax/filebank/blobdload.aspx?BlobID=116389 ("Criminal activity by informants shall not be condoned."); SYRACUSE POLICE DEP'T, GENERAL RULES & PROCEDURES MANUAL § 17.13, at http://www.aele.org/law/2007FPAPR/informants-syracuse.html ("Informants must not self-initiate plans to commit crimes nor solicit persons to act in an illegal manner."). Special concerns also have been raised concerning the use of confidential informants in law enforcement investigations of organized drug dealers. Such investigations "almost always" involve informants, and those informants may have "questionable motives" and be "perhaps the most difficult to manage." G.D. Lee, *Drug Informants: Motives and Management,* 62 FBI Law Enforcement Bulletin 10 (1993).

Criminal activity by informants poses a harm to the public. Indeed, informants may feel that due to their relationship with law enforcement, they can engage in criminal acts with impunity.

See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 109-110 (2008) ("[O]nce a criminal agrees to provide information to the government, he may continue to commit new offenses on his own initiative to which police and prosecutors may or may not turn a blind eye."). Informants also routinely engage in unauthorized criminal activities, often with the understanding that the government will turn a blind eye or under-enforce the law as long as the informants remain useful. See, e.g., *Everything Secret Degenerates*, supra; NATAPOFF, supra, at 32-33; Pamela Colloff, *Feature: How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. TIMES MAG. (Dec. 4, 2019). Informants may receive leniency for their criminal conduct as part of arrangements with law enforcement. See NATAPOFF, supra, at 49 ("In practice, prosecutors are often willing to drop or reduce charges against someone who is cooperating with law enforcement"). Informants also may fail to provide reliable information and, as a result, hamper efforts to end criminal activity. See generally Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737 (2016) (discussing the unreliability of informant information).

The prevalence of and harm caused by criminal activity by informants supports the adoption of carefully considered and well enforced policies regarding the nature and limits of such activity, as well as ongoing monitoring, tracking, documentation, and supervision. There is no single set of best practices regarding agency policy in this area. However, there are notable examples of policies that agencies have adopted. The Federal Bureau of Investigation (FBI), for example, has detailed rules regarding the use of confidential informants, including rules that address the risks involved when they engage in "otherwise illegal activity," as well as rules that specify when supervisory approval or approval by a U.S. attorney is required. *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines (Redacted) Special Report* Chapter 3 (2005). The FBI distinguishes between authorized and unauthorized criminal activities by informants. There are two main allowances of "authorized" criminality: "(1) to provide opportunities for the suspects to engage in the target crime, and (2) to maintain a false identity or to facilitate access to the suspect." Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 165 (2009). According to the FBI, authorized criminal activity poses problems beside the potential for serious harm to victims of these crimes, including: "the lack of transparency about basic information regarding authorized criminality, the exercise of unfettered police discretion, and the moral ambiguity that arises when police engage in criminal activity in order to pursue criminals." Id. at 181.

The FBI and other federal agencies require that any engagement by an informant in illegal activity be authorized in advance, with clear instructions, for a defined time period not to exceed 90 days, and with clear parameters. GAO, Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies, GAO-15-242SU (Washington, D.C.: Mar. 6, 2015). Written instructions are provided to the informant, and signed by the informant, regarding the parameters of the authorized and otherwise illegal activity. Such instructions and documentation procedures always should be followed.

§ 12.06. Oversight of Benefits to Informants

Agencies should conduct oversight to ensure that any benefits offered or provided to informants, including financial compensation, are proportional to the public's interest in securing reliable information.

Comment:

a. Proportionality. Agencies should consider carefully what benefits they offer or provide to an informant. All too often, informants have received excessive financial compensation or unwarranted leniency in criminal cases, or they have had expectations that they would receive excessive benefits if they cooperated. It harms the legitimacy of law-enforcement efforts if informants are seen as profiting financially or avoiding criminal responsibility for their acts in exchange for providing information that is not of sufficient value. For this reason, agencies should ensure that any benefits informants expect or receive be proportional to the value that law enforcement obtains from securing their cooperation. An informant who, at personal risk, provides inside information regarding a serious criminal conspiracy arguably should receive quite meaningful benefits. In contrast, an informant who repeats information that law enforcement could independently gather from public sources should not normally receive meaningful benefits.

b. Limits on benefits. Agency policies should set clear limits and boundaries on the benefits provided to informants. Such constraints can go beyond simply requiring proportionality. For example, they may set out absolute limits on financial benefits provided to informants to ensure that such benefits are not abused. Agencies also may delineate categories of cases or informants that should be ineligible for compensation, or types of cases ineligible for leniency, including because serious ongoing criminal conduct is involved. Law enforcement should not provide to informants incentives that themselves constitute crimes; thus, incentives must be confined to lawful benefits and compensation, and not, for example, illegal drugs or other criminal proceeds. Conversely, agency policies should set clear limits on pressures or harms threatened in order to induce cooperation by informants.

c. Role of prosecutors. Sometimes, prosecutors, rather than policing agencies, enter into agreements to provide benefits to informants. To prevent any misunderstanding, agency policy should set out respective authority to reach agreements with informants. Coordination and information sharing is necessary if both agencies obtain agreements with informants. In addition,

the proportionality of benefits that policing agencies provide to an informant should take into account any further benefits that prosecutors might offer.

d. Auditing. Agencies should conduct auditing and oversight to ensure that benefits provided to informants are documented, and that all benefits provided comply with agency policies.

REPORTERS' NOTES

Informants may have a wide variety of motives for cooperating with law enforcement. Informants may be motivated by "fear, financial gain, avoidance of punishment, competition, and revenge." Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 765 (2016). But the key motive for their cooperation is that they are, by definition, witnesses who expect to receive benefits and avoid harms in exchange for information. As such, they may be driven to engage in dangerous conduct or to produce unreliable or fabricated statements. Indeed, one persistent challenge with the use of informants is that their motivations necessarily include some degree of self-interest, which in turn raises reliability concerns. See U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., AUDIT DIVISION, THE DRUG ENFORCEMENT ADMINISTRATION'S PAYMENTS TO CONFIDENTIAL SOURCES: EXECUTIVE SUMMARY 2 (2005). "Although informants' motivations in some cases may be complex, the very nature of the cooperation transaction requires a presumption that an informant's primary incentive is to obtain a benefit and that this incentive creates a strong bias that colors his or her testimony." Roth, supra, at 765.

Law enforcement's use of monetary incentives in exchange for information or services from confidential informants has sparked public scrutiny. For example, media outlets have drawn attention to the large sums that the U.S. Drug Enforcement Agency (DEA) has paid informants, including paying: "[a]n airline employee over $600,000 in less than four years," "[a] parcel worker more than $1 million over five years," and "[o]ne source $30 million over a 30-year period." Joe Davidson, *Want to Make a Million? Become a DEA Informant*, WASH. POST (Sept. 30, 2016). In a 2016 audit of the DEA's confidential-source program, the U.S. Department of Justice found that over a five-year period, the DEA paid approximately $237 million for information or services to a number of its over 18,000 active confidential sources. U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE PROGRAM i (2016). At the state level, use of compensated informants also can be quite common. State and local prosecutors rely on numerous informants in the same ways that their federal counterparts do. See e.g., Sarah Stillman, *The Throwaways*, NEW YORKER (Aug. 27, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways. They also pay for information. For example, "In the last six years, the [New York] Police Department and programs like Crime Stoppers have paid at least $18 million for information that might assist in criminal investigations, according to police statistics. A vast majority of that money, $16.5 million, went to confidential informants." Erin Tennant, *Money Remains Crime-Fighting Tool for New York Police*, N.Y. TIMES (June 19, 2014), https://www.nytimes.com/2014/06/20/nyregion/money-remains-

crime-fighting-tool-for-new-york-police.html. The Crime Stoppers program provides "rewards up to $2,500 for anonymous information provided to [their hotline] that leads to the arrest and indictment of a violent felon." *Crime Stoppers*, NYPD, https://www1.nyc.gov/site/nypd/services/see-say-something/crimestoppers.page (last visited Feb. 13, 2020) (noting the program is a "public/private partnership between the NYPD and the New York City Police Foundation."). These rewards can incentivize faulty information. For example, "[i]n Cleveland, Ohio alone, the U.S. Postal Service spent over $250,000 in a year or so attempting to "sting" drug dealers in the Service. It later developed that the five informants used by the Service, all with criminal records, framed over 60 innocent people (many of whom were prosecuted) by claiming that tapes of drug-buy conversations, which had actually been concocted by friends, were recordings of the framed individuals." CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 134 (4th ed. 2007).

Agencies should adopt policies that regulate the provision of monetary compensation to informants to ensure against unwarranted, undocumented, or even corrupt payments. Systems that permit automatic compensation can create troubling incentives and raise serious reliability concerns. Indeed, not only is "payment of informants involved in major drug busts, at the federal level and by some states . . . , both significant and typical," but bounty systems are common. CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 134 (4th ed. 2007). Under such systems, "[i]nformants often receive 25% of all money and assets seized as a result of their information. Although some agencies have a cap of $250,000 per case, that cap can be avoided by treating a seizure as more than one case, or 'giving' the seizure to local authorities, who have no cap." Id.

Some informants are incentivized chiefly by expected leniency in their own criminal cases, including forbearance from arrest or prosecution, as well as lesser penalties following prosecution. Such leniency also raises reliability concerns. This can be especially pressing regarding the use of jailhouse informants. See Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996) ("The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air."). In one report, the Innocence Project explained that the use of jailhouse-informant-testimony "is one of the leading contributing factors of wrongful convictions nationally, playing a role in nearly one in five of the 367 DNA-based exoneration cases." *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT, https://www.innocenceproject.org/informing-injustice (last visited Feb. 11, 2020).

Thus, jailhouse informants may have "a strong incentive to lie," which in turn creates a significant problem as criminal defendants may not be "given key information related to the credibility of the jailhouse informants who testified against them[,] including the benefits they received, previous cases in which they acted as jailhouse informants, and their criminal history." Innocence Project, supra. For example, "Martin Reeves spent 21 years in prison after he and his

co-defendant Ronald Kitchen were wrongfully convicted in 1991 of the murder of two adults and three children." Id. Reeves and Kitchen "became suspects after a jailhouse informant . . . contacted a Chicago Police officer and claimed Kitchen had admitted to committing the crime with Reeves during a phone call Williams made to him from jail." Id. However, phone records demonstrated that "no such calls had been made on the dates Williams claimed." Id. The Innocence Project advocates for the following reforms in the arena of jailhouse informant testimony: "[p]rompt and complete disclosure of jailhouse witness evidence," "[t]racking the use of jailhouse witness testimony," "[r]equiring judges to hold pre-trial reliability hearings to assess whether a jailhouse witness's testimony is admissible," and "[p]roviding instructions that jurors should consider benefits offered to jailhouse witnesses and other reliability factors when assessing their statements." Id.

Any compensation provided to informants should be linked to the public-safety value and reliability of the information they provide, under careful rules that set out when and what types of compensation are appropriate. The National Association of Criminal Defense Lawyers (NACDL), for its part, believes that "[t]he government should not sponsor testimony from paid informants," but that if it does, it "should be rare and the payments well documented and fully disclosed." Joe Davidson, *Want To Make a Million? Become a DEA Informant.*, WASH. POST (Sept. 30, 2016, 7:00 AM), https://www.washingtonpost.com/news/powerpost/wp/2016/09/30/want-to-make-a-million-become-a-dea-informant (statement of Barry J. Pollack, President of the NACDL).

Some agencies have set up policies regarding benefits offered to informants. U.S. Department of Justice guidelines provide that "[m]onies that the FBI pays to a Confidential Human Source in the form of fees and rewards shall be commensurate with the value, as determined by the FBI, of the information or assistance the Source provided to the FBI." U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 28 (2002) (Attorney General Guidelines). Confidential sources may be reimbursed for any "actual expenses incurred." Id. However, the Attorney General Guidelines prohibit the use of contingent payments. Id. The Attorney General Guidelines also provide that "payments to a confidential source that exceed an aggregate of $100,000 within a one-year period shall be made only with the authorization of a designated senior headquarters official," and with certain other approvals if the payments exceed $200,000. U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., AUDIT DIVISION, THE DRUG ENFORCEMENT ADMINISTRATION'S PAYMENTS TO CONFIDENTIAL SOURCES: EXECUTIVE SUMMARY 6 (2005). In its Department Manual, the Los Angeles Police Department (LAPD) states that "[a]n informant's motivation should be carefully evaluated in determining the extent upon which the information will be relied." L.A. POLICE DEP'T, L.A. POLICE DEPARTMENT MANUAL: POLICY § 544.10, available at http://www.lapdonline.org/lapd_manual/volume_1.htm#544. Further, immunity from prosecution only may be granted to informants by a judge—not anyone within the LAPD. Id. at § 544.20. The LAPD requires that officers "keep their supervisors informed of their relations and activities involving informants." Id. at § 544.30. Such policies help to accomplish the goals of this Section.

§ 12.07. General Principles for Undercover Officers

In light of the range of interests implicated by their use, agencies should take great care in relying on undercover officers during investigations. In particular, agencies should:

(a) ensure that the use of undercover officers does not unduly risk the undercover officers' safety or the safety of others;

(b) carefully regulate undercover officers' participation in illegal activities;

(c) to the extent possible, limit the intrusiveness of the use of undercover officers; and

(d) document and report on the use of undercover officers.

Comment:

a. Use of undercover officers. As with informants, undercover officers can provide important evidence during criminal investigations. Sometimes, organized criminal groups or conspiracies can be effectively investigated only by securing inside information. However, agencies' use of undercover officers raises concerns about:

(1) the public's safety;

(2) the safety of undercover officers stemming from their involvement in ongoing criminal activity;

(3) intrusiveness, given the reach of some undercover activity into the community; and

(4) reliability of the evidence secured by undercover officers, in that, although undercover agents are screened and employed officers, it sometimes may be less feasible to carefully document and corroborate evidence in an undercover setting.

b. Distinct interests implicated by undercover officers. Undercover officers are trained, professional members of law enforcement, distinguishing them from informants. However, the surreptitious use of law-enforcement personnel creates special risks, including to safety and of intrusiveness. There also are great risks of injury to the officers themselves, as well as to members of the public. There are special concerns regarding legitimacy if law enforcement is directly or indirectly a party to criminal activity.

The use of undercover agents can be highly intrusive, as such use invades privacy and involves surveillance of a wide range of community activities, including confidential and privileged relationships. The use of undercover agents can be particularly intrusive if the agents are posing as members of the press, clergy, or community groups, or as public-health officials, lawyers, or members of any profession that relies on the public trust. Knowing the government engages in this conduct can make people or groups feel targeted, and can chill speech and association. It is a necessary, but nonetheless concerning, exception to the requirement in § 1.07 that officers be truthful in interactions with the public.

c. Policies. Any involvement of undercover agents in criminal activity should be limited to the most high-value investigations. Written policy should include substantive limits consistent with the principle of harm-minimization to ensure that, consistent with § 1.04, the risk of injury to officers and the public be reduced to the extent possible.

Appropriate justifications for undercover agents' participation in illegal activities include:

(1) to obtain information or evidence necessary for the success of the investigation that is not reasonably available without their participation in the activity;

(2) to establish or maintain credibility of a cover identity; and

(3) to prevent death or serious bodily injury.

Policies should require supervisory approval in advance for any ongoing undercover work by officers. The more intrusive the use of the undercover officer, the more limitations should be imposed on that officer's activities, if allowed at all.

d. Reporting. Agencies should document and report on the use of undercover officers. Although sensitive information regarding criminal investigations should not be shared, the public should be able to evaluate the scope of an agency's use of undercover agents and the general practices and reach of their activities.

REPORTERS' NOTES

The use of undercover agents provides law enforcement with the means to covertly investigate criminal activity, and such agents can be invaluable. For that reason, the use of undercover agents remains an integral part of law-enforcement practice.

Although undercover activities are not often documented in a manner that permits members of the public to assess the extent or nature of their use, it appears that law enforcement's use of undercover agents is increasing. In the federal system, law enforcement "has significantly expanded

undercover operations in recent years, with officers from at least 40 agencies posing as business people, welfare recipients, political protesters[,] and even doctors or ministers to ferret out wrongdoing . . . ." Eric Lichtblau & William M. Arkin, *More Federal Agencies Are Using Undercover Operations*, N.Y. TIMES (Nov. 15, 2014), https://www.nytimes.com/2014/11/16/us/more-federal-agencies-are-using-undercover-operations.html. Indeed, "[a]cross the federal government, undercover work has become common enough that undercover agents sometimes find themselves investigating a supposed criminal who turns out to be someone from a different agency." Id. Although much of this expansion arose following the September 11, 2001, terrorism attacks, today, many of these undercover "operations are not linked to terrorism," but instead "reflect a more aggressive approach to growing criminal activities like identity theft, online solicitation[,] and human trafficking, or a push from Congress to crack down on more traditional crimes." Id. Undercover operations also are common among state and local agencies. See, e.g., *Major Crimes Division Standards and Procedures*, L.A. Police Dep't, http://www.lapdonline.org/search_results/content_basic_view/27435 (last viewed May 28, 2020) (providing standards for Los Angeles Police Department undercover agents); George Joseph & Liam Quigley, *Plainclothes NYPD Cops Are Involved in a Staggering Number of Killings*, INTERCEPT (May 9, 2018, 7:00 AM), https://theintercept.com/2018/05/09/saheed-vassell-nypd-plain-clothes (discussing New York Police Department undercover agents).

The use of undercover officers can lead to a variety of harms. One concern with the unregulated use of undercover agents is that their activities may not be as readily or carefully monitored as those of other officers, and they may engage in harmful criminal activities including "introduc[ing] drugs into prison, undertak[ing] assignments from Latin American drug cartels to launder money, . . . print[ing] counterfeit bills, and commit[ing] perjury." Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009). A more explicit example includes an undercover agent "engag[ing] in sexual acts with prostitutes." Id. at 155 n.6 (citing Anchorage v. Flanagan, 649 P.2d 957 (Alaska Ct. App. 1982)). The possible harms of such authorized criminal activity include: "the lack of transparency about basic information regarding authorized criminality, the exercise of unfettered police discretion, and the moral ambiguity that arises when police engage in criminal activity in order to pursue criminals." Id. at 181.

In some circumstances, however, it is justifiable for undercover agents to be involved in criminality. Under the U.S. Attorney General's guidelines for Federal Bureau of Investigation (FBI) undercover operations, undercover agents may not engage in conduct that would violate federal, state, or local law unless the participation in such conduct is both justified and minimized. U.S. DEP'T OF JUST., UNDERCOVER & SENSITIVE OPERATIONS UNIT, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS (2013). Appropriate justifications for undercover agents' participation in illegal activities include:

(1) To obtain information or evidence necessary for the success of the investigation and not reasonably available without participation in the otherwise illegal activity;

(2) To establish or maintain credibility of a cover identity; or

(3) To prevent death or serious bodily injury.

Id. at 12. The guidelines provide that undercover agents may not engage in violent acts unless done in self-defense. Id. at 17. The guidelines contain rules against initiating illegal activities to avoid possible entrapment defenses: "Entrapment must be scrupulously avoided." Id. at 16-17. The guidelines state:

> [N]o undercover activity involving an inducement to an individual to engage in crime shall be authorized unless the approving official is satisfied that –
> (1) The illegal nature of the activity is reasonably clear to potential subjects; and
> (2) The nature of any inducement offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and
> (3) There is a reasonable expectation that offering the inducement will reveal illegal activity; and
> (4) One of the two following limitations is met:
>
> (i) There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or
>
> (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.

Id. at 16.

The guidelines also provide a number of preauthorization requirements. Id. See U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 30 (2002). Further, "[f]ederal criminal prosecution of FBI informants can result from the informant's unauthorized criminal conduct or from situations in which the informant exceeds the scope of his authority to engage in 'otherwise illegal activity' under the Informant Guidelines." U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES: CHAPTER THREE: THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2005). See also Joh, supra, at 165 (undercover activity has been used "(1) to provide opportunities for the suspects to engage in the target crime, and (2) to maintain a false identity or to facilitate access to the suspect.").

The use of undercover officers can and should be regulated by policy that focuses on the officers' safety, the public's safety, the intrusiveness of undercover agents' conduct, and reliability. The U.S. Department of Justice guidelines on FBI undercover operations provides that such operations must be "essential to the detection, prevention, and prosecution of white-collar crimes, public corruption, terrorism, organized crime, offenses involving controlled substances, and other priority areas of investigation." U.S. DEP'T OF JUST., UNDERCOVER & SENSITIVE OPERATIONS UNIT, ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS (1992). In determining whether to authorize an undercover operation, the guidelines provide that the following factors should be weighed:

> (1) The risk of personal injury to individuals, property damage, financial loss to persons or businesses, damage to reputation, or other harm to persons;
> (2) The risk of civil liability or other loss to the Government;
> (3) The risk of invasion of privacy or interference with privileged or confidential relationships;
> (4) The risk that individuals engaged in undercover operations may become involved in [restricted] illegal conduct [. . .]; and
> (5) The suitability of Government participation in the type of activity that is expected to occur during the operation.

Id. All agencies should adopt similar threshold rules regarding the use of undercover officers, and should limit the use of such officers to similarly serious state and local offenses.

Agency policies also can and should seek to minimize unnecessary impositions on privacy. Particularly high-profile concerns have been raised in the use of undercover officers to infiltrate civil-rights, religious, and community groups. Most infamously, over many decades, the FBI and other agencies conducted domestic counterintelligence against groups considered subversive, including civil-rights and women's equality groups. Following a U.S. Senate investigation of such conduct, the Senate Select Committee recommended greater oversight over such activities, concluding that intelligence agencies undermined the constitutional rights of citizens by "infiltrating groups with informants," and treating as targets "a wide array of citizens engaged in lawful activity." Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Notable Senate Investigations, U.S. Senate Historical Office 1-2 (Washington, D.C. 1976). More generally, "[d]eception involved in undercover investigations often infringes on the privacy of those subjected to the investigation and of others who may come into contact with the investigator." George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 211 (1975). And, "[w]hen undercover investigators enter into personal relationships with subjects unaware of their official capacity and covertly obtain information concerning the subjects' relationship with others, they infringe on the interest in interpersonal relations." Id. This can create a chilling effect on interpersonal relations, where "[e]ven persons not themselves the subject of such investigations may be affected by awareness that such investigations occur and the possibility that they may be subjected to one." Id. at 211-212. Agency policies should prohibit romantic relationships between undercover officers and community members. Privacy concerns are especially heightened in scenarios in which undercover agents are posing as professionals, such as physicians—which "may discourage the formation or continuation of a physician-patient relationship." Id. at 212. Some police departments limit the roles undercover agents can play. For example, the Los Angeles Police Department prohibits police officers from posing as members of the news media. L.A. POLICE DEP'T, L.A. POLICE DEPARTMENT MANUAL: POLICY § 547, available at http://www.lapdonline.org/lapd_manual/volume_1.htm#544 ("Once a police officer is discovered in such a role, particularly in a crowd control situation, legitimate members of the media become suspect and could possibly be exposed

to danger. In addition, such undercover activity does damage to the trust which should exist between members of a free society and the news media which serves them.").

Documentation may not always be feasible given the nature of undercover operations. For example, it often not be suitable to use recordings in undercover operations due to their clandestine nature. Thus, the International Association of Chiefs of Police's model policy on the use of body-worn cameras advises that such cameras should not be worn in conjunction with undercover operations. INT'L ASS'N CHIEFS POLICE, MODEL POLICY: BODY-WORN CAMERAS 2 (2014), available at https://www.theiacp.org/sites/default/files/all/b/BodyWornCamerasPolicy.pdf. As a result, carefully ensuring that an undercover officer documents evidence once returning from the field becomes all the more important.

CHAPTER 13

AGENCY AND OFFICER ROLE IN PROMOTING SOUND POLICING

§ 13.01. Agency Role in Promoting Sound Policing

(a) Agencies should create and maintain systems and policies that further the goals of sound policing.

(b) For the purposes of this Chapter and Chapter 14, "sound policing" refers to the practices called for by these Principles, and in particular those called for in Chapter 1.

Comment:

a. "Sound policing" defined. In order to avoid listing all the elements of sound policing each time they are called for, this Section uses the term "sound policing." That term is intended to capture the full set of characteristics policing must embody and promote in working toward the policing goals set out in § 1.02, i.e., promoting a safe and secure society, preserving the peace, addressing crime, and upholding the law. Chapter 1 describes generally what it means to engage in sound policing. To constitute sound policing, the actions of agencies and officers must, for example, seek to reduce harm (as required by § 1.04), promote police legitimacy (as required by § 1.07), and ensure that police investigations are not motivated or justified on the basis or protected characteristics or beliefs (as required by § 1.11). The Chapters that follow spell out the particulars of how to achieve sound policing. Policing that is consistent with the U.S. Constitution or other governing law, or agency policy, nonetheless may not constitute sound policing if it does not promote the goals set out in § 1.02, or if it is inconsistent with these Principles. Because each of the Principles in this project is important to achieving sound policing, internal and external accountability structures should be designed to ensure adherence to the Principles.

b. Agency role in promoting sound policing. Although agencies and officers both should engage in and promote "sound policing," agencies play a special role in advancing sound policing. As the Principles in this Chapter indicate, and the principles in other Chapters reinforce, officers and the public depend on agencies to set clear expectations for officer conduct; to enable and incentivize officers to meet those expectations; and to assess officer conduct and offer feedback for further improvement. This kind of internal accountability helps to ensure that officer conduct aligns with agency and public expectations. See § 1.05.

c. Systems of accountability. Many in the policing community and beyond believe internal accountability best is achieved through an integrated approach in which institutional arrangements reinforce stated rules and values. To this end, this Chapter directs agencies to develop and maintain formal systems of accountability that promote compliance with law and policy and treat officers fairly, rather than depend on less formal or less comprehensive approaches. The focus of these Principles is on describing the minimum characteristics these systems should include to promote legal and policy compliance, while recognizing that they also help to ensure that policing: effectively pursues legitimate goals; respects individual rights and advances racial justice; reduces harm to individuals, communities, and officers; and treats officers and the public fairly and impartially, apart from the written policies and laws that specifically guide officer conduct.

§ 13.02. Recruitment and Hiring

(a) Agencies should recruit and hire individuals who reflect a spectrum of perspectives and experiences, reflect the diversity of the communities they serve, and are well-suited to sound policing.

(b) Agencies should undertake proactive efforts to hire only individuals who are suitable for sound policing and to avoid hiring officers who are unsuitable because they have been terminated from or left previous positions due to misconduct.

Comment:

Recruitment and hiring are linked inextricably to achieving and maintaining sound policing. Officers who are well-suited for sound policing are most likely to rise to its challenges, and a policing agency comprised of officers willing and able to engage in sound policing collectively can create and perpetuate a culture that reinforces it. Once hired, however, it generally is difficult to terminate officers from employment, and officers who engage in unsound policing may do harm before they are terminated. Agencies thus should not count on discovering and terminating officers who are ill-suited for sound policing after they have been hired. Instead, agencies should view a candidate's propensity for sound policing as central to the candidate's suitability for hiring as well as the officer's ultimate retention. This requires both hiring officers who are most able and willing to engage in sound policing and earn the community's trust and screening out officers who are unlikely to do so.

a. Selecting and retaining candidates well-suited to sound policing. Agencies should ensure that institutional incentives and recruitment processes attract, select, and retain individuals willing and able to practice sound policing. This requires that agencies: (1) know which personal qualities and experiences are associated with sound policing, and (2) structure recruitment, hiring, and retention to identify, attract, and retain those candidates. Unfortunately, at present, research about which traits and skills promote sound policing and how to identify those traits in candidates is largely unavailable. See § 14.11 (addressing research needs around policing). Nonetheless, some traits and skills are tied closely to what sound policing demands of officers. Agencies should seek out and work to retain individuals with those traits.

1. Communication skills. Nearly every call to which an officer responds, and every interaction that an officer initiates, can be improved by effective communication skills. Avoiding and defusing conflict requires effective communication skills, as does policing in a manner that is procedurally just. Although communication skills can, and should, be taught and practiced, officers naturally adept at good communication may find it easier to promote sound policing.

2. Self-regulation. Some individuals have a better ability than others to control their own behavior and emotions, that is, to self-regulate, even in challenging situations and environments. Sound policing often demands this skill, and officers with it appear to be less likely to commit misconduct and more likely to de-escalate situations. As with communication skills, self-regulation can be taught and honed through practice, but some people find it easier than others, and policing agencies would do well to seek out those people.

3. Moral courage. Sound policing requires moral courage, that is, the willingness to act ethically and altruistically, even when doing so may lead others to react negatively. Only officers with moral courage can be expected, for example, to intervene to prevent misconduct, report harmful misconduct that is ongoing, and speak out against dangerous orders or policies. Although moral courage can be taught, see § 13.03 (discussing importance of training in influencing officer behavior and active bystandership), and institutional dynamics can reinforce (or undermine) its exercise, individuals who come to policing prone to act ethically and altruistically may help create and maintain a culture of sound policing within an agency, while those with weaker moral courage may undermine it.

4. Values of fairness and empathy. Sound policing—including treating people in a way that engenders trust and intervening to prevent others from being harmed—requires acting

fairly and understanding the perspectives of others. Those who are committed to the values of fairness and empathy may be most likely to exhibit behavior consistent with these values, and agencies should seek and hire candidates with these values.

b. Diversity and inclusion. Each agency should ensure that its workforce at all levels varies in terms of life experience, race, sex, ethnicity, national origin, religion, socioeconomic background, sexual orientation, and gender identity, among other qualities. Agency diversity not only contributes to equal employment opportunity, it also may advance sound policing and agency accountability. For example, diversity in policing agencies may alter the internal dynamics of those agencies, making the agencies less insular, and thereby discouraging the "blue wall" of silence that, in many agencies, makes accountability and sound policing difficult to achieve.

Notwithstanding these potential benefits of a diverse agency, research and experience make clear that a diverse workforce does not lead inevitably to sound policing. Even officers who "look like" community members may commit misconduct. Moreover, hiring diverse officers does not ensure that they will have influence in an agency. To increase the likelihood that diversity positively impacts officer conduct and agency accountability, agencies should institutionalize inclusion; that is, they should adopt behaviors and social norms that make all officers and employees feel welcome and their contributions valued, regardless of differences in life experience, perspective, or a variety of demographic features.

c. Screening out candidates ill-suited for sound policing. Policing agencies should establish and adhere closely to background-investigation and screening protocols in order to do their best not to not hire officers whose conduct or other traits indicate unsuitability for sound policing. The investigation and screening protocols an agency uses should include: a validated pre-employment psychological evaluation that assesses factors relevant to sound policing; a check of relevant records such as police records, military history, and education; a review of personnel records from the candidate's previous employment; and a check of the National Decertification Index (see § 14.14) to determine whether the individual previously has been decertified as a law-enforcement officer. There should be a strong presumption against hiring officers who have been terminated or otherwise left previous employment due to misconduct, as discussed in § 13.07. Agencies never should hire officers: who have a history of engaging in racist speech or behavior; are known to belong to hate groups, including white-supremacist or white-nationalist groups; or who otherwise support ideologies incompatible with fair and objective policing. Agencies also should support

other agencies' efforts to avoid hiring unsuitable officers by providing them upon request with complete information about their employees' and former employees' work history, including complaint and disciplinary history, to the extent allowable by law.

Although recruiting suitable officers can be challenging, agencies should resist lowering hiring standards in order to increase the pool of "eligible" police candidates. Reduced education standards, lower scores on pre-employment psychological tests and entrance exams, and more forgiving background checks have been associated with deficient performance by officers, as has hiring candidates with serious criminal histories. Lowered hiring standards may result in a net negative impact on public safety and police accountability, even when they succeed in increasing the number of officers in the agency.

At the same time, agencies should reconsider recruitment and hiring criteria that may screen out candidates who are suitable for sound policing. For example, physical criteria may limit the number of female candidates, but to the extent that such criteria are unrelated to effective performance and rarely are used for retention decisions, their necessity and utility should be questioned. It is also well-documented that Black and Latinx individuals are arrested at much higher rates than members of other racial and ethnic groups, especially for certain minor crimes. Therefore, in developing/devising/determining their methods for screening candidates, agencies should consider whether arrest histories for certain minors crimes actually indicate that candidates are unlikely to engage in sound policing. Agencies can and should evaluate their standards for hiring and retention to ensure those criteria are consistent with community needs and priorities as well as the best available research findings. Agencies also should examine the effect that civil-service rules have on hiring and retaining officers. Although such rules can promote merit-based employment decisions in government agencies, those rules may require tailoring to the unique circumstances of policing; agencies can help bring to light areas in which modifications would be important to sound policing.

d. Retaining a workforce suited to sound policing. Agencies not only should structure their recruitment and hiring practices to attract candidates suited for sound policing, they should make efforts to retain employees who have exhibited those characteristics. To do so, agencies should ensure that all of their systems incentivize and reward sound policing (as discussed elsewhere in this Chapter), including their systems for: evaluating individuals' performances; assigning and selecting individuals for promotion; training; supervising; and holding individuals accountable.

Similarly, agencies should refuse to tolerate instances or a culture of prejudice or unlawful discriminatory behavior among officers and employees. Toward this end, agencies should adopt policies, training, and disciplinary practices that guide officers and employees, their supervisors, and misconduct investigators on permissible speech and expressive conduct.

REPORTERS' NOTES

1. Challenge of recruiting. The fundamental recruiting challenge for agencies and the communities they serve is two-fold. First, the complexity and breadth of policing requires officers to have traits and skills—not all of which are easily taught—if they are to engage in sound policing. Second, the sheer number of police officers in the United States (over 700,000 currently) makes it difficult for agencies to identify and retain sufficient numbers of diverse individuals with those traits and skills. The purpose of this Section is to emphasize that, in light of this challenge, agencies should work intentionally to recruit, hire, and retain officers who will practice and promote sound policing. This requires that agencies identify the skills and traits associated with sound policing; develop systems to identify, attract, and select candidates with those attributes; and put in place systems that include, incentivize, and reward those individuals so that they remain with the agency.

2. Identifying traits associated with sound policing, and the individuals who possess those traits. Traditionally, policing agencies have used hiring criteria such as physical ability and height, military service, and a lack of criminal history or drug use, to determine eligibility and desirability of police recruits. See Robert E. Cochrane, Robert P. Tett & Leon Vandecreek, *Psychological Testing and the Selection of Police Officers: A National Survey*, 30 CRIM. JUST. & BEHAV. 511, 519 (2009) (finding that more than 90 percent of police agencies used background investigations, medical exams, and psychological assessments as part of the hiring process, and that more than half of agencies utilized drug-testing and physical-fitness exams).

In recent years, researchers and agencies have recognized that, although some of these criteria and selection processes serve to "screen out" poorly suited police candidates, they do little to identify individuals who might be particularly well-suited for the unique challenges of policing. Jorge G. Varela et al., *Personality Testing in Law Enforcement Employment Settings: An Analytic Review*, 31 CRIM. JUST. & BEHAV. 649, 650-654 (2004) (finding that most agencies attempt to identify particular character traits or personalities that are predictive of undesirable performance criteria such as absenteeism, tardiness, and citizen complaints rather than trying to identify traits like patience, conscientiousness, and high emotional intelligence that may be associated with sound policing). Moreover, some of these criteria and selection processes actually may inhibit hiring individuals who are well-suited for sound policing. For example, physical-ability requirements disproportionately disqualify female officer candidates, although the requirements have no demonstrated bearing on effective policing, and female police candidates often appear at least equally suited to be police officers when other criteria are prioritized. See, e.g., Kimberly A. Lonsway, *Tearing Down the Wall: Problems With Consistency, Validity, and Adverse Impact of Physical Agility Testing in Police Selection*, 6 POLICE Q. 237, 266 (2003) (explaining that some

agencies have eliminated entry-level physical-ability testing without sacrificing the quality of candidates selected); NAT'L CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT 23 (noting that there are no documented cases of a female officer's lack of strength leading to negative outcomes). Disqualifying factors such as nonresidency, immigration status, body-art restrictions, or past marijuana use may decrease the size and diversity of the applicant pool with little or no benefit for the community. JEREMY M. WILSON, ERIN DALTON, CHARLES SCHEER & CLIFFORD A. GRAMMICH, RAND CTR. FOR QUALITY POLICING, POLICE RECRUITMENT AND RETENTION FOR THE NEW MILLENNIUM: THE STATE OF KNOWLEDGE 14-15 (2010) (explaining how policies against prior use of marijuana and credit-card debt reduce the pool of potential applicants).

Although more social science research could clarify the characteristics agencies should seek in officers, there is broad agreement about the desirability of some police candidate traits, including those discussed in the Comments to this Section. See GREG RIDGEWAY ET AL., RAND CTR. FOR QUALITY POLICING, STRATEGIES FOR IMPROVING OFFICER RECRUITMENT IN THE SAN DIEGO POLICE DEPARTMENT 9-31 (2008) (discussing evidence supporting best practices in police hiring and retention); see also GARY W. CORDNER, POLICE ADMINISTRATION 54, 160-161 (9th ed. 2016) (including integrity; service orientation; empathy; communication and human-relations skills; good judgment and problem-solving skills as important policing skills); JEREMY M. WILSON ET AL., supra, at 17 (officers must be able to "communicate, collaborate, and interact with a diverse set of stakeholders" and be "culturally competent" among other skills and traits.); see generally NAT'L INST. OF JUST., WOMEN IN POLICING: BREAKING BARRIERS AND BLAZING A PATH (2019) (setting out a research agenda regarding women in policing, including both the impact of women on policing and what experiences and skills are necessary to have a successful policing career).

How an officer communicates, for instance, can affect how an individual perceives the legitimacy and fairness of a police interaction. See, e.g., MEGAN QUATTLEBAUM, TRACEY MEARES & TOM TYLER, THE JUST. COLLABORATORY, PRINCIPLES OF PROCEDURALLY JUST POLICING 40 (2018) (noting as principle 29 that "[o]fficers should endeavor to communicate effectively with the community and with suspects in a way that promotes the tenets of procedural justice"). In addition, officers who are more adept at verbal communication may be less inclined, and have less need, to resort to physical coercion. See, e.g., Scott Wolfe, Jeff Rojek, Kyle McLean & Geoffrey Alpert, *Social Interaction Training to Reduce Police Use of Force*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 126-27 (2020). Research similarly has shown that low self-regulation is a significant predictor of police misconduct. Christopher M. Donner & Wesley G. Jennings, *Low Self-Control and Police Deviance: Applying Gottfredson and Hirschi's General Theory to Officer Misconduct*, 17 POLICE Q. 203, 214-215 (2014) (finding level of self-control to be statistically associated with misconduct while other factors considered for policing, like education level, are not). Additionally, self-regulation has obvious implications for an officer's ability to de-escalate tense situations, avoid the need for force, or cease to use force at the earliest possible moment.

Moral courage can make an officer more likely to intervene to help others, to intervene to prevent harm, or to report misconduct by another officer, even when some of his peers may react

badly to his or her actions. See ERVIN STAUB, THE ROOTS OF GOODNESS AND RESISTANCE TO EVIL: INCLUSIVE CARING, MORAL COURAGE, ALTRUISM BORN OF SUFFERING, ACTIVE BYSTANDERSHIP AND HEROISM (2015). Research indicates that high self-esteem and self-confidence are good predictors of moral courage, particular when these traits are combined with a sense of self-efficacy or agency, that is, a sense that one's actions will make a difference. See CATHERINE A. SANDERSON, WHY WE ACT: TURNING BYSTANDERS INTO MORAL REBELS 174-175 (2020).

Finally, officers who value fairness and empathy may be more likely to engage in procedurally just policing, see, e.g., NAT'L RSCH. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 130 (Wesley Skogan & Kathleen Frydl eds., 2004), and to intervene to prevent unjustified harm to a member of the public, see SANDERSON, 101-103, 108-109, 183-189; C. Daniel Batson et al., *Is Empathic Emotion a Source of Altruistic Motivation?*, 40 J. PERSONALITY & SOC. PSYCH. 290, 302 (1981). Although some pre-employment hiring processes, such as psychological evaluations, take into consideration fairness and empathy, they may not weight them as warranted.

3. Diversity and inclusion. Beyond ensuring that individual officers are well-suited to sound policing, creating a diverse and inclusive workforce—one in which people are different from each other and the contributions of all are valued—can help promote sound policing. Research has shown, for example, that police departments with a certain level of diversity improve officer behavior. See, e.g., Joscha Legewie & Jeffrey Fagan, *Group Threat, Police Officer Diversity and the Deadly Use of Police Force* 9-12 (Colum. L. Sch. Pub. L. Working Paper, Paper No. 14-512, 2016) (arguing that a racially diverse police force reduces police shootings of members of the public and mitigates perceptions of group threat among officers). Moreover, Black and Latinx officers are more likely than white officers to empathize with Black and Latinx culture and concerns. They may also act in a less-biased manner towards Black and Latinx members of the public, although findings on this point are mixed. See, e.g., Billy R. Close & Patrick L. Mason, *Searching for Efficient Enforcement: Officer Characteristics and Racially Biased Policing*, 3 REV. L. & ECON. 263, 315 (2007) (finding that white officers are more likely than African-American and Latino colleagues to lower the guilt signal required for police suspicion when stopping African-American and Latino drivers); Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 610 (2016) (finding that, relative to Black counterparts, white police officers are more likely to frisk/search subjects of all races); Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison between Black and White Police Officers*, 50 CRIME & DELINQ. 516, 531, 534 (2004) (finding that Black officers are more coercive than their white counterparts in responding to conflicts but are also more likely to conduct supportive activities in predominantly Black neighborhoods); Bocar A. Ba, Dean Knox, Jonathan Mummolo & Roman Rivera, *The Role of Officer Race and Gender in Police-Civilian Interaction in Chicago*, 371 SCIENCE 696, 699 (2021) (finding that Black and Latino officers make fewer stops and use less force than white officers, especially against Black people and in majority-Black neighborhoods). Similarly, some research suggests that female officers are less likely than male

officers to use force, Ba et al., supra, at 696, 700, or "extreme controlling behavior," such as threats and physical restraint, Cara E. Rabe-Hemp, *Female Officers and the Ethic of Care: Does Officer Gender Impact Police Behaviors?*, 36 J. CRIM. JUST. 426, 429 (2008).

Increasing diversity may be particularly important to achieving sound policing when an agency's pre-existing culture is at odds with sound policing. A diverse workforce may be more willing to challenge dominant agency culture and follow formal agency norms and rules, rather than acceding to the informal norms, including norms that may be overly protective of officers who commit misconduct. U.S. DEP'T OF JUST. & EQUAL EMPLOY. OPPORTUNITY COMM'N, ADVANCING DIVERSITY IN LAW, at ii (2016) (noting research that increased diversity can make law enforcement agencies "more open to reform, more willing to initiate cultural and systemic changes, and more responsive to the residents they serve," and can have a positive influence on specific activities and practices of law-enforcement agencies); Legewie & Fagan, supra, at 11 (reviewing research showing that officer diversity can decrease "us vs. them" solidarity that inhibits change); see generally Bethan Loftus, *Dominant Culture Interrupted: Recognition, Resentment and the Politics of Change in an English Police Force*, 48 BRIT. J. CRIMINOLOGY 756 (2008) (discussing how contrasting viewpoints between white, heterosexist, male officers and female, minority, gay and lesbian officers, have impacted agency culture).

4. Recruiting, hiring, and retaining individuals with the desired traits. A policing agency that both accurately defines desirable characteristics and traits and reliably identifies officers who excel in those respects still may not be successful in its recruitment and hiring efforts if it does not offer incentives sufficient to enable it to hire and retain the candidates it identifies. Jurisdictions thus should evaluate carefully compensation, medical, and retirement benefits, and benefits that may hold special attraction for candidates the agency seeks to attract and retain, such as flexible scheduling, college-tuition contributions, and wellness programs. See, e.g., POLICE EXEC. RSCH. F., THE WORKFORCE CRISIS, AND WHAT POLICE AGENCIES ARE DOING ABOUT IT 51 (2019); NAT'L CTR. FOR WOMEN & POLICING, RECRUITING & RETAINING WOMEN: A SELF-ASSESSMENT GUIDE FOR LAW ENFORCEMENT 111-116 (discussing how family-friendly policies can help retain female officers). Although expensive, improving compensation and benefits may prove more cost-effective in the long run, if officers otherwise leave the agency after a short time or if less appealing candidates undermine community trust and public safety or increase legal liability.

To retain officers who practice and promote sound policing, agencies also should take care to ensure that each of these systems incentivizes and rewards sound policing: performance evaluation, assignment and selection for promotion, training, supervision, and accountability. Performance evaluations, for example, should be focused not on officer "productivity" in terms of numbers of citations or arrests, but rather should more directly assess an officer's effectiveness at furthering public safety, including through practicing and promoting sound policing. This requires that performance evaluations include qualitative components and that they assess an officer's performance in areas such as: community engagement; effective communication and decisionmaking; use of de-escalation and problem-solving strategies; demonstrated integrity, including engaging in stops, searches, and arrests that comport with law and policy; adeptness at

dealing with individuals in crisis; referral to social services or mediation (where available and appropriate); support for agency accountability efforts, including intervening to prevent other officers from committing or continuing misconduct, reporting misconduct, and cooperating with misconduct investigations; civilian commendations and complaints received by the officers; inappropriate uses of force; and compliance with other departmental rules. Malcolm K. Sparrow, *Measuring Performance in a Modern Police Organization*, NEW PERSP. POLICING, March 2015, at 1, https://www.ncjrs.gov/pdffiles1/nij/248476.pdf (last visited Mar. 16, 2021); CHUCK WEXLER, MARY ANN WYCOFF & CRAIG FISCHER, POLICE EXEC. RSCH. F., "GOOD TO GREAT" POLICING: APPLICATION OF BUSINESS MANAGEMENT PRINCIPLES IN THE PUBLIC SECTOR 24 (2007), https://cops.usdoj.gov/RIC/Publications/cops-w0767-pub.pdf (last visited Mar. 16, 2021); Timothy N. Oettmeier & Mary Ann Wycoff, *Personnel Performance Evaluations in the Community Policing Context*, *in* COMMUNITY POLICING: CONTEMPORARY READINGS 351-398 (Geoffrey P. Alpert & Alex Piquero eds., 1998). Similarly, when giving out promotions and desirable job assignments, agencies should consider not only the unique requirements of the specific position or rank, but also the officer's more general proclivity and skill at promoting sound policing. Agencies should recognize that promoting or otherwise rewarding officers primarily on the basis of "aggressive" or "proactive" policing may not further public safety and may disincentivize sound policing. See, e.g., Samuel Walker, et al., *Early Warning Systems: Responding to the Problem Officer*, NAT'L INST. OF JUST., July 2001, at 3, https://www.ncjrs.gov/pdffiles1/nij/188565.pdf (last visited Mar. 16, 2021) (finding that officers identified as problematic by early-warning systems are promoted at higher rates than control officers, raising question of whether some agencies reward through promotion officers whose conduct is unduly aggressive).

5. Screening out unsuitable officers and employees. To screen out officers unsuitable for sound policing, agencies should have a robust system for conducting background investigations. Background investigators should understand the relationship between the scope and focus of the investigation and the demands and requirements of the job, and should verify the information that the applicant provides by verifying it through the use of multiple specialized sources. See Lynne L. Snowden & Timothy Fuss, *A Costly Mistake: Inadequate Police Background Investigations*, 13 JUST. PRO. 359 (2000). As discussed elsewhere in these Principles, agencies also should contribute to and avail themselves of the National Decertification Index when making hiring decisions in order to determine whether the individual has previously been decertified as a law-enforcement officer. Agencies should support efforts to prevent the lateral hiring of unsuitable officers by providing complete information about the candidate's work history, including complaint and disciplinary history, to the extent allowable by law.

Some agencies offer credentials to individuals willing to pay for the status of being a law enforcement officer, who wish to carry a weapon, or who have offered political support. Such individuals are unsuitable to sound policing Indeed, there is no evidence such individuals benefit public safety; and there are numerous reports of paid and volunteer officers of this kind undermining public safety. See, e.g., Zachary Mider & Zeke Faux, *The Gun-Law Loophole That Entices Tycoons and Criminals to Play Cop*, BLOOMBERG (May 15, 2018), https://www.bloomberg.com/

news/features/2018-05-15/the-gun-law-loophole-that-entices-tycoons-and-criminals-to-play-c (describing how police departments have given badges to paying volunteers, some of whom were later implicated in criminal activities); Larry Barker, *Playing Cop: the Lake Arthur Badge Scheme*, KRQE NEWS (Apr. 26, 2018), https://www.krqe.com/news/larry-barker/playing-cop-the-lake-arthur-badge-scheme/ (quoting a New Mexico State Police chief who criticized the practice of offering police credentials to private citizens as "dangerous" and "inexcusable."). Agencies should end such practices.

Agencies also should enhance protocols for detecting and screening out officers who have a history of racist speech or behavior, are known to belong to hate groups, including white supremacist or white nationalist groups, or who otherwise support racist ideologies incompatible with fair and objective policing. Even avowed white supremacists sometimes have been able to enter and remain in police departments. See, e.g., Vida B. Johnson, *KKK in the PD: White Supremacist Police and What do Do About It*, 23 LEWIS & CLARK L. REV. 205, 216-221 (2019). The FBI has found that white supremacists have infiltrated police departments deliberately and successfully across the United States. Id.; Intelligence Assessment, FBI Counterterrorism Div., White Supremacist Infiltration of Law Enforcement (Oct. 17, 2006).

As part of this effort, agencies should adopt and enforce policies that set clear guidelines prohibiting on-duty and off-duty conduct that endorses violence or indicates bias against a member of a protected class. Although agencies should not punish officers merely for criticizing agency action or policy, they may—consistent with the First Amendment—restrict officer speech about matters of public concern when the negative impact of the speech on agency operations and police legitimacy outweighs the employee's interest in commenting upon matters of public concern and the public's interest in receiving the information. See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 146-147 (1983); Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016) (applying *Connick/Pickering* test in reviewing an agency's social media policy); Pappas v. Giuliani, 290 F.3d 143, 146 (2d Cir. 2002) (upholding termination of officer for anonymously disseminating anti-Black and anti-Semitic materials); Venable v. Metro. Gov't of Nashville, 430 F. Supp. 3d 350, 360 (M.D. Tenn. 2019) (upholding on summary judgment the termination of officer for posting that he would have shot police victim more times); Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006) (upholding termination of NYPD officers for participation in racist parade float). In setting such policies, agencies should not falsely equate support for groups that seek racial justice for historically marginalized groups (e.g., The Movement for Black Lives or the NAACP) with those that disparage such groups and falsely claim historic disadvantage to dominant groups (e.g., Oathkeepers or Proud Boys). Compare Latino Officers Ass'n, New York, Inc. v. City of New York, 196 F.3d 458, 466 (2d Cir. 1999) (finding NYPD could not prohibit Latino officers from marching in parade with association banner) with Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006) (upholding termination of NYPD officers for participation in racist parade float).

Screening out undesirable candidates requires agencies to resist pressures to lower hiring standards in order to increase the number of eligible police candidates. Pressure to lower hiring

standards often is greatest when a dip in applicant volume is accompanied by an increase in crime rates in the jurisdiction. But the harms unsuitable officers inflict may outweigh any public-safety benefit of accelerating hiring, especially given that officers, once hired, can be exceedingly difficult to terminate from employment. See JEREMY M. WILSON, ERIN DALTON, CHARLES SCHEER & CLIFFORD A. GRAMMICH, RAND CTR. FOR QUALITY POLICING, POLICE RECRUITMENT AND RETENTION FOR THE NEW MILLENNIUM: THE STATE OF KNOWLEDGE 17 (2010) (arguing that changes in policing should lead police departments to be even more selective in their recruitment efforts). The experience of Washington, D.C. helps illustrate the problem: In 1989, the Metropolitan Police Department responded to congressional pressure to hire more officers by suspending its usual qualifications and application procedures. The result was, five years later, a rash of arrests of police officers hired during that period. See Keith A. Harriston & Mary Pat Flaherty, *District Police are Still Paying for Forced Hiring Binge*, WASH. POST (Aug. 28, 1994), https://www.washingtonpost.com/archive/politics/1994/08/28/district-police-are-still-paying-for-forced-hiring-binge/fe12d3a9-bfb1-4338-a08e-1fd3498833c3/.

Of course, *changing* hiring standards does not equate necessarily with *lowering* them. Even allowing candidates with arrests records may be a step in the right direction, if those arrests likely reflect historical racism more than the character of the individual arrested. See, e.g., ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 149-170, 192-193 (2018). There may be disagreement at times over whether a particular change to hiring criteria will support or undermine sound policing. To assist agencies in setting criteria that do not unnecessarily screen out officers who would be effective at sound policing, agencies should collect and evaluate their own agency-available data and seek to ensure that their recruitment and hiring criteria are consistent with best available research findings.

6. Liability for deficient recruitment and hiring practices. Agencies can be held legally responsible for hiring unqualified officers who commit misconduct. Notably, an agency may be held federally liable for causing a constitutional violation against a member of the public through inadequate screening of officers, but only in highly circumscribed circumstances. See Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 411 (1997) ("Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference,'"—a necessary predicate for constitutional liability). Courts have allowed such lawsuits to move forward based on allegations that an agency hired officers with histories of excessive-force complaints, Montes v. Cnty. of El Paso, Tex., No. EP-09-CV-82-KC, 2010 WL 2035821, at *18-19 (W.D. Tex. May 18, 2010); of sexual harassment, Birdwell v. Corso, No. CIV.A. 3:07-0629, 2009 WL 1471155, at *7 (M.D. Tenn. May 21, 2009); or of criminal charges of assault and corruption of minors, M.C. v. Pavlovich, No. 4:07-CV-2060, 2008 WL 2944886, at *6 (M.D. Pa. July 25, 2008). But such cases are uncommon. In addition, agencies may be liable for using recruitment and hiring criteria that violate federal laws against

discrimination, see, e.g., Lanning v. Se. Pa. Transit Auth., 181 F.3d 478 (3d Cir. 1999) (evaluating police physical tests for compliance with Title VII of the Civil Rights Act of 1964) or violate other federal laws governing police employment, see, e.g., Uniformed Services and Reemployment Rights Act, 38 U.S.C. § 4301 (returning service members must be re-employed in the job that they would have attained had they not been absent for military service, with the same pay, benefits, seniority, etc.).

§ 13.03. Adequate Training for Agency Employees

All agency employees should receive adequate, relevant, timely, continuing, and effective training and evaluation, both before and during service, to provide and maintain the knowledge and skills necessary for engaging in sound policing.

Comment:

a. Training. Training is critical to ensuring that policing achieves its aims, comports with these Principles, and protects officer and public safety and well-being. In addition, training is indispensable to enabling officers and other agency employees to live up to the dictates of the law and agency policy and the expectations of the community. Training bolsters understanding of the directives with which officers and employees must comply and the values to which a department is committed. It also develops the knowledge and skills needed to satisfy those directives. Thus, agency employees and officers should receive training both before and during service that is adequate and specific to: the legal environment; agency policy and values; and the duties they are expected to perform. Such training should be reinforced with supervision and other systems of accountability described in these Principles.

b. Adequate training. Although state laws and administrative regulations set minimum training standards—and federal law creates civil liability for agency-training failures that cause constitutional violations—these standards alone do not provide an appropriate baseline for training. Accordingly, agencies should not treat compliance with state law or the absence of liability under civil-rights laws as an indication that their training is adequate.

For instance, pursuant to 42 U.S.C. § 1983, individuals who suffer injury as a result of an agency's failure to train officers adequately may be awarded relief only when the failure to train causes a constitutional violation and reflects "deliberate indifference" to constitutional rights. Quite obviously, inadequate training of policing agency employees may result in innumerable harms, even if it does meet those standards. Inadequate training also can reduce officer

effectiveness substantially, increase the risk of harm to officers, violate state law or agency rules, and decrease trust in law enforcement—all without causing a constitutional violation. Moreover, because the liability standard for failure-to-train claims under § 1983 is difficult to satisfy, constitutional standards for adequate training are not well-developed. Thus, while proper training may reduce agency liability both by preventing legal violations and by minimizing § 1983 claims for failure to train adequately, the adequacy of training should be measured by what is needed to ensure sound policing rather than by the dictates of law.

Similarly, while state laws often provide broad minimum-training standards, they do not require training specific to agency policy and values. An officer could receive training that the state views as adequate without understanding or being prepared to implement agency policies that govern his or her conduct. Thus, the training required by this Section exceeds in quantity and scope that demanded by existing law.

c. Relevance. Training is "relevant" if it reflects the core values and policies of the agency, provides the full range of skills and knowledge for the tasks the individual is likely to be expected to perform, and is tailored to the environment in which the individual operates. Thus, agencies should provide training that expressly states and promotes the positive values of the agency, such as training that encourages officers to prioritize human life or to intervene to prevent misconduct by other officers. They should also monitor and correct training that is inconsistent with agency standards and values. For instance, state and regional academies may train officers in tactics, such as precision-immobilization-technique maneuvers for vehicle pursuits, even if they are forbidden by agency policy. Agencies also should update training and provide supplementary training to reflect changes in agency policy or law. Supervisors and officers with special assignments should receive additional training for the added responsibilities and tasks their positions demand.

d. Timeliness. Training is "timely" if it is provided both before service begins and regularly during service. It should be repeated as necessary to reinforce its content and reflect changes in law, policy, technology, and technique. Training should continue throughout an individual's career. No individual should be permitted to exercise policing powers unless that individual has initially met and continues to meet minimum training standards consistent with his or her position and responsibilities.

e. Effectiveness. Training is "effective" if it produces desirable police practices and attitudes. Both training *content* and training *methods* should reflect available research about how

to achieve intended outcomes. To maximize its likely effectiveness, training should be correlated closely to the challenges of policing. It should reflect contemporary knowledge of adult learning and effective pedagogical techniques and should go beyond the classroom. For example, use-of-force training should include reality-based simulations, and procedural-justice training should include interactive role-play training. Legal training should include the application of legal standards to fact scenarios officers are likely to face. In addition, all training should be provided in a competent, professional, impartial, and ethical manner, by highly qualified trainers, utilizing a carefully prepared curriculum.

f. Testing and evaluation. Ensuring effective training requires assessing whether individuals learn what is intended and engage subsequently in conduct consistent with that training. Agencies therefore should aim to evaluate on an ongoing basis the effectiveness of the training that they provide, including by collaborating with independent researchers. See § 14.11 (research principle). In addition, any training assessment should be tailored to the form of training. Thus, for instance, agencies should engage in periodic assessments of the training provided by field-training officers and supervisors in order to ensure that such training is achieving its desired ends.

g. Necessity. Knowledge and skills are "necessary" for policing duties within the meaning of this Section if they enable officers to achieve their duties effectively, safely, and in a manner consistent with the principles of sound policing. Thus, training should be designed to give individuals the capacity: (1) to engage in daily activities such as patrolling, making arrests, engaging in conflict resolution, and assisting members of the public; (2) to protect themselves in the line of duty; and (3) to police in a manner that minimizes harm, facilitates transparency and accountability, adheres to the written policies and values of the agency, and is consistent with the principles of procedural justice.

Use-of-force training, for example, should be designed not only to enable officers to use force lawfully and effectively, but also to enable officers to avoid using force, and to use the minimum force necessary to achieve the intended objective. See § 7.03. Similarly, agencies should provide training on working with juveniles and other special populations—including people with mental illness and intellectual disabilities, people suffering from addiction, people who are homeless, people who are disabled, people who are under the influence of drugs or alcohol, and people with limited English language skills—because doing so is important to protecting public safety, protecting the officers themselves, and minimizing harm to special populations. See § 11.05

(on addressing the needs of vulnerable populations). Thus, training officers on interpersonal and communication skills, bias awareness, crisis intervention, trauma and victim services, mental-health issues, languages and cultural responsiveness, and interacting with special populations is necessary to prepare officers for their work.

h. Agency and state roles. Across the United States, preservice police training is provided variously by state or regional academies, institutions of higher education, law-enforcement agencies, or a combination of those actors. States should play an active role in supporting agency training efforts as well as setting minimum standards for preservice and in-service training. However, state standards cannot ensure that local officers receive all of the training they need. First, state training standards necessarily are minimum standards. As such, they are unlikely to provide the content or frequency of training necessary to enable officers to reach the level of performance to which they and their agencies should aspire. Moreover, as noted above, state training standards cannot suffice to provide training that is tailored to local variations in populations, conditions, law, values and expectations, policy, duties, and organization. Additional training of officers therefore should be provided by the agencies for which they work in order to meet the standards articulated in this Chapter.

Agencies may provide the necessary supplemental training through a range of training activities, provided in-house, by state-approved training providers, and by external public and private providers. However, agencies should only offer training—whether by internal or external providers—that is fully consistent with their values and policies. Agencies cannot provide this additional, high-quality training if they are not given the resources to do so. Jurisdictions therefore should devote the resources necessary to allow agencies to provide effective, specific training, and should consider means of reducing the cost of training by coordinating training with other jurisdictions, where appropriate.

Training provided by law-enforcement agencies for their officers, including field training and in-service training, should reinforce and be consistent with law, with written rules governing officer conduct, and with preservice training, except when changes or local variations in law, policy, or circumstances require deviating from that training. Thus, agencies should carefully supervise and monitor agency culture and training for consistency with training standards, law, and policy. Historically, officers often received field training and informal guidance that undermined the lessons and messages of formal, preservice training and the written policies of the

agency, and that encouraged officers to follow informal norms rather than academy training. Such inconsistency undermines internal accountability and erodes the trust of communities in agencies and officers in their leadership. When agencies use regional, state, or federal training resources and facilities, they must be especially careful to screen the training to ensure that it is consistent with current agency policies and practices. In some cases, inconsistencies between the training program and local policies will make even otherwise high-quality training inappropriate for officers in a particular jurisdiction.

REPORTERS' NOTES

1. Generally. Training is critical to sound policing. Only with effective training can officers follow the law and live up to the values and expectations of their communities and agencies. Presently, however, officer training is inadequate in the scope, quality, and frequency necessary to achieve its goals.

2. Relevance and necessity. All officers receive training, both before they start service and during service. Although the required amount of training on each subject varies by state and agency, all preservice (recruit) training programs provide operations training with lessons on matters such as report writing, patrol procedures, criminal and traffic investigations, vehicle operations, first aid, defensive tactics, firearms skills, the use of force (including weapon retention, verbal command presence, and ground fighting), and criminal and constitutional law. Most officers also receive operations instruction on arrest-control tactics, when to use force, communications, professionalism, and stress prevention. In addition to operations instruction, almost all officers receive some training on community-policing subjects and other special topics, including interacting with vulnerable populations. BRIAN A. REAVES, BUREAU OF JUST. STAT., STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES 6-7 (2006); ARK. CODE ANN. § 12-9-113 (2009) (domestic violence); ARK. CODE ANN. § 12-9-116 (2011) (persons with disabilities); COLO. REV. STAT. § 24-31-313 (2017) (exploitation of elders); MINN. STAT. § 626.8455 (2013) (community policing).

Despite this array of subject matters, many officers do not receive the kind, amount, or quality of training necessary to enable them to do their jobs safely, effectively, and consistently with the principles of sound policing. See, e.g., POLICE EXEC. RSCH. F., RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 4 (2015) ("[T]he training currently provided to new recruits and experienced officers in most departments in inadequate."). For example, many officers are unprepared to address the distinctive populations with whom they interact frequently or to avoid using unnecessary coercion in addressing public safety challenges. They often receive too little training in subjects such as conflict management—in light of how frequently they are called upon to exercise such skills in practice—or training that is too infrequent to adequately address changing agency policies and legal standards. Not surprisingly, many serious problems in policing today, including patterns of illegal stops, searches, arrests, and uses of force, have been attributed to

training failures. See, e.g., CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 44-45 (2014); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Just., to Tomas P. Regalado, Mayor, City of Miami & Chief Manuel Orosa, City of Miami Police Dep't 6 (July 9, 2013) (regarding investigation of Miami Police Department); see also FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 51-59 (2015); CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 130-133 (2016) (citing a lack of training as a contributor to constitutional violations). Thus, many call for expanding officer training to add or increase training on subjects important to contemporary policing, such as: racial bias; interactions with special populations; the disease of addiction; active bystandership/peer intervention; problem-solving; crime prevention; stress management and self-regulation; de-escalation and avoiding the use of force; interpersonal and communication skills; report writing and recordkeeping; departmental values, policies, and philosophy; community engagement and relations; procedural justice and impartial policing; and alternatives to arrests and summonses. See, e.g., PERF, supra, at 4 (describing as inadequate training on de-escalation and avoiding the use of force and strategies for dealing with the mentally ill and other special populations); U.S. CONF. OF MAYORS, REPORT ON POLICE REFORM AND RACIAL JUSTICE 18 (2020) (discussing importance of training officers on peer intervention/active bystandership); PRESIDENT'S TASK FORCE, supra, at 51-59 (recommending—or describing witnesses advocating—training on additional subject matters). As this Section suggests, the full training that police receive should be reevaluated regularly—in terms of subject matter, quantity, timing, and method of delivery—and adjusted to reflect changes in the tasks officers are expected to perform, and to respond to changes in the legal, policy, cultural, social, or technological environments in which they operate. The International Association for Directors of Law Enforcement Standards and Training recommends in its Model Minimum Standard 3.2.2 that training "be based on a valid and reliable job task analysis which is updated at least every five years." INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS & TRAINING, MODEL MINIMUM STANDARDS § 3.2.2, https://www.iadlest.org/Portals/0/IADLEST%20Model%20Minimum%20Standards%20document_1.pdf (last visited March 14, 2021). Such assessment must include the training provided to supervisors, who are critical to sound policing, and yet frequently do not receive training sufficiently tailored for their duties. PERF, *Training*, supra, at 4. Although it is not sustainable to respond to every new or newly heightened concern in policing by adding training, and doing so can be counterproductive if it leads to cynicism or skews the balance of the training officers receive, adjusting training appropriately is essential to promoting sound policing and engendering public trust in police.

3. Effectiveness. Although most standards for police training focus on the subject matter and quantity of training, officer training also should be consistent with contemporary research regarding police training and pedagogy. The empirical evidence on what kinds of police training are effective in changing officer practices is exceptionally limited. Nevertheless, many experts believe that to be effective, officer training should: be consistent with adult theories of learning; include realistic, scenario-based training; and integrate teaching core skills and knowledge throughout the training curriculum. See, e.g., PRESIDENT'S TASK FORCE, supra, at 52-53, 60;

PERF, *Training*, supra, at 4; United States v. City of Seattle (W.D. Wash. 2014), C12-1282JLR, Memorandum Regarding Instructional System Design Model for Comprehensive Use of Force Training, https://www.justice.gov/sites/default/files/crt/legacy/2014/10/23/spd_docket144.pdf.

4. Timeliness. As Comment *a* indicates, training should be provided before service begins and continue regularly during service. Although most officers are fully trained and certified before they begin their duties, some states presently permit officers to work without or before they fully satisfy preservice- or recruit-training requirements for sworn officers. See, e.g., 132-00-13 ARK. CODE R. § 003 (2013) (allowing individuals to serve as officers up to 12 months without formal training); 250 IND. ADMIN. CODE 2-2-1 (2017) (allowing officers to serve for a year prior to basic training). Other states permit individuals to serve as reserve deputies, conservators of the peace, or other positions in which they have some of the core powers of sworn officers, such as the arrest power, but do not receive the training or certification required for most officers. VA. CODE ANN. § 15.2-1734 (1997), OKLA STAT. tit. 19, § 547 (2017). These practices are flatly inconsistent with this Section. Allowing untrained individuals to perform core policing tasks endangers them and the public. Although it may be helpful for an agency to provide for reserve deputies or other positions that can assist law-enforcement agencies, no individual should exercise the core functions of an officer unless he or she is trained, qualified, and certified to do so.

5. Liability for training inadequacy. Although agencies that fail to train officers adequately can be subject to civil liability pursuant to 42 U.S.C. § 1983, constitutional law, as it is presently interpreted, does not ensure that officers receive adequate training. In City of Canton v. Harris, 489 U.S. 378 (1989), the U.S. Supreme Court recognized that municipalities may be held liable for failing to train employees when the inadequate training causes a constitutional injury and amounts to "a policy for which the city is responsible." Id. at 389. This can happen only if "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id. at 390. Courts have also held that supervisors may be liable for inadequate training, but only when their own acts or omissions with respect to training result in constitutional violations, and when they demonstrate callous or reckless indifference with respect to the failure to train. See, e.g., Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87 (1st Cir. 1994); see also Elkins v. District of Columbia, 690 F.3d 554, 566 (D.C. Cir. 2012) ("Supervisory liability under Section 1983 is triggered only when a supervisor fails to provide more stringent training in the wake of a history of past transgressions by the agency or provides training 'so clearly deficient that some deprivation of rights will *inevitably* result absent additional instruction.'" (citations omitted)). As these examples suggest, present doctrine does not attempt to measure whether officers receive training adequate to prepare them for their responsibility, and agencies should not use legal liability as the primary standard by which they measure appropriate training.

§ 13.04. Promoting Officer Well-Being

Agencies should promote officer and employee well-being, including by developing policies, training, and programs that protect their physical safety, support their mental and physical health, and reduce the stress on them and their families that results from performing their job.

Comment:

a. Significance of officer well-being. Officer well-being is critical to sound policing. As noted in § 1.04, in pursuing the goals of policing, agencies have the obligation to minimize the harms of policing for officers as well as for members of the public. This alone would justify agency commitment to programs that protect and promote the health and well-being of officers. In addition, however, officer well-being is a component of enabling officers to meet agency and legal directives. Officers cannot comply with rigorous standards of conduct if they are stymied by injuries, physical and mental-health problems, or the effects of stress, or if they fear these outcomes. Nor can officers who suffer physically and mentally develop and thrive in their work. Moreover, physical and mental-health problems and stress can affect how often officers use force, whether they treat individuals in a fair and impartial manner, how long they stay in the job, and the financial costs of policing to municipalities. For all of these reasons, agencies should make officer well-being a priority and institute programs designed to protect officer safety and minimize threats to officer health. Although this principle focuses primarily on the needs of officers, agencies similarly should tend to the well-being of other organizational members, especially those, such as dispatchers and crime-scene investigators, who face special stress and trauma because of their duties.

b. Understanding threats to officer well-being. Promoting officer well-being requires that agencies develop an understanding of the occupational threats to safety and well-being that most officers face—a task that should be facilitated by state and federal programs focused on officer wellness. It also requires that agencies assess the distinctive agency- and officer-specific threats to health and safety, such as the increased time rural officers may spend in cars, or the additional stresses female officers and officers of color often face in the line of duty and as a result of marginalization inside some agencies.

c. Protecting officer safety. Officers' physical safety can be compromised by job-related injuries, including automobile accidents, assaults, and exposure to infection. In developing a

comprehensive approach to protecting officers, agencies should consider three avenues for increasing safety and reducing injuries and death during the line of duty. First, agencies can help educate officers about—and help officers to avoid—situations that pose a risk to their safety, when doing so is consistent with sound policing, such as by restricting some pursuits or teaching de-escalation techniques. Second, agencies can adopt equipment and programs that prevent injury in high-risk situations, for instance by encouraging officers to wear seatbelts to reduce crash-related injuries. And third, agencies can adopt training, equipment, and policies to prevent death and reduce the seriousness of injuries when they occur, for example, by ensuring that officers have life-saving tools and basic medical skills to aid other officers as well as members of the public.

d. Tracking injuries. Agencies cannot easily adopt policies and practices to prevent common injuries if they do not understand how, how often, and why, these injuries occur. Thus, agencies should track injuries suffered by officers in the line of duty.

e. Protecting physical and mental health. Mental- and physical-health interventions similarly should take three forms. First, agencies should offer training and support to prevent physical and mental-health problems, and to assist officers and their families in coping with them when they arise. In this vein, agencies should seek to educate and support healthy behaviors for officers—both on duty and off—focusing on issues such as proper nutrition, maintaining a healthy weight, exercising for fitness and to prevent injury, and getting sufficient sleep. The efforts should include programs that address health considerations that affect many officers because of the nature of their work, such as strategies for building strength to support the additional weight of duty belts and equipment, eating well on duty, and addressing sleep made irregular by schedule changes. Prevention programs also should support officer mental health and stress reduction. Given the emotional demands of police work, officers need resources to prepare for stress and adversity, such as resilience training and relaxation techniques.

Second, agencies should identify officers at high risk of physical and mental-health issues through screening programs and intervene to ameliorate harm, such as through mandatory debriefings of critical incidents or by allowing officers to take advantage of employee-assistance programs and access to counseling.

Third, agencies should offer support to officers suffering physical or mental-health issues through programs that help in injury recovery or that address post-traumatic stress and substance abuse; and agencies should take measures to help officers and supervisors identify symptoms of

these difficulties. Agencies also should engage in efforts to reduce stigma around utilizing available mental-health, substance-abuse, and physical-recovery services and address officer concerns about professional repercussions of receiving help, so that officers seek and receive the support they need.

Agency programs to promote physical and mental health should be evaluated regularly and updated to determine whether they adequately support well-being and assess whether officers and supervisors are aware of those programs and resources and are willing to use them. Agency programs on well-being should be informed by the best available research.

f. State laws. Officers and agencies cannot adequately support officer well-being if states impose inappropriate obstacles to seeking mental-health, substance-abuse, and physical-injury treatment. Thus, state laws imposing professional consequences for officers seeking treatment should be examined to ensure that they are consistent with this Section and sound policing.

g. Suicide prevention. Tragically, in recent years, officers may have more often lost their lives at their own hands than in the line of duty—a fact that reflects the immense toll policing can take on the individuals tasked with protecting the public. Agencies and federal and state governments should devote resources to suicide prevention as a component of protecting officer well-being, including increasing awareness and dialogue about suicide-prevention efforts.

REPORTERS' NOTES

Policing puts officers and sometimes other agency employees in physical harm's way; it taxes their physical and mental health and generates ongoing stress that erodes personal well-being. As a matter of respect of and fairness to those who serve their communities, every agency should embrace the goal of ensuring the well-being of officers and other law-enforcement personnel. In addition, protecting officer well-being and repairing the physical and emotional tolls of police work serves important instrumental functions. Unwell officers miss work and need costly medical care. Moreover, as one member of the President's Task Force on 21st Century Policing said, "Hurt people can hurt people." FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 61 (2015). In order to ensure that officers engage with members of the public in ways that minimize harm, adhere to law and policy, and engender trust and cooperation, agencies should attend to the physical and mental health of their officers.

In recent years, the federal government has indicated a national commitment to officer wellness. Both houses of Congress unanimously passed the Law Enforcement Mental Health and Wellness Act (LEMHWA) before it was signed into law in 2018. See 163 CONG. REC. H9449-54 (daily ed. Nov. 28, 2017); 163 CONG. REC. S8279 (daily ed. Dec. 21, 2017). That act requires the U.S. Department of Justice to draw on other federal agencies in developing and reporting on programs to address the physical and mental health of officers. In addition, the U.S. Department of

Justice administers several grant programs designed to promote officer health and safety, including the Bulletproof Vest Partnership Program, the Officer Robert Wilson III Preventing Violence Against Law Enforcement Officers and Ensuring Officer Resilience and Survivability (VALOR) Initiative, and the Law Enforcement Safety and Wellness Research and Evaluation grant program.

Nevertheless, federal occupational-safety and health laws do not apply to most law-enforcement officers. Federal law-enforcement agencies are subject to the Occupational Safety and Health Act (OSHA), which commands that federal agencies "provide safe and healthful places and conditions of employment," provide and require the use of safety equipment and personal protective equipment for employees, and report occupational accidents and illnesses. 29 U.S.C. § 668. However, OSHA does not apply to state and local law-enforcement agencies. Moreover, only 22 states apply their state occupational-safety and health standards to state and local law enforcement officers. See ELIZABETH L. SANBERG ET AL., POLICE EXEC. RSCH. F., A GUIDE TO OCCUPATIONAL HEALTH AND SAFETY FOR LAW ENFORCEMENT EXECUTIVES 6 (2010). Even if more states extended occupational-safety and health laws to officers, such laws maybe inadequate to produce a comprehensive approach to officer well-being.

Addressing officer wellness requires that agencies first, identify and collect data on threats to physical and mental health; second, seek to prevent conditions and events that threaten officer safety and well-being; third, prevent or limit harm when such circumstances are unavoidable; and fourth, ensure that harm to officers is mitigated when it occurs. For example, motor-vehicle-traffic crashes are the leading cause of accidental deaths for officers. Nearly two-thirds of officers accidentally killed in the line of duty between 2015 and 2019 were killed in automobile crashes. See FBI: UCR, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-67.xls. To prevent deaths and injuries, an agency might assess officer conduct with respect to making traffic stops and responding to calls for service; change vehicular policies to restrict unsafe pursuits; improve driver training; strengthen supervision and policy around wearing seatbelts; and equip officers with tactical first-aid kits and prepare them to provide medical assistance in the case of an accident. See, e.g., PRESIDENT'S TASK FORCE, supra, at 66 (recommending every officer be provided with individual tactical first-aid kits); id. at 67 (recommending agency policies that require officers to wear seat belts); Hope M. Tiesman et al., *The Impact of a Crash Prevention Program in a Large Law Enforcement Agency*, 62 AM. J. INDUS. MED. 847 (2019) (finding that crash and injury rates could be reduced by an agency crash-prevention program).

Of course, traffic accidents are only one occupation-induced threat to officers. Indeed, officers face an occupational fatality rate nearly three times that of an average U.S. worker. See Brian J. Maguire et al., *Occupational Fatalities in Emergency Medical Services: A Hidden Crisis*, 40 ANNALS EMERGENCY MED. 625, 629 (2002). Officers face injury and death from intentional assaults. They suffer from irregular sleep, inadequate exercise, nutrition challenges, and chronic stress, all of which can lead to increased risk for cardiovascular disease. Officers face post-traumatic stress, depression, and substance abuse, more so than the general population. See R. Nicholas Carleton et al., *Mental Disorder Symptoms Among Public Safety Personnel in Canada*,

63 CAN. J. PSYCHIATRY 54 (2018); Elizabeth A. Mumford et al., *Law Enforcement Safety and Wellness*, 18 POLICE Q. 111, 122-123 (2015). They sometimes are exposed to infectious diseases and dangerous substances. Tragically, suicide is a national crisis among police officers, who may be more likely to die by their own hands than by the hands of a criminal suspect. See Ian H. Stanley et al., *A Systematic Review of Suicidal Thoughts and Behaviors Among Police Officers, Firefighters, EMTs, and Paramedics*, 44 CLINICAL PSYCH. REV. 25 (2016).

Agencies may be able to mitigate many of these risks, and some research indicates the value of agency action to promote officer wellness and reducing officer stress, including programs to prevent suicide, encourage and enforce the use of seatbelts, provide, mindfulness training, and prevent car crashes. See, e.g., Scott Wolfe et al., *Predicting Police Officer Seat Belt Use: Evidence-Based Solutions to Improve Officer Driving Safety,* 23 POLICE Q. 472 (2020); Tiesman et al., supra; Brian L. Mishara & Normand Martin, *Effects of a Comprehensive Police Suicide Prevention Program*, 33 CRISIS 162 (2012); Rollin Mcraty and Mike Atkinson, *Resilience Training Program Reduces Physiological and Psychological Stress in Police Officers*, 1 GLOB. ADVANCES HEALTH & MED. 44 (2012). Nevertheless, high-quality studies of agency interventions are rare, and departments that embrace officer well-being as a goal are hampered by inadequate research. Some common strategies, such as mental-health interventions and debriefings after critical incidents, lack adequate empirical support as to their value. See, e.g., Gregory S. Anderson et al., *Peer Support and Crisis-Focused Psychological Interventions Designed to Mitigate Post-Traumatic Stress Injuries Among Public Safety and Frontline Healthcare Personnel: A Systematic Review*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 7645 (2020), DEBORAH L. SPENCE ET AL., OFF. OF CMTY. ORIENTED POLICING SERVS., LAW ENFORCEMENT MENTAL HEALTH AND WELLNESS ACT: REPORT TO CONGRESS 26 (2019). Similarly, a systematic review and meta-analysis of police-focused stress-management interventions found that they did not seem to reduce stress outcomes. See George T. Patterson et al., *Effects of Stress Management Training on Physiological, Psychological, and Behavioral Outcomes Among Police Officers and Recruits*, 8 CRIME PREVENTION RSCH. REV. (2013). Although studies on non-law-enforcement populations offer some guidance about what might work for officers, clearly, more research is needed on what types of organizational changes and interventions can improve officer wellness. See CYNTHIA LUM ET AL., AN EVIDENCE-ASSESSMENT OF THE RECOMMENDATIONS OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING–IMPLEMENTATION AND RESEARCH PRIORITIES 40-41 (2016).

Officers also fear the stigma and employment consequences of taking advantage of programs designed to help their well-being. In developing programs devoted to improving officer well-being, agencies therefore also should cultivate policies and a culture of mental health and wellness that help officers take advantage of such services. See John Stogner et al., *Police Stress, Mental Health, and Resiliency during the COVID-19 Pandemic,* 45 AM. J. CRIM. JUST. 718-730 (2020) (describing "promising" active-bystandership program piloted in New Orleans Police Department that "focuses on wellbeing to encourage prosocial coping mechanisms and active bystandership" to help reduce alcohol abuse and other unhealthy habits); Jonathan Aronie & Christy E. Lopez, *Keeping Each Other Safe: An Assessment of the Use of Peer Intervention*

Programs to Prevent Police Officer Mistakes and Misconduct, Using New Orleans' EPIC Program as a Potential National Model, 20 POLICE Q. 295 (2017). Still, in developing officer well-being programs, achieving a balance between maintaining confidentiality and protecting the public can be challenging. Officers may be reluctant to take advantage of programs that they believe can threaten their employment. Yet some problems may make officers unsuited for field duty. State law may be helpful in balancing these concerns. A few states offer privacy protections to officers who use mental-health programs. For instance, Washington makes confidential all records related to law-enforcement communications with crisis-referral services, WASH. REV. CODE § 43.101.425 (2019), and Indiana protects communications with certified service providers who help officers manage stress caused by critical incidents. IND. CODE 36-8-2.5-2 (2017). States may wish to consider adopting additional privacy legislation to encourage officers to take advantage of mental-health services.

§ 13.05. Supervision

(a) Agencies should require that supervisors encourage and incentivize officers to engage in sound policing, and that supervisors guide officers and hold them accountable when they do not engage in sound policing;

(b) Agencies should select supervisors who are willing and able to promote sound policing, give them the tools and training to do so, and hold them accountable when they do not promote sound policing.

Comment:

a. Effective supervision to promote sound policing. Sound policing requires that officers understand what is expected of them, are assisted in fulfilling those expectations, and are fairly and consistently held accountable for their actions. Supervision is central to this process. Effective supervisors proactively teach, redirect, support, mentor, and guide officers. They look after their officers' and employees' safety and mental and physical well-being, and seek to further their career success, satisfaction, and longevity. They reward and support officers when they practice sound policing, and they offer nondisciplinary corrective action and, when necessary, disciplinary action, when they do not. Effective supervisors also model sound policing in the field: whether a supervisor de-escalates conflict rather than exacerbates it; intervenes to prevent harm rather than stands by; chooses to cite or give a warning rather than arrest; and responds with patience and professionalism rather than anger and retaliation when subject to verbal abuse, will play a significant role in how subordinate officers act in similar situations.

b. Selecting, evaluating, and promoting supervisors. Agencies should select for supervisory positions individuals who are willing and able to engage in effective supervision as described in this Section. Thus, agencies should ensure that criteria for selecting and testing supervisors are based on the traits and skillsets that agencies and the communities they serve need supervisors to have, rather than merely on the length of an officer's service or poorly tailored written exams. In addition, agencies should consider officers' work history, including complaint and disciplinary history, when selecting supervisors. Because sound policing is not measured in metrics such as stops or arrests, agencies should not overemphasize officer "productivity" in selecting supervisors. Rather, agencies should seek to elevate officers who display good judgment, commitment to community engagement, moral courage, and strong critical-thinking skills, among other qualities.

In selecting supervisors, agencies also should value diverse perspectives and backgrounds. Supervisors holding perspectives different from those that often predominate in traditional police culture may be more able to innovate and improve policing practices and to support those they supervise in doing the same. Relatedly, ensuring demographic diversity in supervisory ranks—in particular racial, ethnic, and gender diversity—is a component of maintaining a diverse and inclusive workforce, as discussed in § 13.02(a). Agencies therefore should scrutinize supervisor-selection and testing systems to ensure that unnecessary demographic disparities are eliminated.

Agencies should hold supervisors accountable for how they supervise their subordinates and how their subordinates police. First-line supervisors in particular, more than any other strata of the police hierarchy, set and perpetuate a law-enforcement agency's culture. Culture, in turn, determines whether sound policing is the norm and misconduct an aberration. Supervisors thus play a critical role in ensuring a culture of policing that is strictly law-abiding and community-focused, and should be held accountable for doing so.

c. Training and supporting supervisors. Supervisors should receive training on the elements of their supervisory role before they begin supervising others. New supervisors should be provided field training and qualitative feedback on their work to foster effective and appropriate supervisory habits and approaches. Supervisors should continue to receive regular training throughout their tenure as supervisors. Agencies also should assign supervisors a manageable workload so that they can provide close and effective supervision of each officer or employee they oversee. The appropriate ratio of officers to first-line supervisor will vary depending upon the particular agency and assignment.

Supervisors should seek to identify problems with officers in the early stages of their development so that the problems can be corrected before they cause significant harm to the community or the officer. Although research supporting their effectiveness and cost-effectiveness is limited, well-designed early-intervention systems may assist supervisors in this task, especially in large departments or departments in which officers change supervisors relatively frequently. Early-intervention systems are databases that aggregate information related to officer performance and notify supervisors or the agency of officers who may benefit from intervention to correct their behavior.

REPORTERS' NOTES

1. Role of supervisors in promoting sound policing. Supervisors must promote sound policing or it is unlikely to take hold in an agency. This is because supervisors, especially first-line supervisors, play a critical role in creating agency culture. While the precise impact of supervision on officer attitudes and behaviors is not fully understood, it is clear that supervisors can influence not only specific officer behaviors, such as how often officers use force, but also on how officers' ethos and outlook develop more generally. Robin Shepard Engel & Robert E. Worden, *Police Officers' Attitudes, Behavior, and Supervisory Influences: An Analysis of Problem Solving*, 41 CRIMINOLOGY 131 (2003); Robin Shepard Engel, *The Effects of Supervisory Styles on Patrol Officer Behavior*, 3 POLICE Q. 262 (2000). Sergeants (or their equivalents), comprise approximately 6.6 percent of sworn personnel and directly supervise 85 percent of a law-enforcement agency's employees. POLICE EXEC. RSCH. F., PROMOTING EXCELLENCE IN FIRST-LINE SUPERVISION 5 (2018) (first citing BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., DATA COLLECTION: LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (LEMAS), https://www.bjs.gov/index.cfm?ty=dcdetail&iid=248; and then citing ICPSR, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS (LEMAS), https://www.icpsr.umich.edu/icpsrweb/ICPSR/ series/92). Each first-line supervisor thus has an outsized ability either to promote sound policing or undermine it.

2. How supervisors promote sound policing. Notwithstanding the considerable autonomy law-enforcement officers have, first-line supervisors play a direct and influential role in guiding, reviewing, and approving officer activity. Among other duties, supervisors—particularly sergeants—often: respond to and manage some arrests and critical incidents in the field; observe officer conduct to see how officers perform (including reviewing body-camera or in-car-camera footage); provide formal and informal feedback and evaluation to officers and employees; review and approve arrests and uses of force; write reports; monitor radio traffic, dispatch information and officer-activity logs; take, investigate, and resolve misconduct complaints; address conflicts between officers and community members; and meet with community members and groups. PERF, *Supervision*, supra.

In addition to setting agency expectations through the supervisory tasks set out above, supervisors make their expectations for sound policing clear through their own conduct—towards both members of the public and other officers. Whether a supervisor's conduct comports with agency rules signals to officers the importance and sincerity of agency support for those values. Further, research on internal procedural justice shows that officers who feel respected by their supervisors and peers are more likely to accept departmental policies, understand decisions, and comply with them voluntarily. See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 10 (2015). Supervisors also can improve officer wellness and health by raising and addressing matters including police fatigue, stress, and health during training, roll calls, and in more informal settings. See CYNTHIA LUM ET AL., AN EVIDENCE-ASSESSMENT OF THE RECOMMENDATIONS OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING–IMPLEMENTATION AND RESEARCH PRIORITIES 42 (2016).

3. Selecting supervisors who will promote sound policing. Given the importance of supervision to the goal of achieving a culture of sound policing, agencies should take considerable care in selecting good supervisors. The act of selecting for promotion individuals who promote sound policing in itself reinforces those ideals by demonstrating concrete organizational support for them to those within the agency. By contrast, supervisors who reject or do not reliably practice sound policing may negatively impact policing by line officers and make an agency's commitment to sound policing seem insincere, both to line officers and members of the public.

Developing a culture of sound policing requires particular attention to supervisors' support for change. Organizational transformation, especially transformation that encourages line officers to be innovative and community-focused, can be challenging for some first-line supervisors. See Robin Shepard Engel, *Supervisory Styles of Patrol Sergeants and Lieutenants*, 29 J. CRIM. JUST. 341 (2001). Agencies can facilitate supervisory support through clear statements promoting sound policing and tangible support for change, but given supervisors' direct impact on attitudes and conduct, it also is critical for agencies to select supervisors who are comfortable promoting organizational transformation and innovation. Toward this end, agencies should seek broad diversity within supervisor ranks, as individuals with perspectives or backgrounds that differ from traditional or status quo policing approaches tend to be more comfortable with change and innovation, as discussed in § 13.02.

Agencies also should develop, maintain, and use effective mechanisms for selecting supervisors. Some agencies have struggled with generating effective supervision because they have failed to develop effective protocols for selecting individuals who will promote sound policing or because they assess candidates for promotion too infrequently. PERF, *Supervision*, supra, at 36 (infrequent promotional exams result in promotion of less-qualified individuals and risk losing good candidates to other agencies); CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 78 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf (noting RAND Corporation study of New Orleans Police Department finding that intervals of several years between promotional exams resulted in officers

leaving agency rather than waiting for next exam, and finding that this dynamic resulted in promotion of lower-scoring officers).

Once supervisors are in place, they should not be expected to supervise so many people, or have so many responsibilities, that close supervision is impossible. Official ratios of officers to sergeant (sometimes called the "span of control") generally range from 4:1 to 15:1, with an average of approximately seven officers to each sergeant. See, e.g., PERF, *Supervision*, supra, at 19. However, actual supervisory ratios can be more extreme, usually to the detriment of safety and sound policing. See, e.g., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, supra, at 61 (finding a 12:1 span-of-control by policy and a 20:1 by practice); CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 33 (2014). https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf (discussing unmanageable workloads for supervisors, making it difficult to "effectively lead, manage, and hold officers accountable.").

4. Early-intervention systems. One popular approach to preventing harm in law-enforcement agencies over recent decades has been early-intervention systems, which Samuel Walker describes as a "performance database that permits police managers to identify officers with patterns of problematic conduct and then to provide specially tailored interventions designed to correct those conduct problems." SAMUEL WALKER, POLICE ACCOUNTABILITY: CURRENT ISSUES AND RESEARCH NEEDS 15 (2006), https://www.ojp.gov/pdffiles1/nij/grants/218583.pdf. In 1981 the U.S. Commission on Civil Rights, in its report *Who is Guarding the Guardians?*, endorsed these systems, and they have been supported widely since, including by the U.S. Department of Justice. See, e.g., U.S. DEPT. JUST., PRINCIPLES FOR PROMOTING POLICE INTEGRITY (2001). Early-intervention systems have been a staple among the reforms mandated by consent decrees that have resulted from federal pattern-or-practice investigations, and many agencies have adopted such systems even in the absence of court-ordered reform.

Despite the popularity of early-intervention systems, there is limited evidence that they are effective or cost-effective in preventing misconduct or other adverse events. Most research supporting early intervention has focused on success in one or a few departments. See, e.g., ROBERT C. DAVIS ET AL., OFF. OF CMTY. ORIENTED POLICING SERVS., FEDERAL INTERVENTION IN LOCAL POLICING: PITTSBURGH'S EXPERIENCE WITH A CONSENT DECREE (2005); Walker et al., *Early Warning Systems*, supra. Moreover, most have been weakly designed without adequate control groups. See Robert E. Worden et al., *Intervention with Problem Officers: An Outcome Evaluation of an EIS Intervention*, 40 CRIM. JUST. & BEHAV. 409 (2013). Recent efforts to study existing early-intervention systems more rigorously have found them to have little positive effect and some unintended consequences. See John A. Shjarback, *Emerging Early Intervention Systems: An Agency-Specific Pre-Post Comparison of Formal Citizen Complaints of Use of Force*, POLICING, Mar. 2015, at 8 (finding that "[i]n the aggregate, departments that have developed and implemented EI systems are generally not experiencing lower levels of formal citizen complaints of use of force relative to before the systems were employed"); Worden et al., supra; Kim Michelle

Lersch et al., *Early Intervention Programs: An Effective Police Accountability Tool, or Punishment of the Productive?*, 29 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 58 (2006).

Several challenges confront early intervention as a prevention strategy. First, early-intervention systems require that agencies choose factors to monitor and thresholds or other means of triggering intervention. Systems vary enormously in the number and kind of criteria and thresholds they use to trigger intervention, and those selection criteria are insufficiently supported by empirical research. See, e.g., id at 58. Second, little research supports the most common interventions used in early-intervention systems, such as supervisor counseling and officer retraining. See Worden et al. Lastly, even assuming that an early-intervention system is designed on a solid foundation, many systems require significant and ongoing information-technology updates, substantial and costly data entry, and continual and considerable institutional commitment to effectively implement and maintain them. See SAMUEL E. WALKER & CAROL A. ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY (2013). Thus, theoretical rigor can be difficult to translate into institutional success.

More research may assist agencies in identifying systems that are more effective and less onerous and costly to adopt. In the meantime, agencies should continue to monitor officer-performance measures and criteria of concern, to follow research on more rigorous, preventative intervention systems, and, when possible, to embrace partnerships with researchers to assess and improve evaluation and prevention systems.

5. Agency liability for inadequate supervision. Agencies should be mindful that municipalities may be held liable for some kinds of inadequate supervision that causes misconduct by police officers. For instance, under 42 U.S.C. § 1983, a municipality may be found liable when it has a policy or custom of failing to provide adequate supervision and discipline of officers who have committed constitutional violations. Such claims are analogous to claims of liability for failure to train officers adequately. See City of Canton v. Harris, 489 U.S. 378 (1989). Inadequate supervision may also be viewed as evidence that officer misconduct in a law-enforcement agency amounts to a "pattern or practice" of constitutional violations that could justify a suit by the U.S. Department Justice pursuant to 34 U.S.C. § 12601. See, e.g., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE, supra, at 33 (finding one root cause of officer misuse of force to be lack of experienced, well-supported, well-trained supervisors). The rationale underlying imposing liability based on inadequate supervision under both statutes—that is, that good supervision promotes sound policing and prevents policing harm—justifies agency efforts to ensure adequate supervision, far beyond the boundaries of legal liability.

§ 13.06. Individual Responsibility to Promote Sound Policing

(a) All employees of an agency should:

(1) engage in and promote sound policing;

(2) intervene to prevent or stop acts inconsistent with sound policing, and mitigate harm resulting from such acts, when feasible, unless unreasonable under the circumstances;

(3) report violations by officers of any laws or agency policies relating to sound policing; and

(4) cooperate with incident reviews and investigations of misconduct, including by being truthful and forthright and by protecting complainants and witnesses from retaliation.

(b) Agencies should incorporate these responsibilities into their policies and training practices and reinforce them with supervision, incentives, and, when necessary, corrective action.

Comment:

a. Individual role in promoting sound policing. Usually, officers and other agency employees promote sound policing by adhering to law and agency policy and encouraging others to do the same. On occasion, however, promoting sound policing requires additional, often difficult, action by officers and other agency employees. This Section highlights three categories of such action: intervention, reporting, and cooperation with investigations.

First, officers should intervene to prevent misconduct or other actions taken by other officers that are inconsistent with sound policing. They similarly should intervene to mitigate harm once such acts have occurred. These sorts of intervention directly promote sound policing, convey a commitment to sound policing, and reinforce positive agency cultures. Although the duty to intervene should be interpreted broadly, there are circumstances in which intervention should be excused as unsafe, infeasible, or unreasonable, such as when an officer can only stop a use of excessive force by risking serious injury. Intervention also is unnecessary when a violation of agency policy neither risks harm nor is likely to affect public trust in the police.

Second, when an officer or employee observes misconduct, the officer should report it or ensure that another appropriate actor does so. In addition, as discussed further in § 13.07, officers and other agency employees should facilitate individuals in—and certainly not discourage them from—lodging complaints about officer conduct or agency service, even if they believe the complaint is unfounded. Such reporting is an essential means of informing agencies about risks to

sound policing and enabling agencies to promote sound policing through supervision and correction.

Third, officers have both a duty of candor and a responsibility to cooperate honestly and completely with misconduct investigations and incident reviews, whether they are conducted by the agency, an external oversight board or commission, or a prosecutor. It is essential that officers cooperate with efforts to evaluate agency and officer conduct—both to identify steps that can be taken to promote sound policing in the future and to engage in corrective or disciplinary action.

b. Agency role in facilitating officer intervention, reporting, and cooperation. Agencies should support and reinforce the affirmative officer responsibilities described in this Section through policies, training, supervision, incentive structures, and accountability systems. Thus, agencies should adopt policies that delineate officers' and employees' responsibilities to: intervene to stop, prevent, or mitigate harm; report misconduct and uses of force; accept complaints and refrain from retaliation; and cooperate with investigations. Because it can be especially challenging for officers to take affirmative steps to promote sound policing through acts such as intervening to prevent misconduct or accepting citizen complaints, agencies should provide training to prepare officers for the difficulties they may face in performing those acts. As with other aspects of sound policing, agencies should reinforce these affirmative obligations by providing supervision and incentives and implementing accountability measures, including disciplinary action when appropriate. Agencies that promote and support sound policing in these ways are likely to attract and retain officers and employees who act with integrity and courage, and, in doing so, will further create a climate conducive to sound policing.

REPORTERS' NOTES

This Chapter emphasizes the importance of agency systems in ensuring that officers and employees follow the law and agency policy. This Section makes clear that notwithstanding this emphasis on agency action, each officer and employee also has a duty not only to act consistently with the requirement of sound policing, but to take affirmative steps to reinforce integrity and accountability within an agency.

There is relatively little academic scholarship or research regarding the role of affirmative actions by officers and employees in promoting sound policing. However, court cases, investigations of incidents and departments, program evaluations, and experience and observation suggest ways officers and agencies can promote and reinforce—rather than undermine—sound policing by officers. These sources suggest that requiring officers to intervene to stop misconduct, to report misconduct, to support those who complain or provide information about misconduct,

and to cooperate with investigations may prevent unsound policing and reinforce a culture of sound policing. See, e.g., SAMUEL E. WALKER & CAROL A. ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY (2013); RAMPART INDEP. REV. PANEL, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL (Nov. 16, 2000) (documenting LAPD Rampart scandal and providing recommendations for ensuring sound policing); United States v. Moore, 708 F.3d 639 (5th Cir. 2013) (documenting rookie and field-training officer failure to inform hospital of force used against Raymond Robair, resulting in Robair's death); Consent Decree at 90, United States v. City of Ferguson, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016) (mandating that city require employees to cooperate with administrative investigations and discipline officers for failure to do so, and requiring city to prohibit retaliation against those who report misconduct or cooperate with investigations and to discipline officers who violate these requirements).

Officers have some affirmative duties to promote sound policing as a matter of law. Every federal circuit court of appeals has held that officers have a duty to intervene to prevent a fellow officer's use of excessive force, and some circuits have recognized a broader duty to prevent other constitutional violations. See, e.g., Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64 (1st Cir. 2016); Anderson v. Branen, 17 F.3d 552 (2d Cir. 1994); Smith v. Mensinger, 293 F.3d 641 (3d Cir. 2002); Randall v. Prince George's Cnty., 302 F.3d 188 (4th Cir. 2002); Hale v. Townley, 45 F.3d 914 (5th Cir. 1995); Floyd v. City of Detroit, 518 F.3d 398 (6th Cir. 2008); Miller v. Smith, 220 F.3d 491 (7th Cir. 2000); Putman v. Gerloff, 639 F.2d 415 (8th Cir. 1981); United States v. Koon, 34 F.3d 1416 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 81 (1996); Mick v. Brewer, 76 F.3d 1127 (10th Cir. 1996); Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000); Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987). Compare Bunkley v. City of Detroit, 902 F.3d 552, 566 (6th Cir. 2018) (recognizing duty to intervene to prevent an unlawful arrest), and *Anderson*, 17 F.3d at 558 (same), with Livers v. Schenck, 700 F.3d 340, 360 (8th Cir. 2012) (declining to recognize duty to intervene to prevent constitutional violations other than excessive force), and Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999) (declining to recognize duty to intervene to prevent fellow officer from fabricating confession). Even under its broadest construction, the constitutional duty to intervene is less specific and extensive than the affirmative responsibilities set out in this Section.

Even officers who might themselves engage in sound policing may need additional guidance and support in taking affirmative steps to promote sound policing. Thus, this Section recommends that agencies adopt detailed policies as a component of their efforts to promote sound policing. But policies alone are not enough.

Agencies also should train officers in how to overcome the challenges of fulfilling these responsibilities. Peer-intervention training has been endorsed by the National Association for Civilian Oversight of Law Enforcement and others. See Letter from Barbara Attard, Past-President, Nat'l Ass'n for Civilian Oversight of L. Enf't, to The President's Task Force on 21st Century Policing: Independent Oversight and Police Peer Intervention Training Programs that Build Trust and Bring Positive Change (Jan. 9, 2015). Although research into such training is just beginning, peer-intervention programs have a strong foundation in social psychology and have

shown initial promise in the law-enforcement context. See, e.g., ERVIN STAUB, THE ROOTS OF GOODNESS AND RESISTANCE TO EVIL: INCLUSIVE CARING, MORAL COURAGE, ALTRUISM BORN OF SUFFERING, ACTIVE BYSTANDERSHIP AND HEROISM (2015); Jonathan Aronie & Christy E. Lopez, *Keeping Each Other Safe: An Assessment of the Use of Peer Intervention Programs to Prevent Police Officer Mistakes and Misconduct, Using New Orleans' EPIC Program as a Potential National Model*, 20 POLICE Q. 295 (2017) (describing the promise of peer-intervention systems and the implementation of such a system in New Orleans). In conjunction with training, agencies should incentivize the exercise of sound policing and support officers who practice it. Maureen Scully & Mary Row, *Bystander Training Within Organizations,* 2 J. INT'L OMBUDSMAN ASS'N., no. 1, 2009, at 89 (emphasizing need to engage all levels of an organization to foster productive behavior and curtail illegal, discriminatory, and destructive behavior).

Agencies also should reinforce officers' obligations to intervene, report, and cooperate through agency investigations and accountability mechanisms. Thus, for example, investigations of allegations of unreasonable force should consider whether officers failed to intervene when appropriate or failed to report a use of force, as required by policy. Many investigating entities inadequately identify and investigate such violations and are insufficiently trained to do so. Some agencies even actively discourage investigation of such violations. See, e.g., CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 50-79 (2016). Others may undermine sound policing by disciplining individuals who report misconduct more harshly than officers who committed and failed to report it. See, e.g*., FWPD Officer Speaks About Demotion After Leaked Video*, CBS NEWS DALL.-FT. WORTH (May 22, 2017), https://dfw.cbslocal.com/2017/05/22/demoted-fwpd-officer-to-speak. These actions are inconsistent with this Section and the demands of sound policing.

Finally, agencies must scrutinize their systems to rid them of elements that undermine sound policing. For example, agencies should prohibit retaliation against officers who promote sound policing and aggressively enforce such prohibitions. Retaliations against officers who promote sound policing are likely to corrode an agency's culture of accountability and can be dangerous to officers. See, e.g., Lisa Bartley, *Bloodhound Handlers Win $10.2 Million in Lawsuit Against LAPD*, KABC (May 23, 2019), https://abc7.com/lapd-police-sexual-harassment-retaliation/5314940 (whistleblower recounting retaliation in form of absent backup when pursuing suspected murderer); Justin Sondel & Hannah Knowles, *George Floyd Died After Officers Didn't Step In. These Police Say They Did—and Paid a Price*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/nation/2020/06/10/police-culture-duty-to-intervene.

§ 13.07. Responding to Allegations of Misconduct

(a) Agencies should readily accept complaints about officer, employee, and agency conduct, and should minimize barriers to filing them.

(b) Agencies should engage in thorough, fair, and timely investigations of allegations of misconduct, conducted by well-trained and highly competent investigators.

(c) Agencies should adjudicate misconduct allegations fairly, based on careful consideration of available evidence, and should find allegations proven when a preponderance of the evidence supports them.

(d) Agencies should impose consequences for misconduct fairly and consistently, as appropriate to promote sound policing, and discipline should be the presumed response to a proven allegation of misconduct.

(e) In deciding whether to disclose complaints, investigations, and adjudications of misconduct, agencies should balance the value of transparency against the privacy needs of the parties and witnesses.

Comment:

a. Handling allegations of misconduct. This Section addresses how agencies should receive and respond to allegations of officer and employee conduct that violates agency rules or applicable law. Such practices are critical means by which agencies contribute to sound policing. By having effective institutional methods for identifying and responding to misconduct allegations, agencies demonstrate a commitment to the law, promote officer compliance with law and policy, help build public trust, and recognize the imperative of treating officers fairly. This Section sets out the framework for handling allegations of misconduct in a manner that meets these objectives.

This Section concerns complaints about officer and employee misconduct made by members of the public, as well as internal reports about officer and employee misconduct toward members of the public. It addresses allegations of misconduct that go beyond minor infractions, including violations of law, policy, or directives that infringe rights or undermine agency legitimacy. It covers not only obviously serious misconduct, such as racially based action or inappropriate uses of force, but also conduct that could contribute to distrust and cynicism about the police, such as officers engaging in discourteous behavior, failing to complete a required report, and turning off a body-worn camera in violation of governing rules. Complaints of other kinds of misconduct, such as abuse of sick leave or workplace harassment, are not addressed in this Section.

b. Complaints. By enabling members of the public to share their concerns about encounters with the police, misconduct complaints alert agencies to possible violations of agency rules and procedures, enabling agencies to foster adherence to both the law and governing standards of conduct. Complaints also inform agencies about conduct and policing practices that, even if they

do not violate existing policy or law, cause unnecessary harm and conflict with community expectations. Thus, they provide agencies with an important source of data, helping to highlight areas of policy or training that are in need of revision.

Notwithstanding the value of public complaints, many agencies resist rather than welcome such input by creating systemic barriers to receiving complaints or turning a blind eye when officers discourage community members from making complaints. Some barriers to complaints are formal and institutionalized, such as restrictions on who may file a complaint, how and where a complaint should be filed, and how long after an alleged incident a complaint may be filed or investigated. Agencies should eliminate such barriers and welcome complaints, setting limits only as necessary to process complaints properly. Agencies should allow third parties to make complaints and should permit anonymous complaints. They should permit complaints to be communicated in a wide variety of ways, including in person, by telephone, online, and by mail. And they should not require complainants to identify an officer by name or badge number in order to file a complaint. Agencies should make information about their complaint-filing processes easily available to the public through brochures, websites, and other means. And agencies should treat allegations of misconduct made outside of their formal intake processes, including allegations made to supervisors or in legal proceedings, as complaints.

Informal or nonstructural barriers to complaints often are less visible than formal barriers, but they equally can discourage complaints, delegitimize agency rules internally, and undermine public trust. Individual officers may mislead a person about the complaint process, refuse to accept a complaint, refuse to provide a name or badge number, offer to drop charges if a citizen does not file a complaint, or retaliate or threaten to retaliate against an individual who seeks to complain. Agencies should take proactive measures to prevent these practices.

c. Administrative investigations. This Section applies only to administrative investigations of allegations of officer misconduct triggered by a complaint or allegation. Criminal investigations of officer conduct are discussed in § 14.12, and routine reviews of officer use of force and significant adverse incidents are discussed in § 13.08.

Democratic values, sound management practices, and concerns about public legitimacy require that an agency determine whether a complaint of law-enforcement misconduct has merit. Thus, agencies should engage in thorough, fair, and timely investigations of allegations of misconduct, regardless of their form, and regardless of who made them. In order for its investigation

of a misconduct allegation to be thorough, an agency should gather all of the information necessary to allow it to fairly and accurately adjudicate an allegation of misconduct. For an agency's investigation to be fair, two criteria should be satisfied. First, evidence that is material to determining the veracity of the allegation should be collected without bias or presumption. Second, all participants, including officers, complainants, and witnesses, should be treated impartially and respectfully during the investigative process. For an agency's investigation to be timely, it should be pursued expeditiously to completion. Delays can make allegations of misconduct more difficult to resolve accurately, as witnesses and evidence become unavailable and memories fade. Unresolved complaints disserve complainants and officers and undermine public trust.

In order to conduct a thorough and fair investigation that garners respect both from within and outside the agency, an agency should assign strong investigators to the task and implement rigorous protocols and oversight to aid them. Individuals investigating allegations of misconduct or supervising such investigations need not be sworn officers or agency employees.

Although there should be a strong presumption in favor of fully investigating misconduct complaints, it may be appropriate for an agency to close an investigation if, after a preliminary inquiry is made, it becomes clear that the complaint has no merit whatsoever, or alleges conduct that, even if true, would not violate the agency's policies or law. Agencies should track complaints that are closed without full investigation so that patterns and trends can be identified and addressed. For example, although an agency appropriately may refuse to investigate complaints that officers asked for consent to search under circumstances that do not violate agency policy or governing law, the agency, by tracking and reviewing such complaints, enables its leadership to reconsider a policy and practice that may be imposing needless intrusions and causing community friction.

d. Mediation. Effective mediation conducted by a well-trained mediator allows participants both to understand each other's perspective and to have a direct and meaningful impact on the resolution of a conflict, which often leaves both parties more satisfied with the process. For this reason, agencies should consider making available mediation or another alternative mechanism for resolving some complaints without full investigation and adjudication. However, mediation is not appropriate if either the complainant or the subject of the complaint does not wish to participate. Moreover, meditation should take place only after a preliminary inquiry into the complaint has determined the nature of the alleged misconduct.

e. Adjudication of allegations of misconduct. Even when an investigation has been thorough and fair, all the relevant evidence necessary for a reliable and accurate resolution of the allegation has been gathered, and a report fully and clearly documenting that evidence has been prepared, a misconduct investigation still may go awry if evidence is not fairly and competently assessed. After a complaint is investigated, the adjudicator should scrutinize each allegation in the complaint objectively and determine whether the evidence is sufficient to establish a violation of agency rules or applicable law. An allegation should be considered proven if it is supported by a preponderance of the evidence, that is, evidence demonstrating that it is more likely than not that the misconduct occurred, as is common in workplace misconduct adjudications outside of the realm of policing. Agencies should use high-ranking officials within an agency as adjudicators or, when appropriate or necessary to engender trust in the outcome, should have an independent entity or individual outside the agency conduct the adjudication. Adjudicators should document their conclusions and the rationales supporting them.

f. Discipline. Agencies best can foster a culture of sound policing and encourage positive behavioral change by holding officers accountable when they commit misconduct. As subsection (d) indicates, accountability for violations of agency rules and applicable law usually should involve discipline in the form of formal negative employment consequences, such as a written reprimand, suspension without pay, or termination. Those consequences should be appropriate to the nature and degree of misconduct and the officer's disciplinary history. They also should be fair and consistent with the discipline imposed in similar cases. For discipline to be fair, officers should be treated justly during the disciplinary process and the discipline imposed should be proportional to the misconduct, unaffected by favoritism, bias, or arbitrariness. For discipline to be consistent, similar violations should be met with similar consequences. Sometimes, an agency cannot impose discipline that is simultaneously appropriate, fair, and consistent with past practice. Specifically, if an agency has not imposed appropriate discipline in the past, it may need to impose discipline that is inconsistent with prior practices as a means to improve its response to misconduct. Agencies should engage in appropriate discipline in such cases, explaining the departure, and seek to act consistent with their new practice in future cases.

When determining what penalties to impose for different classes of violations, agencies should collaborate with stakeholders to assign degrees of penalty that are fair and viewed as such by both officers and the communities they serve. Although discipline should be the presumed

response to misconduct, nondisciplinary corrective action, such as retraining, counseling, or an outcome agreed upon during mediation, may be appropriate, if such action is taken consistent with an agency policy establishing parameters for the nondisciplinary responses to misconduct.

g. Balancing transparency and privacy. Agencies should make protocols governing their investigation processes available and educate officers and members of the public about them. Although complainants and the public have a legitimate interest in knowing how individual misconduct complaints are handled and resolved, disclosure is not always warranted. Agencies should balance complainants' and the public's knowledge interests against the interests of officers, complainants, and witnesses in keeping some kinds of information confidential, provided those interests are legitimate. In each case, however, a proper balancing of these interests requires that agencies timely notify parties to a misconduct complaint—both officers and complainants—of the outcome of the investigation or resolution of the allegation, including whether discipline was imposed and, if so, the nature/type of discipline. In addition, agencies regularly should make public aggregate data regarding misconduct investigations.

h. Agency oversight of its administrative-investigation process and outcomes. As noted in Comment *a*, complaints can provide agencies with an important source of data about the efficacy and impact of policing in their communities. To make use of this data, agencies should create systems for and commit resources toward analyzing data regarding misconduct complaints, their handling, and outcomes on a regular basis. Agencies should use this information not only to improve their processes for investigating allegations of misconduct but also for improving their policing practices more broadly.

REPORTERS' NOTES

1. Generally. Holding law-enforcement officers and employees accountable when they violate law or policy can be difficult, but it is necessary to encourage adherence to the rule of law, foster police legitimacy, and promote community confidence and officer safety. Conducting investigations that comport with this Section requires clear policies, robust training, diligent supervision and, most importantly, agency support.

2. Form and method of complaint intake. In order to serve their multiple purposes, it is essential that agencies accept complaints with little limitation on form and by a wide variety of methods of communication, including anonymous complaints, third-party complaints, complaints that do not identify an officer by name or badge number, and complaints that are not made in writing or under oath. Among other policing groups, the Police Executive Research Forum and the International Association of Chiefs of Police have endorsed a broad approach to accepting

complaints. See, e.g., POLICE EXEC. RSCH. F., CRITICAL RESPONSE TECHNICAL ASSESSMENT REVIEW: POLICE ACCOUNTABILITY—FINDINGS AND NATIONAL IMPLICATIONS OF AN ASSESSMENT OF THE SAN DIEGO POLICE DEPARTMENT 6 (2015); INT'L ASSOC. OF CHIEFS OF POLICE, LAW ENF'T POL'Y CTR., CONCEPTS AND ISSUES PAPER: INVESTIGATION OF ALLEGATIONS OF EMPLOYEE MISCONDUCT 4-5 (2019). Some jurisdictions have written the importance of accepting complaints into their laws and regulations. For example, New Jersey law-enforcement agencies are governed by N.J. STAT ANN. § 40A:14-181, which requires that they adopt guidelines consistent with state Internal Affairs Policy and Procedures promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety. The Internal Affairs Policy and Procedures mandate that: "Each [law enforcement] agency must accept reports of officer misconduct from any person, including anonymous sources, at any time." N.J. OFF. OF THE ATT'Y GEN., INTERNAL AFFAIRS POLICY & PROCEDURES § 1.09(b) (2019).

Despite there being a consensus on best practices, some officer contracts, agency policies, and state officer bills of rights continue to impose considerable restrictions on the investigation of complaints based on their form or method by which they were made. See, e.g., MD. CODE ANN., PUB. SAFETY, LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS § 3-104(c)(1) (West 2021) (prohibiting investigation of a complaint of brutality unless it is signed and sworn under penalty of perjury by an "(i) the aggrieved individual; (ii) a member of the aggrieved individual's immediate family; (iii) an individual with firsthand knowledge . . . or (iv) the parent or guardian of the minor child, if the alleged incident involves a minor child."). Legislatures should eliminate such obstacles, and agencies should avoid such restrictions and should ensure that officers do not dissuade complainant[s] by "coercion, intimidation, threatening to charge the complainant[s] with resisting arrest or offering to drop resisting arrest charges if the [complainants do] not file a complaint." Jenny R. Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should Be Open to Public Scrutiny*, 45 CRIM. L. BULL. 1006 (2009).

3. Mediation. In contrast to broad dissatisfaction with traditional complaint-investigation processes, complainants and officers generally report satisfaction with both the mediation process and its outcomes. For instance, the New York City Civilian Complaint Review Board found that 93 percent of mediations in 2018 reached a resolution with which both parties were pleased. N.Y.C. CIVILIAN COMPLAINT REV. BD., ANNUAL REPORT 5 (2018). The New Orleans Office of the Independent Police Monitor similarly found that 96 percent of citizen complainants and 100 percent of police officers who mediated a complaint felt positively about mediation, and 80 percent of members of the public and 86 percent of officers said that they would recommend it. NEW ORLEANS OFF. OF THE INDEP. POLICE MONITOR, 2018 ANNUAL REPORT: COMMUNITY-POLICE MEDIATION PROGRAM 6 (2019). See also Lonnie M. Schaible et al., *Denver's Citizen/Police Complaint Mediation Program: Officer and Complainant Satisfaction*, 24 CRIM. JUST. POL'Y REV. 632, 639-642 (2013). This satisfaction may stem from the fact that mediation often is more consistent with principles of procedural justice than traditional complaint-resolution mechanisms; it gives all participants an opportunity to be heard, as well as to learn the other party's viewpoint

and why specific actions were taken. SAMUEL WALKER ET AL., MEDIATING CITIZEN COMPLAINTS AGAINST POLICE OFFICERS: A GUIDE FOR POLICE AND COMMUNITY LEADERS 11 (2002); ASTRID BIRGDEN & JULIO LOPEZ-VARONA, COMMUNITY-POLICE COMPLAINT MEDIATION PROJECT: A REVIEW PAPER 10-11 (2011). However, there is still little evidence as to whether mediation is effective at reducing misconduct.

Agencies should not use mediation or label resolution mechanisms "mediation" as a means of preventing a more thorough investigation when one is warranted. See CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 54-55 (2016); WALKER ET AL. at 19. Thus, any mediation program should be voluntary, should involve a face-to-face meeting between the parties to a complaint, should seek a mutually satisfactory resolution, and should be led by a neutral, trained mediator.

4. Preponderance of the evidence. An allegation of misconduct should be considered proven if the evidence shows it is more likely than not that the individual engaged in misconduct. This preponderance-of-the-evidence standard is prevalent in both non-policing employment-law investigations and law-enforcement administrative investigations. See, e.g., JEFFREY J. NOBLE & GEOFFREY P. ALPERT, MANAGING ACCOUNTABILITY SYSTEMS FOR POLICE CONDUCT 66 (2009); BARBARA ATTARD & KATHRYN OLSON, POLICE MISCONDUCT COMPLAINT INVESTIGATIONS MANUAL 44 (2016). However, pursuant to law, collective-bargaining agreement, or informal practice, some agencies have adopted a clear-and-convincing standard—a higher burden of proof for demonstrating police misconduct.

To effectively implement the preponderance-of-the-evidence standard, agencies should train investigators on the standard, and they should eliminate presumptions against finding an allegation supported whenever a complainant's version of the facts demonstrates culpability, but the officer's version of the facts demonstrates no culpability. Whenever possible, investigative entities also should strive to resolve contradictory versions of the facts by gathering and analyzing additional evidence that may corroborate or disprove material facts.

5. Agency liability for inadequate investigation and discipline. Agencies that routinely fail to investigate allegations of misconduct adequately or to discipline officers who have committed misconduct may be liable under 42 U.S.C. § 1983 for subsequent harm caused by their officers. See, e.g., Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996) ("mere procedures" to receive and investigate complaints insufficient to shield city from liability from allegations that its failures to investigate uses of force or to discipline instances of excessive force contributed to the excessive force alleged by plaintiff); LaPorta v. City of Chicago, 277 F. Supp. 3d 969 (N.D. Ill. 2017) (failure to discipline officers and maintenance of code of silence were moving force behind off-duty unconstitutional conduct). Further, inadequate investigation and discipline may be viewed as evidence that officer misconduct in a particular law-enforcement agency is part of a "pattern or practice" of constitutional violations, contributing to agency liability under the federal enforcement police-misconduct statute, 34 U.S.C. § 12601. See, e.g., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT, supra, at 46-93 (2016) (finding that Chicago PD's deficient accountability systems contributed to pattern or practice of unconstitutional conduct). As in the

context of other agency accountability matters, legal sufficiency does not ensure that an agency's complaint and disciplinary mechanisms are adequate to promote sound policing.

§ 13.08. Incident Review

Agencies should have in place systems for routinely evaluating:

(a) uses of force;

(b) significant adverse events; and

(c) patterns of events that involve risk of physical harm, the deprivation of constitutional rights, or a substantial threat to community confidence and trust in the police.

Comment:

a. Purposes of incident review. Section 13.07 indicates the importance of conducting fair and thorough investigations of allegations of misconduct against officers. To ensure that their internal accountability measures are effective, agencies should also conduct self-assessments, beyond investigations and adjudications, to identify policing errors and the means for preventing them. Adverse events in policing often are the result of deficiencies in training, policy, staffing, supervision, equipment, interagency coordination, and officer conduct that, once identified, can be addressed and mitigated. Thus, agencies should have in place systems to engage in routine, thorough, timely, and objective review of uses of force that rise to a certain level, regardless of whether there is any indication of wrongdoing. Agencies also should review other significant adverse events and patterns of events, even those that are less severe. Such reviews may be used to determine whether agency employees complied with applicable policy and law as well as to identify what modifications to agency policies, practices, and training are needed to help prevent future negative outcomes.

b. Covered events. Agencies should review all shootings and other uses of force serious enough to create a significant risk of injury, regardless of whether someone was actually injured. Agencies also should review other significant adverse events, such as police pursuits resulting in serious injury or death, serious deprivations of constitutional rights, and other incidents that threaten public confidence in the police.

Just as significant individual events may undermine community trust and reveal avoidable obstacles to sound policing, patterns of negative events, including less-critical adverse incidents,

may do so. Thus, although agencies may choose not to routinely assess every minor incident that results in an accidental constitutional violation or minor injury, agencies should routinely identify and assess patterns of adverse events, including minor incidents. Reviewing footage from body-worn cameras and the outcome of lawsuits and other court proceedings, such as suppression motions, may aid in this process. Agencies also may seek to review other events, including accidents or incidents that could have resulted in adverse outcomes, but did not do so, or that indicate significant policy violations.

c. Content of incident review. In order to conduct reviews effectively, agencies should have protocols in place that determine how reviews should be conducted, what aspects of them should be communicated to the public, and how the agency should respond to recommendations and assess progress towards preventing future adverse events. At a minimum, an agency system for routinely reviewing incidents should ensure that relevant information about each incident is obtained, preserved, reviewed, and evaluated. The system should determine whether employees followed applicable policies and procedures. And it should evaluate the adequacy of applicable policies, training, and supervision as well as identify what modifications to agency policies and practices could be made to help prevent future events. Incident reviews should result in written reports, and in conducting incident reviews, agencies should avoid interfering with ongoing criminal or misconduct investigations.

d. System-based reviews. Although, for accountability purposes, it is important to hold individuals responsible for violations of applicable policy and law, analyzing the systemic causes of negative outcomes often is useful in preventing them, especially when they do not result from intentional departures from policy or training. One method for systemic review is the sentinel-event review. In a sentinel-event review, an agency convenes a team to carry out a detailed review of past adverse or "near miss" events for the exclusive purpose of determining what factors contributed to the events and identifying steps that an agency or community could take to improve future outcomes. This assessment often implements root-cause analysis—a method of identifying systemic causes of complex events.

The goal of a sentinel-event review is to discover systemic causes of errors in a non-blaming fashion because doing so can promote institutional change in a manner likely to engender widespread participation and acceptance. Towards this end, sentinel-event-reviews are conducted separately from disciplinary and legal processes and may involve a broad range of stakeholders.

Sentinel-event reviews and similar processes have been used successfully in medicine, aviation, and other high-risk industries. Agencies may wish to consider whether they could be similarly effective and cost-effective for preventing negative outcomes in policing. If so, in designing sentinel event reviews, agencies should consider: whether community members and affected individuals should participate; when the process should occur relative to legal and administrative proceedings; and whether and how information from sentinel-event reviews should be shared beyond the agency.

REPORTERS' NOTES

1. Self-assessment. Just as institutions in other industries engage in organizational introspection to improve, strong law-enforcement agencies embrace frequent, systematic, and ongoing self-assessments in order to identify errors and to correct policies and administrative, supervisory, training, and tactical practices that make policing less effective or more harmful than it need be. An agency's willingness to identify errors, hold individuals accountable when appropriate, and implement reforms to prevent future harm also can be an important component of building community trust in law enforcement. This Section therefore recommends agencies engage in a broad practice of self-assessment, one that goes beyond ad hoc reviews of adverse incidents—sometimes referred to as "critical incidents"—that draw public scrutiny, or review only of narrow categories of adverse events, such as officer-involved shootings or domestic-violence homicides. Experts and commentators nearly universally endorse evaluating adverse incidents and near misses that could have resulted in an adverse outcome as a means of identifying reforms for law-enforcement agencies. See, e.g., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 22 (2015) (calling on agencies to work with community members to "review cases involving officer-involved shootings and other serious incidents" and "implement nonpunitive peer review of critical incidents"); NAT'L INST. OF JUST., MENDING JUSTICE: SENTINEL EVENTS REVIEWS 1-2 (2014); INT'L ASSOC. OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS 19 (2013).

2. Sentinel-event-review systems. Common processes for assessing adverse events often serve two purposes; they identify individuals who have failed to comply with agency standards, and they highlight weaknesses in agency systems. Some experts worry that using the same systems for both purposes can hinder the process of identifying and implementing improvements in agency policy and practice to prevent negative outcomes. Systems designed to both assess blame and uncover systemic problems may deter full and forthright participation by officers, and recommendations may underemphasize forward-looking reforms in the process of assessing blame. See John Hollway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time*, 62 VILL. L. REV. 883 (2017).

Commentators have looked to other industries for self-assessment tools that separate the process of allocating responsibility from the process for identifying strategies for preventing future

negative outcomes. In particular, scholars and policing experts have endorsed sentinel-event review as a promising tool for policing reform. See, e.g., Karen B. Friend et al., *Sentinel Event Reviews in the Criminal Justice System: A Review of the Literature*, CRIM. JUST. STUD. 1 (2020); John F. Hollway & Ben Grunwald, *Apply Sentinel Event Reviews to Policing*, 18 CRIMINOLOGY & PUB. POL'Y 705 (2019); Barbara E. Armacost, *Police Shootings: Is Accountability the Enemy of Prevention?*, 80 OHIO ST. L.J. 907 (2019); Hollway et al., *Root Cause Analysis*, supra; Joanna C. Schwartz, *Systems Failures in Policing*, 51 SUFFOLK U. L. REV. 535 (2018); James M. Doyle, *Learning About Learning from Error*, 14 IDEAS IN AM. POLICING (May 2012). A sentinel-event review is a nonblaming assessment of the complex causes of adverse or high-risk events for purpose of identifying ways to prevent future harm. See NAT'L INST. OF JUST., NIJ STRATEGIC RESEARCH AND IMPLEMENTATION PLAN: SENTINEL EVENTS INITIATIVE, 2017–2021 (2017); NAT'L INST. OF JUST., PAVING THE WAY: LESSONS LEARNED IN SENTINEL EVENT REVIEWS (2015).

As John Hollway, Calvin Lee, and Sean Smoot have framed it, sentinel-event review using root-cause analysis "is not a substitute for current mechanisms for accountability and remediation. Rather, it serves as a necessary complement to those retrospective mechanisms, providing a forward-looking form of event review focused on community and officer safety, seeking to prevent future undesired outcomes and gradually improving the safety of a system through targeted reforms over time." Hollway et al., *Root Cause Analysis*, supra, at 887. Thus, sentinel-event review may be especially valuable for negative events that result despite compliance with agency policy. "When an officer follows all established protocols and nonetheless discharges his firearm in the proportionate use of force or self-defense, the *officer* has acted correctly, but the *system* has failed." Id. at 906. As evidence develops indicating whether sentinel-event review in policing is effective at preventing negative outcomes in policing, whether sentinel-event reviews are cost-effective relative to other efforts to prevent negative outcomes, and whether they work to build community trust, agencies may wish to consider engaging in such reviews.

CHAPTER 14

ROLE OF OTHER ACTORS IN PROMOTING SOUND POLICING

§ 14.01. The Responsibility of Other Actors Regarding Sound Policing

(a) Each branch of government—legislative, judicial, and executive—should take steps (including enacting policies and procedures) to ensure that, to the extent policing is necessary, it occurs in a manner that is lawful and advances the principles of sound policing.

(b) Private actors—for-profit and nonprofit entities, as well as private individuals—also can influence policing with the actions they take. Such private actors should take care that their activities advance sound policing.

Comment:

a. Sound policing. As defined in § 13.01, "sound policing" refers to the full set of characteristics policing must embody and promote if it is to achieve the policing goals set out in § 1.02. Chapter 1 describes generally what it means to engage in sound policing, and the following Chapters spell out the particulars of how to achieve sound policing. Policing that is consistent with the U.S. Constitution or other governing law or agency policy nonetheless may not constitute sound policing if it does not promote the goals set out in § 1.02 or if it is inconsistent with these Principles.

b. Policing's role in public safety. The desire for public safety is one of the main reasons we have government. Policing agencies and police officers are part of the ecosystem called upon to advance public safety. But as § 14.09 makes clear, advancing public safety is not solely, or even primarily, the task of policing agencies alone. Advancing public safety is a holistic endeavor that calls upon public and private actors of all sorts to deliver what people require to be safe. When policing occurs, it often involves attendant harms, which should be minimized. § 1.04 (Reducing Harm). The point of this project is that when the policing function is implicated, the goal always should be sound policing. This Section describes the role that actors outside of police agencies can play to advance sound policing—including providing alternatives to policing when appropriate—and identifies what they should do to avoid undermining sound policing.

c. Policing as a multibranch endeavor. Policing does not exist in a vacuum, separate from the rest of government. Rather, it is, or should be, the product of the collective decisions and

policies of each branch of government. The Principles in this Chapter therefore recognize the importance of legislative, judicial, and executive action to advance sound policing.

Federal, state, and local legislative bodies are vested with unique powers that make them particularly well positioned to advance sound policing. Legislatures can go beyond the floor of constitutional constraints on policing and articulate more robust policing standards, enact adequate remedies for rights violations, and conduct oversight to ensure effective and just implementation of the law. The judiciary plays an essential role in the advancement of sound policing by ensuring officials—including prosecutors and police officers—comply with all legally enforceable obligations. Executive officials outside of policing agencies have a duty to contribute to sound policing. For example, heads of governments can issue executive orders on a broad range of issues that affect policing, and can direct police agencies to review current police practices and develop plans to improve them. Prosecutors can identify and actively deter unlawful police conduct and take care that all state evidence is reliable, truthful, and properly preserved. The Principles in this Chapter utilize this framework for multibranch regulation of policing and provide specific means by which each branch of government can advance sound policing.

d. Private actors. Private actors, both at the organizational and individual level, can exert important influences on policing agencies and their personnel. Nonprofit organizations are involved with research, advocacy activities, and programming that can support sound policing as well as advance public safety, such as providing services for unhoused persons. See § 14.09 (Promoting a Holistic Approach to Public Safety). For-profit entities produce and sell technologies and other equipment used by police. Police unions advocate for rules around policing. Individuals call upon the police both in situations in which police are necessary and those in which police presence may be counterproductive. As § 14.15 explains at length, these private entities and individuals should take care to ensure that their actions advance sound policing and that they do not detract from it.

e. Critique and progress. At points in this Chapter, there is thorough discussion of the failings of public and private actors to advance sound policing, or of action taken—intentionally or not—to undermine it. Although these discussions are intended to point to very real problems and challenges that should be addressed, nothing in this Chapter should be construed to minimize the efforts being made throughout the country by various legislative, executive, judicial, and other bodies, as well as by private entities, to advance the cause of sound policing. Some legislative bodies have enacted laws to facilitate sound policing, some prosecutors have advanced practices

that facilitate sound policing, and some courts and executive agencies have done the same. These efforts hopefully signal the beginning of continued progress on this issue. Still, as this Chapter—and this entire set of Principles—makes clear, there is enormous work yet to be done.

REPORTERS' NOTES

Policing goes through periodic crises. When this happens, there is a tendency to focus on how police agencies can change to address the issues of the day. It is, however, both impractical and inappropriate to assume policing agencies can or will act on their own to address the full suite of problems affecting modern day policing. Rather, sound policing requires the buy-in and effort of actors representing nearly every facet of society.

Experts have long recognized the role that actors outside of police agencies can play in guiding police through changing norms and toward effective and rights-protective policing. These actors may include other branches of government, such as legislatures; they may include private actors, such as social scientists or creators of relevant technology; or they may include community members, such as those comprising a citizens' advisory committee or review board. See, e.g., PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (Feb. 1967) ("A balance between individual rights and society's need for protection from crimes can be struck most properly through [a] combination of legislative and administrative action."); id. at 96 (explaining that police agencies "must have the aid of representatives of academic disciplines—such as operations analysts, criminologists, and other social scientists—before crime trend prediction can be fully developed and usefully related to day to day changes in patrol concentrations and planning for long-range patrol needs."); id. at 101 (recommending the establishment of citizens' advisory committees to resolve conflicts between police and communities). Recent calls for improved policing reach well beyond police agencies themselves and address lawmakers at every level of government. See generally BARRY FRIEDMAN, ET AL., CHANGING THE LAW TO CHANGE POLICING: FIRST STEPS (2020) (recommending legislative changes at the federal, state, and local level); see also Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. 778 (2021) (explaining reform movements that seek to shift power to policed communities by, for example, promoting local ordinances giving community control over policing agencies and national legislation reallocating resources from policing to other forms of community investment).

Although the involvement of actors outside of policing agencies will differ by jurisdiction and issue, what is clear is that each has a role to play in promoting sound policing. Governmental actors, private philanthropic institutions, and independent researchers can help promote data-driven solutions to pressing problems in policing. See, e.g., N.Y. Exec. Order No. 203 (June 12, 2020) (requiring police agencies to perform "a comprehensive review of current police force deployments, strategies, policies, procedures, and practices" and to develop a plan, considering evidence-based strategies, to improve the same). Private corporations can build technology and equipment, or set limitations on the use of their existing technology, in a way that ensures the

products are used responsibly to further the goals of sound policing. Each of these entities has unique powers to promote more efficient and just policing, and they should work together with policing agencies to promote and ensure sound policing.

Especially in recent years, there have been increasing actions from all quarters of society to promote the goals of these Principles. For example, legislatures in states such as Colorado and Maryland have enacted sweeping legislative reforms. See, e.g., Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO: CATO AT LIBERTY (June 22, 2020, 11:31 AM), https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity (describing Colorado's Law Enforcement Integrity and Accountability Act, which requires police officers to wear body cameras, bans the use of chokeholds, and removes qualified immunity as a defense for police officers, among other reforms); Michael Levenson & Bryan Pietsch, *Maryland Passes Sweeping Police Reform Legislation*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html (describing recent police-reform legislation enacted by Maryland's legislature, including creating a new, statewide use-of-force policy, repealing Maryland's Law Enforcement Officers' Bill of Rights, and limiting the use of "no-knock" warrants). New York City has done the same. Taylor Romine, *NYPD Officers Are No Longer Protected from Civil Lawsuits After City Council Passes Police Reform Legislation*, CNN (Mar. 26, 2021), https://www.cnn.com/2021/03/25/us/nyc-police-reform-nypd/index.html (describing how recent legislation adopted by New York City makes the city the "first in the nation to end qualified immunity" as a defense for police officers).

Some prosecutors are taking actions to improve policing. See, e.g., Alanna Durkin Richer & Michael Tarm, *Prosecutors Charge Police, Push Reforms Amid Floyd Protests*, ASSOCIATED PRESS (June 18, 2020), https://apnews.com/article/ks-state-wire-pa-state-wire-ma-state-wire-il-state-wire-fl-state-wire-31213873f5dbe43397c50982a46d3fbc (describing various reform efforts by district attorneys, including more frequently charging police officers for alleged criminal conduct and supporting changes to police-union collective-bargaining agreements). Executive officials in many jurisdictions are considering alternatives to police response, particularly when responding to calls involving individuals in mental-health crises. See, e.g., Press Release, Off. of the Mayor of the City of New York, New York City Announces New Mental Health Teams to Respond to Mental Health Crises (Nov. 10, 2020), https://www1.nyc.gov/office-of-the-mayor/news/773-20/new-york-city-new-mental-health-teams-respond-mental-health-crises (announcing an initiative to send mental-health providers, instead of police officers, to assist people experiencing mental-health crises); Edmund Carrillo, *Mayor Proposes New Public Safety Department*, ALBUQUERQUE J. (June 15, 2020), https://www.abqjournal.com/1466317/mayor-proposes-public-safety-department.html (describing Albuquerque Mayor Tim Keller's plans to create a public-safety department made up of "social workers, housing and homelessness specialists and violence prevention and diversion program experts" who would respond to certain 911 calls that do not require armed officers).

The judiciary also has taken steps toward addressing the problems of policing. Judges in many states called for greater attention to racial justice following the murder of George Floyd by

a police officer in Minneapolis in 2020. See, e.g., *State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice (cataloging the statements of 25 state supreme courts and chief justices regarding plans to promote racial equity). Some judges have called out police officers for their lack of credibility as witnesses. See Jake Pearson, *A Union Scandal Landed Hundreds of NYPD Officers on a Watchlist. That Hasn't Stopped Some from Jeopardizing Cases*, PROPUBLICA (Oct. 22, 2021), https://www.propublica.org/article/a-union-scandal-landed-hundreds-of-nypd-officers-on-a-secret-watchlist-that-hasnt-stopped-some-from-jeopardizing-cases (noting judicial rebukes of untruthful police-officer testimony, though also noting that a list of such testimony compiled by public defenders remained under judicial seal). And judges have issued orders curtailing some harmful police practices. See Alsaada v. City of Columbus, 2021 WL 1725554, at *46 (S.D. Ohio, Apr. 30, 2021) (issuing a preliminary injunction enjoining the Columbus Police Department from using nonlethal force, "including tear gas, pepper spray, flash-bang grenades, rubber bullets, wooden pellets, batons, body slams, pushing or pulling, or kettling" on nonviolent protesters), modified sub nom. Alsaada v. City of Columbus, 2021 WL 3375834 (S.D. Ohio June 25, 2021).

At the federal level, the executive branch is taking actions to address troubling police and agency practices. The U.S. Department of Justice announced a new policy that largely prohibits the use of chokeholds or no-knock warrants by its law-enforcement arms. Press Release, Dept. of Just., Department of Justice Announces Department-Wide Policy on Chokeholds and 'No-Knock' Entries (Sept. 14, 2021), https://www.justice.gov/opa/pr/department-justice-announces-department-wide-policy-chokeholds-and-no-knock-entries. The Department reversed a previous administration's policy that limited the use of consent decrees to reform local governments' policing policies, and opened new pattern-or-practice investigations in Phoenix, Louisville, and Minneapolis. Katie Benner, *Justice Dept. Restores Use of Consent Decrees for Police Abuses*, N.Y. TIMES (Apr. 16, 2021), https://www.nytimes.com/2021/04/16/us/politics/justice-department-consent-decrees.html (describing the consent-decree policy reversal as a "significant move[] to hold police forces accountable"); Michael Balsamo & Amy Forliti, *With Civil Rights Charges, Justice Dept. Signals Priorities*, ASSOCIATED PRESS (May 8, 2021), https://apnews.com/article/donald-trump-george-floyd-ahmaud-arbery-europe-death-of-george-floyd-c14e9841c69849e3e9dc36beb755298c (detailing the Department's recent decisions to open up pattern-or-practice investigations). And the office of the Associate Attorney General is conducting a review of compliance with Title VI by agencies that receive federal funds. David Nakamura, *Justice Dept. Looks to Leverage Federal Funding for Police to Ensure Compliance on Nondiscrimination Laws*, WASH. POST (Sept. 16, 2021), https://www.washingtonpost.com/national-security/justice-department-grants-police-departments-nondiscrimination/2021/09/16/949efaa8-1710-11ec-9589-31ac3173c2e5_story.html

Private actors also have taken notable steps to promote sound policing. See, e.g., Letter from Arvind Krishna, CEO, IBM, to Karen Bass, Rep., U.S. Cong.; Cory Booker, Sen., U.S. Cong.; Kamala Harris, Sen., U.S. Cong.; Hakeem Jeffries, Rep., U.S. Cong.; Jerrold Nadler, Rep., U.S. Cong. (June 8, 2020), https://www.ibm.com/blogs/policy/facial-recognition-sunset-racial-justice-reforms/ (communicating IBM's interest in working with Congress on "police reform, responsible

use of technology, and broadening skills and educational opportunities [in communities of color]" and noting that IBM has ceased offering general purpose facial-recognition or facial-analysis software); see generally AM. FED. OF LAB. AND CONG. OF INDUS. ORGS., PUBLIC SAFETY BLUEPRINT FOR CHANGE (2021) (detailing the union's recommendations for public-safety reform, which include establishing national training standards for police officers and adopting a true differential response model). And it is important to recognize in particular the actions of individuals, especially in communities impacted by policing, to advance public safety in sound ways, including by engaging in lawful protests to demand change. See, e.g., RADOUBEH KISHI ET AL., ARMED CONFLICT LOCATION & EVENT DATA PROJ., A YEAR OF RACIAL JUSTICE PROTESTS: KEY TRENDS IN DEMONSTRATIONS SUPPORTING THE BLM MOVEMENT 5, 7 (May 2021) (finding that more than 96 percent of protests associated with the Black Lives Matter movement in the summer of 2020 were nonviolent, despite law-enforcement officers being more likely to use force against these protestors than other peaceful protestors); Carey L. Biron *'That is Power': U.S. Cities Embrace People's Budgets Amid Policing Debate*, REUTERS (July 28, 2020, 6:05 AM), https://www.reuters.com/article/us-usa-cities-police-feature-trfn/that-is-power-u-s-cities-embrace-peoples-budgets-amid-policing-debate-idUSKCN24T199 (discussing how policing-reform advocates and organizations like Movement for Black Lives are promoting participatory budgeting as a way of improving public safety).

Still, it bears repeating: progress has been slow, and there is enormous work to be done. The Principles in this Chapter spell out in detail how the various branches of government, as well as private actors, can advance sound policing, as well as what they should do to avoid undermining it.

§ 14.02. Legislative Responsibilities to Ensure Sound Policing

(a) Legislative bodies at all levels of government should take steps to promote sound policing and should avoid taking actions that impede accountability, undermine sound policing, or encourage practices that are inconsistent with these Principles.

(b) The local legislative body in any jurisdiction that has a policing agency should, at a minimum:

(1) acquire, on an ongoing basis, the information it requires about agency and officer conduct, as well as its impact on communities, in order to provide effective legislative oversight of policing;

(2) adopt legislation to further sound policing and take steps to ensure that agency policies, practices, and procedures are consistent with the principles of sound policing;

(3) ensure that there are effective mechanisms in place to hold officers accountable for misconduct and to identify systemic problems that may require policy change; and

(4) allocate public funds in a manner that promotes adherence to the principles of sound policing within the agency, and facilitates a holistic approach to public safety within the jurisdiction.

(c) State legislatures should:

(1) adopt legislation to regulate specific areas of policing that would benefit from state-level guidance and uniformity;

(2) establish, or direct a state agency to establish, minimum qualifications, training requirements, and standards of conduct for all officers in the state, and provide for the decertification of officers who no longer meet these requirements;

(3) consistent with § 14.03, provide statutory remedies for violations of both statutory and constitutional rights sufficient both to deter unlawful conduct on the part of both officers and agencies, and to provide compensation to those who are harmed; and

(4) ensure that state-level policing agencies adhere to the principles of sound policing by using the various legislative tools and strategies outlined in subsection (b).

Comment:

a. Role of legislative bodies. Legislative bodies play an essential role in setting the standards of sound policing and ensuring that policing agencies adhere to those standards. They serve as an important external check on agency officials. And they may be better able to balance the various interests involved in making critical policy choices around how policing occurs. Legislative bodies also have a set of tools at their disposal that are unavailable to other government actors. They can, for example, impose legal consequences for noncompliance and, in most jurisdictions, they retain the power of the purse. Perhaps most important, they are directly responsible for enacting the laws that policing agencies enforce, and for authorizing the means of enforcement. They therefore have an obligation to ensure that the powers they have delegated to policing agencies are exercised in a manner that is consistent with the needs of their constituents, as well as the principles of sound policing set out in these Principles.

Legislative bodies can fulfill their obligation in a variety of ways. They can enact legislation regulating specific aspects of policing—for example, by setting minimum standards around the use of force or establishing rules regarding the use of information-gathering technologies. They also can ensure that policing agencies have the resources they need to hire and retain qualified officers—and, just as importantly, that other local services, such as housing and public health, are funded adequately to ensure a holistic approach to public safety. Legislative bodies can hold hearings, request information, or establish recordkeeping and reporting requirements. And they can create administrative bodies and delegate to them the responsibility for regulating police conduct, such as peace-officer standards and training boards or commissions (POSTs) at the state level, or local oversight boards. See § 14.07 (External Oversight of Policing Agencies). In short, legislatures need not establish detailed rules for every aspect of policing, but they should take steps to ensure that rules are in fact being adopted and enforced.

b. Legislative guidance at different levels of government. The regulation of policing should occur at all levels of government. As this Section makes clear, some obligations fall most appropriately on local legislative bodies, including municipal councils and county boards. Local legislative bodies, for example, are in the best position to oversee local policing agencies through hearings, requests for information, and budgetary control—and to establish whatever additional administrative structures may be necessary to facilitate policymaking or hold officers accountable for misconduct. See § 14.07 (External Oversight of Policing Agencies). On the other hand, because officers are certified at the state level, state legislatures or state POSTs typically are responsible for establishing the minimum standards for conduct and training with which officers must comply. And it typically falls to state and federal legislatures to establish the remedial schemes that are necessary to enforce both statutory and constitutional rights. See § 14.03 (Statutory Remedies for Violations).

When it comes to establishing clear rules and guidelines for various aspects of policing, legislative bodies at each level of government can play an important role. With respect to officer use of force, for example, a local legislative body can require the local policing agency to adopt a use-of-force policy that is consistent with the Principles set forth in Chapter 7, and ensure that there are systems in place to promote compliance. State legislatures—either acting on their own or through state POSTs—can establish clear use-of-force standards for all agencies and officers; require all officers to receive timely and effective training on how to use force appropriately; mandate uniform data-collection and reporting requirements for all use-of-force incidents; and

provide for the decertification of officers who are terminated for using excessive force. See § 14.13 (Certification and Decertification of Law-Enforcement Officers). And, as discussed in § 14.06, the U.S. Congress also can promote adherence to the use-of-force principles in various ways. Finally, although the focus here primarily has been on officer and agency conduct, legislative bodies also should, consistent with § 14.15, take steps to regulate the conduct of private parties—such as third-party record holders (§ 2.05) or technology companies (§ 14.15)—whose conduct affects how policing occurs.

Although there is no precise formula for how best to allocate regulatory responsibility between the federal, state, and local levels, there are a number of factors that state and federal legislative bodies may wish to consider in identifying areas in which additional guidance is necessary. See also § 14.06 (The Federal Government's Role in Policing). First, state or federal legislation may be particularly valuable in policy areas that would benefit from greater uniformity. For example, uniform data-collection and reporting requirements can facilitate research into the effectiveness of various policing practices—or, at a minimum, enable residents in each jurisdiction to develop a better understanding of how the performance of the local policing agency compares with others. Second, because officers routinely interact with residents from other jurisdictions, it may be especially important for there to be clear and uniform rules to govern police–citizen encounters, including the conduct of stops, searches, and arrests, as well as the use of force against members of the public. State and federal legislation also may be necessary to address practices that require coordination across multiple levels of government. Reforming warrant practices, for example, necessarily must take place at the state level because it involves the practices of state and county court systems over which municipalities have no control. State and federal legislatures also can attach remedial consequences to violations that localities typically cannot, including civil or criminal liability, or the exclusion of evidence in criminal cases. For conduct that may give rise to more serious compensable harm or require more robust remedial deterrence to ensure compliance, it may be particularly important for Congress and the states to articulate clear standards as a matter of law and to create appropriate remedies for noncompliance. See § 14.03 (Statutory Remedies for Violations).

At the same time, federal and state legislatures should refrain from adopting measures that undermine local accountability or otherwise impede sound policing. States should not, for example, adopt laws that interfere with local misconduct investigations or prohibit jurisdictions

from adopting their preferred structure of civilian oversight. These sorts of provisions undermine agency efforts to fulfill their independent obligation to foster sound policing. See Chapter 13. And they make it more difficult for local legislative bodies to take responsibility for the conduct of the policing agencies that they authorize and fund, including, when appropriate, by establishing administrative bodies to facilitate more effective oversight. See § 14.07 (External Oversight of Policing Agencies). States also should not undermine local efforts to bring their agency policies and practices in line with the principles of sound policing. A state that decides not to adopt a comprehensive use-of-force policy, see §§ 7.01 to 7.06, or to invest in a more holistic approach to public safety, see § 14.09, should not preempt local efforts to impose stricter limits on officer use of force or to reallocate local funding in ways that better address local safety needs.

c. Legislative oversight and information-gathering. Legislative bodies cannot govern effectively without adequate information about agency and officer conduct and its impact on communities. Local city council members cannot, for example, exercise effective budgetary oversight unless they understand how the agency plans to use the funds requested, including for any new technologies or programs that the agency plans to put in place. Similarly, legislators cannot take steps to remedy shortfalls in agency practices unless they have: timely information regarding agency strategies and priorities; data on police encounters and complaints; and information about the tactics and technologies that the agency is using to address crime and disorder. See § 14.10 (Data Collection and Transparency).

Legislative bodies can obtain this information in a variety of ways. They can hold periodic hearings with community members and police officials. They can establish recordkeeping and reporting requirements. They can set up clear protocols for approving the requisition of new equipment or technologies, including those obtained with federal or private funds. And they can create regulatory bodies, such as inspectors general, to periodically audit and report on policing practices. Importantly, they also can ensure that the information they collect is made available to the public in a manner that facilitates public scrutiny of—and engagement with—how policing within the jurisdiction occurs.

Although each legislative body with a policing agency in its jurisdiction has an independent obligation to ensure that it has the information it needs to govern, both federal and state legislatures can help to facilitate the collection, reporting, and exchange of information on critical aspects of policing. A number of states, for example, have adopted laws requiring policing agencies to collect

and report data on stops, arrests, and uses of force, and they have created state-level databases to store the information and make it available to the public in an accessible way. As discussed above, these sorts of requirements can ensure greater uniformity and enable residents to see how policing practices and outcomes in their jurisdiction compare to others.

d. Promoting individual and system-wide accountability. As Chapter 13 explains in greater detail, a well-functioning accountability system: provides officers with adequate policy guidance and training on what is expected; imposes appropriate consequences for misconduct; and includes mechanisms to identify and learn from patterns of misconduct or significant adverse events with an eye toward policy change. Although legislative bodies need not—and cannot—directly supervise every aspect of policing in their jurisdiction, they have an obligation to ensure these systems exist and are functioning effectively. Particularly in larger jurisdictions, this may involve creating one or more external entities to perform some of these functions. See also § 14.07 (External Oversight of Policing Agencies).

e. Statutory remedies. Finally, as discussed in § 14.03, it necessarily falls to state and federal legislatures to establish an adequate and effective remedial scheme for violations of statutory and constitutional rights. This requires, at a minimum, that there be adequate mechanisms in place to compensate those who are harmed by unlawful policing practices and to deter unlawful conduct on the part of agencies and officers.

REPORTERS' NOTES

1. Importance of legislative role. Legislative bodies have an essential role to play in promoting sound policing. Policing involves policy choices and tradeoffs, many of which cannot plausibly or appropriately be resolved by the police alone. Decisions as to whether to utilize particular surveillance technologies, when to allow pretextual traffic stops, and what content to redact when releasing officer disciplinary records all involve sharply competing values and affect different stakeholders and communities in varying ways. Under our system of government, legislative bodies are charged with making these value choices and, as a practical matter, they are in a much better position than are policing agencies to strike the necessary balance among competing interests. They also likely are more responsive to constituencies that may not always get the ear of the police.

In addition, some of the changes necessary to bring policing in line with these Principles necessarily must come from the legislative branch. For example, legislative bodies can authorize (and in some cases mandate) broader use of citation in lieu of arrest (§ 4.05), beef up statutory remedies to address officer and agency violations of statutory and constitutional rights (§ 14.03), and mandate uniform data collection and reporting practices (§ 14.10).

Finally, it is a basic principle of democratic government that policing agencies, like all agencies of government, may only exercise those powers that have been legislatively granted (or committed to them by state constitutions or local charters). See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 94 COLUM. L. REV. 573, 577 (1984). Having authorized policing agencies to enforce the criminal laws—and to do so using extraordinary powers such as force and arrest—legislatures have an obligation to ensure that agencies exercise that authority in a lawful, equitable, and proportional manner.

2. Inadequate legislative guidance. Too often, these obligations have been honored in the breach. In many jurisdictions, policing agencies operate under broad grants of legislative authority to enforce the criminal law—with few constraints on the means they use to do so. See, e.g., N.Y.C. N.Y. Charter § 435 (2012) (broadly authorizing police to "preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages . . . [and] protect the rights of persons and property"); Detroit Charter and City Gov't art. 7-801 ("The Police Department shall preserve the public peace, prevent crime, arrest offenders, protect the rights of persons and property, guard the public health, preserve order, and enforce laws" and ordinances.). When it comes to officer use of force, for example, most states impose few if any limits beyond the federal and state constitutional floors. Indeed, many state statutes simply say that an officer may use force when he or she "reasonably believes" such force is necessary. See, e.g., ARK. CODE § 5-2-610; FLA. STAT. § 776.05; N.C. STAT. § 15A-401. Similarly, states often impose few constraints on authority to effect an arrest beyond the constitutional requirement that an arrest be supported by probable cause.

Indeed, legislative bodies often lack the basic information about policing practices within their jurisdictions that they would need in order to govern effectively. In most states, there is no comprehensive data on how often officers use force, make stops, or conduct arrests, let alone demographic information about the people stopped or arrested, or the bases for the stops, arrests, or uses of force. In some instances, local legislators only have learned after the fact that their local policing agency has acquired military-grade equipment or invasive surveillance technologies. See generally Catherine Crump, *Surveillance Policy Making by Procurement*, 91 WASH. L. REV. 1595 (2016); see, e.g., Rick Anderson, *Game of Drones*: *How LAPD Quietly Acquired the Spy Birds Shunned by Seattle*, L.A. WEEKLY (June 19, 2014); Matt Bigler, *San Jose Police Returning Mine-Resistant Armored Truck to Feds Amid Militarization Debate*, CBS S.F. BAY AREA (Aug. 29, 2014).

Moreover, at times, legislative bodies have intervened in ways that have detracted from sound policing. Nearly one-third of state legislatures have codified variations of law-enforcement officers' bill of rights (LEOBORs) that contain provisions that seriously impede agencies from holding officers accountable for using excessive force and for other misconduct. See Kevin Keenan & Samuel Walker, *An Impediment to Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 PUB. INT. L.J. 185 (2005). For example, many LEOBORs afford officers waiting periods anywhere from 48 hours to 30 days in which officers may not be questioned following an incident and/or give officers an opportunity to review relevant evidence before they are interviewed. See Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall*

of Silence: How to Challenge the Police Privilege to Delay Investigation, 2016 U. CHI. LEGAL F. 213, 215-216 (2016); IOWA CODE § 80F.1(5); FLA. STAT. § 112.532(1)(c). Legislative bodies also have contributed to the problem of over-policing through ever expanding criminal codes. And they have adopted measures that facilitate or even encourage revenue-driven policing. See, e.g., TENN. CODE. ANN. § 39-17-428 (providing that half of the mandatory minimum fines for certain drug offenses "shall be paid to the general fund of the governing body of the law enforcement agency responsible for the investigation and arrest which resulted in the drug conviction."); see also § 1.10 (Policing for the Purposes of Revenue Generation). States also have interfered with local budgeting decisions by prohibiting municipalities from reducing police expenditures in order to pursue a more holistic approach to public safety. "An Act Relating to Combating Public Disorder," Fla. Chap. 2021–6 (permitting state officials to override local budgets that reduce police-department budgets), http://laws.flrules.org/2021/6.

3. Models of legislative intervention. Legislative bodies can fulfill their essential role in a variety of ways. Legislative bodies cannot possibly regulate every aspect of policing, much like they cannot regulate every aspect of education policy, environmental regulation, or anything else legislatures authorize agencies to do. But they can take a variety of steps to ensure that adequate rules are in fact in place.

In some cases, legislative bodies can and should provide legislative guidance. Clear guidance is particularly important in areas in which the police and members of the public would benefit from legally enforceable norms and remedies. For example, legislative bodies should enact comprehensive statutes consistent with the principles that regulate: when police may use force (Chapter 7); when police may stop, detain, or arrest members of the public (Chapters 3 and 5); which surveillance technologies police may use and how they may use them (Chapter 5); and what remedies are available when agencies run afoul of the enacted statutes (§ 14.03). A number of states have adopted measures along these lines. See, e.g., Ill. H.B. 3653, available at https://www.ilga.gov/legislation/101/HB/PDF/10100HB3653lv.pdf; Md. S.B. 71, available at https://legiscan.com/MD/text/SB71/2021; Md. S.B. 178, available at https://legiscan.com/MD/text/SB178/2021; 2019 Mass. S.B. 2963, available at https://malegislature.gov/Bills/191/S2963. Legislative bodies should also enact guidance-giving statutes consistent with these Principles in contexts in which the police cannot implement reform on their own without legislative action. See, e.g., § 2.08 (Limiting the Impact of Outstanding Warrants); § 4.05 (Minimizing Intrusiveness of Stops and Arrests).

States also can delegate various responsibilities to state Peace Officer Standards and Training boards (POST boards) or other state-level administrative agencies. Although POST boards in some states have played a narrow role, limited primarily to establishing basic training and certification standards, a number of legislatures have instructed state POSTs to exercise considerably broader authority in regulating various forms of police conduct. See, e.g., Ill. H.B. 3653 at 697-762; Mass. S.B. 2963 §§ 2, 8.

As discussed in more detail in § 14.07, localities also may have an important role to play in establishing and empowering entities that supervise the police. Many localities already have established and funded various kinds of regulatory bodies to supervise policing agencies, and there

is room for other localities to do the same. See generally Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NORTHWESTERN L. REV. 1 (2019). In some jurisdictions, policing agencies are overseen by police commissions with authority to set policy for the department and to review existing practices to ensure that they are consistent with community needs. A number of cities also have created police inspectors general who are tasked with reviewing policing data and records to identify patterns of misconduct, or areas where policy change may be necessary to improve outcomes or reduce the risk of harm. N.Y.C. LOCAL LAW NO. 70 (2013), https://www1.nyc.gov/assets/doi/oignypd/local-law/Local-Law-70.pdf (creating NYPD inspector general); CHI. IL. MUNICIPAL CODE § 2–56–205 (2016) (Chicago police inspector general); Seattle, Wash., Ordinance 125315 (2017). Still others have established external entities responsible for investigating allegations of misconduct. Sharon Fairley, *Survey Says? U.S. Cities Double Down on Civilian Oversight of Police Despite Challenges and Controversy*, CARDOZO LAW REVIEW DE NOVO (2020).

Legislative bodies also can adopt information-forcing mechanisms that require policing agencies to disclose data, records, and other information so that the legislators and the public have the information necessary to supervise policing agencies and make informed decisions about agency performance. See § 14.10 (Data Collection and Transparency). For example, legislatures could require agencies to collect and publish data on reported crimes, stops, arrests, and uses of force. See, e.g., CAL. GOV. CODE § 12525.2 (requiring use-of-force data collection); 625 ILL. COMP. STAT. § 5/11-212 (requiring stop data collection). Local legislative bodies can require policing agencies to obtain city-council or county-board approval before acquiring and deploying new surveillance technologies. See BERKELEY, CAL., ORDINANCE 7592 (2018); NASHVILLE, TENN., ORDINANCE BL2017-646 (JUNE 7, 2017); SEATTLE, WASH., ORDINANCE 124142 (2017).

And of course, as discussed in § 14.03, legislatures can help ensure that policing agencies adhere to statutory and constitutional requirements by providing for adequate remedies to vindicate violations of constitutional and statutory rights. Effective remedies are necessary to deter misconduct and to provide compensation to those who are harmed. They also can help facilitate legislative oversight and information gathering by increasing the likelihood that harmful policing practices are brought to light.

As the above examples suggest, some legislative reforms can take place at the local level, while others may require federal or state intervention. And, in some contexts, federal, state, or local legislative bodies could coordinate or act in tandem to accomplish the same goals. A state legislature could, for example, require all agencies in the state to collect and publicize data on complaints filed against the police. A local legislative body could add additional reporting requirements or require the local department to make various policy changes to address any potential problems that the complaints bring to light. Although there are some contexts in which it would be ideal to have state or federal legislation because of an interest in uniformity (e.g., uniform data, see § 14.10 (Data Collection and Transparency)), local legislative bodies should not wait for Congress or state legislatures to act when it is clear that basic legislative obligations are not being met.

§ 14.03. Statutory Remedies for Violations

Federal, state, and local legislative bodies should adopt effective remedies for violations of common-law, statutory, and constitutional rights by agencies and their officers. In doing so, legislative bodies should ensure that immunities from liability do not vitiate remedial goals.

Comment:

a. Violations of rights require remedies. A cardinal rule of jurisprudence is that when rights are violated, the law will provide a remedy. The constitutions of nearly three-quarters of the states so provide. Remedies serve critical functions. They provide redress to individuals whose rights have been violated. They serve to punish those who violate rights. They deter the government and its officers from engaging in future violations of those rights. They provide an opportunity to define the scope of rights themselves. When remedial schemes fail, the underlying rights themselves become insecure at best and illusory at worst. It thus is imperative that enforceable remedial schemes exist that are sufficient to deter and prevent violations of constitutional, statutory, and common-law rights by agencies and their officials.

b. Violations of rights as evidence of inadequate remedies. Violations of rights of individuals by policing officials and policing agencies are common. In numerous pattern-and-practice investigations, the U.S. Department of Justice has established that agencies have, as a matter of course, engaged in the excessive use of force, conducted numerous unjustified stops and arrests, and engaged in racially discriminatory practices. The adjudication of private suits also has made clear the scope of constitutional misconduct, such as the overuse of stop-and-frisks in many major metropolitan areas. No system of remedies will achieve perfect deterrence, and it is extremely difficult to assess how well a remedial regime is functioning. Nonetheless, these adjudicated findings of pervasive rights violations suggest a troubling number of rights violations undeterred by existing remedial schemes.

c. Responsibility of legislative bodies. Although judges apply remedies in the course of adjudicating legal disputes, legislative bodies are better suited to structure the overarching terms of a remedial regime. Legislative bodies have the capacity to consider the entire panoply of possible remedies and determine which should be available, and in which circumstances. Legislative bodies have the ability to move beyond the constitutional floor and devise a system of

remedies that serves to compensate individuals whose rights were violated, punish offenders, and deter future violations.

d. Inadequacy of existing legislative remedial schemes. The existing legislative remedial terrain around policing involves a mixture of statutory and judicial remedies. There are money-damages remedies against officers, agencies, and jurisdictions that arise under both statutes and the common law. There are equitable remedies against agencies and jurisdictions. There are criminal actions against officers. Under the "exclusionary rule" judges in some circumstances will exclude evidence that is seized unconstitutionally. And there are pattern-and-practice actions for equitable relief, at present brought primarily by the federal government, although some states have followed suit.

No remedy is likely to be without some appropriate constraints, but existing remedial actions have been limited over time by a combination of statutory and judicial restrictions that appear to undercut their intended aims. Legislative bodies, in considering remedial schemes, might have to balance the remedy against competing goals, such as public safety. Commentary on remedies regarding policing, as well as the existing evidence, suggests remedies have been limited too much, and not always in a coherent way so as to suggest an alternative goal. For example, federal damage actions against individual officers are limited by qualified immunity. It can be difficult to find a plaintiff who can bring a claim for equitable relief in federal court in light of decisions like Los Angeles v. Lyons, 461 U.S. 95 (1983), which held that even a person subjected to unconstitutional police conduct lacks Article III standing to obtain injunctive relief absent a showing that the person faces a "real and immediate threat" that they *again* would be subjected to the same conduct. Municipalities are not liable for money damages unless the challenged action is municipal policy, or falls within one of the narrow exceptions to that rule. The exclusionary remedy is undercut by a host of doctrinal limitations. Some states by statute limit common-law tort remedies that otherwise would be available to challenge officer behavior. Taken together, these restrictions often mean there can be no avenue for redressing clear instances of legal violations. Recently, a few states have begun to address remedial shortcomings, but for the most part these efforts have focused primarily on limiting the qualified immunity of officers. There are other actions that can and should be taken, such as expanding municipal liability, removing standing limitations on challenging policing agencies' violations of constitutional guarantees, or

eliminating judicially imposed or statutory restrictions on tort actions, such that the limitations that exist in law do not obviate the remedies themselves.

e. Forms of remedies and remedial calibration. As Comment *d* makes clear, remedies can take many forms; what is critical is that, as a whole, they operate in systemic fashion to prevent, to the extent possible, violations. The key word in this Section is "effective." There always will be some violations of constitutional and statutory rights, and one goal should be to see that those whose rights are violated are compensated. The overall objective, though, is to adopt a regime that achieves systemic deterrence. Each jurisdiction's legislative body must make choices about what remedies to adopt, but that legislative body should ensure that, as a whole, the goals of remediation, retribution, and fostering lawful policing are furthered, and that policing agencies have sufficient incentive to adhere to statutory and constitutional requirements.

The challenge is adopting a remedial scheme that achieves the proper level of deterrence. At present, under federal law, both federal and state officers enjoy qualified immunity that can let them escape liability even for serious violations. Although it may make sense to afford officers some limited immunity to avoid over-deterring them in their work and hurting recruitment efforts, the law at present—which often provides a complete shield and looks to settled judicial decisions rather than department policies, best practices, and statutes to determine liability—has been subjected to extensive criticism. Similarly, under federal law, municipal jurisdictions escape liability unless the action of an officer constitutes municipal "policy," when respondeat superior might be more effective at ensuring sound policing. State governments cannot be sued under 42 U.S.C. § 1983, and state officials cannot be sued in their official capacity for damages under that statute. All this is complicated by present practices that fail to translate the judgments that are obtained into tangible changes to deleterious practices. Officers and other agency personnel including investigators typically are indemnified if they are held responsible at all. Judgments against municipalities and agencies are paid out of general funds, with little or no impact on agency budgets such that agencies would be incentivized to improve their practice.

Although striking the correct remedial balance no doubt is complicated, legislative bodies can and should take actions to improve what is at present an unacceptable result. For example, agencies and jurisdictions could be made liable in respondeat superior for the actions of their officers. Jurisdictions should develop means of accountability such that when judgments regularly are paid out for violations by officers and agencies, those agencies are forced to take note and

modify practices. Injunctive remedies could be made available to halt open and notorious patterns and practices of violating individual rights.

REPORTERS' NOTES

One of the foundational principles of law is that where there is a right, there is a remedy. The ancient origins of the maxim *ubi jus, ibi remedium* speaks to the centrality of this principle in law. United States v. Loughrey, 172 U.S. 206, 232 (1898) ("The maxim, '*ubi jus, ibi remedium*,' lies at the very foundation of all systems of law."). The principle was at the heart of Chief Justice Marshall's opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In that case—itself a pillar of the institution of judicial review—he famously asserted the obligation of the judiciary to afford remedies for government violations of legal rights—both by directing executive officials to refrain from unconstitutional conduct and by failing to give effect to unconstitutional statutes. Id. at 137. Almost three-quarters of state constitutions incorporate this maxim. ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6 ("a speedy remedy afforded for every injury to person, property or character"); CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. 1, § 18; ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation); IND. CONST. art. 1, § 12; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Decl. of Rights, art. 19; MASS. CONST. pt. 1, art. 11; MINN. CONST. art. 1, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. 1, art. 14; N.C. CONST. art. I, § 18 ("every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law"); N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. 1, art. 4; W. VA. CONST. art. 3, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

Remedies serve many vital goals. The first is redress for the victim of lawless conduct. The common-law maxim was directed at just this—the idea that a person injured by lawless conduct on the part of the government is entitled to relief. See Better Gov't Bureau v. McGraw, 106 F.3d 582, 591-592 (4th Cir. 1997) (noting that "it was well recognized at common law that a government official who exceeded his authority enjoyed no immunity"); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 51, 55 (2018).

One of the most important consequences of remedies, though, is that they serve to advance future lawful conduct on the part of the government. They do so in three ways. First, they punish offenders. Second, and even more important, by punishing offenders, they discourage future unlawful conduct. See Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 959-960 (2015) (noting federal remedies "have been and will be essential in promoting lawful, effective, and rights-protective policing"). This deterrence function is essential and is at the heart of common-law remedies in many areas, such as tort law. See Daryl J. Levinson,

Making Government Pay: Marks, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345, 346-347 (2000) (recognizing deterrence to be a primary rationale for imposing remedies on the government); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788-1789 (1991) (same); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999) (hypothesizing that "raising the 'price' of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations"); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 72 (1998) (recognizing the importance of deterrence in the context of qualified immunity). Finally, the decisions that adjudicate present controversies establish legal rules that guide the future by defining the bounds between lawful and unlawful conduct.

The importance of remedies is magnified in the policing space because policing historically has been regulated on the "back end" rather than the front. BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 20 (2017) ("[M]ost of the oversight in policing today is *after-the-fact* review, when what we need are policies in place *before* things go wrong."). One of the central goals of this Principles project, and particularly this Chapter, is to create a regulatory approach that fosters a sound policing regime in which statutes, regulations, and policies set out in advance what is expected of agencies and officers.

The common-law governance of official conduct typically happened by means of tort law, and, around the time of the founding, the law could be quite unforgiving. Baude, supra, at 56 (explaining how the common law's strict rule of personal liability "was a fixture of the founding era"); Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure* 4 (Cato Inst. Pol'y Analysis No. 901, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure (explaining how, during the founding era, "government agents were, in general, strictly liable for constitutional violations that gave rise to common-law torts"). Typical is the case of Little v. Baremme, 6 U.S. (2 Cranch) 170 (1804). In that case, a U.S. naval commander seized a foreign vessel contrary to what the law permitted, but in a way ordered by the President. Chief Justice Marshall stated that he had agonized over upholding the large verdict against the officer, but that the presidential order "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." Id. at 170-172, 175-179.

As policing became institutionalized in the late 19th and early 20th centuries, however, the common-law remedial scheme failed to achieve its deterrent purpose. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1866 (2015). Whatever the reason, courts found it exceedingly difficult as a matter of practice or will to bring policing under control. The U.S. Supreme Court's decisions in Weeks v. United States, 232 U.S. 383 (1914), Wolf v. Colorado, 338 U.S. 25 (1949), and Mapp v. Ohio, 367 U.S. 643 (1961), catalogue the misconduct of state and federal officials, including wantonly breaking into people's homes.

The Supreme Court addressed the failure of common-law remedies by fashioning alternatives that define today's remedial structure. Friedman & Ponomarenko, supra, at 1866. In Monroe v. Pape, 365 U.S. 167, 172 (1961), the Supreme Court held that 42 U.S.C. § 1983 provided

an individual damages action for violations of the U.S. Constitution—including the Fourth and Fifth Amendments—occurring "under color of" state authority. In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Court did the same under the common law with regard to the actions of federal officers. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court applied the exclusionary remedy against the federal government. In Mapp v. Ohio, 367 U.S. 643 (1961), it did the same against the states. Each of those decisions was built on the notion that absent an effective remedy, the underlying rights were valueless.

Over time, though, judicial decisions have degraded these remedies. See Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010) (noting that over "the nearly fifty years that have passed since *Monroe*, the Supreme Court has issued a series of decisions that have gradually diminished § 1983 in ways that make damages recovery both costly and difficult"); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009) (arguing the Supreme Court's decisions in Herring v. United States, 555 U.S. 135 (2009), and Hudson v. Michigan, 547 U.S. 586 (2006), diminish the exclusionary rule); Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561, 570-571 (2019) (same). It is not clear what the causes were, whether it was societal controversy over them, judicial opposition, or some sense the remedies went too far. In a long string of cases, the Supreme Court has offered individual officers a "qualified immunity" that imposes no liability unless officers' conduct was deemed unlawful in a prior judicial decision. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (recognizing federal officials are entitled to qualified immunity); Pearson v. Callahan, 555 U.S. 223 (2009) (finding officers who conducted a warrantless search were entitled to qualified immunity); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1816 (2018) (noting the Supreme Court "repeatedly grants qualified immunity without ruling on the underlying constitutional claim"); see also Stephen Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (arguing that the Supreme Court's qualified-immunity doctrine "create[s] such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights"). From the start, the justices were loath to hold municipal bodies liable. Under the doctrine of Monell v. Department of Social Services, 436 U.S. 658, 691-695 (1978), municipalities cannot be held liable under 42 U.S.C. § 1983 using the respondeat superior theory. The Supreme Court has held that 42 U.S.C. § 1983 does not abrogate states' Eleventh Amendment immunity from suit, see Quern v. Jordan, 440 U.S. 332, 345 (1979) (relying on lack of clear statement of intent to abrogate state immunity), and that states are not persons that can be sued under § 1983, see Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

Those judicial decisions themselves have been contested by scholars as both undermining the underlying rights and as being incorrect as a matter of law. The literature on this is vast. See, e.g., Schwartz, *The Case Against Qualified Immunity*, supra, at 1801-1803 (arguing "qualified

immunity has no basis in the common law"); Baude, supra, at 55-61 (explaining why the claim that qualified immunity derives from the common law does not survive historical scrutiny). They question the failure to apply respondeat superior to municipal governments and policing agencies. See, e.g., David Jacks Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C. § 1983 and the Debate over* Respondeat Superior, 73 FORDHAM L. REV. 2183, 2196 (2005) (questioning the historical basis for *Monell*); Larry Kramer & Alan O. Sykes, *Municipal Liability under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 252, 255 (arguing that "the Court's reasons for rejecting the use of respondeat superior under § 1983 [in *Monell*] were mistaken"); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 963-964 (2015) (arguing adopting respondeat superior "would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense"); see also Alexander A. Reinert, *Measuring Success of Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 849-850 (2010) (proposing a hybrid form of liability that would result in both the individual official and the government being held financially accountable). The legitimacy of the bar on money damages against states under the Eleventh Amendment is also hotly contested. See, e.g., Vicki Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 13 (1988).

Whether one agrees or disagrees with those judicial decisions, investigations by the U.S. Department of Justice have revealed constitutional violations in some jurisdictions. See, e.g., C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 22-45 (2017), https://www.justice.gov/opa/file/925846/download (detailing the department's pattern or practice of unconstitutional use of force); C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2-3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (describing a police-department culture that permitted "a pattern of stops without reasonable suspicion and arrests without probable cause in violation of the Fourth Amendment; infringement on free expression, as well as retaliation for protected expression, in violation of the First Amendment; and excessive force in violation of the Fourth Amendment"); C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 12 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf (finding "Cleveland police officers use unnecessary and unreasonable force in violation of the Constitution at a significant rate."). Much other evidence exists. Nicky Woolf, *2,000 Cases May Be Overturned Because Police Used Secret Stingray Surveillance*, GUARDIAN (Sept. 4, 2015), https://www.theguardian.com/us-news/2015/sep/04/Baltimore-cases-overturned-police-secret-stingray-surveillance (describing how Baltimore's police department hid its use of Stingray technology from the public); Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden 'Black Site',* GUARDIAN (Feb. 24, 2015), https://www.theguardian.com/us-news/2015/feb/24/494chicago-police-detain-americans-black-site; *What Led to LAPD Restricting Neckholds in 1982? A Doctor Remembers*, PBS NEWSHOUR (Aug. 2, 2020), https://www.pbs.org/newshour/show/what-led-to-lapd-restricting-neckholds-in-1982-a-doctor-remembers (describing how, in the early 1980s, 16

people who were taken into Los Angeles Police Department custody died from chokeholds); Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 986-989 (2017) (detailing how police use surveillance tactics to track individuals); David Rudovsky & Lawrence Rosenthal, Debate, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 123 (2013) (detailing constitutional flaws in New York's and Philadelphia's police programs); John Eligon & Shawn Hubler, *Throughout Trial Over George Floyd's Death, Killings by Police Mount*, N.Y. TIMES (Apr. 17, 2021), https://www.nytimes.com/2021/04/17/us/police-shootings-killings.html (explaining that, partly as a result of our system's deferential nature, just one percent of officers who kill civilians are ever charged with murder or manslaughter); Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16793, 16973 (2019) (explaining that police killings are far more than common in the United States than other advanced democracies).

In fairness to judges, though, policing is a complex endeavor, the sound regulation of which often will stand well outside constitutional law. There are serious structural impediments to using adjudication as the means to develop rules of police behavior. For example, most of the cases judges see are exclusionary-rule cases in which the very fact that the police obtained evidence of guilt suggests that the tactic used by police was effective. What judges do not and cannot see are the many times the tactic may have been used unsuccessfully. See FRIEDMAN, UNWARRANTED, supra, at 82 ("[I]n exclusionary rule cases, judges see a biased sample . . . [and] see only an instance in which the cops' tactic worked."). Similarly, a ruling that something is unconstitutional bars the police from using the tactic in a way that understandably leads to judicial reluctance to impose this remedy. This is especially the case because judges simply lack the knowledge or experience to know what is efficacious or not around policing. See Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776 (2012) ("Courts lack the institutional capacity to regulate the police without substantial assistance from institutions designed to amass context-specific expertise and undertake complex, ongoing empirical analysis."). And policing in the 21st century is an intricate and complex business; policing agencies are bureaucracies, and often large ones. ROBERT E. WORDEN & SARAH J. MCLEAN, MIRAGE OF POLICE REFORM 14-17 (2017) (describing police departments as complex "street-level bureaucracies"); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 16-18 (2019) (describing "the difficulty of writing and enforcing rules for the police"). It is difficult to think of another area in which constitutional principles are used as the primary means of governance.

The fact is that there is far too little legislative guidance about how police are to perform their jobs, and what remedies are available when rights are violated. State and local remedial regimes rarely extend protections beyond the federal 42 U.S.C. § 1983 standard. See Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. L. REV. 737, 759 (2021) (finding that "only eight states have conferred a statutory right analogous to Section 1983 to pursue constitutional tort litigation" while the remainder "appear to rely on garden-variety tort liability to secure government accountability"). For state statute examples, see ARK. STAT. ANN. § 16-123-105 (1996) (mirroring § 1983); ME. REV. STAT. ANN. tit.

5, § 4862 (1991) (mirroring § 1983); MASS. GEN. LAWS ch. 12, § 11H (2020) (placing cap on damages); NEB. REV. STAT. § 20-148 (1977) (mirroring § 1983). Equally problematically, some states have statutes that limit the availability or scope of common-law remedies as applied to police.

Although these Principles call for front-end substantive legislation to regulate policing, one of the most critical areas for legislative intervention is around remedies. Legislative bodies at the federal, state, and local level should put in place workable, specific, and (most importantly) effective remedial schemes to hold policing agencies and officials liable for misconduct and unlawful conduct, and to meet the goals of remediation. Absent this, individuals will not be compensated for harm done to them, agencies and officials will not be deterred from misconduct, and policing will not improve. It is that simple.

The first and most pressing area that needs attention is the liability of municipal governments and agencies. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 896 (2014) (noting that current standards for establishing municipal liability are "exceedingly difficult to satisfy"). Although there are circumstances that may call out for holding individual officers liable, the sensible place to begin with liability is governments and governmental bodies themselves. Placing liability on individuals while obscuring focus on their employers fosters a "bad apples" narrative that ignores the structural and systemic problems with policing. See, e.g., Reinert, Schwartz & Pfander, *New Federalism*, supra ("[M]aking clear the entity's responsibility for the tortious conduct of its employees might . . . help shift discourse away from a 'bad apples' narrative towards an appreciation of the systemic nature of unconstitutional conduct."); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering Custom in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31-32 (2000) ("The 'bad apple theory' is essentially an institutionalized belief system ensuring that fault for unconstitutional conduct . . . will never be localized in the culture of the municipal agency itself."); Christy E. Lopez, *Limiting Police Officers' Qualified Immunity Isn't the Only Change Needed to Achieve Real Police Reform*, WASH. POST (May 4, 2021), https://www.washingtonpost.com/opinions/2021/05/04/limiting-police-officers-qualified-immunity-isnt-only-change-needed-achieve-real-police-reform. Respondeat superior is the rule almost everywhere but in policing, and that should change. See Oklahoma City v. Tuttle, 471 U.S. 808, 843 (1985) (Stevens, J., dissenting) (emphasizing that "all of the policy considerations that support the application of the doctrine of *respondeat superior* in normal tort litigation against municipal corporations apply with special force [in § 1983 cases] because of the special quality of the interests at stake"); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2191 (2005) (asserting *Monell* "confines entity liability in a manner that is unique to 1983 and exists in no other area of the law"); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title XI*, 7 WM. & MARY BILL RTS. J. 755, 791 (1999) (arguing respondeat superior liability should be imposed in 42 U.S.C. § 1983 cases like it is for other civil-rights violations). Legislative bodies should impose liability on policing agencies and governments for the actions of, and harm done by, their employees.

Second, legislative bodies should consider whether qualified immunity, as currently implemented by courts with regard to the actions of police officials, serves remedial goals. Much of the difficulty arises because under governing U.S. Supreme Court precedent, officer violations of rights are excused if there is not a circuit-court judicial decision on point making clear that what the officer did violated the Constitution. See United States v. Lanier, 520 U.S. 259, 268-272 (1997) (noting that a circuit court decision can establish the scope of a constitutional right if it provides "fair warning" that the conduct is prohibited). (In a decision without briefing or argument, the Supreme Court suggested even this may not be enough. See Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) ("Even assuming that controlling Circuit precedent clearly establishes law for purposes of § 1983, [an earlier Ninth Circuit decision] did not give fair notice to [the defendant in this case].").) This requirement of a circuit court ruling on point has to be an exercise of matching the facts of a given policing case to prior precedents. The smallest factual difference can lead to a finding of nonliability. See Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018) (distinguishing two fact patterns in which officers unleashed police dogs on unarmed, surrendering individuals because in one case the surrendering individual put their hands up, while in the other case they did not); Allah v. Milling, 876 F.3d 48 (2d Cir. 2017) (finding qualified immunity shielded prison officials who placed an inmate in solitary confinement for 23 hours a day for almost seven months and forced him to shower in leg irons, despite there being a Supreme Court precedent that stated that a detainee being held in shackles and chains and thrown in a dungeon would be too punitive, because that precedent did not put these officials on notice that this "particular practice" was unconstitutional); Latits v. Phillips, 878 F.3d 541, 553 (6th Cir. 2017) (distinguishing prior cases because they involved officers shooting at a nonviolent driver "as he attempted to initiate flight" while, in this case, the police only shot after the nonviolent driver already began fleeing). Police who stole money while executing a search warrant have escaped liability because no previous case existed saying this violated the Constitution. Jessop v. City of Fresno, 140 S. Ct. 2793 (2020). Police who harassed an individual filming them beating up a suspect escaped liability. Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021), cert. denied, 211 L. Ed. 2d 251 (2021). Police who chased a suspect into a yard populated with six playing children, ordered the children to lie on the ground at gunpoint, shot at the family's pet dog, missed twice and struck a 10-year-old child's knee escaped liability. Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019), cert. denied, 141 S. Ct. 110 (2020). Police who threw a flashbang device into a quiet, dark bedroom and caused a woman to suffer severe burns escaped liability. Dukes v. Deaton, 852 F.3d 1035 (11th Cir. 2017). This case-matching approach has been criticized as failing to further the remedial purposes of 42 U.S.C. § 1983. See Jamison v. McClendon, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020) ("If Section 1983 was created to make the courts 'guardians of the people's federal rights,' what kind of guardians have the courts become?") (quoting Haywood v. Drown, 556 U.S. 729, 735 (2009)). Also, officers typically are guided by statutes and department policies, and can be unaware of judicial decisions. Joanna Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 358-359 (2020); Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) ("It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is

thinking to himself: 'Are the facts here anything like the facts in *York v. City of Las Cruces*?'"); Michael D. White, *Hitting the Target (or not): Comparing Characteristics of Fatal, Injurious, and Noninjurious Police Shootings*, 9 POLICE Q. 303, 306 (2006) (noting research has found that criminal law and judicial interventions rarely impact police shooting behavior "if not accompanied by support within the police department"). Some justices and lower-court judges have called upon the Supreme Court to reconsider its approach to qualified immunity. See, e.g., Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing the Court's recent approach to qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870-1872 (2017) (Thomas, J., concurring in part and concurring in judgment) (calling on the Supreme Court to "reconsider our qualified immunity jurisprudence" after detailing how the Court "diverged from the historical inquiry mandated by [§ 1983]"); Cole v. Carson, 935 F.3d 444, 470-471 (5th Cir. 2019) (Willett, J., dissenting) ("By insulating incaution, the doctrine formalizes a rights−remedies gap through which untold constitutional violations slip unchecked."); Rivera v. City of Pasadena, 2021 WL 3620281, at *1 (S.D. Tex. Aug. 16, 2021) (Rosenthal, J.) (commenting that the case's police-misconduct claims "present issues that have led some judges to question whether 'the judge-made immunity regime ought not be immune from thoughtful reappraisal'") (quoting Zadeh v. Robinson, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring in part)); Thompson v. Clark, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress . . . ."); *Jamison*, 476 F. Supp. 3d at 423-424 (Reeves, J.) (describing the doctrine as "extraordinary and unsustainable," and pleading with the Supreme Court to "waste no time in righting this wrong"). In the meantime, a few jurisdictions, such as Colorado, New Mexico, and New York City, have begun to impose limitations on qualified immunity at least insofar as cases proceed in state court under state or local statutes. COLO. REV. STAT. ANN. § 13-21-131 (2020); N.M. STAT. ANN. § 41-4A-4 (2021); N.Y.C. ADMIN. CODE § 8-804 (2021).

Third, legislative bodies should consider modifying statutory and common-law provisions that deliberately block accountability for (what are in principle) common-law rights violations by police officers. Although every state has some statutory law partially waiving some form of sovereign immunity (for state political entities), see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN BUBLICK, THE LAW OF TORTS § 342 (2d ed. 2016), and many states have similar statutes partially waiving governmental immunity (for local and municipal entities), see id. at § 343, such statutes consistently retain high levels of immunity (and "public duty rule" based nonliability) for tortious police conduct. Id. at §§ 342 to 344, 346. Additionally, many state courts simply assume that police conduct that does not cross constitutional-law boundaries is legally permissible under state law. Restatement of the Law Third, Torts: Intentional Torts to Persons § 39, Comment *b* (AM. L. INST., Tentative Draft No. 6, 2021). Through broad readings of the "discretionary function exception," an archaic immunity for "governmental functions," see DAN B. DOBBS, PAUL T. HAYDEN & ELLEN BUBLICK, THE LAW OF TORTS § 344 (2d ed. 2016), and the heightened state-of-mind standard of

"willful" or "malicious" for official immunity, see id. § 350, tort law for police misconduct in most states retains a de facto form of nearly complete immunity.

As a legal and constitutional matter, state legislatures have full authority to treat batteries by police officers and acts of wrongful liberty invasion as actionable torts, regardless of whether they fall within constitutional boundaries. Restatement of the Law Third, Torts: Intentional Torts to Persons § 39, Comment *b* (AM. L. INST., Tentative Draft No. 6, 2021). Even assuming the existence of reasons for shielding government employees who act in good faith, there is plenty of room for legal regimes in the states that take police tort accountability more seriously than currently is the case. States could move toward such regimes by passing statutes that eliminate or narrow the discretionary-function exception, the immunity for governmental functions, and the state-of-mind requirements for individual official immunity. For example, moving from "willful or malicious" to "unreasonableness," "negligence," or even "gross negligence" for individual official immunity would itself generate a more balanced framework. Insofar as states fear for the financial security of their employees, broad use of respondeat superior and indemnification can address such concerns. Joanna C. Schwartz, *Police Indemnification*, supra (documenting that overwhelmingly tort awards against police officers are fully indemnified).

Fourth, legislative bodies need to find a way to ensure that liability gives rise to change when the practices that led to liability are misguided, wrong, or harmful. At present, awards against municipalities and policing agencies come out of general funds, and all too often do nothing to advance the cause of sound policing. Schwartz, *Police Indemnification*, supra, at 957 n.341. Similarly, even in the rare instances in which officers are held liable, they almost never pay because they are indemnified. Id. at 939; Devon W. Carbado, *Blue-on-Black Violence, a Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1522-1523 (2016). This is the case even when indemnification is inappropriate under state law. See Schwartz, *Police Indemnification*, supra, at 921-923 (detailing how officers in jurisdictions across the country avoided paying punitive-damage judgments despite state or local prohibitions on indemnification).

Change in this area is necessary. Officers who commit bad-faith violations should pay at least some portion of those judgments themselves. See, e.g., COLO. REV. STAT. ANN. § 13-21-131(4) (2020) (requiring officers who did not act in good faith to personally pay up to five percent or $25,000 of any judgment or settlement—whichever is less—unless they are financially unable). Policing agencies should be cognizant of the harm they do, and remedies should spur change. Legislative bodies should experiment with mechanisms to make sure liability leads to improvement, whether it is auditing of awards and mandatory process changes or some other structure.

Fifth, legislative bodies should consider instantiating in statutory language the proper use of the exclusionary remedy. Exclusionary remedies are common, not only in the United States but elsewhere, as a response to unlawful conduct. See Yue Ma, *The American Exclusionary Rule: Is There a Lesson to Learn from Others?*, 22 INT'L CRIM. JUST. REV. 309 (2012). But the nature of those remedies varies in other places. See id. at 310, 313-317 (discussing exclusionary remedies in England, Canada, France, and Germany, and noting that no other country has adopted a "generally applicable mandatory [exclusionary] rule or rested the rule on its effect as a deterrent

against police illegality"). The U.S. Supreme Court has limited the application of the federal constitutional exclusionary remedy in many ways. See, e.g., Utah v. Strieff, 579 U.S. 232, 239 (2016) (limiting application of exclusionary rule even when officer stops individual unlawfully, if there was a warrant for the person's arrest of which the officer was unaware at the time of the stop); Herring v. United States, 555 U.S. 135, 144 (2009) (finding exclusion inappropriate if unlawful seizure was result of erroneous police record); United States v. Leon, 468 U.S. 897, 922 (1984) (limiting exclusion if officer acted in "good faith" despite violating constitutional rights); Nix v. Williams, 467 U.S. 431 (1984) (finding the exclusionary rule should not apply when "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means"). Many state high courts have rejected aspects of the Supreme Court's doctrine. See, e.g., State v. Cline, 617 N.W.2d 277, 288-293 (Iowa 2000) (rejecting the good-faith exception to the exclusionary rule established in United States v. Leon, 468 U.S. 897 (1984), and citing other state courts' rejection of the doctrine). Legislative bodies could draft exclusionary remedies and, at the same time, tailor them in ways the courts simply cannot. Legislatures in other countries have done exactly that. See Ma, *The American Exclusionary Rule*, supra, at 320 (explaining how, unlike the United States, other countries' "rules of criminal procedure usually are spelled out in statutes or a comprehensive code of criminal procedure"). For example, the Parliament of the United Kingdom enacted legislation that codified and expanded an existing common-law exclusionary rule. See Yue Ma, *Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany, and Italy*, 22 POLICING: INT'L J. POLICE STRATEGY & MGMT. 280, 285 (1999) (describing how Parliament's Police and Criminal Evidence Act of 1984 "armed [courts] with [a] new statutory authority" to exclude evidence). And Germany's legislature adopted a statutory provision that automatically excludes evidence obtained through physical abuse or coercion. Id. at 294. Legislative action in the United States would give courts applying the exclusionary remedy greater legitimacy and possibly greater fortitude.

Sixth, the law regarding injunctive remedies should allow for injunctive suits when policing agencies engage in a pattern and practice of ill-conceived and often unlawful or unconstitutional conduct. In City of Los Angeles v. Lyons, 461 U.S. 95, 105-110 (1983), the Supreme Court held that a Black man who had been wrongly subjected to a chokehold could not sue to stop the practice because he could not say to a certainty it would happen to him again. Chokeholds were recognized at the time to be dangerous and poor policing procedure. See id. at 116 (Marshall, J., dissenting) ("It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death."); Monika Evstatieva & Tim Mak, *How Decades of Bans on Police Chokeholds Have Fallen Short*, NPR (June 16, 2020), https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short (noting the Los Angeles Police Department banned "bar-arm chokeholds" in 1982); Jeremy Gorner & William Lee, *After George Floyd's Death, Where Does Chicago Draw the Line on Police Chokeholds?*, CHI. TRIB. (July 22, 2020), https://www.chicagotribune.com/news/breaking/ct-chicago-police-use-of-force-20200622-2twwuh3otjc2fbwtpnmkfa3z3i-story.html (explaining how Chicago began restricting officers' use of chokeholds in the 1980s). Yet, it took nearly 40 years, and many unnecessary deaths, until finally legislative bodies

are addressing what policing agencies would not. See Farnoush Amiri, Colleen Slevin & Camille Fassett, *In Year since George Floyd's Death, Some States Ban or Limit Police Chokeholds*, L.A. TIMES (May 24, 2021) ("At least 17 states [since Floyd's death] . . . have enacted legislation to ban or restrict [chokeholds] . . . . Before Floyd was killed, only two states, Tennessee and Illinois, had bans."). Courts in some cases have distinguished *Lyons* and found standing on the part of plaintiffs seeking systemic relief with respect to policing practices. See, e.g., Floyd v. City of New York, 283 F.R.D. 153, 169-170 (S.D.N.Y. 2012) (stressing that a named plaintiff had been stopped by police four times; that the plaintiff's risk of future stops didn't depend on whether he engaged in illegal conduct; and that the documented frequency of the challenged practices helped show the likelihood of future injury to that plaintiff)." Yet, the fact is that *Lyons* has been and remains an obstacle to bringing lawsuits to ensure sound policing. See ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 12 (2021) ("In the almost four decades since *Lyons*, the Supreme Court and the lower courts have repeatedly dismissed suits brought by citizens for injunctive relief against police departments because the plaintiff could not demonstrate a likelihood of future personal injury and therefore lacked standing.").

As an alternative, and at a minimum, legislative bodies should empower the appropriate state officials to bring pattern-and-practice lawsuits against policing agencies and give them the resources to do this successfully. See Press Release, Xavier Becerra, Attorney General, State of California, Attorney General Becerra Launches Civil Rights Investigation of the Los Angeles County Sheriff's Department (Jan. 22, 2021), https://oag.ca.gov/news/press-releases/attorney-general-becerra-launches-civil-rights-investigation-los-angeles-county (describing the California Attorney General's lawsuit against the Los Angeles Police Department brought pursuant to the California Constitution and California Civil Code § 52.3); Press Release, Letitia James, Attorney General, State of New York, Attorney General James Files Lawsuit Against the NYPD for Excessive Use of Force (Jan. 14, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-files-lawsuit-against-nypd-excessive-use-force (describing the New York Attorney General's lawsuit against the New York Police Department brought pursuant to New York Executive Law § 63). At the state level, this should be state attorneys general. At the local level, some other solution is needed.

It is further worth considering whether one remedy available to the federal and state attorneys general should be to have courts put errant policing agencies into receivership. Some agencies have proven simply unable to address their own ills, whether it is because of leadership, the failure of the jurisdiction to fund them properly, or some other cause. See Simone Weischelbaum, *The Problems with Policing the Police*, TIME, https://time.com/police-shootings-justice-department-civil-rights-investigations (recounting how police departments in Cleveland, Miami, New Orleans, and New Jersey all failed to implement meaningful reform following U.S. Department of Justice investigations); see also Barbara Armacost, *The Organizational Reasons Police Departments Don't Change*, HARV. BUS. REV. (Aug. 19, 2016), https://hbr.org/2016/08/the-organizational-reasons-police-departments-dont-change. At present, the remedy for agencies found culpable in pattern-and-practice investigations has been a monitorship supervised by the courts. See

generally C.R. DIV., U.S. DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT (2017) (overviewing the Department of Justice's pattern-and-practice process and recent investigations). But monitorships often are criticized for being slow and expensive. Jacob Schulz & Tia Sewell, *Pattern-or-Practice Investigations and Police Reform*, LAWFARE (Apr. 30, 2021), https://www.lawfareblog.com/pattern-or-practice-investigations-and-police-reform (explaining that "consent decree monitoring is expensive and can sometimes last more than a decade"); see also Weischelbaum, supra (describing how local officials "have railed at the high cost of the Justice Department's reform plans"); Memorandum from Merrick Garland, U.S. Att'y Gen., to Heads of Civ. Litigating Components, U.S. Att'ys (Sept. 13, 2021), https://www.justice.gov/ag/page/file/1432236/download (recognizing complaints about monitorships, and adopting procedures to address them). In other areas, failed entities are placed into competent hands, be it receivership or trusteeship. See Ziwei Hu, Comment, *Equity's New Frontier: Receiverships in Indian Country*, 101 CAL. L. REV. 1387, 1420 (2013) (detailing how courts have used receiverships in other contexts, such as railroads, municipalities, civil rights, and housing); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 555, 561-562 (2006) (discussing the value of receiverships in the context of prison litigation). That approach should be explored for policing agencies.

§ 14.04. Judicial Responsibilities with Regard to the Policing Function

(a) Judges foster lawful policing when they:

(1) evaluate thoroughly, fairly, and impartially, without any presumption of credibility, all evidence offered by officers, including testimony in pretrial hearings, trials, and other formal proceedings, in sworn statements, and in affidavits associated with applications for warrants and other orders;

(2) enforce fully legal requirements that obligate prosecutors' offices and policing agencies to disclose information to a criminal defendant;

(3) assess thoroughly, fairly, and impartially whether police officers and prosecutors have complied with their obligations of truthfulness and disclosure, document diligently any noncompliance with those obligations, and—as appropriate—impose sanctions for violations;

(4) assess thoroughly, fairly, and impartially any assertions officers make of legal privileges or immunities; and

(5) scrutinize applications for warrants or other like court orders with care, giving them the attention and deliberation they are due in light of the significant individual interests at stake.

(b) The judiciary, as an institution, can foster sound and lawful policing by identifying, evaluating, and adopting systemic practices such as:

(1) establishing case-assignment procedures to eliminate or minimize judge-shopping at any stage of proceedings, including the warrant docket;

(2) fostering transparency in the adjudicative process, including providing to the public data relevant to sound policing, see § 14.10, and minimizing nondisclosure orders regarding policing practices, see § 2.05(c);

(3) developing mechanisms and protocols by which individual judges can take note of, and report, instances of unlawful conduct by officers in the performance of their official duties; and

(4) providing judges with useful educational resources, including training, to help them adhere to the responsibilities set out in subsection (a).

Comment:

a. The role of the judge and the judiciary. Much of the responsibility for promoting sound policing rests with other actors, as these Principles make clear. That said, judges are charged with an important role in promoting *lawful* policing, and actions they take (or fail to take) can detract from lawful policing. In addition, the judiciary, as an institution, can adopt measures that promote sound and lawful policing. "Lawful policing" is policing that occurs within the requirements of the state and federal constitutions, statutes, and governing precedents; "sound policing," as defined in § 14.01, Comment *a*, sweeps more broadly. Subsection (a), discussed in Comments *b* through *i*, concerns the actions and responsibilities of individual judges. Subsection (b), discussed in Comment *j*, speaks to actions that can be taken by the judiciary as a whole.

b. Domain of relevant cases. Although issues regarding policing obviously arise in criminal cases, including during suppression hearings, such cases are not the only cases in which officers and other government officials participate or in which lawful policing is implicated. Evidence provided by officers often is critical in other affirmative litigation by the government, such as that arising from immigration or tax enforcement. Officer truthfulness and candor often are critical to appropriate resolution of litigation that concerns the legality of police conduct, such as criminal prosecutions of officers, private actions for damages, and equitable actions against officers and municipalities. The obligations of prosecutors and other public lawyers, as set out in § 14.05, also

are implicated in litigation outside of criminal cases. Thus, this Section concerns judicial obligations not only in criminal cases, but in all other cases in which lawful policing is implicated. In addition, there are some aspects of the criminal adjudication process in which judges play more of a supervisory role over police investigations than a role as neutral adjudicator, such as in the granting or disapproving of warrants.

c. Definition of "policing officials." These Principles adopt a functional, rather than formal, test in defining "policing" agencies. See § 1.01. Although for the most part these Principles are directed at policing agencies and their personnel, they recognize that in some circumstances—particularly in the course of investigations—lawyers perform policing functions. Prosecutors direct police investigative actions, and lawyers in both private and public settings work with police to ensure evidence is accurate and truthful and discovery obligations are met. Thus, the integrity and lawfulness of the policing function will depend in some instances on the actions of lawyers. As such, "policing officials" as used in this Section includes such lawyers when they act in concert with the police in conducting investigations, presenting evidence, and performing discovery obligations. See also § 14.05 (obligations of prosecutors in fostering sound policing).

d. Evaluating evidence provided by officers. Sworn statements and testimony by officers are central to a range of legal proceedings, including: applications for warrants that justify government intrusions; criminal trials that assess guilt and appropriate punishment; and civil trials and pretrial hearings in criminal cases that determine the applicability of constitutional rules to officer conduct. In these settings, judges often are called upon to evaluate officer-provided evidence, officer credibility, and officer basis of knowledge.

Emphasis is placed on these necessary actions by judges, because research and case law have documented many instances of policing officials engaging in deceptive, false, and untruthful conduct. That conduct has included planting evidence, falsifying police reports, failing to disclose evidence to prosecutors, and lying or tailoring testimony under oath. These corrupt and unlawful practices make a mockery of adjudicatory proceedings, compromise public trust in the fairness of the criminal legal system, and undermine the rule of law. They also can lead to enormous harm, as in the case of no-knock warrants issued based on representations that proved to be false. In some instances, as indicated in the Reporters' Notes to this Section, judges have enabled police misconduct by failing to scrutinize officer testimony or affidavits sufficiently, failing to enforce constitutional and legal rights involving officers, or neglecting to document and hold officers

accountable when they discover misconduct. Although judges are of course obligated to scrutinize carefully the testimony of all witnesses, including criminal defendants, lawful *policing* (the subject of these Principles) is promoted when they ensure to the best of their ability that the testimony of officers is truthful and credible; even if judges face inevitable limitations in assessing the truthfulness and legality of officer conduct, including, for example, the burdens of overcrowded dockets. Still, the simple and inescapable fact is that both the adjudication of individual cases and the integrity of the judicial system require careful evaluation of officer conduct and testimony.

Even when officers are truthful, judges still should take special care in evaluating warrant applications given the individual interests at stake when those warrants are issued. This particularly is the case with "no-knock" warrants, which authorize police to forcibly enter residences and other venues without giving occupants an opportunity to comply. The execution of no-knock warrants—often by officers in tactical gear, using heavy weaponry—creates a serious risk of death and serious injury not only to the targets of the search, but also to officers and innocent bystanders. These warrants should only be used—if at all—in cases in which they are absolutely essential.

e. Assessing officer claims of immunity. Judges frequently confront matters in which officers assert legal privileges or immunities, including in criminal cases against officers, and in civil cases, stemming from state or federal qualified immunity. Judges can foster lawful policing by thoroughly, fairly, and impartially examining the basis for such claims.

f. Enforcing disclosure obligations. Existing constitutional and statutory law imposes significant obligations on the government to provide information to criminal defendants and civil plaintiffs alike. These obligations help to protect the integrity of criminal and civil proceedings and to promote just results. Although discovery obligations often are conceived as obligations belonging primarily to prosecutors, the government cannot fulfill its obligations unless officers and other policing officials properly collect, document, retain, and timely disclose exculpatory and impeachment evidence to which criminal defendants have a right. Yet, there is ample evidence that the government sometimes violates its criminal-discovery obligations, threatening the integrity of the justice system and at times causing tragic results, such as wrongful convictions.

Given the individual and systemic consequences of failure to fulfill disclosure obligations, judicial attention to these obligations is essential. Yet, as the Reporters' Notes to this Section indicate, judges sometimes have failed to take sufficient care that the government and its officers comply with discovery and disclosure obligations. Judges can facilitate sound policing by adhering

to a set of procedures that ensures compliance by officers and lawyers with discovery obligations. Judges can investigate instances of possible noncompliance with discovery obligations when they arise, and declare mistrials of cases or retry cases in which such noncompliance justifies that result. When a suggestion of noncompliance arises, judges can and should investigate. Cases should be mis-tried or retried if it is demonstrated that noncompliance could affect the outcome. Officials that violate their obligations should face discipline, and if noncompliance is knowing or intentional, it should be punished. Sanctions could range from publicly reprimanding prosecutors who fail to comply with their duties, to barring or suspending prosecutors from appearing before the judge, to contempt. Relevant disciplinary bodies always should be notified of misconduct.

g. Imposing lawful remedies. Although, as indicated in § 14.03, legislative bodies have primary responsibility for crafting remedial regimes, judges have a role to play as well. When statutory remedial schemes make remedies available, those regimes will fail in their purpose if judges do not apply them in appropriate cases.

h. Awareness of biases in adjudicative process. Lawful and sound policing are facilitated if judges, in performing their obligations, keep in mind some systemic biases that can affect both the outcome of cases and the law governing policing. Judges adjudicating individual cases must do so neutrally and without bias. That much is a given. But even in the context of individual cases, there are systemic challenges that present themselves. For example, in adjudicating suppression motions, judges may tend to credit the efficacy of police practices that have turned up evidence against an accused. After all, the evidence in the case before them suggests the practice was efficacious. Yet, judges can be cognizant of the fact that they typically do not have before them any evidence regarding the number of times a tactic has been employed without similar success. This particularly is the case when the governing law instructs judges to weigh the value of a practice to the government's law-enforcement efforts against concerns such as individual privacy or freedom from government intrusion. As an antidote to this unavoidable systemic bias, judges can be cognizant that they only see an instance in which a given practice turned up evidence. Similarly, they can be aware that the opinion written to resolve one case will have an impact on future cases, and draft their opinion cognizant of that fact, including by indicating where there is a shortage of information in the record before them. In appropriate cases, judges can seek from the government broader evidence about how often a particular tactic is used, and to what effect. If the government does not know, that fact alone may be telling.

i. Implicit biases of individual judges. It is one of the most fundamental tenets of due process that the administration of justice be "neutral." An adjudication fails in its most basic requirement if it does not occur before an unbiased judge. As the U.S. Supreme Court frequently has admonished, warrants and other orders must be awarded (if at all) by a "neutral magistrate." Yet, research and scholarship establish what we of course understand, which is that judges are human, and unavoidably have human biases of which they—like all people—may not be fully conscious. In adjudicating cases, judges should try to be attentive to these biases and adopt procedures and practices that work against them. For example, as scholarship detailed in the Reporters' Notes to this Section suggests, judges can structure decisionmaking processes to avoid situational triggers of bias by prioritizing careful, deliberative processing of information over speed and efficiency; establishing clear criteria for decision-making ahead of time; and minimizing distractions, stress, and time pressure when making tough judgments.

j. The judiciary and systemic reform. On a day-to-day basis, individual judges bear the responsibility for ensuring the integrity of the system of adjudication as it relates to policing. But these Principles have identified issues in which the judiciary as an institution could address judicial practices outside the context of the adjudication of individual cases. Such systemic action can promote the integrity of the system of adjudication and public confidence in it, and also foster lawful and sound policing. For example, these Principles have identified the problems posed by bloated, outdated, and inaccurate warrant databases. Section 2.08 sets out systemic actions that should be taken by the government, including the judiciary, to regulate the integrity of the warrant system. Similarly, these Principles address actions that should be taken with instances of police misconduct and lying. Courts can establish regularized procedures for documenting such misconduct, making it public, and notifying appropriate authorities. Courts as institutions can and should analyze the data in their possession about the adjudication of individual cases and use that data to determine if there are systemic issues (e.g., regarding the conduct of prosecutors and police in the jurisdiction, or the predictive value of probable-cause determinations) that perhaps can be addressed systemically. They also should release data that the public or other decisionmakers might require in order to evaluate the soundness of policing practices. See § 14.10.

One area of particular concern that could benefit from such systemic approaches is warrant practice. Although some jurisdictions assign matters in ways that prevent judge-shopping, other jurisdictions permit officers and prosecutors to seek warrants from a judge of their choice.

Jurisdictions with more than one judge hearing applications for warrants should randomize assignments or employ other mechanisms to prevent officers and prosecutors from selecting judges to review warrants. The judiciary also should support efforts to streamline the warrant process, including by facilitating electronic or digital filing when appropriate. Accord § 2.03. To the greatest extent possible, data on the filing and execution of tangible and electronic searches should be public, and the sealing of court orders regarding such searches should be minimized. Accord § 2.05.

REPORTERS' NOTES

Judges are integral to ensuring lawful policing, and the judiciary can contribute to sound policing. Neutral, full, and fair adjudication is essential to safeguarding individual rights and ensuring accurate adjudicative outcomes. See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980) (explaining that the impartiality of judges "serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime"); In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); cf. Woodford v. Ngo, 548 U.S. 81, 104 (2006) (Stevens, J., dissenting) ("The citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted."). This sort of neutrality is particularly important when those being judged are officers of the state. No one must be seen as above the law, particularly those responsible for enforcing the law. See, e.g., Miranda v. Arizona, 384 U.S. 436, 479-480 (1966) ("Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)); United States v. Lee, 106 U.S. 196, 220 (1882) (stating that "[n]o man in this country is so high that he is above the law" and that government officials are "only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives"). In addition, both judges and the judiciary have a stake in safeguarding the integrity of the judiciary and the perception and reality of fairness in adjudication, particularly the adjudication of criminal matters. See, e.g., Bracy v. Gramley, 520 U.S. 899, 904-905 (1997) ("[T]he floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (internal citation omitted) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975))); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."). Much of what must be done falls upon individual judges in adjudicatory matters, but there also are actions the judiciary can take to address systemic issues. Adhering to basic principles of procedure, judicial neutrality, and procedural justice are essential to maintaining public confidence in the judiciary and the work of judges. See 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-end

report.pdf (noting that "judges must be scrupulously attentive to both the letter and spirit of our rules" and that they are "duty-bound to strive for 100% compliance because public trust is essential, not incidental, to [the judicial] function."). Constitutional, statutory, and procedural rules must be followed. See, e.g., Smith v. Turner, 48 U.S. 283, 291 (1849) ("In all our courts the judges are bound to decide according to the law of the land; not according to what they think the law ought to be, but according to the manner in which they find it settled by adjudged cases."); Gamble v. United States, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring) ("'[P]recedents and rules must be followed, unless flatly absurd or unjust,' because a judge must issue judgments 'according to the known laws and customs of the land' and not 'according to his private sentiments' or 'own private judgment.'" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69-70 (1765))). Judges must neither favor one of the parties before them, nor be perceived as doing so. See In re Murchison, 349 U.S. 133, 136 (1955) (explaining that even judges "who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties" should not necessarily preside over a trial because "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting Offutt v. United States, 348 U.S. 11, 14 (1954))); MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2020) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary"); MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2020) ("A judge shall perform the duties of judicial office impartially, competently, and diligently"); CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (JUD. CONF. 2019) ("The judge should perform [their] duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased."). Studies show that litigants even will accept losing if they perceive the system was fair and that they were heard. See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

Constitutional law provides some basics to fair adjudication. For example, prosecutors must not suborn perjury. See Mooney v. Holohan, 294 U.S. 103 (1935). They must correct false testimony they know or should know to be false. See Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972). They have an obligation to turn over to the defense any potentially exculpatory or impeachment evidence. See Brady v. Maryland, 373 U.S. 83 (1963). And government actors, including police and prosecutors, must not deliberately fabricate evidence. See Devereaux v. Abbey, 263 F.3d 1070, 1074-1075 (9th Cir. 2001) ("[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government."). Federal, state, and local statutory rules and court procedures provide others. See, e.g., FED. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience."); CAL. PENAL CODE § 118.1 (making it a crime for a peace officer to knowingly and intentionally make a false statement when filing a report regarding the commission of a crime); N.Y. C.P.L. § 245.20(k) (requiring the prosecution to disclose all evidence, including evidence known to the police, that would negate the defendant's guilt; mitigate culpability; support a potential defense; impeach the credibility of a prosecution witness; undermine evidence of the defendant's identity as the perpetrator; provide a basis for a motion to suppress; or mitigate

punishment); ADMIN. RULES OF THE UNIFIED CT. SYS. OF N.Y. § 100.3 (outlining the adjudicative responsibilities of judges in New York State, including to "perform judicial duties without bias or prejudice against or in favor of any person" and to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law").

Yet, there is far too much evidence that despite the existence of these clear rules and prohibitions, there are systemic and individual failures. The criminal-adjudication system too often is one of assembly-line justice, no doubt fostered by dockets too large to manage effectively. Misdemeanor adjudication is a particular culprit; defendants often are rushed through arraignment and guilty pleas in mere minutes, sometimes without a lawyer. See Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1013 (2021); see also ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 10 (2018) (arguing that misdemeanor criminal courts have abandoned their traditional role of adjudicating the guilt of individual people and instead have adopted a "managerial model" of administering justice, primarily concerned with "managing people over time through engagement with the criminal justice system"). The result is that misdemeanor courts are characterized by two fundamental problems: "pervasive disregard for basic criminal law and procedural protections" and "strong inegalitarian tendencies toward criminalizing and punishing the poor and people of color." Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L. REV. 1648, 1660 (2019) (reviewing MISDEMEANORLAND, supra); see also ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018). But even for felonies, there are concerns that proceedings are too hurried or pro forma, that defendants are not heard, and that pleas are forced. See, e.g., AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009).

Although these concerns are not about lawful policing, they have a profound effect upon it. When the adjudicative process is not operating properly, many violations of lawful policing will go unnoticed, unchallenged, unadjudicated, or unremedied. And when lawful policing is not enforced, it will be neglected.

Evidence is all too plentiful that some police officers commit the most inexcusable acts as part of criminal investigations and adjudication. They falsify reports, plant evidence, and, most consequentially, they lie, even under oath and in judicial tribunals. See generally MICHAEL R. BROMWICH ET AL., ANATOMY OF THE GUN TRACE TASK FORCE SCANDAL: ITS ORIGINS, CAUSES, AND CONSEQUENCES (Jan. 2022) (detailing "truly egregious acts of corruption" committed by Baltimore Police Department officers, including planting weapons and drugs on suspects, robbing people during street stops, and illegally using GPS trackers); see also Rachel Weiner, *Virginia Beach Police Used Forged Forensic Documents in Interrogations*, WASH. POST (Jan. 12, 2022), https://www.washingtonpost.com/dc-md-va/2022/01/12/virginia-beach-police-forged-documents/ (describing how Virginia Beach police officers used forged forensic documents to convince suspects that evidence connected them to a crime, and at least one of the forged documents was presented at a bail hearing as evidence); Tom Jackman, *Ex-Philadelphia Homicide Detectives Arrested, Accused of Lying in Wrongful Conviction*, WASH. POST (Aug. 14, 2021) (three former

detectives charged with perjury and false statements for their role in wrongfully convicting a man of murder and putting him in prison for 25 years); Nicholas Bogel-Burroughs & Frances Robles, *When Police Lie, the Innocent Pay. Some Are Fighting Back*, N.Y. TIMES (Aug. 28, 2021) (noting that "[t]here have long been instances in which the police have provided false accounts of arrests, but disparities between officers' descriptions and what people see have become more common with the expansion of body cameras and cellphone videos"); Jake Pearson, *A Union Scandal Landed NYPD Officers on a Secret Watchlist. That Hasn't Stopped Some from Jeopardizing Cases*, PROPUBLICA (Oct. 22, 2021) (reporting on several instances of police officers providing false testimony, even after prosecutors had placed them on a secret "No Fly List" because of prior misconduct); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 4-15 (2010) (cataloging robust evidence of police lying, including the well-known Mollen Commission that "found police perjury rampant" in New York City between 1992 and 1994); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992) (finding that police, judges, prosecutors, and public defenders agreed there was a "pattern of pervasive police perjury" in Chicago); Joseph Goldstein, '*Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018) (chronicling instances of police lying in New York City); Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013) (quoting former San Francisco Police Commissioner: "Police officer perjury in court to justify illegal dope searches is commonplace. One of the dirty little not-so-secret secrets of the criminal justice system is undercover narcotics officers intentionally lying under oath."); U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 75 (2017) (indicating that "a code of silence exists" among police officers and "is apparently strong enough to incite officers to lie even when they have little to lose by telling the truth"). Such conduct is so common it has a name: "testilying." Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1.

Unfortunately, the evidence also shows that judges have at times failed in their responsibility to address these problems. At the least, some judges have not scrutinized the actions of police sufficiently, leading to the impression that misconduct is all part of the process, or that the ends justify the means. See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (conducting a survey with judges, prosecutors, and defense attorneys in Chicago and finding that 69% of respondents believed Chicago's system did not effectively control police perjury at suppression hearings); id. at 114 ("A disturbing number of [Chicago system survey] respondents actually believe that police lying in court is not perjury. . . . When I asked whether [one Chicago judge] equated police fabrications with perjury he answered, 'Of course it is not perjury. Who would ever think it was perjury? Do you know what perjury is?'"); Christopher Slobogin, *Testilying: Police Perjury and What to Do about It*, 67 U. COLO. L. REV. 1037, 1045 (1996) ("Many prosecutors and judges believe perjury is systematic and often suspect it is occurring in individual cases. But they also frequently claim that they are not sure enough to do anything about it . . . ."); Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM.

L. 259, 263-264 (2010) (explaining that a two-year study of Kansas judges' rulings on allegations of police perjury revealed that trial judges are "failing to fulfill [the] important role of identifying police perjury, either because they are unable to distinguish carefully crafted lies from truth or because they err on the side of punishing a culpable defendant, even if police may have lied."); State v. Finkle, 201 A.3d 954, 968 (Vt. 2018) (dissenting opinion) ("Judicial attempts to protect a citizen's Fourth Amendment rights are further frustrated by well-documented police falsification and perjury, which trial court judges are often either unable or unwilling to identify."). At the worst, some judges—with full awareness that misconduct is occurring—simply have averted their eyes. See Alan M. Dershowitz, *Controlling the Cops: Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17 ("Some judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness and muteness that guides the vast majority of judges and prosecutors."); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1023 (1987) (arguing that "because the exclusion of evidence frequently returns guilty criminals to the street, judges may 'wink' at obvious police perjury in order to admit incriminating evidence"); cf. Michael Traynor, *Some Friendly Suggestions for the Federal Judiciary about Accountability*, 168 U. PA. L. REV. 128, 131 (2020) (arguing that federal judges can be "timid when courage is needed"). This is an issue that judges themselves have recognized. See Jon Loevy, *Truth or Consequences: Police Testilying*, 36 LITIG. 13, 14 (2010) (quoting Massachusetts District Judge Mark Wolf's remark that there was a "'long and recent history' of false testimony in court by Boston police officers" and Eastern District of New York Judge Jack Weinstein's remark that the NYPD engaged in "repeated, widespread falsification"); Nancy Gertner, *The "Lower" Federal Courts: Judging in a Time of Trump*, 93 IND. L.J. 83, 86 (2018) (criticizing federal judges for employing a "duck, avoid, and evade" approach that reduces certain litigation—"notably, civil rights cases and police misconduct litigation—to kabuki rituals" in which plaintiffs "regularly lose long before trial"); Jonathan Blanks, *Reasonable Suspicion: Are Police Lying in Use of Force Cases?*, CATO INST. (Jan. 7, 2015), https://www.cato.org/commentary/reasonable-suspicion-are-police-lying-use-force-cases ("Alex Kozinski, now-chief judge of the U.S. Court of Appeals for the Ninth Circuit once said, 'It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers.'"); Joseph Goldstein, *Brooklyn Judge Seeks to Examine Prevalence of Police Lying*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/nyregion/brooklyn-judge-police-perjury-nypd.html (describing how Judge Weinstein "told the city to prepare for a court hearing regarding the prevalence of lying by New York City police officers" after reviewing recent accusations of false testimony by NYPD officers); Steve Mills & Todd Lighty, *Cops Rarely Punished When Judges Find Testimony False, Questionable*, CHI. TRIB. (May 6, 2016) (quoting a retired Cook County, Illinois, judge who confirmed that judges often encounter police lies but "don't do enough about it").

It is not just policing officials, though, who break the rules; other government actors, from investigators to prosecutors, do the same. They suborn perjury. See Slobogin, *Testilying: Police Perjury and What to Do About It*, supra, at 1046-1047 (noting that in Orfield's Chicago system

survey, "52% [of respondents] believed that at least 'half of the time' the prosecutor 'knows or has reason to know' that police fabricate evidence at suppression hearings"); Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1353 (1996) (noting New York's Mollen Commission concluded that prosecutors sometimes exhibited the same tolerance for police perjury as law-enforcement officers themselves); see also I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 870 (2008) ("Blue lies are so pervasive that even former prosecutors have described them as 'commonplace' and 'prevalent.'"). They fail to comply with perfectly clear discovery and disclosure obligations. See KATHLEEN RIDOLFI ET AL., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES 1 & n.2 (2014) (collecting studies demonstrating "conclusively" that prosecutorial disclosure duties are "often left unfulfilled"); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090 (2010) ("A host of studies have documented prosecutorial misconduct, and one of the most common types of prosecutorial misconduct in these cases involved the suppression of exculpatory evidence in violation of Brady v. Maryland."); THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 2 (2009) ("The most common form of prosecutorial misconduct is a failure to provide the defense team with evidence that is favorable to the defendant."); ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY (2D ED. 2021).

And once again, at times members of the judiciary have failed to do what they can or should to avoid such misconduct. At the least, judges have been insufficiently attentive to prosecutorial obligations, taking them at their word or not insisting on compliance with basic disclosure and discovery rules. See Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87 (2017) (noting that "trial judges traditionally rely on prosecutors to self-regulate their *Brady* disclosure duty" and "do not become involved in managing and regulating the *Brady* disclosure duty until the defense identifies favorable information . . . that has not been disclosed"); WAYNE R. LAFAVE, 6 CRIMINAL PROCEDURE § 24.3(b) (4th ed.) ("Courts tend to be reluctant to undertake pretrial review of *Brady* requests."); KATHLEEN "COOKIE" RIDOLFI ET AL., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES, at xiii (2014) ("[T]his study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging prosecutors from disclosing information that does not meet the high bar of materiality."); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 433 (2010) ("Other than the unenforceable 'honor code,' there are few incentives for prosecutors to comply with *Brady* because there is no meaningful judicial oversight of the process."). At the worst, some judges have failed to discipline or report violations. See KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 48-50 (2010) (discussing the failure of California judges to report prosecutorial misconduct to the California State Bar, despite a law requiring such reporting); CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 71 (2008) (noting that the California State Bar could not find a single

example of judicial reporting on prosecutorial misconduct in its review of 27 cases in which prosecutorial misconduct resulted in a conviction reversal); David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 221 (2011) (analyzing disciplinary practices in all 50 states and finding that "those who are in the best position to discover prosecutorial misconduct—judges, prosecutors, and defense attorneys—routinely fail to report it"); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062 (2009) (noting that, in reversing convictions due to prosecutorial misconduct, appellate courts "often do not call out the offending prosecutors by name in judicial opinions. Rather, many judges go to great lengths to redact the names of misbehaving prosecutors from trial transcripts quoted in judicial opinions"); LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 29 (stating that federal judges "reported that they rarely hold an attorney in contempt, and seldom report an attorney's conduct to the Department of Justice's Office of Professional Responsibility (OPR), bar counsel, or some other disciplinary body").

Finally, there is the problem of judges—often acting under the pressure of caseloads—simply failing to take the time to scrutinize carefully and independently the requests of officers for warrants. Yet, the issuance of a warrant regularly involves a substantial intrusion into people's lives. One area of particular concern is the issuance of no-knock warrants, which often are executed by police in tactical gear, wielding a variety of armaments. In far too many instances, the execution of these warrants has led to property damage, serious personal injury, and even death. See Courtney Kan, Jenn Abelson, & Nicole Dungca, *5 Takeaways from the Post's Investigation into No-Knock Warrants*, WASH. POST (May 5, 2022); Piper Hudspeth Blackburn, *Breonna Taylor's Death: A Push to Limit No-Knock Warrants*, A.P. (Mar. 30, 2021). Sometimes the information provided by police was accurate but did not necessarily justify the use of a no-knock entry. See Nicole Dungca & Jenn Abelson, *No-Knock Raids Have Led to Fatal Encounters and Small Drug Seizures*, WASH. POST (April 15, 2022). In other instances, police representations to obtain the warrant themselves were false. See *Ex parte Mallet*, 620 S.W. 3d 797 (Tex. Crim. App. 2021, unpublished).

A wealth of scholarship suggests actions judges can take to address these problems. When it comes to false testimony or evidence, commentators recommend several different strategies. First and foremost, commentators agree that judges can take an active role in scrutinizing police work, particularly during suppression hearings. See Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 332-336 (2005) (encouraging judges to hold more suppression hearings and (1) permit vigorous cross-examination of police witnesses, (2) require the officers most directly involved in the arrest to testify, and (3) permit the defense to call their own witnesses); Joseph Goldstein, *Police 'Testilying' Remains a Problem. Here Is How the Criminal Justice System Could Reduce It*, N.Y. TIMES (Mar. 22, 2018) (making a similar recommendation and noting that only 2.4% of felony cases in Manhattan that do not end in a guilty plea at initial arraignment have a suppression hearing). In particular, judges should take

seriously allegations of police perjury and "encourage a much deeper exploration of the issue of police credibility than presently occurs." David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 464 (1999). Recent reporting on the issue of testilying has led to a suggestion to make police officer credibility findings public in order to better inform the public about the prevalence of police lying. See Joseph Goldstein, *Police 'Testilying' Remains a Problem. Here Is How the Criminal Justice System Could Reduce It*, N.Y. TIMES (Mar. 22, 2018). Other commentators encourage judges to focus on accountability and to adopt stronger sanctions for police lies to more effectively deter perjury. See Wilson, *An Exclusionary Rule for Police Lies*, supra, at 45-46. Still others suggest that judges should cease instructing juries that the testimony of a police officer is to be treated like that of any other witness, and instead warn the jury that police officers hold certain biases that may affect the credibility of their testimony. See Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 298-299 (2017).

Judges also can and should—in signing warrants and other court orders—take the time to review and deliberate over them commensurate with the interests involved. See, e.g., U.S. v. Leon, 468 U.S. 897, 913 (1984) (emphasizing the importance of neutral and detached magistrates scrutinizing warrants); ABA Standards for Criminal Justice: Special Functions of the Trial Judge, Standard 6-1.10 (judges should "carefully observe constitutional and statutory requirements and not permit these procedures to become mechanical or perfunctory"). Perhaps judges issuing no-knock warrants should be required to affix an additional signature indicating that is the way entry will occur. It also is worth noting that several states have banned the use of no-knock warrants altogether. Kiara Alfonseca, *What to Know About No-Knock Warrants, Following Amir Locke's Fatal Shooting*, ABC NEWS (Feb. 10, 2022) (noting that Florida, Oregon, and Virginia have banned no-knock warrants and at least 34 other states have restrictions or limitations on their use).

When it comes to disclosure and discovery obligations, again there are a number of actions that could be taken to make judging more effective. Although disclosure obligations fall on lawyers much more than police, attention to this issue is entirely appropriate in principles about policing. Policing officials have their own obligations. See, e.g., 725 ILL. COMP. STAT. 5/114-13 (requiring law-enforcement officials to provide investigative materials and exculpatory information to the prosecution); U.S. Dep't of Just., Justice Manual, § 9-5.100 (establishing policy for evidence disclosure to the prosecution by federal law-enforcement officials). But their conduct also affects compliance by prosecutors with obligations under federal and state law. See, e.g., Kyles v. Whitley, 514 U.S. 419, 437-438 (1995) (holding the prosecution responsible for a *Brady* violation even when the exculpatory information was known only to the police). And the many sources cited above indicate prosecutors often tolerate police misconduct.

The adversarial process will not always generate compliance with discovery obligations, but judges can adopt procedures that make compliance more likely. Judges can issue comprehensive standing orders governing the prosecution's evidence-disclosure duties. See Jones, *Here Comes the Judge*, supra, at 110. In fact, this is now a requirement of federal judges. The recently enacted Due Process Protections Act requires federal judges to "issue an oral and written

order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law." Pub. L. No. 116-82, 134 Stat. 894 (2020). Judges could go even further and issue an Ethical Rule Order requiring the prosecution "to search his file and disclose all information that 'tends to negate the guilt of the accused or mitigates the offense,'" in accord with ABA Model Rule 3.8(d). RIDOLFI ET AL., MATERIAL INDIFFERENCE, supra, at 48. Many practitioners agree that it is crucially important for judges to hold mandatory pretrial *Brady* conferences and impose clear deadlines for when material must be turned over. See Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2032 (2010). Along the same lines, some commentators suggest judges create and use *Brady* "checklists," hold pretrial *Brady* compliance hearings, and require prosecutorial certification of compliance with *Brady*. See Jones, *Here Comes the Judge*, at 113-122. Finally, commentators emphasize that judges should issue sanctions for failure to comply with disclosure obligations, publicly call out prosecutors for their misconduct, and report violations to the relevant disciplinary committees. See Jones, *Here Comes the Judge,* supra, at 129; *New Perspectives on Brady and Other Disclosure Obligations*, supra, at 2034; KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 50 (2010).

Finally, judges may have a special role to play when the function they are serving is less neutral adjudication in the classic sense, and more supervision of the policing function itself. A prime example of this is the warrant process. See Jack Knight, Mitu Gulati & David Levi, *How Bayesian Are Judges?*, 16 NEV. L.J. 1061, 1067, 1077 (2016) (describing involvement of judicial officials in reviewing warrant applications).

It is not just individual judges who should take action to ensure the adjudicatory process fulfills its role of ensuring lawful policing, or to incentivize sound policing; the judiciary as an institution (or entire courts) also have a role to play. Courts can amend their rules and policies to address specifically the issues discussed in this Section. For example, several scholars suggest courts at the federal and state level codify clear rules outlining the prosecution's evidence-disclosure duty, including the specific type of information that must be disclosed, the timing of disclosure, and sanctions for failure to comply. See Jones, *Here Comes the Judge*, at 124; RIDOLFI ET AL., MATERIAL INDIFFERENCE, supra, at 49. Similar rules and policies could be adopted around reporting requirements and sanctions for untruthful police testimony. And, importantly, judges can leverage the massive amount of information they have about the actions of prosecutors and police to better understand how the court system is functioning at an institutional level, and take action to promote sound policing. See generally, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016) (discussing the various types of "systemic facts" that criminal courts possess from the information contained in warrant applications and returns, suppression hearings, and evidence disclosure statements, and suggesting ways to use this information to improve criminal-court operations). Issues of implicit bias are more complicated. There is a lack of current evidence that antibias trainings promote long-

term changes in attitudes and behavior. See NAT'L CTR. FOR STATE COURTS, THE EVOLVING SCIENCE ON IMPLICIT BIAS (2021); THE BEHAVIOURAL INSIGHTS TEAM, UNCONSCIOUS BIAS AND DIVERSITY TRAINING – WHAT THE EVIDENCE SAYS (2020). Judge Bernice Donald of the U.S. Court of Appeals for the Sixth Circuit recommends that judges gather and analyze data about case dispositions and sentences to identify and combat bias that may occur. See Bernice Donald, *Judges on Race: Reducing Implicit Bias in Courtrooms*, LAW360 (Dec. 6, 2020); see also ABA & NAACP Legal Def. Fund, Joint Statement on Eliminating Bias in the Criminal Justice System (July 2015), https://www.americanbar.org/content/dam/aba/images/abanews/aba-ldf_statement.pdf (calling on judges to "seek expert assistance to implement training on implicit bias for their employees"). This type of empirical analysis could be encouraged or required through new policies and practices court-wide. Finally, commentators have noted the importance of improving conditions of judicial decisionmaking by providing judges with the resources and time to "engage in effortful, deliberative processing." See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173 (2012); Kang et al., *Implicit Bias in the Courtroom*, supra, at 1177.

One area ripe for attention by the judiciary is warrant practice. At present, there can be judge-shopping for warrants, unlike the more typical rule of random assignment. See James Orenstein, Opinion, *I'm A Judge. Here's How Surveillance is Challenging Our Legal System*, N.Y. TIMES (June 13, 2019), https://www.nytimes.com/2019/06/13/opinion/privacy-law-enforcment-congress.html (discussing the practice of judge-shopping among prosecutors); RICHARD VAN DUIZEND ET AL., NAT'L CTR. FOR STATE CTS., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES – AN EXECUTIVE SUMMARY 44 (1984) (finding that "judge-shopping is practiced by search warrant applicants"). In jurisdictions with more than one judge, assignment should be randomized or other means should be adopted to prevent judge-shopping. There also is insufficient public information about warrants and court orders, particularly around electronic and digital surveillance. See generally Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CAL. L. REV. 917 (2021); Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 HARV. L. & POL'Y REV. 313 (2012); see also § 2.05 (discussing sealing and nondisclosure of court orders). The data contained in warrant returns can also be a rich source of information for judges to analyze and learn from—though this practice is not routinely engaged in. See Jack Knight, Mitu Gulati & David Levi, *How Bayesian Are Judges?*, 16 NEV. L.J. 1061, 1067, 1077 (2016) (surveying 30 federal judges and finding "the overwhelming majority of the judges did not appear to pay any attention whatsoever to the data in the returns"). Inspecting returns could inform future judicial review of warrant requests and ensure the quality of officer evidence and testimony.

§ 14.05. Prosecutor and Other Attorney Responsibilities for Ensuring Sound Policing

(a) Prosecutors should promote agency and officer compliance with the law and with principles of sound policing, and should avoid undermining sound policing. Their efforts with respect to sound policing should include:

(1) documenting and reporting to policing agencies and appropriate state and federal authorities officer conduct that they reasonably suspect to be inconsistent with sound policing;

(2) declining to bring charges in appropriate cases in which officer conduct has been inconsistent with sound policing, and taking appropriate action if officer misconduct is discovered after charging;

(3) ensuring that investigations and charging decisions concerning potentially criminal conduct by officers are thorough, timely, fair, and impartial;

(4) collecting and disclosing evidence concerning officers that may be subject to discovery in criminal cases; and

(5) educating officers about their legal obligations, and promoting sound policing in interactions with officers.

(b) Other attorneys, including those hired or appointed to represent criminal defendants, government attorneys who advise agencies or jurisdictions, and attorneys employed or appointed to represent jurisdictions, should promote agency and officer compliance with the law and with principles of sound policing, and avoid undermining sound policing.

Comment:

a. Role of prosecutors. Prosecutors serve as gatekeeper to the criminal-justice system, and they are among the most powerful actors in it. They act as officers of the court and as the public's legal representative. Their responsibility is not just to see that convictions are obtained, but to see that justice is done, and, more broadly, that the public interest is served. This obligation extends beyond seeking appropriate criminal charges in individual cases. Prosecutors also have systemic responsibility for ensuring the integrity and soundness of the criminal process, including by promoting sound policing and by acting in accordance with these Principles when their work involves investigation or other policing activities.

Yet, some prosecutors are reluctant to take an active role in ensuring sound policing. They often fear alienating officers and agencies. Prosecutors work closely with officers in gathering and assessing evidence of criminal wrongdoing, and they depend on officers' effort and cooperation. Strong, ongoing relationships between policing agencies and prosecutors' offices often benefit the

interests in justice, so it is understandable that prosecutors seek to avoid fraying those close ties. Many prosecutors run for office and worry that a majority of the public may not support sound policing. In addition, prosecutors sometimes view themselves as unable or unsuitable to promote sound policing because they do not directly supervise officers and have limited means of influencing officer and agency actions. Thus, despite their responsibility for promoting the public interest, prosecutors sometimes fail to encourage sound policing, and sometimes facilitate unsound policing, for example, by relying on potentially unreliable or untruthful police testimony or by allowing acts that reflect racial animus or expressions of racial animus by officers to go unreported.

In the face of these tensions, this Section highlights that prosecutors are responsible for carrying out and promoting sound policing in their everyday activities, and that they are capable of doing so consistent with ordinary principles that guide the prosecution function. For example, prosecutors are expected to act independently, impartially, and with balanced judgment in determining appropriate criminal charges. That requires fairly evaluating criminal complaints against police officers without bias or assumptions about officer truthfulness and integrity. Prosecutors are also responsible for improving public safety and the administration of criminal justice. To live up to this obligation, prosecutors appropriately may decline to bring criminal charges in cases in which an officer used excessive force to make an arrest or obtained a confession by unreliable and abusive methods, even if that confession would be admissible in court. Finally, prosecutors have a heightened duty of candor in fulfilling their professional functions. That duty obliges them to document, report, and maintain records of improper conduct by officers, including instances in which officers are less than truthful in their reports or testimony.

b. Promoting sound policing in exercising charging discretion. As Comment *a* suggests, it is critical that prosecutors zealously protect public safety and promote the public interest, including by bringing criminal charges against police officers when charges are warranted. Such charges may deter police misconduct, promote the rule of law, and vindicate the interests of victims of illegal acts. Prosecutors, however, have failed sometimes to fulfill their responsibility to evaluate such charges fairly, fully, impartially, and without bias or favor. Even when prosecutors seek to act impartially, some community members may distrust the independence of prosecutorial decisions, given close interactions between prosecutors and the police. To fulfill their obligation to promote sound policing, prosecutors should develop and adhere to policies and procedures for thorough, timely, fair, and impartial review of the lawfulness of police actions, and they should,

when appropriate, bring charges in such cases. Prosecutors should avoid improper considerations and biases, and should seek to eliminate any formal or informal presumptions in favor of exonerating officers suspected or accused of misconduct. They also should avoid the appearance of impropriety in evaluating such cases by seeking outside assistance in evaluating cases in which close relationships between a prosecutors' office and an agency make the appearance of impropriety difficult to avoid, among other measures. These obligations apply not only to high-profile cases or those involving fatalities, but also to more common misconduct, such as perjury, planting evidence, and nonfatal excessive force. See § 14.12 (Criminal Investigation of Officers).

Prosecutors have the same obligation to protect the public interest in determining when to decline charges against nonofficers. In some cases, prosecutors must decline charges based on officer misconduct because that misconduct taints evidence such that admissible evidence is insufficient to support conviction beyond a reasonable doubt. In addition, prosecutors are not obligated as a matter law or ethics to file or maintain all criminal charges that evidence might support. Under ordinary ethical principles governing prosecution, prosecutors are obliged to promote compliance by law-enforcement personnel with applicable legal rules, including those against improper bias. Even if a case is prosecutable, one appropriate consideration in determining whether to file, decline, or dismiss criminal charges is whether an officer acted improperly in investigating a crime, searching or questioning suspects and witnesses, or making an arrest. In exercising their discretion to determine charges, prosecutors may consider whether they, by declining or dismissing criminal charges, could help to encourage sound policing and therefore serve the public interest. To encourage sound policing in the future, officers and agencies should be informed when an officer's misconduct contributes to a prosecutor's decision to decline or dismiss a charge. Prosecutors should not enter into agreements to drop criminal charges in exchange for releasing a municipality or officer from civil liability in cases in which they reasonably suspect that officers have engaged in illegal acts, because doing so threatens to cover up and facilitate unsound policing.

c. Promoting sound policing within criminal cases. Many principles in this project, such as those that apply to evidence-gathering and witness-questioning, apply to prosecutors and their offices as well as to traditional policing agencies, and prosecutors should comply with these principles as applicable. Thus, prosecutors should ensure that testimony on behalf of the state is truthful and accurate, that those testifying are reliable, and that evidence is appropriately preserved

and analyzed. Prosecutors also should adopt systemic practices that promote compliance with these principles by law-enforcement officers, for example, by maintaining and insisting that law-enforcement agencies maintain adequate systems for collecting, analyzing, documenting, retaining, and providing to prosecutors all evidence from criminal investigations and all information about police misconduct that could be discoverable in criminal cases. Then, prosecutors should fulfill their ethical and legal obligations to provide discoverable evidence to defendants.

d. Education and advice. To ensure that police comply with those rules and earn individual and community trust, officers should be familiar with legal rules. Although agencies and officers often are sophisticated about their legal obligations, prosecutors usually have greater familiarity with the intricacies of law because they work with these legal issues every day. Prosecutors therefore should provide ongoing assistance to agencies and officers in ensuring that officers know the relevant law. They can do this by providing all officers with adequate and up-to-date knowledge of their legal obligations, and assisting individual officers in specific cases. In addition, prosecutors, both individually and as an agency, should identify errors or gaps in officer knowledge that should be addressed through further training. Prosecutors should encourage individual officers to engage in sound policing and assist agencies in developing policies that promote sound policing. Finally, prosecutors may work in partnership with law-enforcement and community groups to identify and address priorities for arrest and prosecution that will enhance public safety in the community in a manner consistent with community values and the principles of sound policing.

e. Transparency. In adopting policies to fulfill the obligations identified in this Section, prosecutors should work to be clear and transparent to officers, agencies, and the public. By doing so, prosecutors facilitate their working relationships with policing agencies. Prosecutors should also encourage compliance with these Principles by providing notice to agencies and officers about the potential consequences of violating them. For example, some prosecutors' offices fulfill their obligation to promote lawful and sound policing in part by maintaining lists of officers that they consider poor witnesses because they previously have engaged in misconduct. These lists serve to promote the integrity of criminal proceedings and discourage police misconduct. However, without fair and public guidelines about the kinds of conduct that justify inclusion in such a list and the process for inclusion, communities may not trust these determinations, and officers may worry that political influences could affect them. Transparency can help mitigate such concerns.

f. Documenting and reporting officer conduct. Through their ongoing interactions with police officers during criminal investigations and prosecutions, prosecutors are exposed to aspects of officer performance that no other actors see. Prosecutors have the opportunity to: observe how thoroughly and fairly officers investigate criminal activity; hear reports from witnesses and suspects of their interactions with officers, including the use of unnecessary force; and take statements from and prepare testimony by officers. This access gives prosecutors a special responsibility to document, track, and report to agencies and appropriate state and federal authorities instances of known, suspected, or reported misconduct, such as when officers demonstrate bias, make false statements, conduct improper searches and seizures, and fabricate evidence. Prosecutors' offices should have mechanisms for encouraging, documenting, and following up on reports of improper conduct, including those that are revealed in court. Prosecutors also see and hear reports about exemplary officer performance, and they should document and track such conduct to encourage positive performance and allow it to be recognized and rewarded by agencies.

g. Discovery obligations and documentation of officer conduct. Prosecutors cannot fulfill their discovery obligations to criminal defendants unless they systematically document and track known false statements and other potentially discoverable misconduct by officers, including the failure of officers to collect, preserve, or turn over evidence valuable to the defense. They also should ensure that officers and agencies systematically provide to prosecutors all discoverable findings of misconduct made by the agency or any reviewing authority against officers involved in criminal cases.

h. Ongoing obligation. After an individual is charged, or even after a case is closed, prosecutors may receive information that indicates officer misconduct. Prosecutors have an ongoing obligation to take appropriate action under such circumstances, including by documenting and reporting newly discovered misconduct and dismissing charges or reconsidering closed cases to avoid the possibility of a wrongful conviction or miscarriage of justice. Prosecutors should ensure that they have systems in place, such as those adopted by conviction-integrity units, to handle such matters. Although finality remains an important value in the criminal-justice system, a demonstrated willingness to reconsider closed cases can facilitate justice, promote trust in government, and provide information about agency and officer practices to promote better compliance with these principles and the law.

i. Defense attorneys. Counsel for defendants, including indigent defendants, often have opportunities to promote sound policing. For instance, defense attorneys investigate cases to determine whether evidence supports the prosecution and to identify potential avenues for impeaching prosecution witnesses. In speaking to their clients, and in carrying out these investigations, attorneys frequently learn of officer misconduct. When doing so is consistent with their legal and ethical obligations to their clients, defense attorneys should consider reporting such misconduct to agencies and appropriate state and federal authorities.

Because defense counsel bring motions to suppress evidence based on illegal conduct by officers, they also often are present when judges find that officers have made false statements or otherwise have acted illegally. When prosecutors' offices and agencies do not adequately track these findings, public defenders and other defense attorneys may promote sound policing by doing so. Efforts by defense counsel to collect or report incidents of improper conduct by officers should not be taken as an excuse for other actors, including prosecutors, to avoid their responsibility to promote sound policing. Legislatures should consider the additional burden that promoting sound policing may place on defense attorneys in allocating resources for their work.

j. Other government attorneys. Attorneys representing jurisdictions in noncriminal matters concerning the police or policing agencies also have opportunities to promote sound policing and to refrain from encouraging unsound policing, consistent with their legal and ethical obligations. Attorneys employed by or appointed by governments often give advice to public officials and agencies; they review agency policies; they manage civil liability risks for jurisdictions; they assist in drafting legislation; and they represent the government and its officers in defending suits about police conduct. In carrying out these duties, they should recognize that the interests of the jurisdiction and the public trust in the police usually will best be promoted by transparency and by reducing unsound policing and its resulting harms.

For this reason, government attorneys should prioritize prompt and candid communication with the public in advising agencies in the aftermath of critical incidents. They should avoid standing in the way of agency policies that go beyond legal standards to promote sound policing. In their role representing officers and jurisdictions in litigation, consistent with their ethical obligations, they should encourage public disclosure of settlements and judgments involving police conduct and generally should not enter nondisclosure agreements that deny agencies or the public information about the harms and financial costs of unsound policing. In assessing litigation

strategies in civil suits, such as when and whether to raise legal defenses, when to appeal adverse decisions, and when and whether to settle, government attorneys should consider as part of their calculus the implications of their choices on sound policing and public trust in the police. In addition, government attorneys that defend civil suits are often best positioned to aid agencies in learning from litigation. Thus, they should share with agencies information unearthed during civil suits with police agencies and officials and help agencies identify policies and personnel, training, and management practices that contribute to unsound policing and need reform.

REPORTERS' NOTES

Prosecutors have a distinctive obligation to promote sound policing. First, prosecutors have a general obligation to reform and improve the criminal-justice system. As the American Bar Association's Standards on the Prosecution Function indicate, "The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice." Am. Bar Ass'n, Crim. Just. Standards, Prosecution Function, Standard 3-1.2(f). As these Principles suggest, promoting sound policing is central to improving both public safety and public trust in government and the criminal system. Second, prosecutors have more specific obligations to ensure that officers comply with the law. See, e.g., id., Standard 3-3.2 ("The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias.").

Still, prosecutors have a special and complicated relationship to policing agencies and officers that often makes fulfilling these obligations challenging. On the one hand, prosecutors properly cultivate and value close working relationships with the police. In investigating, charging, and trying criminal cases, they work alongside officers, and depend on their hard work, expertise, testimony, and judgment. See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) (describing the relationship between federal agents and prosecutors as a "bilateral monopoly"); Kate Levine, *Who Shouldn't Prosecute Police Officers*, 101 IOWA L. REV. 1447, 1465-1470 (2016). Prosecutors also cannot fulfill their own ethical and legal obligations, for example, their obligation not to present untruthful testimony or their responsibility to disclose favorable information to criminal defendants, without the cooperation of officers. See Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

Yet, on the other hand, prosecutors also are responsible for assessing police conduct to determine whether criminal charges against officers should be brought. See Am. Bar Ass'n, Crim. Just. Standards, Prosecution Function, Standard 3-1.2 ("The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety . . . by pursuing appropriate criminal charges."). They are also responsible for evaluating officers' credibility as

witnesses, see id., Standard 3-1.4 ("The prosecutor should not . . . offer evidence[] that the prosecutor does not reasonably believe to be true . . ."), and disclosing impeachment evidence about them to defendants, see, e.g., Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013) (finding that impeachment evidence against a testifying officer included judicial orders taken because of his legal violations and personnel records documenting his lies and misconduct); United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule."); Giglio v. United States, 405 U.S. 150, 154-155 (1972).

This multifaceted and complex relationship creates difficulties for prosecutors, who must both work closely with officers and yet maintain a critical, independent perspective on their conduct. Perhaps because of tensions inherent in this relationship, prosecutors often have failed to promote sound and lawful policing. Despite past failures, however, prosecutors can and should promote sound and lawful policing. Indeed, as a result of their close work with officers, they are uniquely situated to do so.

Accordingly, these Principles encourage prosecutors to take a more active role in monitoring and influencing police conduct while executing their duties. Although existing data are insufficient to say how widespread police misconduct is today, scholarly and journalistic sources indicate that it is common enough that proactive efforts to detect and deter it are not merely warranted, but necessary to fully discharge the prosecutor's duty to ensure that policing is carried out lawfully. See, e.g., Phillip M. Stinson, *The Henry A. Wallace Police Crime Database*, police crime.bgsu.edu (cataloging 1,718 instances of official misconduct, 321 instances of evidence destroying or tampering, and 834 instances of false reports or statements resulting in the arrest of sworn officers between 2005 and 2016); N.Y. C.L. Union, *NYPD Police Misconduct Database*, https://www.nyclu.org/en/campaigns/nypd-misconduct-database (reflecting 11,661 substantiated citizen complaints of abuse of authority by NYPD officers and 4,415 substantiated complaints of excessive force between 2000 and 2021).

In the interests of justice, prosecutors should implement systems to review officer conduct for illegal behavior early in the case-handling process. Thus, the widespread practice of building the early stages of a criminal prosecution and extending early plea offers based on a complaining officer's account of an incident may be inconsistent with the prosecutor's role to promote sound policing and not encourage or permit unsound policing. More careful case-intake and screening procedures that allow review and evaluation of police investigations already are common in the federal system. Such procedures also will allow prosecutors to study their own practices, including whether they contribute to bias. Finally, it will allow prosecutors to disclose publicly more information about their work to the public. See American Bar Association and NAACP Legal Defense Fund Joint Statement on Elimination Bias in the Criminal Justice System (June 2015).

As the Comments note, prosecutors are not required by law or ethics to file or maintain every criminal charge that evidence might support, and they may use their discretion in a manner that promotes sound policing. According to the American Bar Association's Criminal Justice Standards for the Prosecution Function, even when a case meets the minimum requirements for filing and maintaining charges because "the charges are supported by probable cause, that

admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice," Am. Bar Ass'n, Crim. Just. Standards, Prosecution Function, Standard 3-4.3, prosecutors still may exercise discretion not to initiate or to dismiss a criminal charge. id., Standard 3-4.4. One of the factors that prosecutors "may properly consider" in exercising that discretion is "any improper conduct by law enforcement." id., Standard 3-4.4(a)(viii). Thus, as the black letter and Comments of this Section suggest, prosecutors may decline charges because of officer misconduct not only in cases in which misconduct taints evidence and makes the charge unprosecutable, but also when charges are viable, if doing so serves the public interest.

When prosecutors decline or dismiss charges at least in part because of improper conduct by officers, they should communicate their reasons to the officers involved and to their agencies. Otherwise, such declinations are unlikely to discourage improper officer conduct in the future, and repeated improper conduct may lead to repeated dismissals. Cf. U.S. Department of Justice Investigation into the Baltimore City Police Department 34-35 (noting that the Baltimore City Police Department persisted in a pattern or practice of making arrests unsupported by probable cause despite a high number of declinations by the Baltimore City State's Attorney's Office). In addition, prosecutors can help promote public trust by explaining decisions not to prosecute officers involved in critical incidents, especially fatal shootings. See American Bar Association and NAACP Legal Defense Fund Joint Statement on Elimination Bias in the Criminal Justice System (June 2015).

Prosecutors often train officers in the law, and they have an ethical obligation to do so. See Am. Bar Ass'n, Crim. Just. Standards, Prosecution Function, Standard 3-3.2(c) ("The prosecutor's office should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters"). This type of legal training is essential to ensure that officers adequately understand, for example, discovery rules, and their obligation to collect, retain, and turn over to prosecutors evidence favorable to criminal defendants. Cf. Mary H. Caballero & Constantin Severe, Independent Police Review, Police Review: Portland Police Bureau Compliance with Brady v. Maryland (2017) (documenting officers' limited understanding of *Brady*). They also model behavior and set informal expectations for officer conduct. In addition, because prosecutors are obliged to consider the public's interest in charging decisions, prosecutors appropriately consider whether police misconduct may be discouraged by declining some criminal cases. See Am. Bar Ass'n, Crim. Just. Standards, Prosecutor Function, Standard 3-4.4 (noting prosecutors are not obliged to file all criminal charges that evidence supports, and indicating that prosecutors may properly consider in exercising charging discretion "any improper conduct by law enforcement"). Such acts not only may make police misconduct less likely; they may signal to the public a commitment to sound policing that can help build community trust.

Prosecutors also have both the opportunity and obligation to see that officer misconduct is tracked properly and remedied. They are the only actors who observe routinely how officer conduct affects litigation outcomes. They view misconduct that otherwise is invisible, such as false statements in police reports, misconduct during interrogations, and false testimony by officers. As

repeat players in court, they and their officers frequently are aware of judicial findings that officers have lied or acted improperly. Only by reporting and tracking what they know can they promote sound policing, fulfill their obligation to disclose evidence that can be used to impeach the credibility of officers who testify in criminal trials, and ensure the integrity of criminal prosecutions. Indeed, unless prosecutors track and collect evidence of police misconduct, including lying and racial animus, they cannot comply with their obligation to disclose impeachment material about officers or assist agencies in avoiding using officers whose credibility is compromised. See Jonathan Abel, Brady's *Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015).

Prosecutors, and not officers, are responsible for deciding whether to institute formal criminal proceedings. See Am. Bar Ass'n, Crim. Just. Standards, Prosecutor Function, Standard 2-4.2. They should carry out this task with the thoroughness and care that depriving people of their reputation and liberty warrants. Prosecutors sometimes fail to scrutinize an officer's version of a search, an arrest, or an interview before charging, leaving such scrutiny to defense counsel later in the case. Such an approach to charging is inconsistent with the prosecutor's obligation to seek truth, prioritize the interests of justice, and ensure that only those cases that a prosecutor reasonably believes are supported by the evidence are brought. When screening cases, prosecutors should look for indications of police misconduct, including suggestions that officers used excessive force, fabricated evidence, or made arrests for improper reasons. Because misconduct often will not be evident in a police officer's written report, prosecutors should consider whether in-person interviews are appropriate to fulfill their responsibility to make charging decisions in the interests of justice.

In their role evaluating the appropriateness of criminal charges against officers involved in critical incidents, prosecutors also have unique power to ensure that the interests of victims of police misconduct are vindicated, and that justice is served when officers break the law. Investigations and prosecutions of alleged officer misconduct are considered further in § 14.12.

Defense attorneys also frequently see evidence of illegal or unsound conduct by officers. Some offices have collected and maintained records of police misconduct to help their cases. For example, New York City's Legal Aid Society maintains a database that tracks police misconduct in New York City as part of its Cop Accountability Project. See Legal Aid Soc'y, Cop Accountability Project, https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/. This is especially useful when local officials neglect their responsibility to mandate transparency about police practices and conduct. In addition, defense attorneys should consider whether they may serve the cause of justice and the interests of their clients by reporting alleged incidents and patterns of misconduct to agencies or appropriate state officials. See Am. Bar Ass'n, Crim. Just. Standards, Defense Function, Standard 4-1.2.

Although defense attorneys frequently are overburdened, the community of criminal-defense attorneys may have opportunities to contribute to sound policing that do not further stretch existing resources. For example, defense offices sometimes provide training in the law, in the use

and testing of forensic evidence, or in avoiding improper bias that might reasonably be open to officers as well as attorneys. See id., Standard 4-1.12.

In considering their responsibilities for promoting sound policing, government attorneys should consider that public trust in policing is essential to police effectiveness and legitimacy, and that the advice and representation they offer policing agencies can contribute to or undermine that public trust. When deciding how best to defend municipalities sued in civil litigation, government attorneys should keep in mind that they are representing not only the interests of government officials but also the interests of the taxpayers. Litigation decisions should be made with an eye not only toward preserving the public fisc, but also advancing sound policing and public trust. In addition, in their role as advisers and risk managers, government attorneys should be attentive to the information they receive about incidents and patterns of misconduct that may justify reform. As Joanna Schwartz has said, "lawsuits are, in essence, unsolicited audits by deeply dissatisfied customers . . . . Hearing from a deeply dissatisfied, highly motivated customer may be an unpleasant experience, but it can be illuminating." Joanna C. Schwartz, *Introspection through Litigation*, 90 NOTRE DAME L. REV. 1057-1058 (2015). Municipal and county attorneys should help agencies use lawsuits to ensure that agencies mitigate problems that harm individuals and undermine public trust. Although this Section focuses on those attorneys who represent the government, some of the same concerns adhere to attorneys who are appointed or hired by insurance companies to represent individual officers or municipalities in civil lawsuits.

§ 14.06. The Federal Government's Role in Policing

The federal government should engage in sound policing, exercise its authority to promote sound policing nationwide, and avoid actions that undermine sound policing.

Comment:

a. The federal role in policing. The federal government has three critical roles to play in policing. First, the federal government includes more than 80 policing agencies, among them the Drug Enforcement Administration, Customs and Border Protection, and the Federal Bureau of Investigation. These agencies empower approximately 100,000 officers to investigate crimes, patrol federal lands, facilitate court operations, protect federal departments, and coordinate with and assist state and local agencies, among other activities. In performing these functions, these agencies and officers affect individual lives, shape public perception about policing, and influence state and local agency practices. These Principles apply to policing by federal agencies and officials, and these agencies and officials should engage in sound policing.

Second, the federal government provides coordination, technical assistance, and resources to state and local agencies. Some of these efforts are directed at pursuing federal-enforcement ends,

and some to facilitating and improving state and local policing. As the federal government pursues these activities, it should ensure that it designs them to promote sound policing and to avoid undermining it.

Third, the federal government promotes civil and constitutional rights. The U.S. Constitution imposes this obligation on all branches of the federal government. Policing, perhaps more than any other governmental endeavor, regularly implicates rights protected by the U.S. Constitution, including rights to be free from: excessive force; suppression of speech; discrimination of any sort; and unjustified intrusions on autonomy, privacy, and security. As noted in § 1.03, ensuring that agencies and officers respect constitutional rights, and signaling the government's commitment to those rights, are essential to democratic society and the legitimacy of policing. As described in this Section and other Sections in this Chapter, the federal government should maintain appropriate remedies and actively enforce civil rights to fulfill its responsibility to promote sound policing.

b. The need for federal involvement in promoting sound policing. As these Principles have made clear, policing in the 21st century is a complex matter. Yet, the 18,000 or so policing agencies in the United States vary widely in size and capacity. Many have neither the expertise nor the resources to identify and implement research-informed practices for sound policing. Some simply choose not to. State capacity, and the commitment to promote sound policing, is similarly uneven across state and local agencies. Only with national leadership can policing in the United States achieve the standards advanced in these Principles and the mandates imposed by law.

The idea that federal assistance is valuable to improve state and local policing is not new. For more than a century, the federal government has provided state and local police departments with technical assistance, training, and access to national forensic databases that are critical to criminal-enforcement efforts. For nearly as long, the federal government has maintained and enforced criminal and civil-rights laws against officers who have violated the constitutional rights of individuals. For more than a half century, the federal government has offered substantial funding to improve and coordinate state and local policing. And for decades, the federal government has offered technical assistance to struggling agencies, and it has investigated and sued errant police departments to promote constitutional policing.

While recognizing and reaffirming the substantial role the federal government has long played in state and local policing, this Section emphasizes that federal intervention in state and local policing should promote only *sound* policing.

c. Federal power to promote sound policing. Some argue that the federal government should not play a significant role in state and local policing, or that it lacks the power to do so. Even if the federal government did not have regulatory power over local policing, it has other powers, such as the spending power, the power to attach conditions on spending grants, and the power of the bully pulpit, which can be deployed noncoercively to promote sound policing. But the federal government also has ample regulatory powers. Section 5 of the Fourteenth Amendment of the U.S. Constitution allows the federal government to address matters such as the excessive use of force or racial discrimination. And Congress has power to regulate other aspects of policing, including the use of surveillance technologies, because they constitute or are a part of interstate commerce.

The best evidence of federal power is the fact that for good and for ill, as noted above, the federal government has long acted to aid state and local law enforcement and foster federal priorities for policing. As part its antiterror and drug-enforcement activities, for example, the federal government has: offered funding to state and local agencies; created multijurisdictional task forces; provided equipment, support, training, and coordination; and encouraged and shared the proceeds of asset forfeitures. As part of its civil-rights and anticorruption efforts, the federal government has prosecuted federal, state, and local officers who have broken federal law, and sued agencies that violate constitutional rights. Congress, in passing federal privacy laws, sets the terms by which state and local agencies can acquire certain types of personal information. And federal rules and court procedures, such as the Federal Rules of Criminal Procedure, have provided models that state and local governmental entities can, and often do, adopt.

d. Avoiding programs and practices that detract from sound policing. Although some forms of federal policing and federal intervention into state and local policing, such as civil-rights enforcement, almost inevitably promote sound policing, not all have this character. Both historically and currently, some federal interventions in local policing have pursued public-safety goals by means that imposed harm, contributed to racial disparities, evaded local political accountability, or frayed public trust. For example, federal programs that provide financial incentives to state and local agencies to engage in asset forfeiture, such as equitable sharing, encourage harmful policing while circumventing ordinary political processes for checking that harm. Similarly, programs that

transfer military-grade equipment and information-gathering technologies to local communities often have avoided ordinary budgeting and requisition processes and allowed agencies to adopt especially intrusive means of policing without legislative approval or other local democratic accountability. In addition, through programs such as Operation Pipeline and Data-Driven Approaches to Crime and Traffic Safety, the federal government has promoted the programmatic use of pretextual traffic stops without paying adequate attention to the racially discriminatory effects of such stops and the distrust they often sow between policing agencies and the communities they serve. In short, in too many instances, the federal government has undermined sound policing.

As this Section indicates, not only should the federal government take care to engage in and promote sound policing; it should ensure that its policing and programs do not undermine sound policing. Federal officials should ensure that federal programs and practices do not promote excessive harm, contribute to racial disparities, impede local accountability, or otherwise detract from sound policing by state and local agencies and officers.

e. The dual role of the federal government in policing. As the preceding Comments suggest, the federal government intervenes in state and local policing in two different ways. First, through the U.S. Department of Justice and civil-rights offices within other federal agencies, the federal government enforces federal rights against officers and agencies and otherwise promotes constitutional policing. Second, the federal government offers state and local policing partnerships, technical assistance, training, grants, and equipment to expand and foster policing, consistent with national goals. These roles can come into tension if, for example, federal grant programs encourage policing that may facilitate civil-rights violations or undermine accountability mechanisms used to check them. The federal government and its officials should be conscious of these dual roles and work to ensure that all federal-government interventions in state and local policing pull in the same direction: the direction of sound policing.

f. Specific areas in which the federal government does or should play a role. Although the expansiveness, form, and focus of the federal government's role in policing appropriately changes over time, some aspects of policing especially warrant federal leadership, commitment, and participation.

(1). Excessive force. Policing at times involves the state's use of force upon individuals without their consent, and sometimes that force is used when it is unnecessary or is applied in an excessive or unfair manner. Such inappropriate use of force inevitably harms

individuals, has historically enforced societal inequality, and often threatens community trust. Obviously, the authority to use force—to engage in violence against individuals—is a weighty responsibility, and the federal government should itself abstain from using excessive or unnecessary force, should avoid promoting local policing that does so, and should use its powers to see that policing agencies and officers nationwide minimize force and use only such force that is lawful and necessary. The federal government has sought to discharge its special responsibility for reducing excessive force primarily through civil-rights enforcement. But it should also do so by facilitating local efforts to assess and reduce the use of excessive force. Most obviously, the federal government is best positioned to set national data-collection standards on force and encourage or require data collection. In addition, the federal government may appropriately adopt and promote national standards on how force should be used in policing.

(2). Discrimination. Policing has a long and disturbing history of discriminating against minorities and vulnerable communities, and enforcing and endorsing inequality. See §§ 1.11 (Policing on the Basis of Protected Characteristics or First Amendment Activity); 1.12 (Interacting with Vulnerable Populations). The federal government has a special constitutional role in promoting equality, and it has at times been an important protector of civil rights and an opponent of discrimination. However, it also is the case that federal actions and programs have fostered discrimination in policing, for example, by encouraging pretextual vehicle stops to uncover drug crimes, a practice long linked to producing significant racial disparities. To fulfill its constitutional role and to promote sound policing, Congress should adopt legislation to prohibit and combat racial and other types of discrimination in policing nationally, and it regularly should audit its own programs to ensure that federal actions are not promoting such discrimination, even indirectly. Federal executive agencies should take care that their actions promote racial equality and avoid racial discrimination.

(3). Surveillance. Policing often pursues law-enforcement goals through surveillance practices that collect information on individuals and their activities. Surveillance may achieve public-safety benefits, but it also can undermine privacy, autonomy, and racial justice. The federal government has long played a role in fostering the development of surveillance tools, utilizing them, and putting those tools in the hands of state and local agencies. But the federal government sometimes has done so in ways that circumvent local political processes, e.g., by directly providing grants to agencies to adopt technologies without local approval. In order to

engage in and promote sound policing, the federal government should be transparent about its own use of surveillance technology, and it should not use it in ways inconsistent with these Principles. In addition, the federal government should take care that its programs for, and collaborations with, state and local agencies that use surveillance technology are consistent with these Principles with regard to transparency, accuracy, and accountability. The federal government has the capacity to play a leadership role in educating the country about surveillance technologies and in adopting sound policies regarding their use, and it should do so.

(4). Data collection and dissemination. Sound policing cannot occur unless there is adequate information about police activities, policies and practices, and institutions. Such information is necessary for both agencies and communities to assess and change policing, and it is essential to facilitate research about the police. Given our federal system and the sheer number of policing agencies, it is difficult to gather and disseminate uniform data to inform the public about policing and to foster sound policing. Federal leadership is essential to set national standards for data collection and ensure the collection and dissemination of information about policing.

Although there are many ways the federal government might go about ensuring data collection and dissemination, the federal government, at a minimum, should make public all the data identified in § 14.10 about federal policing agencies. It also should require the same of agencies receiving federal grants. It should provide national standards for the collection of this data. In addition, the federal government should foster the availability of national data, including by aggregating information it receives about policing and making it available to the public.

REPORTERS' NOTES

1. The federal role in local policing, generally. If anything seems apparent, it is that the federal government has an important role to play in fostering sound policing. There are 18,000 policing agencies in the United States, including more than 12,000 local policing agencies. SHELLEY S. HYLAND & ELIZABETH DAVIS, U.S. DEP'T OF JUST., NCJ 252835, LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 3 tbl.3 (2019). While 45 of them have more than 1,000 officers, more than 9,000 others have fewer than 25 officers. Id. Even if a deferential posture toward their decisions were appropriate, there simply is no way that the thousands of departments, many quite small, have the resources to study and implement best practices for policing. The federal government can, and does, provide funding to policing agencies, including grants from the Office of Community Oriented Policing Services (COPS Office), the Office on Violence Against Women, and the Office of Justice Programs within the U.S. Department of Justice, and grants from other federal agencies, such as the U.S. Departments of Health and Human Services, Homeland Security, Agriculture, and

Transportation. It can, and does, provide technical assistance, especially through the COPS Office, but also through other offices and agencies. See, e.g., 34 U.S.C. § 10381(d) (authorizing the Attorney General to provide technical assistance to policing agencies). And perhaps most important, the federal government can, and does, take action against policing agencies and officers that violate constitutional rights, as it does through the Civil Rights Division of the U.S. Department of Justice and offices for civil rights in other federal agencies that ensure compliance with laws against discrimination in federal programs. See, e.g., 42 U.S.C. 2000ee-1 (requiring agency heads to designate officers to assist in promoting and enforcing civil rights). But it should do much more.

When the subject of the federal government regulating policing is raised, sometimes the response is an expression of concern about principles of federalism. As a matter of law, the claim is that Congress lacks power over these local agencies. See Edwin Meese, *Federalism in Law Enforcement*, FEDERALIST SOC'Y (May 1, 1998), https://fedsoc.org/commentary/publications/federalism-in-law-enforcement (arguing Congress should keep out of local law enforcement because "the drafters of the Constitution clearly intended the states to bear the responsibility for public safety"). As a matter of policy, the argument is that it is inappropriate for Congress to act in this area. The notion is that policing is quintessentially a local activity, and Congress should—or must—stay its hand. See 166 CONG. REC. H2464 (daily ed. June 25, 2020) (statement of Rep. Tom McClintock) (describing policing as a "uniquely community-based function" that should not be federalized); Reuters Staff, *McConnell Says Democrats' Policing Bill 'Going Nowhere' in Senate*, REUTERS (June 16, 2020), https://www.reuters.com/article/us-minneapolis-police-senate-mcconnell/mcconnell-says-democrats-policing-bill-going-nowhere-in-senate-idUSKBN23N34M (arguing the George Floyd Justice in Policing Act will result in federal overreach); 166 CONG. REC. H2466 (daily ed. June 25, 2020) (statement of Rep. Andy Biggs) (same). Neither of these objections holds water as a matter of history, law, or policy.

As the following Sections indicate, the federal government long has been involved in local policing, and it unequivocally has the power to do much of what is required to achieve sound policing.

2. The federal government's historic role in policing. The federal government long has been involved in addressing matters of local policing. This was true at least since Reconstruction, when Congress responded to racial violence initiated by the Ku Klux Klan—often aided by local officials—by empowering federal law-enforcement officials to pursue Klan members. Bryan Greene, *Created 150 Years Ago, the Justice Department's First Mission Was to Protect Black Rights*, SMITHSONIAN MAG. (July 1, 2020), https://www.smithsonianmag.com/history/created-150-years-ago-justice-departments-first-mission-was-protect-black-rights-180975232/. Armed with new civil-rights laws that remain on the books today, Attorney General Amos Akerman investigated, detained, and prosecuted Klan members in the South. See id. (describing how Akerman's Department of Justice "obtained hundreds of convictions" against Klan members in the South); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2141-2146 (1993) (describing Akerman's aggressive

enforcement of the 1866 Civil Rights Act, now codified at 18 U.S.C. § 242, the 1870 Enforcement Act, and the 1871 Ku Klux Klan Act, part of which is codified at 42 U.S.C. § 1983).

For many decades, the federal government has played an active role in state and local policing. For instance, it has long provided funds to hire many thousands of officers and to acquire surveillance and weaponized equipment. It has given equipment away under programs like the 1033 Program and the Urban Areas Security Initiative Program. 10 U.S.C. § 2576a (Department of Defense's 1033 Program); 6 U.S.C. § 604 (Urban Areas Security Initiative Program); see EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 7 (2014), available at http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf (describing how the Department of Defense's 1033 Program has supplied law-enforcement agencies with $5.1 billion in excess equipment). It has set priorities for enforcement, including through grant programs targeting gangs and guns, and the federal government's declaration of and funding for a War on Drugs. See U.S. DEP'T OF JUST., 2021 GRANT OPPORTUNITIES AND RESOURCES FOR VIOLENT CRIME REDUCTION INITIATIVES (2021) (describing Department of Justice grant programs designed to achieve safer communities, including Project Safe Neighborhoods and the Title II Formula Grants Program); Nathaniel Lee, *America Has Spent Over a Trillion Dollars Fighting the War on Drugs*, CNBC (June 17, 2021), https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html (observing that the "the federal government is spending more money than ever to enforce drug policies"). And the federal government has done much more, all with the purpose of *enhancing* policing and expanding its reach and resources. Whatever their public-safety benefits, these programs also can impose considerable harm. Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872 (2015); see ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICE 21 (2014) (finding federal grant programs arm local police with "unnecessarily aggressive weapons and tactics designed for the battlefield"); *Militarization of Police*, CHARLES KOCH INST. (July 17, 2018), https://charleskochinstitute.org/stories/militarization-of-police/#:~:text=Police%20militarization%20is%20defined%20by,mindsets%2C%20or%20culture%20of%20the (describing and criticizing domestic policing's militarization); Radley Balko, *Rise of the Warrior Cop*, WALL ST. J. (Aug. 7, 2013), https://www.wsj.com/articles/SB10001424127887323848804578608040780519904 (same); Matt Apuzzo, *After Ferguson Unrest, Senate Reviews Use of Military-Style Gear by Police*, N.Y. TIMES (Sept. 9, 2014), https://www.nytimes.com/2014/09/10/us/ferguson-unrest-senate-police-weapons-hearing.html (describing how violent images from Ferguson, Missouri, "forced the federal government to review its policy of providing local police forces with military-style equipment"). By contrast—only more recently, and far less expansively—the federal government has sometimes sought to reduce the harms and unfairness of policing and promote community trust in the police. See, e.g., 34 U.S.C. § 10381 (authorizing the Attorney General to make grants for conflict-resolution training and to establish collaborative programs to address mental health and substantive abuse).

As a matter of constitutional law, and of sound policy, though, this imbalance between programs designed to expand policing and those designed to make it less harmful or fairer does not make sense. It is the responsibility of the federal government to prevent and provide redress for violations of constitutional rights. More important, the federal government is perhaps the only player with the capacity and ability to promote sound policing.

3. The federal government's legal authority over sound policing. Congress and the Executive Branch acting in tandem have ample power to do virtually anything that would be required to foster sound policing nationwide.

Congress can, and does, attach conditions on spending grants to states and local agencies, both through eligibility requirements and express conditions on receiving grants. Such conditions are permissible so long as they encourage but do not compel compliance. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012); South Dakota v. Dole, 483 U.S. 203, 206 (1987). This may be Congress's most common method of regulating policing, but it often poorly used. First, it sometimes is employed to expand the intrusiveness of policing without attention to its harms. See, e.g., 34 U.S.C. § 10461 (defining eligibility grantees to encourage only agencies that encourage or mandate arrests of domestic-violence offenders); see also Harmon, supra, at 904 (2015) (noting "[f]ederal programs often encourage policing that is especially coercive and therefore costly"). Second, when grant conditions have been focused on promoting civil rights or policing that engenders community trust, those conditions have been enforced weakly if at all. See Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal"*: *A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 58-60 (2019) (asserting that the federal government's weak enforcement of the SAFE Streets Act resulted in minimal local policing reforms); BRIAN A. REAVES, U.S. DEP'T OF JUST., NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 29 (2010) (explaining that while the COPS Office originally emphasized community policing, it eventually lost that focus while continuing to hire more officers). For example, the federal Death in Custody Reporting Act conditions federal dollars on reporting on individuals who die at the hands of or while in custody of law enforcement. But reporting has been uneven and often absent, and federal dollars have been withheld so far. Grace E. Leeper, Note, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U. L. REV. 2053, 2088 (2017) (noting that the Death in Custody Reporting Act's financial penalty has never actually been employed); Kenny Lo, *How To Address Concerns About Data on Deaths in Custody*, CTR. FOR AM. PROGRESS, (2021), https://www.americanprogress.org/issues/criminal-justice/reports/2021/05/24/499838/address-concerns-data-deaths-custody/ (describing an "absence of accurate and complete information on the number of people who die in custody and the nature of such deaths").

Congress also has the authority to regulate local policing more directly under Section 5 of the Fourteenth Amendment of the U.S. Constitution, and it should use that power more effectively. Section 5 authorizes Congress to adopt legislation that is necessary to enforce federal constitutional rights, including the rights protected under the First, Fourth, and Fourteenth Amendments. U.S. CONST. amend. XIV, § 5; Sam Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 S. CT. REV. 109 (noting that,

under Section 5, "Congress enjoys a remedial authority to act in a prophylactic fashion to prevent violations ever from occurring"). Congress utilized its Section 5 powers when it passed 42 U.S.C. § 1983, which permits individuals to bring suit against police officials and municipalities for violating their constitutional rights, and when it passed 18 U.S.C. § 242, which makes willful deprivations of federal rights a crime. Monroe v. Pape, 365 U.S. 167 (1961) (interpreting 42 U.S.C. § 1983); Screws v. United States, 325 U.S. 91 (1945) (interpreting 18 U.S.C. § 242); see WHITNEY K. NOVAK, LSB10487, CONG. RSCH. SERV., CONGRESS AND LAW ENFORCEMENT REFORM: CONSTITUTIONAL AUTHORITY 3 (2020) (reviewing Congress' use of its Section 5 power to furnish remedies for deprivations of constitutional rights). More recently, it has used this power to authorize the Attorney General to bring suit against local policing agencies reasonably believed to be engaging in a "pattern or practice" of constitutional violations. See 34 U.S.C. § 12601.

So long as it makes an adequate factual record, Congress also could use Section 5 to address some of the most prominent ills of policing, among them excessive force and racial disparity. The U.S. Supreme Court has held that the Section 5 power can be used to remedy rights violations but not to define the underlying constitutional rights. City of Boerne v. Flores, 521 U.S. 507, 519-524 (1997). However, the Court also has made clear that so long as the remedy Congress chooses is "congruent and proportional" to the rights violation, Congress can exceed the right itself and adopt prophylactic measures. Id. at 520, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000). Using this power, Congress could, for example, use its authority to establish minimum standards around the use of force, or require agencies to collect and report data around stops and arrests in order to make it easier to identify and address patterns of misconduct or racial disparity. See Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CAL. L. REV. 263, 299-301 (2017) (urging Congress to track use-of-force data); RAM SUBRAMANIAN ET AL., BRENNAN CTR. FOR JUST., A FEDERAL AGENDA FOR CRIMINAL JUSTICE REFORM 11 (2020) (urging the federal government to create national certification standards and a police-misconduct database).

What Congress must do to utilize these powers is develop an adequate record that state and local governments are engaging in rights violations. See Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729-738 (2003) (finding extensive evidence of gender discrimination by states justified prophylactic family-care provision of Family and Medical Leave Act). There is ample evidence of such violations, including in the investigation reports of the Civil Rights Division of the Department of Justice. See, e.g., C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 22-45 (2017), https://www.justice.gov/opa/file/925846/download (finding the CPD engaged in a pattern or practice of unreasonable force, including deadly force, in violation of the Fourth Amendment); C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2-3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding Ferguson's law-enforcement practices were partially motivated by discriminatory intent and therefore violated the Fourteenth Amendment's Equal Protection Clause).

Congress also has power under the Commerce Clause of the U.S. Constitution to regulate the tools of policing that move in interstate commerce, including weaponry and surveillance technologies. Congress's power over the channels of interstate commerce is plenary. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536-537 (2012) (noting that Congress's "expansive" commerce power "has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop"). It could dictate, for example, that surveillance technologies used by policing agencies contain certain protections such as self-auditing functions to enhance public transparency. Congress also can regulate the instrumentalities of interstate commerce. United States v. Lopez, 514 U.S. 549, 558 (1995). So, for example, if policing agencies are using databases or algorithms accessed over the internet, Congress could set the terms of such use, including measures to ensure democratic accountability, transparency, and protection against unconstitutional or unauthorized uses.

4. The federal government should promote sound policing, and not detract from it. The problem has not been a lack of power, but one of will.

The federal government has engaged in any number of practices that are contrary to sound policing, or that encourage state and local agencies to engage in conduct contrary to sound policing. For example, it provides grants to policing agencies in ways that circumvent the local democratic process. See Harmon, supra, at 939 (contending that federal programs that provide resources directly to police departments "disrupt the usual means by which communities exert local control over police chiefs and departments"). This actually denigrates principles of federalism and localism rather than supporting them. It has provided technical assistance, grants, and equipment to local policing agencies in ways that were specifically intended to avoid transparency. For example, the federal government encouraged and supported the use of cell-site simulators under terms that prohibited local police from being candid with local officials and judges. See STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., LAW ENFORCEMENT USE OF CELL-SITE SIMULATION TECHNOLOGIES: PRIVACY CONCERNS AND RECOMMENDATIONS 31-32 (Comm. Print 2016) (finding that state and local law-enforcement agencies signed nondisclosure agreements with the FBI that "actively prohibit[ed] the public from learning about the use or role that a cell-site simulator may play in a state or local criminal investigation"); Andrews v. Balt. City Police Dep't, 8 F.4th 234, at 235 n.1, 238, 239 (4th Cir. 2020) (directing a lower court to collect data regarding the Baltimore Police Department's use of cell-site simulators after acknowledging law-enforcement agencies who possess nondisclosure agreements with the FBI "are reluctant to disclose" this information); Adam Lynn, *Defendant Challenges Use of Secret 'Stingray' Cell Device*, NEWS TRIBUNE (Apr. 26, 2015), https://www.thenewstribune.com/news/local/crime/article26283343.html (explaining that Tacoma, Washington's police department refused to publicly discuss its use of cell-site simulators due to its nondisclosure agreement with federal authorities). This sort of conduct is unacceptable. The federal government should be attentive to the principles of sound policing and take care not to undermine them.

The federal government should use its ample powers to foster sound policing. In addition to the formal powers described above, the federal government can lead by example. Federal agencies that engage in policing activities, as defined in § 1.01, should ensure that they do so in a manner that is consistent with the Principles in this volume. Indeed, to the extent that federal policing agencies benefit from national prominence and greater resources, they should strive to exemplify best practices, and not simply adhere to what is required under these Principles or under governing law. See POLICING PROJ., N.Y.U. SCH. OF L. & CTR. FOR CRIM. JUST., UNIV. OF VA. SCH. OF L., POLICING PRIORITIES FOR THE NEW ADMINISTRATION 9 (2020), available at: https://www.policingproject.org/news-main/2020/12/policing-priorities-for-the-new-administration (advocating for the adoption and promotion of national best policing practices).

The federal government also can use the power of the bully pulpit to elevate initiatives and programs that are consistent with these Principles. Over the years, federal task forces and commissions—such as the Kerner Commission in the 1960s and the President's Task Force on 21st Century Policing that convened in 2014—have drawn much-needed attention to prevailing issues in policing, and have identified a variety of steps that agencies can take to address them. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; see RICK LOESSBERG & JOHN KOSKINEN, RUSSELL SAGE FOUND., MEASURING THE DISTANCE: THE LEGACY OF THE KERNER REPORT (2018) (finding that the "Kerner report dramatically called America's attention to the grave disparity between blacks and whites" and that a "surprising number of [its] recommendations were implemented"); Brent Kendall, *Obama-Era Policing Proposals Find Some Success, but Ambitious Ideas Are Slow-Moving*, WALL ST. J. (June 15, 2020, 2:11 PM), https://www.wsj.com/articles/obama-era-policing-proposals-find-some-success-but-ambitious-ideas-are-slow-moving-11592242031 (reporting that, following the President's Task Force on 21st Century Policing, 40 percent of large metropolitan police departments changed their use-of-force policies and updated training protocols). Federal officials can use their authority in less formal ways as well—for example, by providing a national forum for police officials and community leaders who have been working to improve policing practices in various ways.

§ 14.07. External Oversight of Policing Agencies

To promote sound policing and accountability, states and localities should consider developing and maintaining formal external oversight entities to:

(a) elevate the values, concerns, and community-safety priorities of the public, particularly in communities most impacted by policing, so that these views can inform decisions relating to sound policing and accountability;

(b) increase transparency and understanding of policing policies, practices, outcomes, and decisions;

(c) facilitate the development of policing policies and practices that are effective, consistent with sound policing, and reflective of the values and priorities of communities, including those most impacted by policing; and

(d) provide independent evaluation of policing policies, practices, incidents, and disciplinary decisions to determine whether they are consistent with sound policing and accountability.

Comment:

a. External oversight entities. This Section covers formal, government-established entities that provide ongoing oversight of policing agencies independent of the agencies themselves. Generally created via local charter or ordinance, these entities include: police commissions; civilian/community oversight boards; inspectors general or auditors; and boards focused on particular topics (such as law enforcement use of surveillance technology). This Section does not address external oversight entities that have no formal government backing or relationship with the agencies they oversee (such as copwatching programs), entities that serve solely an advisory function or include members selected solely by the police chief (such as community advisory boards), nor those that are internal to the policing agency (such as internal affairs bureaus). This Section also does not address ad hoc commissions or task forces, whether created to evaluate an agency, incident, or the state of policing in general, or criminal investigations or prosecutions of officers. Agency review of significant adverse incidents and patterns of incidents is addressed in § 13.08. Criminal investigations of officers are addressed in § 14.12.

b. Purposes of external oversight. Historically, governments tend to create external oversight agencies when members of the public lose confidence in a policing agency's ability to hold itself or its officers accountable to community standards. However, even agencies that are not in crisis and that maintain internal supervision, discipline, and incident-review systems, as discussed in Chapter 13, may not have the objectivity, latitude, incentives, or breadth of perspective to facilitate sound policing on their own. Localities thus should consider whether external oversight may promote sound policing in the jurisdiction.

Research into the efficacy and cost-effectiveness of external oversight is limited. Rather than recommending any particular form of oversight, this Section sets out the purposes that external oversight might serve and identifies characteristics and conditions that may facilitate

external oversight, whatever its form. In considering whether, and what types of, external oversight might meet a jurisdiction's needs, jurisdictions should recognize that external oversight alone will not ensure sound policing. Rather, external oversight may serve as one component of a jurisdiction's overall efforts to secure sound policing.

As set out in this Section, oversight bodies can serve a variety of functions. Jurisdictions should choose the type, responsibilities, and authority of external oversight bodies with care. An entity is unlikely to be successful if its mission is unclear or it is not given the resources and tools to fulfill that mission. When a jurisdiction decides to establish more than one oversight entity, it should strive to ensure the functions of the entities are complementary so as to minimize unnecessary bureaucracy and redundancy.

(1). Elevating perspectives of impacted communities. Oversight entities for policing agencies, like other formal bodies in a democracy, may facilitate public participation and incorporate outside expertise or review. Entities that provide external oversight of policing should be especially attentive to elevating the perspectives of those most in need of sound policing and those who disproportionately suffer policing's negative effects. These individuals and communities may be politically marginalized and thus underrepresented in other means of governing the police.

External oversight entities can serve this function by recruiting members and staff from underrepresented communities and by directing individuals experienced in outreach to solicit values, concerns, and priorities from a broad swath of the public, including impacted communities. Once an entity identifies these insights and perspectives, it can memorialize and convey them to the public and to public officials through publications, meetings, and public forums, and evaluate whether existing agency directives and practices adequately address them. In this way, external oversight agencies may align policing policies and practices more closely with the values and priorities of the communities they serve.

(2). Increasing transparency. Communities cannot govern policing meaningfully if they lack access to agency policies, data about officer activities, and information about the impact of police activities. Without such access, the public does not have a full understanding of the standards to which an officer should be held accountable, or how well individual officers or the agency as a whole measures up. External oversight entities can promote agency transparency by collecting, analyzing, publicizing, and explaining data about police practices and outcomes; publicly reporting the findings of their evaluations of agency systems, practices, and incidents; and

explaining agency rules and directives. Section 1.05 addresses the connection between transparency and accountability more broadly. Section 14.10 considers in greater depth the specific role of other actors in ensuring appropriate data collection, and public access to that information.

(3). Providing independent and informed guidance. Because external oversight entities are independent from policing agencies, their members and staff are likely to have different perspectives and incentives than those who work within agencies. Entities also may have access to broader experience and expertise, both through the members and staff, and through outreach to communities. These elements of external oversight can be useful in promoting policies and practices that address a full range of public concerns and priorities, including those easily overlooked or ignored. For example, external oversight entities can be structured to identify police practices that most negatively affect a community; evaluate the practices to determine whether and how they can be changed; propose policy and training interventions to implement new practices; and confer with stakeholders, including community members and officers, about their recommendations.

(4). Evaluating practices and incidents. The independence and differing incentives of external oversight bodies may result in more objective and critical investigations and evaluations of police practices and incidents than those conducted internally. External oversight entities may be less invested in an existing practice than a policing agency, and they do not face the same pressures and conflicting interests as internal actors when assessing officer conduct or recommending discipline. As a result, entities that are adequately trained, empowered, and resourced may promote officer and agency accountability and community trust in ways that agencies alone cannot.

c. Characteristics of external oversight entities. Existing external oversight entities vary substantially in their roles and powers. Traditional civilian-review boards review agency investigations of officer misconduct when citizens complain or, sometimes, carry out misconduct investigations. Today, external oversight entities also are being empowered to evaluate agency practices and to weigh in on new policies or the hiring of chiefs. Some entities participate in police budgeting and priority-setting.

Oversight entities also differ in how they are structured. Members may be elected or appointed by mayors, and sometimes the members are from targeted communities or groups. Some entities, such as inspectors general and police auditors, hire experts and focus on systemic oversight responsibilities, even if they also have incident-specific responsibilities.

No single structure or scope of oversight will serve all communities. Nevertheless, whatever its form, an external oversight entity is unlikely to fulfill its intended mission unless it is independent, legitimate, resourced, and transparent. Rather than promote sound policing, an unsuccessful external oversight entity may reduce community confidence in the police and the government. For this reason, jurisdictions should attend to these characteristics when developing and maintaining external oversight entities.

External oversight entities should be independent from the agencies they oversee. To generate independence, jurisdictions should avoid formal and informal constraints on the entity that could undermine its objectivity or give police officials or political actors undue influence or control over its decisionmaking.

External oversight entities should act in ways that build public trust and legitimacy between an agency and stakeholders, including underrepresented members of the public. Independence may help promote this legitimacy. So may including members from a cross-section of the public. When an oversight body takes the form of an auditor or professional monitor, and therefore is not a multiple-member body, jurisdictions should consider other means of incorporating community participation within the organization, such as hiring community members and leaders as staff, or having a regularized process of obtaining community input. Regardless of community representation within the entity, external oversight entities also should be intentional and consistent about learning from the communities they serve through individual outreach, public forums, and other means.

External oversight entities require adequate support to be successful. Jurisdictions should provide an oversight entity with a clear legislative mandate, one that communicates to stakeholders the scope of the entity's authority. An entity also should be given ongoing financial, political, and practical support necessary to pursue its mission. External oversight entities require staff, office space, and training. An oversight entity may need access to agency data, including information systems, incident reports, and officer records. It might need access to agency personnel, including cooperation from command staff and officers, to assess incidents or practices or to offer recommendations on policies. Some oversight entities may need to observe trainings, to watch disciplinary hearings, or to view the scenes of officer uses of force or alleged misconduct. Others may need subpoena power or directives to the policing agency that ensure full cooperation with the oversight entity. Without adequate initial and ongoing support, oversight is likely to be illusory.

Oversight entities also should have the authority and capacity to inform the public about their work and internal processes and report findings to the public. Oversight entities also should collect and make public sufficient data concerning their activities to enable the community to assess whether an entity is achieving its intended objectives.

REPORTERS' NOTES

As this Section suggests, communities struggle to develop and maintain effective external oversight entities for police departments. Such entities come in many forms, and it can be difficult to choose among them. Communities sometimes fail to give oversight entities adequate authority or resources, and they may face legal constraints in designing effective oversight entities. Even well-designed, well-supported entities may be plagued by unrealistic expectations, problematic relationships with the agency they oversee, and institutional deficiencies.

Designing external oversight. Although oversight bodies have been around for decades, communities will find little social-science research to help them choose among possible forms or design effective entities. Until more research is available, communities should gather information about the various options in external oversight entities and then consider which form or forms might best meet the jurisdiction's needs. See JOSEPH DE ANGELIS, RICHARD ROSENTHAL & BRIAN BUCHNER, OFF. OF JUST. PROGRAMS, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: ASSESSING THE EVIDENCE 52 (2016) (recommending that jurisdictions focus on "best-fit" rather than "best practices" when considering how to structure external police-oversight structures).

In designing oversight bodies, communities should consider that oversight entities vary in character. Some entities focus exclusively on either *front-end* or *back-end* oversight. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1877 (2015) (distinguishing between "front-end" and "back-end" accountability). When an entity engages in front-end oversight, it provides input on policing directives (for example, laws, rules, and policies) and practices before they are put into place, and it often aims to increase public participation in the development of these policies and practices. See Maria Ponomarenko, *Rethinking Police Rulemaking,* 114 NW. U. L. REV. 1, 45-50 (2019) (proposing greater use of front-end "regulatory intermediaries" like police commissions to provide broader governance around how police decisions are made); *Front-End Voice in Policing*, POLICING PROJECT, https://www.policingproject.org/front-end-landing (last visited Nov. 11, 2021) (describing front-end accountability as requiring "robust, direct engagement between police and community members . . . to ensure that policing truly reflects community priorities and values"). By contrast, entities engaging in back-end oversight may assess whether officers or agencies followed policies and other directives, and they may evaluate the impact of policies or practices already in place. See MICHAEL VITOROULIS, CAMERON MCELLHINEY, & LIANA PEREZ, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., THE EVOLUTION AND GROWTH OF CIVILIAN OVERSIGHT: KEY PRINCIPLES AND PRACTICES FOR EFFECTIVENESS AND SUSTAINABILITY 7-10 (2021), https://cops.usdoj.gov/RIC/Publications/cops-w0951-pub.pdf (discussing "review-focused" and "investigation-focused" oversight models, both

of which focus on investigating or adjudicating complaints about officer conduct); Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 655 (2003) (describing limitations of citizen review boards' "focus on the retrospective investigation of complaints as a principal mechanism for rooting out officer malfeasance and enhancing the performance of police").

Front-end and back-end oversight may each improve police legitimacy and accountability in different ways. Front-end oversight promotes higher quality and increased legitimacy of police practices by facilitating broader input and expertise from the outset and by putting in place policies and systems that prevent police harm from occurring. Back-end oversight can increase police legitimacy and deter future police harm by ensuring that officers are held accountable for misconduct more consistently and fairly than internal agency mechanisms are likely to achieve on their own.

Relatedly, some oversight entities focus on *systemic* features of policing (for example, an agency's policies and practices related to domestic-violence calls); others examine particular police *incidents* (for example, the handling of complaints of discrete instances of misconduct, such as a particular police shooting or a police agency's response to a protest). See Livingston, *The Unfulfilled Promise of Citizen Review*, supra at 654 (contrasting "problem oriented" oversight with "rule enforcement" oversight). Incident- or enforcement-focused oversight may provide insight into what went wrong in a given adverse instance and may promote officer accountability by ensuring each incident is thoroughly and objectively evaluated. Oversight with a more systemic or problem-solving focus may have a broader impact by identifying agency dynamics that contribute to ongoing patterns of harmful police conduct. Ponomarenko, *Rethinking Police Rulemaking*, supra at 45-46; WALKER, supra, at 135-136. Federal oversight bodies are not addressed in this principle, which confines itself to community-based oversight. Nevertheless, federal inspectors general serve as examples of systemic oversight in that they conduct independent audits and investigations relation to agency programs and operations to identify inefficiency and abuse within agencies. By contrast, the most traditional form of external oversight—a review board authorized only to investigate and/or review police investigations of complaints about officer misconduct—acts solely as a back-end, incident-based form of oversight. WALKER, supra at 36-38, 135; Livingston, *The Unfulfilled Promise of Citizen Review*, supra, at 654-661. Police auditors or monitors are generally viewed as taking a more systemic and, often, front-end approach. VITOROULIS, THE EVOLUTION AND GROWTH OF CIVILIAN OVERSIGHT, supra, at 7 (contrasting review- and investigation-focused models as typically focused on individual complaints, and auditor/monitor-focused model as "all focused on large-scale systemic law enforcement reform"); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 135 (2005) (discussing the focus on "organizational change" rather than investigation of "individual complaints" as the "crucial aspect" of the police auditor).

Oversight entities may include both back-end and front-end oversight, and both systemic and incident-level review. The New Orleans Independent Police Monitor, for example, conducts prospective reviews of police practices and issues reports with recommendations; responds to the scenes of critical incidents and then reviews the investigations of those incidents; regularly meets

with community groups; and runs a misconduct-complaint mediation program. Jessica Williams, *New Orleans Independent Police Monitor Gets Good Marks from Review Panel*, TIMES-PICAYUNE/THE NEW ORLEANS ADVOC. (July, 28, 2019), https://www.nola.com/news/crime_police/article_ba475272-ae54-11e9-b590-df8dc09b6dac.html; *The New Orleans Independent Police Monitor*, OFF. OF THE ORLEANS INDEP. POLICE MONITOR, https://nolaipm.gov/ (last visited Nov. 11, 2021). Increasingly, communities are expanding the authority of entities formed to conduct incident review, allowing them to analyze department policies and procedures and make recommendations based on that analysis. VITOROULIS, THE EVOLUTION AND GROWTH OF CIVILIAN OVERSIGHT, supra, at 7.

Empowering oversight entities to conduct front-end, systemic oversight may not be enough to ensure that oversight elevates the perspectives of impacted communities. The Seattle Community Police Commission is comprised of 21 community representatives and employs specific selection criteria to ensure broad geographic representation and diversity of perspective. The Commission is required to hold public meetings at least once per month and to provide recommendations on a broad swath of organizational concerns, from recruiting and promotional practices, to training and accountability. SEATTLE, WASH., ORDINANCE 125315 (2017). Similarly, Chicago's primary front-end oversight efforts include both a Community Commission for Public Safety and Accountability, with members appointed by the mayor, and district councils elected by residents of each police district. The seven-member commission has the authority to draft and approve policies for the police department and to nominate candidates to head the police department, while the district councils work with and advise the commission about community concerns. *Chicago Passes Legislation to Create a Community Oversight Board for Public Safety*, POLICING PROJECT (July 31, 2021), https://www.policingproject.org/news-main/2021/7/31/chicago-passes-legislation-to-create-a-community-oversight-board-for-public-safety.

Some communities are adopting a new, narrower form of oversight in which the entity focuses on a single policing issue. The Oakland, California, Standing Privacy Advisory Commission is one such body. *Privacy Advisory Commission*, CITY OF OAKLAND, https://www.oaklandca.gov/boards-commissions/privacy-advisory-board (last visited Nov. 11, 2021). Subject-based entities emphasize front-end, systemic function, but may also be tasked with back-end systemic and specific oversight. The Oakland Privacy Commission, for instance, evaluates both the acquisition and uses of certain technologies. See OAKLAND, CAL., ORDINANCE NO. 13349 (2015) (stating that the commission will "provide advice and technical assistance on best practices to protect privacy concerns in the City's use of surveillance equipment and other technology that collects or stores citizen data").

Although research is limited, commentators generally agree that an external-oversight body is unlikely to succeed if it is not: independent from the agency it is overseeing; legitimate in the eyes of the public; adequately resourced and supported; given access to the information, people, and places necessary to fulfill its mandate; and transparent to the community and agency. See also JOSEPH DE ANGELIS, RICHARD ROSENTHAL & BRIAN BUCHNER, OFF. OF JUST. PROGRAMS, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: ASSESSING THE EVIDENCE 36 (2016) (detailing 12

core elements of successful oversight: independence; adequate jurisdictional authority; unfettered access to records; access to law-enforcement executives and internal-affairs staff; full cooperation; support of process stakeholders; adequate resources; public reporting or transparency; pattern analysis; community outreach; community involvement; respect for confidentiality requirements); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 168-169 (2005) (identifying similar principles as being essential for an effective police auditor's office).

External oversight often is undermined by the failure of policymakers to provide the resources necessary for the entity to carry out the tasks it has been assigned. For example, an agency composed of part-time volunteers or limited staff may be unable to fulfill its mandate to investigate every misconduct complaint. To limit their workloads, some entities have created artificial barriers to access, for example, by requiring complainants to sign sworn affidavits, rejecting anonymous complaints, or refusing to investigate older complaints. See, e.g., U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 47 (2017). Similarly, to speed resolution of complaints, entities have sometimes misused valid oversight tools, such as mediation, in a manner that undermines both the effectiveness of oversight and public confidence. See, e.g., id. at 50, 54-56. Overwhelmed oversight agencies may even fail to investigate the most serious incidents, severely undermining entity effectiveness and public confidence. Kelly Davis, *Police Oversight Group Set to Dismiss 22 Death Cases Without Investigation*, VOICE OF SAN DIEGO (Nov. 13, 2017), https://www.voiceofsandiego.org/topics/public-safety/police-oversight-group-set-dismiss-22-death-cases-without-investigation/ (reporting an oversight entity's unnecessary dismissal of 22 in-custody death cases amidst internal turmoil and a "growing backlog" of death cases). Communities can help avoid these dynamics by making available resources to hire sufficient numbers of qualified staff and ensuring that those staff are well trained in policing and oversight.

Jurisdictions also may hamstring entities from the outset by failing to give them sufficient authority to fulfill their mission. For example, some believe that an agency without the power to subpoena officers may not be able to credibly, robustly investigate incidents of alleged misconduct. See *Community Oversight Paves the Road to Police Accountability*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF L. ENF'T, https://www.nacole.org/community_oversight_paves_the_road_to_police_accountability (last visited Nov. 11, 2021) (asserting that localities should give oversight entities broad subpoena authority to "empower" them and make oversight meaningful). But see *Should the Oversight Entity Have Subpoena Power?*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF L. ENF'T, https://www.nacole.org/subpoena_power (last visited Nov. 11, 2021) ("If you are able [to] include subpoena power in the agency's enabling legislation, by all means, include it. If you are unable to, this is not a roadblock to effective civilian oversight.").

Even if an oversight entity has sufficient authority on paper, official intransigence or informal norms can undermine its effectiveness. In Chicago, for example, the mayor rejected all three candidates nominated by the Chicago's Police Commission for police superintendent, though the oversight body was charged with selecting candidates, and the mayor was required to choose from among them. Fran Spielman & Frank Main, *Rahm's Surprise Top Cop Pick—a Sun Times Exclusive*, CHI. SUN TIMES (Mar. 27, 2016 8:21 PM), https://chicago.suntimes.com/2016/3/27/183

60746/rahm-s-surprise-top-cop-pick-a-sun-times-exclusive. In other cities, police agencies ignore reasoned oversight entity findings regarding incidents or recommendations made, after careful evaluation, about policing practices. See Nicole Dungca & Jenn Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back,* WASH. POST (Apr. 27, 2021), https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability/ (describing an instance in which a police chief sought to overturn an oversight entity's recommendation by appealing to the city council). When officials casually dismiss credible findings or sound recommendations of a legitimate oversight agency, they compromise the entity's ability to fulfill its function, and they undermine its credibility and efficacy. Jurisdictions should ensure that oversight entities are granted the authority they need to fulfill their mandate. Officials in the jurisdiction should respect decisions when they are required to do so, and take seriously other findings and recommendations by oversight bodies.

External oversight entities also respond to stakeholders with conflicting interests and perspectives. If they get too close to some, they risk losing legitimacy in the eyes of others. For example, external oversight entities may so thoroughly adopt the incentives of the police agencies they oversee that they are no longer viewed as truly independent or representative of other values and perspectives. See DAVID CHO, ET AL., RESTORING PUBLIC CONFIDENCE: RECOMMENDATIONS FOR IMPROVING OVERSIGHT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 10 (describing a critique of the Los Angeles Sheriff's Department Office of Independent Review as not being truly objective because it was not truly independent of the agency). Entities viewed as "captured" in this way quickly lose public trust. On the other end of the spectrum, an external oversight entity may, legitimately or otherwise, be viewed by the police agency as having a bias against the police agency or otherwise being unable to carry out its responsibilities fairly and competently. This view may lead officers, command staff, and public officials to resist the entity's processes, findings, and recommendations. Jurisdictions can help equip oversight entities to balance these competing pressures effectively. They might, for example, on one hand, ensure structural independence and, on the other, require that oversight officials and staff receive training in policing practices and challenges and maintain regular communication with the policing agency.

State and local law and collective-bargaining agreements may generate legal obstacles to effective oversight. In extreme cases, localities are prohibited by state law or union contract from requiring civilian oversight of law enforcement. See VA. CODE ANN. § 9.1-601 (West) (allowing police departments to establish civilian oversight bodies but excluding sheriff's offices from being subject to civilian oversight); Nicole Dungca & Jenn Abelson, *When Communities Try to Hold Police Accountable, Law Enforcement Fights Back,* WASH. POST (Apr. 27, 2021), https://www.washingtonpost.com/investigations/interactive/2021/civilian-oversight-police-accountability/ (noting that a police union contract in New Bedford, Massachusetts, includes a clause that states, "There will be no Civilian Review Boards in the New Bedford Police Department"). In other jurisdictions, limitations on making public certain information about officer discipline may deny oversight entities access to information essential to their mission. See, e.g., Oakland Police Officers' Ass'n v. City of Oakland, 277 Cal. Rptr. 3d 750, 753 (Cal. Ct. App. 2021), as modified on denial

of reh'g (May 13, 2021), review denied (July 28, 2021) (holding that agencies do not have an obligation to disclose confidential material pending investigation). In still others, state law may prohibit civilian oversight entities from exercising subpoena power. Rebecca Panico, *N.J. Supreme Court on Wrong Side of History for Stripping Civilian Police Board of Subpoena Power, Activists Say,* NJ.COM (Aug. 21, 2020 12:12 AM), https://www.nj.com/essex/2020/08/nj-supreme-court-on-wrong-side-of-history-for-stripping-civilian-police-board-of-subpoena-power-activists-say.html. Securing external oversight thus may require a multi-step, multi-year process, starting with making changes at the state level.

Smaller jurisdictions face distinctive challenges when they consider external oversight. Half of all law-enforcement agencies in the United States have fewer than 10 officers. Mark Berman, *Most Police Departments in America are Small. That's Partly Why Changing Policing is Difficult, Experts Say.*, WASH. POST (May 8, 2021 4:59 PM), https://www.washingtonpost.com/nation/2021/05/08/most-police-departments-america-are-small-thats-partly-why-changing-policing-is-difficult-experts-say/. A small jurisdiction may not have enough funding or complaints to justify hiring a police auditor or establishing a civilian review board on its own. Still, it may choose to establish a more limited version of oversight through a small commission or committee. Alternatively, smaller jurisdictions may be able to pool resources with surrounding communities to create multijurisdictional oversight entities. More research is needed on oversight options for smaller jurisdictions, and federal and state actors should consider whether external support for oversight in small jurisdictions is appropriate.

Even when a community has carefully selected the form of oversight entity that best suits its objectives (within any legal constraints) and has ensured that the elements essential to success are in place, external oversight entities' perceived success may be hampered by unrealistic stakeholder expectations. Community members may not understand the limits of an entity's design and therefore may feel betrayed when the entity does not achieve objectives outside its reach. Or community members may assume that an oversight entity can compensate for elected officials, judges, and others who fail in their obligations to govern policing in the manner other Sections in this Chapter underscore. External oversight also cannot take the place of broader community efforts to reduce the harms of policing, including efforts to achieve public safety through actors other than police. See § 14.09.

In addition, oversight entities face some of the same obstacles to generating effective police accountability as policing agencies themselves do. For example, even a thorough investigation often cannot generate sufficient evidence to resolve a factual dispute over an incident of alleged misconduct. Individuals involved in external oversight may suffer the same biases, both implicit and explicit, that can unfairly skew decisions by officers. Community hostility and unmanageable workloads can compromise investigations and policy audits and make it difficult to retain good staff in both policing agencies and oversight entities. Communities should recognize that establishing external oversight does not resolve all of these problems; rather, it creates a different, possibly more favorable, environment in which to seek accountability and to attempt to mitigate these longstanding challenges to police accountability.

Jurisdictions also can help mitigate unrealistic expectations of external oversight entities by engaging in inclusive planning when developing oversight. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 26 (May 2015) (recommending that civilian oversight be established in accordance with the needs of the community and with input from local law-enforcement stakeholders). Some communities have used working groups and task forces successfully to assess community oversight priorities and identify oversight forms best suited to those objectives. See, e.g., U.S. DEP'T OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 113-114 (Mar. 16, 2011). Incorporating stakeholders in early planning can help avoid some pitfalls in developing external oversight, and may at least prepare oversight advocates for the work ahead. Jurisdictions also may manage expectations by evaluating in detail how proposed oversight entities will carry out each oversight objective and what resources are likely to be necessary to fulfill their mission.

External oversight of policing agencies is made more difficult because little evidence exists about which approaches to oversight are successful, and which are not. Without tools to evaluate oversight entities, communities cannot easily replicate the success of others or revise or discontinue ineffective models. Without evidence, politics rather than effectiveness may determine whether an oversight agency continues or dies, and communities may waste resources and undermine community trust with ill-fated oversight efforts. See, e.g., Betsy Graef, *The Seattle Community Police Commission: Lessons Learned and Considerations for Effective Community Involvement,* 14 SEATTLE J. FOR SOCIAL JUST. 1, X (2016). To promote evaluation, jurisdictions should require oversight entities to collect and make public information about their work, and, when possible, should partner with researchers and experts to assess oversight effectiveness. See § 14.11.

Finally, communities and local governments should recognize that effective external oversight of policing is challenging and that community conditions constantly change. Communities should commit to evaluating entities and revising oversight bodies that are not working as intended. Although it is possible to undermine oversight by changing its structure and entities too frequently, communities adhering to moribund systems, rather than developing something new, are more likely to damage their ability to achieve their oversight goals.

§ 14.08. Minimizing Interference with Officer Accountability

(a) Legislative and executive bodies at each level of government—federal, state, and local—should not adopt laws or promulgate regulations that undermine sound policing or officer accountability within agencies, and they should repeal or amend current laws and regulations that do so.

(b) Legislative bodies, the executive branch, and policing agencies should not agree to collective-bargaining-agreement provisions that unduly interfere with officer accountability

or sound policing, and they should seek to renegotiate agreements, formal or informal, that do so.

Comment:

a. Impact of labor agreements and employment laws on officer accountability. Among government employees, the police are unique: they have unparalleled power and authority over the public, and when they engage in misconduct, they can cause great harm. One critical way agencies encourage conduct consistent with sound policing and earn community trust is by holding officers responsible for misconduct. A well-functioning system for dealing with complaints against police officers and imposing appropriate consequences for misconduct is essential to sound policing. See § 13.07.

Labor and employment laws, including civil-service rules and regulations, promote fair treatment of employees. Labor organizations also play an acknowledged and appropriate role in advocating for better wages, benefits, and conditions of employment. The protections afforded by law and negotiated by labor organizations help ensure that, when employees are accused of wrongdoing or mistakes, they are treated appropriately during investigations and disciplinary proceedings. This is true for law-enforcement officers, as it is for other public employees.

Some statutes, regulations, and agreements, however, have granted officers protections that go beyond what is needed to secure fair treatment. These protections instead prevent agencies from investigating and terminating officers when it is appropriate to do so, or even disciplining or reassigning officers who undermine sound policing and cause harm. In some respects, existing laws and policies offer greater protection to officers facing administrative penalties, such as a suspension or loss of vacation time, than the criminal legal system provides to individuals facing criminal sanctions, such as imprisonment. Although the line between ensuring fair treatment and interfering with appropriate discipline can be difficult to draw, legislative and executive bodies, and policing agencies themselves, need to draw that line. To promote sound policing, they should ensure that state and local laws and regulations, collective-bargaining agreements, and other agreements or policies, whether formal or informal, do not interfere unduly with officer accountability.

b. Law enforcement "Bills of Rights" and similar statutory protections. Legislatures in approximately 20 states have passed statutes or provisions that create protections for law-enforcement officers subject to administrative investigations and disciplinary proceedings that are

not available to other public employees. These provisions often are included in statutes named "Law Enforcement Officers' Bills of Rights" (LEOBORs), although they are also found in other statutory frameworks.

Some of these provisions require agency investigators to wait days to interview an officer accused of serious misconduct or involved in a serious use of force, such as a shooting. Some prohibit agencies from disciplining an officer found to have committed misconduct unless they communicate the discipline to the officer within an unreasonably short period of time. Other provisions limit the types of discipline an agency can impose, for example, by prohibiting reassignment, or making it difficult for managers to break up problematic policing units or ensure an officer is not in a unit in which they are more likely to cause harm. Some statutory protections can make it challenging to gain a full understanding of an officer's course of conduct over time by permitting or requiring that jurisdictions conceal or destroy records of complaints or misconduct. Still other provisions effectively prohibit some forms of external oversight of policing by entities charged with investigating officer misconduct. See § 14.07 (External Oversight of Policing Agencies).

These and similar statutory provisions, which enshrine protections unique to law-enforcement officers into state law, can make it overly difficult for agencies to investigate and address officer misconduct, and can prevent jurisdictions from undertaking measures necessary to promote police accountability and sound policing. Moreover, these statutory protections generally cannot be countermanded by local law or agency policy. As a consequence, LEOBORs and statutes with these and similar provisions can also render moot local efforts to ensure that rules, policies, and agreements, including collective-bargaining agreements, do not undermine officer accountability.

In recent years, members of the public have expressed concern about LEOBORs, and studies have suggested a link between such laws and increases in the harm caused by police. Consequently, some states have rescinded or revised their LEOBORs. The legislatures of every state with a LEOBOR or other statutory provisions granting unique protections to law-enforcement officers should scrutinize those laws and take action to ensure that state law does not unduly interfere with officer accountability and other elements of sound policing.

c. Collective-bargaining agreements. Even when state laws do not interfere with officer accountability, local governments may bargain away important features of an effective accountability system. In doing so, they frustrate sound policing.

Most states permit or require local governments to bargain with police unions regarding wages, benefits, and conditions of employment. Police unions thus generally have the same ability as other public employees to bargain over procedural protections during misconduct investigations and disciplinary proceedings. However, many jurisdictions have agreed to collective-bargaining agreements (CBAs) with officers, which provide investigatory and disciplinary protections that are far more expansive than those afforded to other public employees.

It is not uncommon for police CBAs to dictate in minute detail the procedures regarding the intake of misconduct complaints, to specify how administrative investigations must be conducted, or to prescribe the precise disciplinary processes and penalties for police misconduct. Like LEOBORs, CBAs often include provisions requiring agency investigators to wait for days before interviewing an officer who has killed someone or who has been accused of serious misconduct. They may prohibit external oversight by nonofficers, require arbitration to affirm discipline meted out by the agency, or set unreasonably short time limits for agency discipline after misconduct has been committed. CBA provisions may prohibit anonymous complaints, require that complaint and disciplinary records be expunged, or bar public disclosure of such records.

Like provisions in LEOBORs and similar state laws, CBA provisions such as these may inhibit agencies from holding officers appropriately accountable for misconduct and may prevent jurisdictions from identifying and addressing patterns of misconduct or ensuring sound policing. Destroying officers' disciplinary histories, for example, both compromises officer accountability in individual cases and makes it more difficult for external oversight entities to evaluate an agency's systems for handling complaints and responding to incidents of officer misconduct. Arbitration provisions can result in meritorious disciplinary decisions being overturned, or can reduce disciplinary penalties, compromising both accountability and efforts by agency and city leadership to remove unsuitable officers from policing.

Jurisdictions should avoid provisions in CBAs that frustrate accountability or undermine sound policing. Reaching this objective may require changing how CBAs are negotiated. Jurisdictions should render CBA negotiations transparent and publicly accessible so that members of the public have the opportunity to understand negotiations and offer input on provisions that

affect the public. Jurisdictions also should prohibit informal side agreements with unions, especially those that offer special protections for officers during investigations and disciplinary proceedings; and if such agreements are made, they should not be treated as binding.

REPORTERS' NOTES

As they do for other public employment, unions and employment-protection laws serve an important function in policing. At the same time, the power and history of police unions, as well as the unique features of policing in the United States, mean that labor protections often have different consequences in policing than in other public employment sectors. When bargaining with police unions and considering policing laws and regulations, public officials should be attuned to these dynamics and should understand how they play out for their constituents, especially those most negatively impacted by policing, than they have in the past. See Walter Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy*, 74 SMU L. REV. 419, 435-436 (2021) (describing political leaders as having succumbed to regulatory capture in their dealings with police unions); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1192, 1215 (2017) (arguing that the conditions under which most municipalities negotiate police-union contracts are susceptible to regulatory capture).

Perhaps no law impacts police accountability and sound policing more than civil-service law. Civil-service laws arose in the late 19th century to reduce political patronage and increase merit-based public employment. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1192, 1207 (2017). Now, states overwhelmingly have civil-service statutes that apply to local law-enforcement officers, and those statutes cover many employment actions germane to police accountability, including demotions, transfers, terminations, training, attendance, safety, grievances, pay and benefit determinations, and position classification. Id. As both policing scholars and the U.S. Department of Justice have noted, civil-service laws have become a potent defensive tool that officers routinely use to challenge disciplinary and corrective actions on both procedural and substantive grounds. See Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 796 (2012) (civil-service and employment laws act as an immediate "tax" on efforts to hold officers accountable); U.S. Dep't of Just., Report of the Investigation of the New Orleans Police Department 96-100 (2011) (setting out impact of civil-service commission review on agency disciplinary decisions). Little research exists about how civil-service laws affect officer accountability and sound policing, but local legislative and executive bodies would do well to consider the intricacies of these laws and their impact on policing in their communities.

Like civil protections, police unions first emerged in the late 19th century. Like other labor unions, early police unions sought to improve the pay and working conditions of officers. However, these early police unions faced public hostility that stunted their growth for decades. Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2206 (2014) (recounting causes and impact of "disastrous" Boston Police Department strike of 1919); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 713, 734-737 (2017) (setting out

history of police unions). Police unions only gained a "lasting foothold" in American policing after they reemerged in the 1960s in response to police reform efforts. See Fisk & Richardson, supra, at 736. Rather than focus on economics, civil-rights era police unions opposed affirmative action, external oversight entities, and other civil-rights-movement demands aimed at addressing police brutality and race discrimination. See Samuel Walker, *Institutionalizing Police Accountability Reforms*, 32 ST. LOUIS U. P.L. REV. 57, 69 (2012). In this period, police unions were helped along by rising crime, which encouraged public officials to expand agencies and give officers increased power and latitude. See Jamein Cunningham, Donna Feir & Rob Gillezeau, *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights*, at 3 (2020). http://craftmediabucket.s3.amazonaws.com/uploads/LEOBR_Cunningham_12_3_20.pdf.

Today, only a handful of states prohibit police departments from engaging in collective bargaining, and 41 states either permit or require collective bargaining with police unions. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1192, 1204 (2017). The U.S. Department of Justice estimates that two-thirds of officers are employed by departments that engage in collective bargaining. BRIAN A. REAVES, U.S. DEP'T OF JUST., LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), http://bjs.gov/content/pub/pdf/lpd07.pdf. Other estimates are even higher. See, e.g., Cunningham, et al., supra (estimating 75 percent). The Fraternal Order of Police (FOP) purports to be the largest law-enforcement labor organization, with over 300,000 members, although not all FOP chapters have bargaining authority. Fraternal Order of Police: Government & Media Affairs, https://fop.net/government-and-media-affairs/about/.

Today's police unions continue to oppose many of the same accountability and reform efforts that prompted their rise in the 1960s. See, e.g., Walker, supra, at 69 (police unions continue to be the "principal opponents of affirmative action in police hiring and the creation of independent citizen oversight mechanisms."); Fisk & Richardson, supra, at 737. In addition to their efforts, discussed below, to secure special disciplinary protections for police officers, unions increasingly oppose police reforms more generally. They have, for example, opposed requiring data collection for traffic stops and tracking and sharing information about police uses of force and misconduct complaints. They also have resisted community efforts to create external oversight of policing. See, e.g., Fisk & Richardson, supra, at 744-747; William Finnegan, *How Police Unions Fight Reform*, THE NEW YORKER (July 27, 2020).

Police labor organizations have, through collective bargaining and lobbying, achieved robust legal protections for officers. Those protections routinely exceed those available to other public employees. They often are embedded in statutes named "Law Enforcement Officers' Bills of Rights" (LEOBORs). A few states have repealed or reformed LEOBORs recently; still, 20 states have such statutes protecting officers. See Michael Levenson & Bryan Pietsch, *Maryland Passes Sweeping Police Reform Legislation*, N.Y. TIMES (Apr. 10, 2021) (reporting Maryland's repeal of the nation's first LEOBOR, among other legislative reforms); Wes Muller, *New Police Reforms Coming to Louisiana*, LA. ILLUM. (July 7, 2021) (reporting new police-reform laws including mild revisions to the state's officer bill of rights). National Conference of State Legislatures, Law Enforcement Officer Bill of Rights https://www.ncsl.org/research/civil-and-criminal-justice/law-

enforcement-bill-of-rights.aspx (detailing states that have LEOBORs). Those provisions generally deprive local communities of the ability to impose stricter accountability measures on officers who serve that community.

LEOBOR provisions and collective-bargaining agreements can impact the accountability process from beginning to end. They limit who may file a complaint of police misconduct and how they may file it. See Fisk & Richardson, supra, at 750 (listing restrictions on which complaints will be investigated, including refusing to investigate anonymous complaints, as among those contractual provisions that are potentially problematic for reform efforts). They impose overly restrictive limits on how quickly misconduct investigations must be initiated and completed. See Christopher Harris & Matthew M. Sweeney, *Police Union Contracts: An Analysis of Large Cities*, POLICING: J. POL'Y & PRAC. 6 (June 25, 2019) (analyzing collective-bargaining agreements and finding completion limits as narrow as 45 days), https://doi.org/10.1093/police/paz042; requirements that an investigator wait for days—or weeks—before interviewing an officer accused of misconduct, see, e.g., Stephen Rushin, *Police Arbitration*, at 1037-1038 (listing contracts that include delay before interviewing officers ranging from 48 hours to 10 days); LA Act No. 451 (2021) (revising officer bill of rights to reduce the time allowed for officer to retain an attorney before administrative interview from 30 to 14 days). They prohibit non-police officers from investigating misconduct or participating in decisions about discipline. See, e.g., Richard G. Carlson, *Charter Fight Over, Let's Get to Work on Real Reform*, STAR TRIBUNE (Nov. 6, 2021) (arguing that changing Minnesota's statute prohibiting external oversight bodies from making misconduct findings of fact or imposing discipline should be at the center of state reform efforts). They require that jurisdictions destroy disciplinary records. See Katz, supra, at 1197 (noting difficulty of conducting pattern or practice investigation because police department had purged disciplinary records from databases because of union contract requirement). And they require that officer complaints against officers and officer disciplinary records be kept secret. See, e.g., Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STANFORD LAW & POLICY REV. 109 (2017).

Collectively, LEOBORs, similar statutes, and collective-bargaining agreements have, under the guise of protecting officer rights, undermined efforts to impose appropriate discipline and promote sound policing. See Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, Univ. of Chi. Coase-Sandor Inst. For L. & Econ. Rsch., Paper No. 831 (2018) (collective bargaining in Florida sheriffs' departments associated with statistically significant increase in complaints and officer violence); Abdul N. Rad, *Police Institutions and Police Abuse: Evidence from the US*, Dept. of Pol. & Int'l Relations, University of Oxford (finding statistically significant positive correlation between police protections created via union contract and police killings of unarmed civilians); Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1343 (2020) (police unions and contracts can "operate as markers or structural guarantors of obstruction and unaccountable policing, particularly as they affect communities of color, poor people, and other marginalized groups"); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2216-

2217 (2014) (when collective bargaining gives line officers more authority to define police role, officers "embrace a legalistic patrol style that results in higher arrests and more aggressive criminal enforcement."). Richard D. Elliott, *Impact of the Law Enforcement Officers' Bill of Rights on Police Transparency and Accountability*, SO. POL. SCI. ASSOC. (2021) (finding "substantially greater hurdles to police accountability and transparency in states with LEOBOR in effect."), https://ssrn.com/abstract=3690641. In instances in which discipline is meted out despite these protections, arbitration, a common right of appeal for officers included in collective bargaining agreements, may result in the disciplinary decision being overturned, or the disciplinary penalty reduced. Some reversals by arbitrators are doubtless appropriate. There are indications however, that, on balance, reversals and reinstatements by arbitrators bring unsuitable officers back in to policing more than they protect wrongly disciplined officers. This undermines sound policing and forces cities to continue paying officers they have tried to terminate and may believe pose an ongoing danger in the community where they work. See Stephen Rushin, *Police Arbitration* (finding that of 624 arbitration awards, 52% reduced or overturned police officer discipline and that in 46% of the cases involving termination, arbitrators ordered police departments to rehire previously terminated officers); *36 Fired MPD Officers Reinstated; Receive $14 Million in Back Pay,* A Report by the Office of the District of Columbia Auditor (October 6, 2022) (finding that the most common reason an MPD termination was overturned was because an arbitrator though termination was an excessive punishment for the officer's misconduct). See also, Jamein Cunningham, Donna Feir & Rob Gillezeau, *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights*, at 10 (2020) ("Research has also shown that unionization may not influence police misconduct, but the adoption of collective bargaining rights more broadly changes police behavior—negatively impacting minority civilians.").

In light of the role unions have played in generating legal obstacles to accountability and in resisting police reform, some have called for dismantling police unions or expelling them from labor federations. See, e.g., Kim Kelly, *No More Cop Unions*, SOLD/SHORT (May 29, 2020) https://newrepublic.com/article/157918/no-cop-unions; Paul Butler, *Why the Fraternal Order of Police Must Go*, MARSHALL PROJECT COMMENTARY (Oct. 11, 2017). Others call, more moderately, for prohibiting collective bargaining over discipline-related matters. See, e.g., Benjamin Sachs, *Police Unions: It's Time to Change the Law and End the Abuse*, onlabor.org (June 4, 2020), https://onlabor.org/police-unions-its-time-to-change-the-law/ (arguing for amending public-sector bargaining laws so that police unions can bargain only wage and benefit matters but not any subject that implicates the use of force, including disciplinary matters); Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not be Allowed to Delay Police Reform Efforts*, STAN. J. OF C.R. & C.L. (2019) (arguing that state and federal courts should prohibit negotiation of use-of-force and police-accountability rules because these are managerial topics on which union interest in these topics is "specious," and urging state and local governments to clarify the scope of public-employee collective-bargaining rights). Recent LEOBOR reforms and limits on collective bargaining suggest that some jurisdictions are heeding these calls. See H.R. 3653, 101st Gen. Assemb., Reg. Sess. sec. 10-150, § 3.8(b), sec. 25-40, § 6.7 (Ill. 2021) (prohibiting

some newly adopted accountability-related provisions from being included in future collective-bargaining agreements); Fraternal Order of Police v. Dist. Of Columbia, 502 F. Supp. 3d 45 (D.D.C. 2020) (upholding District law that excludes "all matters pertaining to discipline of sworn-law enforcement personnel" from negotiation in future collective-bargaining agreements).

As some advocates point out, removing limiting collective bargaining over disciplinary matters does not prohibit unions from influencing disciplinary processes. Rather, it shifts debate about accountability mechanisms from often opaque contract negotiations to more public arenas. See Katz, supra, at 441-442 (setting out proposal to "democratize collective bargaining" by moving certain positions from the collective-bargaining arena to the local legislative body for public consideration). Limits on collective bargaining also stymie municipal leaders who would offer concessions on discipline in exchange for lower officer salaries. See SAM ASHBAUGH, GOV'T FIN. OFFICERS ASS'N, AN ELECTED OFFICIAL'S GUIDE TO NEGOTIATING AND COSTING LABOR CONTRACTS 66 (2003) (advising government officials to avoid the temptation to trade management control of employees in exchange for economic concessions); John Chase & David Heinzmann, *Cops Traded Away Pay for Protections in Police Contracts*, CHI. TRIB. (May 20, 2016); Stephen Rushin, supra, *Police Union Contracts*, app. D xvii (describing the idea that the legal procedure used to negotiate police-union contracts can be susceptible to a form of regulatory capture as an "emerging hypothesis" for how the collective-bargaining process causes lax internal disciplinary procedures).

Still, it is not clear that restricting police unions or collective bargaining is the best reform strategy. Other scholars and advocates contend that police unions are not so different from other unions as to warrant special constraints. See Benjamin Levin, *What's Wrong with Police Unions?* 120 COLUM. L. REV. 1333 (2020); Allison Schaber, *In Defense of Police Unions, which, After All, Have a Job to Do*, STAR TRIBUNE (Sept. 11, 2020); Michael Z. Green, *Black and Blue Police Arbitration Reforms*, OHIO ST. L.J. (forthcoming) (arguing that police disciplinary actions warrant reversal by arbitrators due to department errors and procedural violations). Further, some argue that weakening police unions will have broader implications, including undermining organized labor more generally. See, e.g., Levin, supra. Instead, such advocates argue that public officials should be pressed to bargain more vigorously on behalf of those who suffer most when police are not held accountable. See, e.g., Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 OR. L. REV. 673, 706 (2013); Levin, supra, at 1399; Katz, supra, at 422-423. Moreover, jurisdictions can make legislative processes and contract negotiations more transparent, as some states do. This may help generate political support for more stringent police-accountability measures. Katz, supra, at 436-437, 443 (suggesting that insufficient transparency is the "distinct flaw" of police-union collective bargaining). In some jurisdictions, activists have reported that open negotiations have allowed them to "change the dynamics" of bargaining and influence police contracts. See Sukyi McMahon & Chas Moore, *Opinion: To Reform the Police, Target Their Union Contract*, N.Y. TIMES (Apr. 8, 2019), https://www.nytimes.com/2019/04/08/opinion/austin-police-union-contract.html. Still, greater transparency and public involvement in the bargaining process does not guarantee tempered union influence or stronger accountability,

and more research is needed to understand how legislative or collective-bargaining transparency affects police accountability. See Katz, supra, at 438-441 (noting that organizing, alongside transparency, may be needed for community groups to match the influence of unions, as well as the lack of scholarship focused on whether sunshine laws are effective in influencing accountability-related contract provisions).

Moreover, police unions can contribute to sound policing. Not all unions have opposed police-reform measures, and some have played other roles in promoting sound policing, such as endorsing changes to especially harmful police practices. Some scholars argue that police unions have more potential yet. See Fisk & Richardson, supra (proposing that cities be required to meet and confer with unions representing even a minority of officers in order to elevate the voices of officers whose interests may not be adequately reflected in "majority union" positions); Samuel Walker, *Twenty Years of DOJ "Pattern or Practice" Investigations of Local Police: Achievements, Limitations, and Questions*, at 22 (Feb. 2017), https://samuelwalker.net/wp-content/uploads/2017/02/DOJ-PP-Program-Feb24.pdf (noting the collaboration between union and community representatives on Seattle's Community Police Commission suggests the potential for unions to be a positive force in reform). In addition, police unions that are effective in bettering salaries and working conditions for officers may contribute to sound policing by allowing agencies to attract and retain employees better suited for its challenges. Cf. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, YALE L.J. 2131-2136 (2017) (arguing that low pay perverts policing by driving good police officers from lower-paying cities and by putting pressure on officers to work too many hours). Whatever the precise approach, the legal changes required to satisfy this Section can help ensure that police unions play a more positive role in the future of policing than they have sometimes done in the past.

§ 14.09. Promoting a Holistic Approach to Public Safety

(a) Recognizing that government plays a critical role in advancing public safety, all branches of government should consider and call upon the entire range of public and private institutions and resources available to achieve this goal.

(b) Legislative and executive officials should recognize the proper role that policing and law enforcement can and should play in achieving public safety, and they should consider and adopt alternative approaches that are effective and equitable, and that minimize any attendant harm.

Comment:

a. The domain of public safety. One understanding of government's role in providing public safety is quite limited: protecting people from third-party harm. On this understanding, public safety simply means preventing crime and violence. But that definition is too narrow. Public safety

should be understood to encompass the full range of issues that people believe must be addressed by the government or private entities such that they are able to flourish and lead healthy, safe, and meaningful lives.

b. The limited role of policing. Policing agencies play an essential role in promoting public safety, but they are but one of many agencies with the responsibility for keeping the public safe. Police often are thought to be primarily responsible for public safety because they are the only responders available 24 hours a day, every day of the week, to address problems that are emergencies or for which no other responder is available. But using law-enforcement officials as primary responders comes with serious social costs. See § 1.04 (concerning minimizing the harms that attend policing). Many of the problems that policing agencies and officers are called upon to deal with daily might be addressed more effectively and with less harm by individuals other than police, such as mental-health professionals, social-service agencies, mediators, medical workers, or other administrative officials. Enforcement of the criminal law is important in society, but its use should be minimized and confined to when it is necessary to achieve its aims. Law enforcement never should be utilized without recognizing its social costs and considering nonenforcement alternatives.

c. Alternative responders. To the extent the police are not the ideal responders to public-safety needs, but respond nonetheless, this is a shortcoming of society and not of the police. Many jurisdictions today are exploring alternatives to police response on issues as diverse as traffic enforcement, school discipline, unhoused populations, mental health, and domestic disagreements. Legislative and executive officials at every level of government should be exploring, funding, and promoting alternative means of addressing social issues—both on an emergency basis and otherwise—in order to address social issues effectively and equitably, and avoid the harms that attend policing.

REPORTERS' NOTES

Policing agencies are called upon to perform many tasks, not because they are the optimal agency to do so but because they are the default. Police are left to deal with a raft of social issues because society has failed to provide alternatives to policing. See, e.g., Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 VIRTUAL MENTOR 886, 887-888 *in* AM. MED. ASS'N J. OF ETHICS (Oct. 2013), https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10 (noting that deinstitutionalization has led many mentally ill people to "'fall through the cracks' in

the system," and has left them to "wander the streets in major cities, being arrested or dying"); Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 132-133 (2020) (describing studies that have found that homeless people are significantly more likely to have spent time in jail than the general population); Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT 73, 77, 81 (2006) (explaining that schools are incentivized to adopt zero-tolerance policies and offload troubled youth onto the criminal justice system because these students' "likely-poor test performance will pull down average[] [test scores]," reducing a school's prestige and financial resources); RICHARD B. FELSON, JEFFREY M. ACKERMAN & CATHERINE GALLAGHER, POLICE INTERVENTION AND THE REPEAT OF DOMESTIC ASSAULT 18 (June 2005), https://www.ncjrs.gov/pdffiles1/nij/grants/210301.pdf (finding that arrests of perpetrators in domestic-violence cases have an insignificant effect on the likelihood of reoffending). The police themselves recognize this. See MICHAEL J. D. VERMEER, DULANI WOODS & BRIAN A. JACKSON, RAND CORP., WOULD LAW ENFORCEMENT LEADERS SUPPORT DEFUNDING THE POLICE? PROBABLY—*IF* COMMUNITIES ASK POLICE TO SOLVE FEWER PROBLEMS 3 (2020) ("Police are frequently called to respond for minor disturbances, dispute mediation, traffic collisions, responses to alarms or low-level property crimes, and other events which undoubtedly need to be addressed but rarely need the attention of a sworn officer."); Alfonso Morales, *I'm Milwaukee's Police Chief. Here's What 'Defunding the Police' Might Mean.*, MILWAUKEE J. SENTINEL (July 14, 2020), https://www.jsonline.com/story/news/solutions/2020/07/14/mpd-chief-details-cuts-might-required-defund-police/5421894002/ ("Police cannot and should not be the first responder for all social ills. Being a [police] officer in 2020 means being a part-time therapist, drug addiction counselor, landlord-tenant arbitrator, homelessness advocate, private security guard, traffic controller, parking attendant, family counselor and animal control officer."). For a long time now, policing leaders and police themselves have decried the fact that a host of societal issues are thrust upon them, rather than more appropriate responders. See, e.g., VERMEER ET AL., supra, at 2 (quoting police officers criticizing the fact that law enforcement is often expected to address problems such as homelessness, substance abuse, and mental-health issues without receiving specialized training).

Many agree with the underlying insight that police have been called upon to do too much. See, e.g., Brady Dennis, Mark Berman & Elahe Izadi, *Dallas Police Chief Says "We're Asking Cops to Do Too Much in This Country*," WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-continue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing/ ("We're asking cops to do too much in this country . . . . Every societal failure, we put it off on the cops to solve . . . . That's too much to ask. Policing was never meant to solve all those problems."); Movement for Black Lives, *End the War on Black Communities*, *in* A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE 3 (2020) ("Policing, criminalization, and surveillance have increasingly become the primary and default responses to every conflict, harm, and need . . ."). And being asked to deal with many problems to which their training was insufficient, police responses frequently left

two forms of harm. First, and most prominent in popular discourse, police response too often ended in uses of force, arrests, and even killing. See, e.g., Alexi Jones & Wendy Sawyer, *Not Just "A Few Bad Apples": U.S. Police Kill Civilians at Much Higher Rates than Other Countries*, PRISON POL'Y INITIATIVE (June 5, 2020), https://www.prisonpolicy.org/blog/2020/06/05/policekillings/ (reporting that police in the United States killed 1,099 people in 2019, or 33.5 people per 10 million—a rate that is significantly higher than other Western democracies); U.S. COMM'N ON CIV. RTS., POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 4 (Nov. 2018) (finding that "[t]he best available evidence reflects high rates of [police] use of force nationally"). Second, police simply failed to solve the problem that brought them to the scene initially. They simply were not equipped to deal with issues such as mental illness or substance abuse. See, e.g., VERMEER ET AL., supra p. __, at 6 (noting that some officers feel like they are expected to "solve complex problems, such as homelessness, [even] when they might not have the training, the resources, or even the constitutional authority to respond in the way [their] community might expect").

In response to this concern, many jurisdictions have begun to experiment with alternative-response models to deal with a number of social issues. See, e.g., Eric Westervelt, *Removing Cops from Behavioral Crisis Calls: 'We Need to Change the Model'*, NPR (Oct. 19, 2020), https://www.npr.org/2020/10/19/924146486/removing-cops-from-behavioral-crisis-calls-we-need-to-change-the-model (explaining San Francisco's decision to begin dispatching mobile teams of paramedics, mental-health professionals, and counselors—instead of police officers—to behavioral-health calls); Jill Cowan, *Berkeley Moves Closer to Ending Police Traffic Stops*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/us/berkeley-police.html (describing measures passed by Berkeley's City Council to limit the role of police officers in traffic enforcement, including banning traffic stops that are not related to safety); Hannah Metzger, *Council Committee Talks Expanding Denver's STAR Program, Replacing Police in Low-Level Incidents*, DENVER GAZETTE (Mar. 24, 2021), https://denvergazette.com/news/government/council-committee-talks-expanding-denver-s-star-program-replacing-police-in-low-level-incidents/article_074afa4e-8cfa-11eb-882d-2391b9959a48.html (describing Denver's Support Team Assisted Response program, which sends paramedics and mental-health clinicians to respond to 911 calls that do not involve weapons and that have a "low threat[] of violence, including public intoxication, suicide incidents, welfare checks, trespassing and indecent exposure"); Nader Issa, *CPS Schools Remove Dozens of Cops, Shifting $2M from School Policing to Other Student Supports*, CHI. SUN TIMES (July 21, 2021), https://chicago.suntimes.com/education/2021/7/21/22587789/cps-public-school-police-cops-resource-officers-sro-restorative-justice (discussing how some schools in Chicago voted to remove uniformed officers from their school and redirect funding to behavioral and mental-health support for students). The "Memphis Model" of critical incident training emerged in 1988 after a mentally ill, Black man was killed by police officers. Michael S. Rogers, Dale E. McNiel & Renée L. Binder, *Effectiveness of Police Crisis Intervention Training Programs*, 47 J. AM. ACAD. PSYCH. L. 1, 2 (2019) (describing the origin of the Memphis CIT model). Its goal was both to equip police to deal with calls that involved someone in mental or emotional crisis, and to provide for co-response with mental-health professionals. Rogers et al., supra, at 2-3. Another program that has received a lot of

attention is Eugene, Oregon's Crisis Assistance Helping Out On The Streets (CAHOOTS), which sends unarmed first responders to "crises involving mental illness, homelessness, and addiction." WHAT IS CAHOOTS?, WHITE BIRD CLINIC (Oct. 29, 2020), https://whitebirdclinic.org/what-is-cahoots/ (last visited July 26, 2021). In 2019, CAHOOTS responded to 24,000 calls, of which only 150 required police backup. WHAT IS CAHOOTS?, WHITE BIRD CLINIC (Oct. 29, 2020), https://whitebirdclinic.org/what-is-cahoots/ (last visited July 26, 2021). See also Indiana University Public Policy Institute, *Evaluation of the Indianapolis Mobile Crisis Assistance Team* 19 (Mar. 2018) (describing successes of Indianapolis' MCAT approach in avoiding arrests).

Alternative responders can be government or community based. See, e.g., *Removing Cops from Behavioral Crisis Calls: 'We Need to Change the Model'*, NPR (Oct. 19, 2020), https://www.npr.org/2020/10/19/924146486/removing-cops-from-behavioral-crisis-calls-we-need-to-change-the-model (describing a new city program in San Francisco that will dispatch mobile teams of paramedics, mental-health professionals, and counselors through the city's fire department instead of police department); GREG BOLER ET AL., STUDY OF THE SERVICE COORDINATION TEAM AND ITS INFLUENCE ON CHRONIC OFFENDERS 4 (2018) (describing Portland, Oregon's Service Coordination Team: a program run by the Portland Police Department that provides chronic offenders with "low barrier" housing and evidence-based treatment); CITY OF HOUSTON, MAYOR'S TASK FORCE ON POLICING REFORM (2020) (describing Houston's Crisis Call Diversion program, which connects some 911 callers with mental-health professionals instead of dispatching police officers, firefighters, or EMS providers); WHAT IS CAHOOTS?, WHITE BIRD CLINIC (Oct. 29, 2020), https://whitebirdclinic.org/what-is-cahoots/ (last visited July 26, 2021) (describing the nonprofit-run CAHOOTS program); CRISIS RESPONSE NETWORK, STRONGER THROUGH CHANGE: ANNUAL REPORT 2020 12 (2021) (discussing the nonprofit Crisis Response Network's mobile crisis and non-crisis intervention and transportation services). There are many community-based resources that could be brought to the task of addressing social issues if they had the proper funding. This is true even of violence reduction, as programs like Cure Violence and READI make clear. See WESLEY G. SKOGAN ET AL., EVALUATION OF CEASEFIRE-CHICAGO 8-14 (2009) (finding that the introduction of CeaseFire, now known as Cure Violence, in four neighborhoods led to a statistically significant decline in actual and attempted shootings, ranging from 16 to 28 percent); READI CHICAGO EVALUATION FINDS REDUCTIONS IN SHOOTINGS AND HOMICIDES, READI CHI. 1 (2021) (noting that an early analysis of the READI Chicago program shows that program participants may experience up to a 32 percent reduction in shootings and homicide involvement).

For the most part, the realm in which alternative response is being explored is still quite limited. Most attention is being given to mental-health issues. These make up a relatively small number of the total calls to 911, but the outcomes from having the police respond too often are tragic. See Amam Z. Saleh et al., *Deaths of People with Mental Illness During Interactions with Law Enforcement*, 58 INT'L J. L. & PSYCHIATRY 110, 114 (2018) (finding that about 23 percent of people killed by police in 2015 had signs of mental illness); CITY OF HOUSTON, MAYOR'S TASK FORCE ON POLICING REFORM 77 (2020) (noting that of the approximately one million calls received by Houston's 911 call center, about 40,500 calls—slightly more than four percent—have a mental-

health component). There also are programs that deal with a number of other behavioral issues such as substance use, or with other social problems like the unhoused. See, e.g., Susan E. Collins, Heather S. Lonczak & Seema L. Clifasefi, *Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49, 49-50 (2017) (finding that low-level drug and prostitution offenders had lower odds of being arrested or charged with a felony after being connected to community resources through the LEAD program); Kristi L. Nelson, *McNabb Wants More Money for its Behavioral Health 'Safety Center,' a Jail Alternative*, KNOXVILLE NEWS SENTINEL (June 2, 2019), https://www.knoxnews.com/story/news/health/2019/06/03/mcnabb-center-knoxville-more-money-behavioral-health-safety-jerry-vagnier/1269455001/ (describing a jail alternative for "nonviolent, misdemeanor offenders with behavioral health or substance abuse problems"); GREG BOLER ET AL., STUDY OF THE SERVICE COORDINATION TEAM AND ITS INFLUENCE ON CHRONIC OFFENDERS 4 (2018) (explaining that the Service Coordination Team assists those who suffer from "chronic substance abuse, mental health issues . . . , long-term homelessness, and frequent engagement in criminal behaviors"). Some small number of jurisdictions are exploring replacing armed police with other individuals for traffic enforcement. Jill Cowan, *Berkeley Moves Closer to Ending Police Traffic Stops*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/us/berkeley-police.html; Paige Fernandez & Brandon Cox, *Brooklyn Center Provides a Model for Reexamining Public Safety*, ACLU (May 24, 2021), https://www.aclu.org/news/criminal-law-reform/brooklyn-center-provides-a-model-for-re-examining-public-safety/.

Generally speaking, there are three approaches these alternate-responder models utilize. The first is not really an alternative, but involves training police to respond to emergency situations in ways other than with force and law enforcement. See generally AMY C. WATSON, MICHAEL T. COMPTON & LEAH G. POPE, VERA INST. OF JUST., CRISIS RESPONSE SERVICES FOR PEOPLE WITH MENTAL ILLNESSES OR INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 27-33 (2019) (discussing the use of the Crisis Intervention Team (CIT) model, which utilizes a 40-hour specialized training "designed to provide officers with the knowledge, attitudes, and skills to safely and effectively intervene with people in crisis and link them to services"). The second is to replace the police entirely with individuals with professional training in the particular issue. See generally WATSON ET AL., supra, at 39-44 (describing the Mobile Crisis Team (MCT) model, which provides "on-site crisis management" through the mental-healthcare system and is typically unaffiliated with police); see also CRISIS RESPONSE NETWORK, STRONGER THROUGH CHANGE: ANNUAL REPORT 2020 12 (2021) (discussing how Crisis Response Network, a nonprofit organization, dispatched 25,485 mobile crisis and non-crisis teams in 2020). And the third is "co-response" models in which the police respond to calls alongside professionally trained individuals. See generally, WATSON ET AL., supra, at 14-19 (describing the use of the co-responder team model).

Each of these models has its difficulties. Alternative responders may be unwilling to approach incidents that might pose risks to personal safety without the police present. See, e.g., Greg B. Smith, *Cops Still Handling Most 911 Mental Health Calls Despite Efforts to Keep Them Away*, CITY (July 22, 2021), https://www.thecity.nyc/2021/7/22/22587983/nypd-cops-still-respond

ing-to-most-911-mental-health-calls (quoting a union president who explained that few EMTs volunteered for a New York City program that dispatches non-police first responders to mental health calls, "because of the danger . . . [t]here's a fear that without having police on the scene, who is going to mitigate?"). On the other hand, police presence can exacerbate an already fraught situation. See, e.g., Amos Irwin & Betsy Pearl, *The Community Responder Model*, CTR. FOR AM. PROGRESS (Oct. 28, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/28/492492/community-responder-model/ (noting that because most police officers are not specially trained to address "complex behavioral health needs" or disabilities, they often arrest these individuals without realizing that this may worsen their medical needs). Commentators express concern that when police respond, enforcement follows all too readily. See Martin Kaste, *Are Police Being Taught to Pull the Trigger Too Fast?*, NPR (July 15, 2016), https://www.npr.org/2016/07/15/486150716/are-police-being-taught-to-pull-the-trigger-too-fast (questioning whether standard police trainings are leading officers to resort to using force more quickly). And in co-responder models, it often is unclear which approach—the police's or other professionals'—will prevail.

In addition, the current movement toward alternative response may be far too limited. It certainly is the case that society should respond to people in distress in ways other than with enforcement, and that the use of force itself should be minimized. This supports alternative responses to people with substance-use issues, the unhoused, and those in mental-health crisis. But there are a wide range of other situations for which police are not adequately trained, or to which bringing force and law is problematic. Traffic enforcement is a good example. Traffic enforcement today often is used pretextually, something these Principles suggest should be minimized if not eliminated entirely. See § 2.04. Traffic stops often bring great harm. See § 4.03; ERIKA HARRELL & ELIZABETH DAVIS, BUREAU JUST. STATS., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 4 (2020) (showing that being a driver in a traffic stop and being a passenger in a traffic stop were the first and second most common form of police-initiated contact in 2018); Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns (finding that more than 25 percent of Black people killed by police between 2015 and 2021 were killed during traffic stops). This is why some jurisdictions are considering removing police from many traffic encounters. Many social issues such as noise complaints, domestic disagreements, and other disputes, call for mediation more than enforcement. Police respond to criminal incidents, but what often is needed is victim services, and forensic science, both of which might be provided better by alternative responders. See § 9.02; see also Friedman, *Disaggregating the Policing Function*, supra, at 981 (discussing the need for police training that better aligns with the realities of what police do, e.g., training that teaches officers how to effectively write reports, interview witnesses, and respond to victims).

Of course, as the number of potential responders increase, so do the complications. One of these is dispatch. Dispatch today is ill-equipped to triage and dispatch a variety of different responders. S. REBECCA NEUSTETER ET AL., VERA INST. OF JUST., THE 911 CALL PROCESSING SYSTEM: A REVIEW OF THE LITERATURE AS IT RELATES TO POLICING 3-5, 11-13 (2019) (discussing

the history of 911 and the lack of standardized data collection and analysis that prevents the system from being improved). But see CITY OF HOUSTON, MAYOR'S TASK FORCE ON POLICING REFORM 85-86 (2020) (discussing Houston's Crisis Call Diversion program, in which mental-health professionals are embedded in the city's 911 call center in order to identify and resolve mental-health crisis calls). This is all the more the case because calls to 911 for service do not always announce themselves as requiring coercion or law enforcement. S. REBECCA NEUSTETER ET AL., VERA INST. OF JUST., THE 911 CALL PROCESSING SYSTEM: A REVIEW OF THE LITERATURE AS IT RELATES TO POLICING 19 (noting the challenge of categorizing 911 calls). Even calls that seem without risk initially can turn dangerous. S. REBECCA NEUSTETER ET AL., VERA INST. OF JUST., THE 911 CALL PROCESSING SYSTEM: A REVIEW OF THE LITERATURE AS IT RELATES TO POLICING 19 (2019) (noting instances in which a situation described in a 911 call turned out to be different than described). A second complication is sheer cost. Alternative responders may result in cost savings vis-à-vis the police. See Roger L. Scott, *Evaluation of a Mobile Crisis Program: Effectiveness, Efficiency, and Consumer Satisfaction*, 51 PSYCH. SERVICES 1153, 1155 (Sept. 2000) (finding that the average cost of cases handled by the mobile crisis program in DeKalb, Georgia, was lower than the average cost of cases handled by police officers); WHAT IS CAHOOTS?, WHITE BIRD CLINIC (Oct. 29, 2020), https://whitebirdclinic.org/what-is-cahoots/ (last visited July 26, 2021) (noting that CAHOOTS saves Eugene, Oregon, an estimated $8.5 million per year in public safety costs); *Crisis Call Diversion Program*, HOUS. POLICE DEP'T, https://www.houstoncit.org/ccd/ (last visited Apr. 8, 2021) (noting that the Crisis Call Diversion Program is estimated to save Houston $860,218 per year). But under existing models, these alternatives exist alongside the cost of maintaining a police force, which is a substantial expenditure for many municipal governments. See, e.g., WHAT POLICING COSTS: A LOOK AT SPENDING IN AMERICA'S BIGGEST CITIES, VERA INST. OF JUST., https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities (last visited July 30, 2021) (finding that a majority of the 72 largest cities in the United States spend at least 25 percent of their municipal budget on policing).

One possible solution that deserves exploration is the idea of a single, holistically trained responder. Although there certainly have been advances in policing over the last 150 years, policing today still looks very much like its 19th century origin: individuals trained primarily in force and law responding to crime, social disorder, and social needs. What if society created a different profession that involved training individuals in the wide range of skills an emergency responder might need? This could include basic medical care/EMS, mediation skills, diagnosis of behavior issues, the availability of social services, and much more. See generally Friedman, *Disaggregating the Policing Function*, supra, at 991-994 (proposing a new type of first responder, who would be specially trained to address a variety of social needs without resorting to force unless absolutely necessary); see also Barry Friedman, *Amid Calls to 'Defund,' How to Rethink Policing*, WALL ST. J. (June 13, 2020), https://www.wsj.com/articles/amid-calls-to-defund-how-to-rethink-policing-11592020861 (arguing that first responders with more extensive, multidisciplinary training would be better equipped to address the root causes of social issues and would free up police resources). The model for this sort of response would be emergency-room doctors, who are tasked to stabilize

situations, treat what they can, and refer for treatment that which they cannot solve. These new, holistically trained professionals could do the same, including having the ability to compel jurisdictions to provide follow-on services to address social problems, rather than having first responders called to the same location time and again because those problems are not addressed.

§ 14.10. Data Collection and Transparency

(a) Governments should require—through legislative or executive action—that agencies and courts collect, analyze, and release to the public data and information about the following, in a form that easily can be accessed, understood, analyzed, and compared to the data and information of other agencies and courts:

(1) crime rates or reported crimes and calls for service;

(2) enforcement actions;

(3) reportable uses of force;

(4) policing policies, strategies, techniques, and mechanisms for public input;

(5) allegations and outcomes of citizen complaints of officer misconduct, civil suits filed against agencies and officers, and, in criminal proceedings, motions to suppress;

(6) organizational structure, employment standards, and staffing, including staff demographics;

(7) requests for and executed search warrants and court surveillance orders;

(8) collective-bargaining agreements; and

(9) civil settlements and judgments.

(b) Governments should require that courts collect, analyze, and release to the public data and information—in a form that easily can be accessed, understood, analyzed, and compared to other like data—about:

(1) requests by agencies for search warrants, executed search warrants, and court surveillance orders;

(2) motions to suppress evidence and their resolution; and

(3) civil settlements and judgments regarding officers or agencies.

(c) Governments should require—through legislative or executive action—that agencies using body-worn cameras and other video technologies to record police encounters:

(1) make relevant footage available on the agency website within a reasonable time following a significant adverse incident; and

(2) make footage available to any individual who it captures on video and who requests to review that video.

(d) Governments should ensure agencies and courts have the capacity, training, technology, and other resources necessary to collect, retain, analyze, and release this data.

(e) Governments should establish a process by which data collected is regularly analyzed and used to inform policies and practices.

Comment:

a. Transparency, generally. The public, and agencies of democratic governance charged with superintending policing agencies, cannot do their job of superintending policing agencies without the information necessary to reach reasoned conclusions about policing-agency performance. Policing agencies therefore should collect and analyze such data as is necessary to allow for public supervision, and they should make such data and any other information specified in this Section routinely available in an accessible and meaningful fashion.

b. Data collection and analysis. Agencies routinely should collect, retain, analyze, and make public all of the information specified in this Section. Some of the information will be readily available to agencies. Other information may require additional data collection or analyses beyond what the agency presently does. Jurisdictions should ensure that agencies have sufficient staff and the necessary resources to support data collection, retention, analysis, and publication. Jurisdictions also should ensure that clear definitions for data elements are established, adhered to, and published. Although the data and information indicated here may be restricted or protected by state or local laws, agencies should release this information to the greatest extent permitted by law. To the extent present law prohibits the collection or release of such information, legislative bodies should explore whether such prohibitions are appropriate, and modify them if not. See § 14.02 (Legislative Responsibilities to Ensure Sound Policing).

c. Routine release. The frequency with which data and information should be released will depend on the fluidity and immediacy of the data, the capabilities of the agency, and the priorities and expectations of the public in a jurisdiction. For example, agencies that update crime statistics on a monthly basis should release them on that schedule. By contrast, it may make sense to release

agency demographics annually. Policing-agency policies should be released as soon as they go into effect, and they usually should be shared for public input prior to final adoption. See § 1.05 (Transparency and Accountability). Agencies and communities should come to a consensus on what data and information should be available and when it should be available, and they should formalize these expectations in a publicly available data-and-transparency policy.

d. Meaningful and accessible fashion. Agencies should release data and information in a manner that ensures the public and other interested parties can comprehend its meaning and compare trends over time. For incident-based data in particular, this means including aggregate as well as anonymized incident-level data. Data should be released in a standard format and be machine-readable. Ideally, data should be released through a platform operated by the jurisdiction in question (i.e., not just by a policing agency) that is accessible to all and includes relevant criminal-justice data from other system actors such as prosecutors, courts, and correctional institutions. Agencies should publish data and information on their official agency websites, ensure the websites are easily navigable and are accessible to people with disabilities, and educate the public as to where and how the data can be accessed.

e. Confidential information. Agencies should take great care to anonymize data about members of the public and ensure that any personally identifiable information—such as a member of the public's name, phone number, birth date, or exact address—is stricken prior to release, unless it is a matter of public record. Additionally, agencies should avoid releasing data and information in a manner that allows deductive disclosure, i.e., that it permits an individual's identity to be ascertained despite the absence of personally identifiable information. If an agency is releasing photographs or videos, it should obscure the faces and other identifiable characteristics, such as prominent tattoos, of any individuals who are not the subject of the incident in question. In addition, confidentiality concerns may mandate redaction of some information; see § 1.06 regarding principles governing confidentiality concerns.

f. Crime rates or reported crimes and calls for service. Information about crime trends and enforcement actions provides critical insight into a jurisdiction's public-safety issues and the policing agency's actions in response. Release of this information allows the public to hold policing agencies accountable both for public-safety outcomes and the measures taken to achieve public safety, including any impact those measures may have on personal safety, privacy, or racial disparities. See § 1.05 (Transparency and Accountability).

(1). Crime rates or reported crimes. Agencies should release data on crime rates or reported crimes and trends that, in larger jurisdictions, is broken down at least through the district or precinct level. Agencies should include rates beyond the Part 1 crimes required under the Federal Bureau of Investigation's Uniform Crime Reports, including hate crimes, and ensure that data released addresses the public-safety priorities of their jurisdiction. For example, if an agency in a jurisdiction with high rates of vehicle break-ins focuses solely on Part 1 crime rates, they are unlikely to meet the public's need for timely information about their safety concerns and if and how policing agencies are addressing them.

(2). Calls for service. Agencies should release data on calls for service, including the nature of those calls, broken down at least through the district or precinct level. Agencies also should include contextual information such as time of day and day of week. This affords communities necessary insight into when, where, and why police services are requested, as well as an understanding of the nature and extent of demand for police response in their jurisdictions.

g. Enforcement actions. Agencies should release data on enforcement actions, including pedestrian and traffic stops, arrests, searches—including consent searches—and citations. Data should be broken down at least through the district or precinct level and include demographic information about the subject of the action and the alleged offense. These enforcement actions—particularly traffic and pedestrian stops—have been linked to discriminatory practices such as racial profiling, and the fines and fees associated with citations for minor offenses can have catastrophic financial implications. See §§ 1.09 (Furthering Legitimate Policing Objectives); 1.04 (Reducing Harm). The public requires information about enforcement actions to ensure agency practices align with community public-safety and social-justice priorities, and to identify and hold agencies accountable for any harms inappropriately imposed.

Agencies also should track and release information about the location and date/time of checkpoints such as sobriety checkpoints, which have been shown to disproportionally be deployed in Black and other marginalized communities (such as immigrant communities) in some jurisdictions. Some states have legislation governing when and where checkpoints can be administered. Even in the absence of governing legislation, communities deserve access to information about checkpoint deployment to determine whether agencies are deploying them equitably.

h. Reportable uses of force. Reportable uses of force means any application of physical force—that is, any intentional touching by a body part or by the intentional application of a tool, technique, or weapon to a person's body—other than physical contact used solely for facilitating the taking of custody of a compliant person (such as the application of handcuffs on a cooperative arrestee). Agencies also should consider reporting threats of force, such as the pointing of a firearm at or in the direction of a person.

Agencies should release data on reportable uses of force, including for each incident the type of force used, justification for use, geographic location of the incident, demographic information about the individual(s) against whom force was used, and any resultant injuries to the officer or individual(s). The public requires information on police use of force in order to identify any trends or disparities and to hold agencies accountable to the law, agency policy, and equitable standards. Ideally, use-of-force data will contribute to the development of police practices that go beyond basic constitutional minimums to prioritize de-escalation and affirm the sanctity of human life. See Chapter 7 (Use of Force).

i. Policing policies, strategies, and techniques. For public safety to be a shared endeavor between communities and police, the public must have access to the strategies, policies, and techniques that define how a policing agency fulfills its mission. Agencies should release this information on a regular basis.

(1). Policy manuals. An agency's manual defines how officers respond to a community's public-safety needs and establishes parameters for how agency employees interact with the public they serve. By publishing its policy manual, an agency provides communities with necessary information about what the agency deems to be acceptable and expected police behavior. Communities then are in a position to advocate for revised policies that align more closely with their priorities, and to hold agencies and officers accountable for deviations from accepted practices.

(2). Strategic plan. A policy agency should have a strategic plan that indicates how it will address public-safety challenges in its jurisdiction and achieve sound policing in accordance with these Principles and governing law. Democratic governance requires that an agency's goals and strategies reflect the priorities of the community it serves. Reviewing published strategic plans allows communities to make informed decisions about their agencies' plans, and offer meaningful input into how they are policed.

(3). Specific policing strategies. Policing strategies and tactics further define how an agency will achieve its public-safety mission. Such strategies must balance effective enforcement with the preservation of constitutional rights and advancement of public trust and confidence in the police. See generally Chapter 1 (General Principles of Sound Policing). Communities—particularly those most impacted by policing strategies—require general information about agencies' use of particular strategies and their expected and intended impact. Evidence regarding common policing strategies, such as predictive policing or focused deterrence, varies widely, and some strategies carry with them the inherent risk of harms such as racial discrimination and over-criminalization. Together with crime and enforcement data, information on policing strategies helps the public understand the extent to which a given strategy might achieve its intended purpose, and at what social cost.

(4). Information-gathering techniques. Information-gathering techniques—from consent searches to the use of new technologies—are important investigative tools. However, each of these tools carries some risk of imposing harm. Chapter 3, governing the use of information-gathering techniques, calls upon agencies to adopt policies addressing the use of those techniques. Policies regarding the use of information-gathering techniques and data regarding the frequency of their use, as well as any documented abuse, should be made public to allow for adequate democratic supervision.

j. Allegations and outcomes of officer misconduct, lawsuits, and motions to suppress. Information about allegations and actual instances of misconduct help the public hold agencies and officers accountable. See § 13.07 (Responding to Allegations of Misconduct). Agencies should release the following information to the greatest extent legally permissible, and work to minimize restrictions on disclosure and access over time.

(1). Complaints and other allegations of misconduct. Given the authority invested in officers, it is particularly important that data on misconduct and abuses of power, and allegations of such misconduct, be made known to the community. Agencies routinely should release data on both individual complaints against officers and misconduct first identified through internal investigations, including allegations, adjudication statuses, complaint and investigation dispositions, and demographic information about the officer and individual(s). Whenever legally permissible, the identity of the offending officer should be disclosed. Specifics of complaints should be made available to individuals who are entitled to the information, such as a defendant

against whom an officer is testifying. Additional circumstances requiring disclosure of complaint specifics, such as disclosing the complaint history of an officer seeking employment in a different agency, is addressed in Chapter 13.

(2). Status and disposition. In addition to allegations of misconduct, departments should release details about the status and outcome of citizen complaints, as well as information about complaint resolution and any disciplinary action taken, including dismissal. Such disclosure provides communities with necessary information about the extent to which an agency is willing and able to hold officers accountable, as well as the expediency with which the agency investigates allegations and allows the public to identify and seek to address failures or insufficiencies in accountability standards.

(3). Lawsuits. Agencies routinely should release information on lawsuits against individual officers and agencies, including allegations, judgments, and settlement information, to the extent permissible under any applicable settlement agreement. In most cases, individual officers who lose or settle a lawsuit are indemnified by their departments or municipalities. These payouts cost local taxpayers hundreds of millions of dollars per year, and the public deserves a transparent accounting of how their tax dollars are being spent to address officer misconduct. In general, municipal settlements should be made public, as the failure to do so may obscure from the public the need for agency reform.

(4). Motions to suppress. Governments should track, analyze, and release information on motions to suppress evidence allegedly obtained in violation of a defendant's constitutional rights. In criminal proceedings, these motions may offer insight into problematic police practices and/or identify specific officers with a demonstrated history of committing constitutional violations related to stops, searches, and arrests.

k. Organizational structure, employment standards, staffing, and mechanisms for public input. Information on agency budgets, organization, staffing, and employment standards allows the public to hold agencies accountable for efficient, equitable, effective, and appropriate use of public funds.

(1). Budget. Budgets indicate agency priorities and values, both within an agency and across other agencies in a jurisdiction. Communities deserve to understand the extent to which their own priorities and values are reflected in the expenditure of their tax dollars. Further, the

public needs to know how police funding fits proportionally within the municipal budget and the extent to which funding as allocated appropriately meets community needs.

(2). Organizational chart. Agencies should make available and update regularly their organizational charts, including names and biographic information about their leadership, to help the public understand individual qualifications, agency hierarchy, and who is responsible for specific functions within the agencies.

(3). Hiring, promotion, and training standards/qualifications. Currently, there are no national standards or guidelines for the qualifications, promotional standards, or training requirements for police officers. Although aspects of these matters are regulated in some states, local directives that vary widely across jurisdictions are commonplace. See § 13.03 (Adequate Training for Agency Employees). The public ought to know the experiences and qualifications necessary for the officers serving them in any capacity, from patrol officers to executive leadership, and the extent to which an agency screens for concerning traits and behaviors. Training requirements in particular offer the public insight into the skills and abilities they can expect from their officers, and the extent to which these skills are reinforced over time. This information also informs the public as to whether training curricula omit any critical skills, such as de-escalation, or disproportionately emphasize skills that do not align with public priorities.

(4). Recruitment and retention information. Agency recruitment strategies illustrate who the agency believes will be effective and what they value in their ranks, while retention rates are an indication of officer morale, organizational efficacy, and internal procedural justice. The public ought to have access to recruitment strategies to determine whether an agency is likely to attract individuals who are particularly well suited to sound policing. See § 13.02 (Recruitment and Hiring).

(5). Officer demographic data. Officer demographic data—including race, gender, ethnicity, sexual orientation, and gender identity—should be published across all ranks. Such data helps the public understand the extent to which the agency is diverse, inclusive, and represents the community. Research establishes that when members of the public believe policing agencies reflect the diversity of the communities they serve, they have higher levels of trust and confidence in the police. Coupling recruitment and retention information with demographic data allows the public to identify any trends in underrepresentation, and to hold agencies accountable for improving recruitment and retention strategies to address disparities.

(6). Officer injuries and fatalities. Data and information on officer injuries and fatalities, including the circumstances under which they were sustained, contributes to the public's comprehensive understanding of policing in their jurisdiction, including the inherent risks and the extent to which a department adequately ensures officer safety and wellness, which is critical in pursuing the goals of sound policing. See § 13.04 (Promoting Officer Well-Being).

(7). Mechanisms for public input. Policing agencies should have formalized processes for receiving input from the public on policing strategies and policies, public-safety priorities, and other relevant feedback. Instructions for providing feedback should be clear, publicly available, and translated in the predominate languages of the jurisdiction.

l. Search warrants and court-ordered surveillance. Jurisdictions should release data and information on requests for search warrants and surveillance orders, as well as the related affidavits. This promotes public understanding of policing strategies, when they are deployed, and on what grounds. This information—particularly as it relates to the use of surveillance technology—also demonstrates the extent to which police and the courts are meeting basic minimum constitutional and statutory requirements, including by demonstrating sufficient cause.

m. Collective-bargaining agreements. Collective-bargaining agreements that dictate an agency's internal disciplinary procedures often are barriers to officer accountability, as they impose restrictions on reasonable investigations into misconduct and disciplinary measures. To understand misconduct and disciplinary data in context, the public needs to know the extent to which the agency's actions (or failure to act) are dictated by collective-bargaining agreements. See § 14.08.

n. Civil settlements and judgments. Settlements for police misconduct largely are paid through public funds, and the public deserves access to the specifics and cost of these incidents. Additionally, the underlying facts of these suits may provide insight into persistent problems and trends of which the public deserves to be aware. Jurisdictions should prioritize transparency and disclosure and minimize the use of confidentiality agreements unless they are in the best interest of the plaintiff.

o. Video-footage release. One of the primary factors driving the rapid implementation of body-worn cameras and other video technologies is the notion that the technology enhances police accountability. But greater police accountability is achieved if the relevant camera footage is made available to the public within a reasonable time after significant adverse incidents, particularly those in which an officer's behavior is in question. See § 13.08, Comment *b* (discussing significant

adverse incidents). Agencies should have clear, publicly available policies dictating how and when camera footage should be released. If circumstances require a deviation from policy, agencies should communicate this to the public and be transparent about the factors necessitating it.

Additionally, agencies should make footage of any incident available to a member of the public whose behavior is captured on the video. For many, interactions with police are stressful and unsettling. Video footage offers a more neutral account of police interactions and may lead to fewer complaints being filed. Inversely, if the video footage depicts problematic officer behavior, the public has a right to view it and use it to make an informed complaint. In order to effectuate this, agencies need policies that require retention of body camera footage for a long enough period to allow for requests. This precise level of disclosure may be restricted by law in some states; agencies should release incident footage to the greatest extent permissible by law and should work to ensure as much transparency as possible. State laws should reflect such need for transparency.

p. Using data to inform policies and practices. It is fairly common practice for policing agencies to use data to inform certain strategies, such as adjusting patrol assignments relative to calls for service. However, agencies also should leverage data to inform improvements to agency policies and practices. The data identified in this Section are critical for agencies to understand the impact of their tactics and choices on communities and the extent to which current policies and practices are achieving their intended outcomes. Agencies should leverage this data to identify and prioritize opportunities for improvement. Many agencies lack the capacity, training, technology, and other resources necessary to provide the data called for in this Section. Government should work to remedy this situation as the accessibility and analysis of such data is essential to sound policing.

REPORTERS' NOTES

Accurate, sufficiently detailed, accessible data about policing activities is essential for understanding the effectiveness, propriety, and fairness of policing practices and interactions. This data provides critical insight for stakeholders—from state and local legislators to police leaders and communities—to understand the extent to which policing agencies are fairly and effectively achieving their public-safety mission, and whether and how policies, procedures, and practices should be changed. Rachel Harmon, *Why Do We (Still) Lack Data on Policing*, 96 MARQ. L. REV. 1119, 1122-1128 (2013).

Reliable, accessible data also is a fundamental aspect of police accountability, particularly data regarding involuntary contacts with the public. Data reveals trends about individual and agency-level discriminatory practices and other misconduct, disparate impacts of policing

practices, and other problematic patterns that negatively impact public-safety outcomes and may rise to the level of actionable violations of law. Alexandra Holmes, *Bridging the Information Gap: The Department of Justice's Pattern or Practice Suits and Community Organizations*, 92 TEX. L. REV. 1241 (2014). And transparent access to this data is critical for democratic accountability and fostering community trust in policing. Grace E. Leeper, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U. L. REV. 2053, 2057 (2017). See Final Report of the President's Task Force on 21st Century Policing, Office of Community Oriented Policing Services (2015) (advocating for improvements in data collection and release to build community trust). National efforts to improve data collection, analysis, and transparency—such as the Obama Administration's Police Data Initiative—are built in part on the premise that transparent and timely access to police data is foundational to improving public trust in police and strengthening accountability. See White House Fact Sheet: Police Data Initiative (2016).

Despite the critical importance of police data and concerted efforts to improve it, policing data remains notoriously limited, unreliable, inaccessible and, in many cases, nonexistent. See Harmon, supra; Grace E. Leeper, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U. L. REV. 2053, 2055 (2017). This is particularly concerning with regard to data around involuntary police contacts. For example, police conduct tens of millions of vehicle and pedestrian stops annually, yet the data on these stops is so limited and of such poor quality that it is difficult to understand whether and to what extent they achieve their public-safety objectives (ranging from improved roadway safety to investigating criminal activity and deterring future crimes), let alone whether they do so equitably. There is a growing body of research indicating a disproportionate burden of these stops on non-white communities, and the operational practice poses inherent risks both to law-enforcement officers and the individuals stopped. See Ted R. Miller et al., *Perils of Police Action: A Cautionary Tale from US Data Sets*, 23 INJURY PREVENTION 27 (2016); Janet M. Blair et al., *Occupational Homicides of Law Enforcement Officers in the United States, 2003–2013: Data from the National Violent Death Reporting System*, 51 AM. J. PREVENTIVE MED. 188 (2016). It therefore is critical for police and other municipal leaders as well as communities to determine whether stops are appropriate, equitable, and effective, but local data often is insufficient to support that analysis. See, e.g., Denise Rodriguez, et al., *Racial Bias Audit of the Charleston, South Carolina, Police Department*, CNA INST. FOR PUB. RSCH. (2019) (finding the department's current data structure hindered analysis of trends and racial disparities at the individual level). These limitations also negatively impact the ability of police leaders to understand and evaluate officer performance, and to determine whether and how training, policies, and procedures should be modified. Tiffany R. Murphy, *When Numbers Lie: The Under-Reporting of Police Justifiable Homicides*, 21 BERKELEY J. CRIM. L. 42, 48 (2016).

Contributing factors driving the insufficiency of police data are varied. In some cases, officers are ill-trained, ill-equipped, inadequately resourced, or otherwise unable to capture and report data in an accurate and complete way. Often, state-level requirements for policing data fall short, failing to require sufficient detail for the data to be useful. For example, although 40 states require reporting of race in arrest records, only 15 states require reporting ethnicity. This leads to

severely undercounting the Latinx population, as states that do not capture ethnicity are likely to label many Latinx people "white." This also obscures in part the overrepresentation of Black people by artificially inflating the representation of white people. See *The Alarming Lack of Data on Latinos in the Criminal Justice System*, URBAN INST. (2016).

When data is captured, it is not necessarily easily accessible, or sometimes an agency may choose not to make it so. For example, much of the critical data needed to understand police practices, such as data on uses of force and information about predicating events, are buried in narrative sections of incident reports. It is unlikely police departments have the internal capacity or acumen to extract and analyze this data on a large scale. And even if a department is able to aggregate and analyze this data, they may choose not to publish it absent a government mandate to do so. Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1517-1518 (2018).

Policing data also suffers from a lack of standardization with regard to data elements and definitions. Similarly, there are no standardized methods or procedures to govern data collection related to law-enforcement activities and interactions. Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. 15, 22-25 (2019). This makes it difficult if not impossible to conduct much needed research into policing activities both within and across jurisdictions. Garrett, supra at 1518.

Fortunately, there is a growing recognition of the deeply problematic limitations of police data and calls for legislative and federal action to address them— both to mandate and standardize data collection, and provide appropriate resources to agencies to do so. See Barry Friedman & Elizabeth G. Jánszky, *Policing's Information Problem*, 99 TEX. L. REV. 1, 22 (2020) (recommending that Congress adopt "information-forcing legislation," e.g., "statutes requiring the collection of demographic information around police stops"); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 895-897 (2014) ("Additional legislative or agency attention is also appropriate. A great deal of information about law enforcement is conceptually obtainable but does not currently exist in any collected or useful form"). Though there are existing mechanisms focusing on broad collection of specific police data (such as the FBI's National Use-of-Force Data Collection and the Death In Custody Reporting Act (DCRA)), they largely fall short of providing comprehensive, reliable insights into police practices absent reporting requirements, standardization, and resources to support agency compliance. KENNY LO, CTR. FOR AM. PROGRESS, HOW TO ADDRESS CONCERNS ABOUT DATA ON DEATHS IN CUSTODY 1, 4-5 (2021) (discussing the absence of data on deaths in police custody and suggesting that "Congress should appropriate the necessary funding for [DOJ's Bureau of Justice Assistance] to implement a methodology to search for and validate leads on deaths in custody," while "state legislatures should look to compel all state and local law enforcement agencies to report DCRA data"). Michael McKeown, *Police Misconduct*, 51 SUFFOLK U. L. REV. 309, 318 (2018) ("To improve data collection and reporting across all states, the new administration should direct the Attorney General to aggressively utilize the tools available under the DCRA. Specifically, the DCRA allows the Attorney General to cut funding to states that

fail to meet the DCRA's reporting standards. If the Attorney General aggressively enforces this provision, it would mitigate the inaccurate statistics currently reported by states"). See also Barry Friedman & Rachel Harmon, *Policing Priorities for the New Administration* (2021) (arguing the federal government should play a leading role in data standardization and support capacity building for collection and analysis at the state and local level).

§ 14.11. Research in Support of Sound Policing

(a) Agencies should facilitate, participate in, and collaborate on research concerning policing, including by allowing researchers access to agency employees, data, and other information.

(b) Local, state, and federal governments should support the production and advancement of research, and adopt policies that support making research transparent to the communities agencies serve.

(c) The needs of agencies and the communities they serve are integral to high quality research relevant to sound policing, which individuals and entities should consider in pursuing research projects. Making such relevant research readily available to agencies and to the public is especially important to sound policing and policy.

Comment:

a. Importance of research to sound policing. Research is essential in order to develop and implement policies that promote public safety and sound policing. This includes ensuring the safety and security of all members of society, preserving the peace, addressing crime, and upholding the law, while respecting the rights of all people, promoting police legitimacy, and minimizing the potential harms that policing itself can impose. At present, agencies often rely only on loosely defined "best practices" that are weakly supported or unsupported by scientific research and evidence. Chapter 1 makes clear that agencies should adopt written policies, and that such policies should be informed by evidence, to ensure they promote legitimacy, prevent harm, and respect the rights of all people. To achieve these goals, there must be high quality research available on topics relevant to agency needs, including needs that are not always obvious to agencies, such as the social costs of policing tactics and techniques. Such research should include a broad range of sciences, from social science to the hard sciences. The production of this research

requires the willing participation and insight of policing agencies and researchers, and support from private and government entities.

b. Agency support for research. Agencies often benefit directly and immediately from collaborations with researchers. Even when such benefits cannot be produced immediately or in a very short time frame, agencies should consider partnerships with researchers to be an investment in the future of sound policing. To that end, agencies should consider establishing policies that encourage and support investment and participation in research—to the extent not inconsistent with governing law and agency resources. Agency policy should indicate how the agency will evaluate requests for research partnerships, recognizing that sound research that advances the field of policing may not necessarily be what benefits the agency immediately.

c. Support for policing research. Local, state, and federal governments, as well as private philanthropic and educational institutions, should support the production of research financially, legislatively, and by engaging in data-collection and analysis efforts that promote transparency and centralization. All involved should find a way to make such research readily available, instead of hidden behind paywalls.

d. Selection of projects. In formulating, carrying out, funding, and publishing research on policing, individuals and entities should consider the needs of agencies and of the field. Basic science is important in any field, of course, but in the area of public safety and policing there is a particular dearth of important research. Researchers working with agencies should be cognizant of, or learn about, how policing agencies operate, so that their research design works within existing agency structures and does not unduly burden the agency.

REPORTERS' NOTES

Agencies often are encouraged to engage in evidence-informed or evidence-based policing, including with respect to promoting legitimacy and preventing harm. To do so, however, there must be high-quality research available on topics critical to agency needs. Currently, for some topics, agencies often can rely only on loosely defined "best practices," which are weakly supported or unsupported by social-science evidence. Policymakers tend not to consider academic research in forming policing policy and making important decisions. See Cynthia Lum, Cody W. Telep & Christopher S. Koper, *Receptivity to Research in Policing*, 14 JUST. RSCH. & POL'Y 1 (2012); GEOFFREY P. ALPERT, JEFF ROJEK & J. ANDREW HANSEN, NAT'L INST. OF JUST., BUILDING BRIDGES BETWEEN POLICE RESEARCHERS AND PRACTITIONERS: AGENTS OF CHANGE IN A COMPLEX WORLD (2013); and INT'L ASS'N OF CHIEFS OF POLICE, POLICING IN THE 21ST CENTURY (2011). Between 2004 and 2009, not even one-third of law-enforcement agencies participated in

practitioner-researcher partnerships, and those that did tended to engage in partnerships that were short-term. Jeff Rojek, Hayden P. Smith & Geoffrey P. Alpert, *The Prevalence and Characteristics of Police Practitioner-Researcher Partnerships*, 15 POLICE Q. 241 (2012). Rather than considering data-driven policy recommendations, Tseng finds that leaders in law enforcement tend to seek out the suggestions of interest groups and professional organizations. Vivian Tseng, *The Uses of Research in Policy and Practice*, 26 SOCIAL POL'Y REP. no. 2, at 1 (2012). Practitioner–researcher partnerships increasingly are important, particularly as funding and resource constraints continue to impact public institutions, and as stakeholder expectations continue to rise. Eran Vigoda, *Stress-Related Aftermaths to Workplace Politics: The Relationships among Politics, Job Distress, and Aggressive Behavior in Organizations*, 23 J. ORG. BEHAV. 571 (2002).

Policies that have garnered support in the field often lack research regarding their effectiveness. Controversial incidents involving uses of force by police in recent years, for instance, has led to widespread support for reforms such as implicit bias training and crisis-intervention teams, but such policies often are ambiguously defined and have yet to be supported by strong bodies of empirical evidence. See Robin S. Engel, Hannah D. McManus & Gabrielle T. Isaza, *Moving beyond "Best Practice": Experiences in Police Reform and a Call for Evidence to Reduce Officer-Involved Shootings*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 146 (2020); Patrick S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures*, 117 J. PERSONALITY & SOC. PSYCHOL. 522 (2019); and Sema A. Taheri, *Do Crisis Intervention Teams Reduce Arrests and Improve Officer Safety? A Systematic Review and Meta-Analysis*, 27 CRIM. JUST. POL'Y REV. 76 (2016). Moreover, the notion of effectiveness itself too often is cramped. Many researchers and agencies undertake research to determine whether particular strategies and tactics have a particular impact. That is not the same as assessing whether a strategy meets the criteria of cost-benefit analysis, including the evaluation of social costs imposed by the policing technique. See Maria Ponomarenko & Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT-COST. ANAL. 305 (2017); see also Barry Friedman & Elizabeth G. Janszky, *Policing's Information Problem*, 99 TEXAS L. REV. 1 (2020).

Social-science research is essential to achieving sound policing. It is useful in determining what kinds of policing practices and agency policies and procedures serve the goals of policing, minimize harm, protect constitutional rights, and build community participation and trust. Procedurally just interactions with the police, for instance, have been found to increase legitimacy and cooperation with the police among individuals, even when the interactions involve punitive police activities such as arrest. See Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 L. & SOC. INQUIRY 983 (2000); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008); and TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002). Focused deterrence interventions, which blend law-enforcement and social-service actors with community members in an attempt to prevent crime and the underlying conditions that sustain violence, also have been found to be effective in combatting crime. Anthony A. Braga & David L. Weisburd,

Focused Deterrence and the Prevention of Violent Gun Injuries: Practice, Theoretical Principles, and Scientific Evidence, 36 ANN. REV. PUB. HEALTH 55 (2015); and 2 DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION (2009). The most recent ANNALS of the American Academy of Political and Social Science Research volume on police use of force (2020) demonstrates that fatalities of citizens by officers can be reduced through the implementation of practices such as risk-based gun removal of guns from people in behavioral crisis who are most likely to encounter the police, quickly stopping citizens from bleeding, promoting effective hiring, and codifying interactional tactics that have been shown to save lives. See generally 687 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. (2020).

Studies show that in addition to improving policing, research also can be used to determine the conditions under which research is translated into practice, including successful implementation techniques. See Marc-Antoine Granger, *La Distinction Police Administrative/ Police Judiciaire au sein de la Jurisprudence Constitutionnelle*, 2011 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 789 (2011); John H. Laub & Nicole E. Frisch, *Translational Criminology: A New Path Forward*, *in* ADVANCING CRIMINOLOGY AND CRIMINAL JUSTICE POLICY (2016); Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIME & JUST. 377 (2013); and Robert J. Sampson, Christopher Winship & Carly Knight, *Translating Causal Claims: Principles and Strategies for Policy-Relevant Criminology*, 12 CRIMINOLOGY & PUB. POL'Y 587 (2013). Practitioner-researcher partnerships provide researchers insight into the complexities of institutions, allowing them to understand better the policymaking process and pinpoint the factors affecting decisionmaking. See Anthony A. Braga, *Embedded Criminologists in Police Departments*, 17 IDEAS AM. POLICING 1 (2013); John H. Laub & Nicole E. Frisch, *Translational Criminology: A New Path Forward*, *in* ADVANCING CRIMINOLOGY AND CRIMINAL JUSTICE POLICY (2016); and Joan Petersilia, *Influencing Public Policy: An Embedded Criminologist Reflects on California Prison Reform*, 4 J. EXPERIMENTAL CRIMINOLOGY 335 (2008). Through research, academics become better equipped to predict windows of opportunity for positive change. See Michael Tonry & David A. Green, *Criminology and Public Policy in the USA and UK*, *in* THE CRIMINOLOGICAL FOUNDATIONS OF PENAL POLICY 485 (Lucia Zedner & Andrew Ashworth eds., 2003).

Successful partnerships between agencies and researchers long have contributed to studies that inform best practices within and across agencies. Research dating back to the early 1900s demonstrated that communities, agencies, and public officials can benefit from sound research. In 1917, the chief of police of Berkeley, California, August Vollmer, partnered with the University of California, Berkeley, in an attempt to improve policing practices and policies. August Vollmer & Albert Schneider, *School for Police as Planned at Berkeley*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 877 (1917). Since then, practitioner–researcher partnerships in law enforcement traditionally have followed either the "critical police research" tradition, which emphasizes independent roles of researchers and finds fault with the police, or the "policy police research" tradition, which emphasizes reforming the police through practical changes. David Bradley & Christine Nixon, *Ending the "Dialogue of the Deaf": Evidence and Policing Policies and*

Practices. An Australian Case Study, 10 POLICE PRAC. & RES. 423 (2009). The ineffectiveness of such partnerships, see, e.g., WHAT WORKS IN POLICING (David H. Bayley ed., 1998); and WESLEY G. SKOGAN & KATHLEEN FRYDL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (2004), however, has led to calls for practitioner–researcher relationships that aim to enhance collaboration, trust, and effective policymaking by making the parties co-producers and beneficiaries of knowledge, see Robin Engel & Samantha Henderson, *Beyond Rhetoric: Establishing Academic-Police Collaborations that Work*, *in* THE FUTURE OF POLICING 217 (Jennifer M. Brown ed., 2014); John H. Laub, *Director's Corner: Translational Criminology*, NAT'L INST. JUST.; and Laub & Frisch, supra. Practitioner–researcher partnerships can involve (1) individual researchers working with police departments, (2) academic units within universities working with police departments, or (3) collaborations between researchers from multiple academic institutions working with police agencies. Engel & Henderson, supra.

To be effective, policing agencies, researchers, and other government entities must be willing to collaborate throughout the research process. Engel and Whalen list four reasons why police should consult researchers in making important decisions: (1) operational effectiveness and efficiency; (2) external validity; (3) cooperative transparency; and (4) the information technology (IT) revolution. Robin Engel & James Whalen, *Police-Academic Partnerships: Ending the Dialogue of the Deaf, the Cincinnati Experience*, 11 POLICE PRAC. & RES. 105 (2010). First, research that is publicly available can inform best practices for policing agencies. Second, empirically supported best practices now are necessary for ensuring respect and effectiveness. By working with researchers to improve issues such as compliance with civil-rights requirements and fair treatment, the police can strengthen relations with the public. Cooperative transparency therefore can be useful in establishing procedural justice and police legitimacy, which have been shown to impact officer attitudes and behaviors positively as well. Specifically, research suggests that procedural justice can benefit police officers and the organizational contexts in which they are embedded. See Anthony Bottoms & Justice Tankebe, *"A Voice Within"" Power-Holders' Perspectives on Authority and Legitimacy*, *in* LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 60 (Justice Tankebe & Alison Liebling eds., 2013); Justice Tankebe, *In Their Own Eyes: An Empirical Examination of Police Self-Legitimacy*, 43 INT'L J. COMP. & APPLIED CRIM. JUST. 99 (2019); and Rick Trinkner, Tom R. Tyler & Phillip Atiba Goff, *Justice from within: The Relations between a Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement, of Democratic Policing, and Officer Well-Being*, 22 PSYCHOL., PUB. POL'Y & L. 158 (2016). Research also has shown that officers who experience procedural justice in their work settings have more positive views of decisions, increased trust in their administrations, and higher job satisfaction, among other positive outcomes. See Christopher Donner et al., *Policing and Procedural Justice: A State-of-the-Art Review*, 38 POLICING 153 (2015). Generally, then, research confirms the idea that police officers who experience self-legitimacy and organizational justice feel and perform better than their counterparts. Finally, technological advancements in data-driven approaches to policy have led policing agencies to benefit from partnering with and seeking assistance from academics, see John H. Laub, *Moving*

the National Institute of Justice Forward: July 2010 thru December 2012, CRIME, L. & DEVIANCE NEWS, Spring/Summer 2013, at 1; and John H. Laub has pointed to a number of other benefits of practitioner–researcher partnerships, see John H. Laub, *Life Course Research and the Shaping of Public Policy*, *in* 2 HANDBOOK OF THE LIFE COURSE 623 (Michael J. Shanahan et al. eds., 2016). By partnering with researchers, for example, the police gain valuable information and support, and become aware of the usefulness of social science for knowledge creation and application. Laub, *Moving the National Institute of Justice Forward*, supra. Further, police skepticism of researchers, and researchers' skepticism of police, are lowered as the two entities learn to work together. Laub, *Life Course Research and the Shaping of Public Policy*, supra.

Laub and Frisch highlight the importance of partnerships between criminologists and practitioners, for knowledge creation:

> [C]riminologists provide theoretical expertise to inform policies as well as knowledge of statistical or methodological techniques to determine the effectiveness of these policies. In exchange, practitioners and policymakers offer insight about the context a program will be implemented within and the organizational constraints of their agencies. Through bidirectional communication, researchers and policymakers can use criminological research to devise effective solutions to relevant problems that are feasible for the agency to implement. In doing so, basic and applied research coalesce toward creating a more effective, fair, and efficient criminal justice system.

Laub & Frisch, supra, at X.

In addition to promoting knowledge creation and sound policing, research also has numerous benefits for social scientists. Participation in practitioner–researcher partnerships not only enhances research, see Engel & Whalen, supra; and Christopher Innes & Ronald Everett, *Factors and Conditions Influencing the Use of Research by the Criminal Justice System*, 9 W. CRIMINOLOGY REV. 49 (2008), and accessibility, Engel & Whalen, supra, but it allows researchers to better understand system complexities and decisionmaking processes, Laub & Frisch, supra; and Tonry & Green, supra, allows academics to provide their students with real-world lessons, Engel & Whalen, supra, and can inspire researchers to engage in policy-relevant research, Petersilia, *Influencing Public Policy*, supra; and Braga, supra, increasing their real-world impact, Engel & Whalen, supra.

Importantly, the effectiveness of policy depends on training and quality assurance. Researchers should consider the needs of agencies in carrying out research on policing. This will require a funding stream that rewards police–researcher partnerships and collaboration between multiple criminal-justice agencies, and a particular need for implementation studies and program/policy evaluation studies. Anthony A. Braga & Marianne Hinkle, *Participation of Academics in the Criminal Justice Working Group Process*, *in* NEW CRIMINAL JUSTICE: AMERICAN COMMUNITIES AND THE CHANGING WORLD OF CRIME CONTROL 114 (John Klofas et al. eds., 2010); Peter Orszag, Director, Cong. Budget Office, Show Me the Evidence: Obama's Fight for Rigor

and Results in Social Policy, Presentation Before the Brookings Institution (Dec. 1, 2014); and Sampson et al., supra.

Although basic science is important in any field, in considering future research, social scientists, especially those interested in partnering with agencies, should consider working toward actionable evidence for agencies interested in promoting sound policing. A number of important recommendations have been proposed to do this, among the most important being the utilization of innovative, cost-effective, and replicable research methods, particularly during times characterized by budget deficits and limited resources; the prioritization of knowledge dissemination in ways that are useful to communities, practitioners, lawmakers, and other researchers; and the execution of randomized, controlled studies and community-based research that considers the perspectives of those most affected by policing.

This will require that practitioners and researchers overcome a number of challenges and concerns relating to time and resource constraints, rigor in research, political issues, and interagency and interdisciplinary collaboration issues, among others. MacDonald's notion of the "dialogue of the deaf," Barry MacDonald, Research and Action in the Context of Policing – An Analysis of the Problem and a Programme Proposal (1987) (unpublished manuscript), does well in explaining challenges relating to practitioner–researcher partnerships, including the time-consuming and expensive nature of research, the notion that policymakers often need quick solutions, and the oft politicization of policymaking. See also NAT'L RESEARCH COUNCIL, USING SCIENCE AS EVIDENCE IN PUBLIC POLICY (2012); Wesley G. Skogan, *The Challenge of Timeliness and Utility in Research and Evaluation*, *in* THE NEW CRIMINAL JUSTICE: AMERICAN COMMUNITIES AND THE CHANGING WORLD OF CRIME CONTROL 128 (2010); and Laub, *Life Course Research and the Shaping of Public Policy*, supra. Engel and Whalen note that "too often the real value of material presented by academia is lost when the tone with which it is presented is received as being either condescending, confusing, or a total reversal of what the police department is currently doing." Engel & Whalen, supra, at 109. Other issues, such as publishing concerns, Joan Petersilia, *Policy Relevance and the Future of Criminology – The American Society of Criminology. 1990 Presidential Address*, 29 CRIMINOLOGY 1 (1991); and Petersilia*, Influencing Public Policy*, supra, and the assumption that close partnerships lead to less objectivity in research can push academics away from research. Finally, there are important interdisciplinary and interagency collaboration issues. Because the causes and consequences of crime are so complex, and because agencies are interdependent on one another, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: SCIENCE AND TECHNOLOGY: A REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967), effective policy may require collaboration from multiple disciplines and agencies outside of policing (e.g., courts and probation and parole), which requires more time, energy, and resources.

First, a multifaceted and interdisciplinary approach to dissemination is needed. Laub & Fisch, supra. Laub and Fisch note that this will require more explicit efforts to disseminate information to policymakers, such as publishing in a diverse range of outlets, and that researchers will need to have a social-media presence and to stay in tune with technological advancements.

Laub & Fisch, supra. Researchers should make their research more accessible to the general public. Technical articles and their most important findings should, for instance, be routinely translated into lay language for police chiefs and policymakers at local, state, and federal levels. Laurie O. Robinson, *Five Years after Ferguson: Reflecting on Police Reform and What's Ahead*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 228 (2020).

Theory must also be used to better understand policing and its effects. Sherman, supra; Robinson, supra. As shown in a recent ANNALS volume on police use of force, theory can be used to inform a wide variety of practices ranging from hiring and training to responses to misconduct. 687 ANNALS AM. ACAD. POL. & SOC. SCI. (2020). Informing effective policy will require going beyond traditional methods of targeting, testing, and tracking police actions. In addition to using innovative strategies to collect and analyze data, we must also use theory in our movement toward a broader understanding of police fatalities and the systems that produce them. Perhaps most importantly, researchers, practitioners, and policymakers can and must work together to improve policing.

In addition, it might be possible to incentivize students, faculty, academic institutions, and agencies to embrace applied research. According to Engel and Henderson, structured collaborations that span multiple universities and police agencies will be most effective at advancing data-driven policy in law enforcement. Engel & Henderson, supra. Finally, collaboration between academia and law enforcement must be prioritized under unique circumstances. Police executives can engage in evidence-based policing by scientifically testing interventions, and academics can engage in rapid research responses for critical issues in policing.

Local, state, and federal governments should support the production of research financially, legislatively, and by engaging in data collection and analysis efforts that promote transparency and centralization. Effective reform requires that research be conducted—and academia−law enforcement relationships be developed in formulating and carrying out research on policing—at local, state, and federal levels. Police chiefs and elected officials at the local level appear to be open to research. Robinson, supra. This is important, as the decentralized nature of policing makes decisionmaking highly local. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); and Franklin E. Zimring, *Police Killings as a Problem of Governance*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 114 (2020). Local police departments should collect data relating to police attitudes and behaviors, such as use of force, Greg Ridgeway, *The Role of Individual Officer Characteristics in Police Shootings*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 58 (2020), and social-network influences, Linda Zhao & Andrew V. Papachristos, *Network Position and Police Who Shoot*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 89 (2020). Local governments would also do well in committing to evidence-based legislative changes requiring, for example, improving officers' social-interaction skills through training, Scott Wolfe et al., *Social Interaction Training to Reduce Police Use of Force*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 124 (2020), and mandating rapid hospital transport by police, Sara F. Jacoby, Paul M. Reeping & Charles C. Branas, *Police-to-Hospital Transport for Violently Injured Individuals: A Way to Save Lives?*, 687

ANNALS AM. ACAD. POL. & SOC. SCI. 186 (2020); Daniel S. Nagin, *Firearm Availability and Fatal Police Shootings*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 49 (2020); and Robinson, supra.

Though empirical evidence is needed to determine which policies are effective, states appear to be increasing their involvement in research. Legislation has increasingly supported the implementation of laws regarding de-escalation training, body-worn cameras, Crisis Intervention Team (CIT) training, and the like. Robinson, supra. Thirty-four states and Washington, D.C., adopted police-reform legislation between 2015 and 2016, RAM SUBRAMANIAN & LEAH SKRZYPIEC, VERA INST. OF JUST., TO PROTECT AND SERVE: NEW TRENDS IN STATE-LEVEL POLICING REFORM, 2015–2016 (2017), https://dataspace.princeton.edu/bitstream/88435/dsp01bn999967j/1/041417-PolicingTrendsReport-web.pdf, and at least 16 states have adopted use-of-force policies since 2014, NAT'L CONFERENCE OF STATE LEGISLATURES, STATE TRENDS IN LAW ENFORCEMENT LEGISLATION: 2014–2017 (2018), http://www.ncsl.org/research/civil-and-criminal-justice/state-trends-in-law-enforcement-legislation-2014-2017.aspx. Though legislative changes such as these are important, governors and attorneys general should support legislation that increases state funding and mandates data collection and analysis. State-level actors are in a unique position to coordinate and evaluate police-department policies within their states, and they should use this to their advantage.

The Federal Bureau of Investigation (FBI) is a national-level policing agency that houses the Uniform Crime Reports (UCR), the largest statistical reporting effort on policing and crime. Though the FBI does not mandate data collection or audit most UCR data, it has encouraged local police agencies to report important statistics that are available to the public as aggregate monthly tallies of outcomes such as crimes and clearances. Zimring, supra. Another FBI system, the National Incident-Based Reporting System (NIBRS), collects more detailed incident-level data on victims, offenders, and crimes at local, state, and federal levels. According to the FBI, the UCR Program has recently partnered with the Bureau of Justice Statistics on the National Crime Statistics Exchange in the hopes of making nationwide implementation of NIBRS possible and transition to a NIBRS-only system.

Major improvements in the funding of science have taken place within the U.S. Department of Justice (DOJ), with the creation of agencies including the National Institute of Justice (NIJ) as part of the Omnibus Crime Control and Safe Streets Act of 1968, and later the Office of Community Oriented Policing Services (COPS). Robinson, supra. As part of the Violent Crime Control and Law Enforcement Act of 1994, the NIJ and COPS encouraged the National Research Council's establishment of the Committee to Review Research on Police Policy and Practices, which assesses the state of the research on policing. NAT'L RSCH. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (2004). In 2012, the Bureau of Justice Assistance (BJA) also demonstrated its commitment to science with its publication of five strategic goals, including the "integration of evidence-based, research-driven strategies into the day-to-day operations of BJA and the programs BJA administers and supports[, and the] increasing program effectiveness with a renewed emphasis on data analysis, information sharing, and performance management." BUREAU OF JUST. ASSISTANCE, BJA STRATEGIC PLAN (2012), https://bja.ojp.gov/

sites/g/files/xyckuh186/files/About/BJAStrategicPlan.pdf. The NIJ has devoted federal funds to improve data collection and analysis within and across policing, courts, and corrections programs (e.g., SMART programs, Justice Reinvestment, Violence Reduction Network). Petersilia, *Policy Relevance and the Future of Criminology*, supra; and Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. POL'Y REV. 327 (2014).

There are a number of challenges that the federal government must address. First and foremost, federal research efforts appear to be dwindling, and a more aggressive federal program of research and statistics on policing may be needed. Robinson, supra. Of further concern is the limiting of financial support to very specific types of research studies, such as randomized controlled trials and studies centered around a specific type of "evidence-based policing." The formation of evidence-based graduate-school programs and societies of evidence-based policing have furthered this trend, leading to thousands of evidence-based policing researchers. Sherman, supra. While useful, such research privileges internal validity over external validity, and it prevents scientists from exploring basic science and less popular, but potentially important, topics and methods. Finally, the highly decentralized nature of policing in America makes it difficult to promote large-scale, centralized reform at the federal level.

Other public institutions within and outside of the United States can provide recommendations for improving policing research. In a recent interview, Ayanna Howard, a roboticist stationed at Georgia Tech, called on Americans to control police facial-recognition technologies that have been shown to act in ways that disproportionately falsely identify Black Americans (NISTIR 8280). Noam Hassenfeld, *Today Explained: How AI Makes Policing More Racist*, VOX NEWS (July 2, 2020), https://podcasts.apple.com/us/podcast/how-ai-makes-policing-more-racist/id1346207297?i=1000481986977. To promote accountability among police departments, Howard suggests creating an institution akin to the Food and Drug Administration (FDA), which is responsible for highlighting the costs and benefits of particular drugs and medicines and acts as a centralized system that ensures accountability among companies nationwide. What if police departments were mandated to evaluate and report all benefits and/or costs of police activities and programs before implementing them and promoting them? An FDA-type institution, Howard argues, would allow for the federal government to effectively manage police-department activities, ban policies that are ineffective, and disseminate policies that appear to be effective. It would also promote transparency and the documentation of what may be deemed "acceptable harms." Calls have also been made by researchers Joy Buolamwini (Massachusetts Institute of Technology) and Ben Shneiderman (University of Maryland) to create oversight through a crowdsourced "algorithmic bill of rights" or a "National Algorithm Safety Board." Hassenfeld, supra.

Countries outside of the United States provide models for funding research and managing data collected at local, state, and federal levels. Rather than restricting funding to specific types of studies, topics, and centers, the United States should emulate international research centers, such as the Dutch Research Council (NWO), that fund a wide range of basic and applied scientific research studies, coordinate researchers at various universities and institutes, promote

interdisciplinary collaboration, and manage databases that are made available to national and international audiences. Zimring recently called for the creation of a Justice Department statistical and research office that would mirror the United Kingdom's Independent Office for Police Conduct. Zimring, supra. This should be considered.

The President's Task Force on 21st Century Policing called for the tracking and analyzing of data relating to policing changes and their effects. Such data would allow for researchers and practitioners to gain insight into policing changes and their impacts on attitudes, behaviors, and crime. While a number of studies have been done to evaluate police activities and their effects on a number of outcomes within and outside of the United States, the field of policing has yet to examine and attempt to standardize policy changes and recommendations. Time and resource constraints often prevent police agencies from engaging in policy discussions and changes, and the decentralization of police departments causes police departments to have little guidance when developing, implementing, and/or evaluating policy changes. When they are able to implement practical changes, police departments lack the time and effort needed to disseminate their important findings and recommendations. The field of policing would largely benefit from a centralized repository designed to track and disseminate knowledge regarding police practices used by law-enforcement agencies throughout the United States. Such a resource would benefit police departments and researchers seeking guidance on best practices, collaboration, and ways of developing, implementing, and/or evaluating practices.

On June 25, 2020, the House and Senate introduced the Facial Recognition and Biometric Technology Moratorium Act of 2020 that would ban federal police agencies from using facial-recognition technologies and require state police departments to ban facial recognition in order to be eligible for specific federal grants. While legislative changes such as these may be beneficial, many other improvements can and should be made. Improving policing will first and foremost require increased funding for collecting and analyzing data across local, state, and federal levels. American policing would largely benefit from legislation that mandates comprehensive and high-quality data reporting, and a centralized database would be particularly useful in promoting best practices and scientific research among researchers and police departments. Further, because policies that have garnered support have modest support at best, Robin S. Engel et al., *Moving Beyond "Best Practice": Experiences in Police Reform and a Call for Evidence to Reduce Officer-Involved Shootings*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 146 (2020); Robinson, supra, rather than restricting research funding to particular types of studies and programs, such as randomized controlled trials that evaluate hotspots policing, the government can and should encourage interdisciplinary and interagency collaborations, and fund and incentivize studies that span a wide variety of methods and topics.

§ 14.12. Criminal Investigation of Officers

(a) Police conduct that may involve physical harm, a deprivation of constitutional rights, or public corruption should be investigated and evaluated in a thorough, timely, fair, and impartial manner to determine whether criminal charges are warranted.

(b) When an investigation of an officer concerns a significant use of force or deprivation of rights, the public should be timely apprised of the status of the investigation, decisions about whether to bring charges, and—to the extent permitted by law—an explanation of any actions taken.

(c) Officer conduct should be investigated, and charging decisions made, by actors outside the officer's agency or jurisdiction when doing so is necessary to:

(1) ensure thoroughness, fairness, or impartiality;

(2) promote community trust; or

(3) comply with policy or law.

(d) Officers accused or suspected of crimes in their private capacities—not under color of law—should be investigated and charged in the same manner as individuals who are not officers would be for the same offenses.

Comment:

a. Criminal investigations of police officer misconduct, generally. Criminal prosecutions of officers who commit crimes against members of the public serve several important functions. They vindicate the public's interest in sound policing and the rule of law. They show the same concern for victims of police misconduct as is shown for other victims of crime. They generate trust in the fairness of the criminal-justice system. And they prevent future harm by deterring would-be offenders. See § 14.03 (describing purposes of statutory remedies). The public rightfully expects investigators and prosecutors to investigate and evaluate potentially criminal conduct fairly, no matter who is the perpetrator or victim. See § 14.05 (Prosecutor and Other Attorney Responsibilities for Ensuring Sound Policing).

Yet, criminal investigations of potential legal violations by police officers raise special concerns. Police officers carry out criminal investigations, including those in which law-enforcement officers are suspects. Prosecutors work closely with police officers and agencies, and prosecutorial decisionmaking is largely shielded from public view. Given these realities, members

of the public understandably are sometimes skeptical about the fairness and accuracy of investigations and prosecutorial decisionmaking in cases involving law-enforcement officers.

In order to advance the public trust, investigations into allegations of police-officer misconduct should be thorough, fair, and impartial, and should occur in a timely fashion. The best way to ensure fairness, and to garner public trust, is through established and publicly available protocols for investigating and charging cases involving law enforcement. States should set the minimum standards for such protocols for agencies, and agencies should adopt policies and train personnel in preparation for critical events. Those standards should be designed to ensure that investigations are not only accurate, but thorough, fair, impartial, and timely.

b. Public notification. To garner public trust, those conducting an investigation concerning an officer's participation in a significant adverse event should notify the public in timely fashion of the outcome of the investigation, and, when law permits, the reasons supporting it. Whether or not charges are pursued in a matter involving law enforcement, the cause of justice and public faith in law enforcement best is served by informing the public promptly of the decision and the basis of that decision, even if such announcements and explanations are not regularly done in cases that do not involve law-enforcement personnel.

c. Independent investigation and prosecution. To ensure that justice is done, and to promote trust in the criminal-adjudication system, criminal investigations and charging decisions concerning officer conduct may need to be carried out independently, that is, by actors not closely connected to the officers involved. When appropriate, external prosecutors should be brought into the process as soon as possible after the occurrence of the critical incident that justified an external criminal investigation. Because just prosecutions also may be stymied by weak or biased investigations, when independence is required, critical incidents should be investigated by agencies that do not employ the involved officers, and prosecutors and agencies should ensure that this is done. When outside investigations occur, agencies should facilitate them.

d. Other crimes. Although public attention often focuses on crimes officers allegedly committed while acting under color of law, officers also sometimes are accused of or have committed other crimes, such as domestic assault or driving under the influence. Officers and prosecutors have at times been overly deferential to police officers who have committed ordinary crimes and have failed to make arrests or bring charges in circumstances in which a nonofficer would face arrest and prosecution. This practice undermines the rule of law, the public trust, and

the criminal-adjudication system, and it may be inconsistent with public safety. Instead, officer actions should be evaluated fairly, similarly to the actions of other individuals, and in accordance with the public interest and appropriate retributive principles.

REPORTERS' NOTES

Appropriately investigating and prosecuting police officers who commit crimes serves the same purposes as other criminal prosecutions, including punishing the guilty and discouraging future offenses. In addition, police officers act with a cloak of state authority, and when they commit crimes under the color of law, they "seem to signal the state's contempt for the victims as citizens. Criminally prosecuting the officers counteracts that disrespect and recognizes the political status of victims and their communities." RACHEL HARMON, THE LAW OF THE POLICE 690 (2021).

Although appropriate criminal investigations and prosecutions of officers may serve these important goals, these cases also raise distinctive challenges. Because law enforcement investigates crimes, including crimes by the police, it is easy for those investigations to be biased, thereby compromising the fair collection of evidence and evaluation of potentially criminal events. See Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS PUB. L. REV. 151, 156-157 (2003). Moreover, prosecutors who depend on close working relationships with officers and agencies and sympathize with the challenges of policing may have difficulty exercising independent judgment about whether criminal charges against them are warranted, as they are required to do. See, e.g., Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 398 (2017); see also Am. Bar Ass'n, ABA Criminal Justice Standards, Prosecution Function § 3-3.2(a) (2017) ("The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel."). Not only do these difficulties undermine some criminal prosecutions that should be brought, they compromise public trust, even when prosecutors appropriately decline to bring charges.

In light of both the reality and perception of bias, some have argued that investigations and prosecutorial decisions concerning officers should not be carried out by officers and prosecutors who are in the same jurisdiction as the officer whose conduct is at issue. See, e.g., Final Report of the President's Task Force on 21st Century Policing, §§ 2.2.2, 2.2.3 (2015). Indeed, several states require independent assessment of some alleged crimes by the police. See, e.g., WIS. STAT. § 175.47(2)-(5); UTAH CODE ANN. § 76-2-408(2)-(5). Although external investigation and prosecution can reduce bias and increase community trust, independence is not always easy to achieve, even when investigations and prosecutions are conducted by external entities. Outside investigation and prosecution is not a panacea. Whatever their circumstances, investigations and prosecutions of police misconduct are unlikely to earn the public trust if they are not conducted carefully, with sufficient resources, and with insulation from political or law-enforcement pressure. See Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235 (2015).

Traditionally, prosecutors have rarely explained either prosecutorial decisionmaking or declinations, and they usually are under no legal obligation to do so. However, given the perception that prosecutors may not be unbiased evaluators of police conduct, there are special reasons for them to announce and explain decisions not to bring charges against officers involved in critical incidents. Recognizing this, several prosecutors' offices have adopted public-disclosure policies and practices for declinations in some cases involving officers. See, e.g., Div. of Crim. Just., N.J. Off. of the Att'y Gen., Uniform Statewide Procedures and Practices for Investigating and Reviewing Police Use-of-Force Incidents 12; Off. of the State's Att'y for Baltimore City, Police Use of Force Declination Reports, https://www.statorney.org/policy-legislative-affairs/policy/police-use-of-force-declination-reports. See also Jessica Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 538 (2020) (suggesting that prosecutors might choose to issue declination reports in police-misconduct cases because "there have long been concerns about underenforcement and preferential treatment, and because such conduct uniquely threatens democratic ideals of equal protection of the law and political participation."). To promote careful consideration by public officials and to enhance trust and understanding by the public, this Section advocates transparency about the procedures used to ensure appropriate investigation and prosecution of police officers and the reasons for decisions regarding critical incidents involving the police.

§ 14.13. Certification and Decertification of Law-Enforcement Officers

(a) State Certification and Decertification of Officers.

(1) States should only permit officers certified to exercise policing powers to do so, and they should certify only those officers who meet carefully considered state standards for qualifications and training. Except in exceptional circumstances, states should not certify an officer who has been decertified in that state or in another state.

(2) States should decertify officers who fail to meet ongoing requirements for certification or who commit acts warranting decertification.

(b) Agency Reporting and Hiring Obligations.

(1) Agencies should report arrests of, convictions of, or serious misconduct by officers, as well as officer terminations, to the state agency responsible for decertification, and states should mandate that they do so.

(2) Except in exceptional circumstances, agencies should not hire an officer who has been decertified in another state.

Comment:

a. Certification and decertification of police officers. Certification is a process by which state officials formally establish and attest that a person meets the standards for exercising the powers of a police officer within the state. Decertification (also known as revocation) deprives an officer of the certification or license to serve as a sworn officer, and thereby bars that individual from serving as an officer in the state.

A state, by certifying police officers before they commence their responsibilities, assures the public that its officers are qualified and prepared for their duties, and signals its commitment to sound policing. The practice of decertifying officers advances sound policing in three ways. First, it prevents misconduct and harm by prohibiting the continued employment of an officer who already has committed serious misconduct. Second, it promotes the legitimacy of policing by preventing officers who have abused the public trust from continuing to serve as officers and by making clear the state does not tolerate such abuse. Third, it enhances policing by maintaining standards of professional conduct for all officers. All states license or certify police officers, and all but a handful decertify officers in some circumstances. All states should both certify and decertify officers, and states should develop both the standards for certification and the grounds and procedures for decertification in light of the demands of sound policing.

b. Requiring certification of all individuals who exercise policing powers. Some states presently allow individuals to exercise the powers of an officer in auxiliary or temporary positions before they are certified or without earning state certification. Such practices undermine sound policing by allowing individuals who do not have the necessary qualifications and preparation to exercise state authority to do so. They also erode public confidence that the officers the public encounters are qualified or competent. To ensure that officers meet the standards that the state specifies, no state should permit officers who are not certified to exercise the powers of an officer. Thus, states should not permit auxiliary or provisional officers who are not fully qualified, trained, and certified to exercise policing powers.

c. Grounds for decertification. Legislatures should require decertification of officers who fail to meet minimum professional standards or who have committed serious wrongdoing. Although states reasonably may vary in their elaboration of the kinds of serious misconduct that should give rise to decertification, and in their capacity to investigate and assess misconduct, decertification should, at a minimum, occur upon:

(1) conviction (including by a plea of guilty or nolo contendere) for any felony and any misdemeanor that reflects on an officer's fitness to serve, regardless of the sentence imposed;

(2) commission of any conduct that would constitute a felony in the state; and

(3) commission of any conduct, whether criminal or not, that constitutes a significant abuse of the public trust or reflects an unfitness to serve, including, for example, sexual misconduct in the line of duty, unjustified use of deadly force, or perjury.

Some states presently limit decertifications to officers who have been convicted of a crime. Although using criminal convictions as the only basis for decertification reduces discretion and limits the institutional burden necessary to carry out decertifications, a decertification process that operates only upon conviction does not satisfy this Section. Criminal prosecutions of police officers are simply too rare and too limited in scope to be the sole basis for decertification. While criminal prosecutions are subject to a standard of proof that is commensurate with the seriousness of criminal stigma and punishment, they are inappropriate for determining whether an individual should continue to have authority to exercise the powers of a police officer. Limiting decertification to cases in which there is criminal conviction is inadequate to maintain professional standards, prevent harm, or sustain community trust in the institution of policing.

d. State commission and process for decertification. Every state should have a commission or agency that has the power to decertify officers pursuant to standards provided by law. Decertification should take place when an officer voluntarily surrenders his or her certification; when a judgment of conviction for an offense warranting decertification has been entered for an officer in any state or federal court; or when a state commission, board, or administrative process finds that an officer warrants decertification because he or she no longer meets the qualifications for certification or because he or she has committed misconduct that requires decertification under state law. At a minimum, state agencies should be organized, staffed, and have adequate resources to enable them to identify, assess, and decertify officers when one of these conditions has been met, regardless of whether criminal or disciplinary action has been taken with respect to the misconduct. States should not place on agencies the burden of assessing or proving that conduct warrants decertification, or set up unreasonable barriers to establishing that an officer should be decertified.

State decertification processes should be fair to officers and consistent with the principles of procedural justice specified in § 1.06. In order to fully serve the purposes of decertification and to meet minimum standards of accountability and transparency, state commissions should track and make public, by officer and agency, reports of misconduct warranting decertification, findings by the state commission, and any decertifications or other discipline imposed. See § 14.14(b).

e. Sanctions short of decertification. Officers who commit misconduct warranting decertification should be decertified. In addition, states should consider empowering state commissions responsible for decertification to impose lesser sanctions when misconduct does not warrant decertification but otherwise violates professional standards because, for example, it is dishonest, illegal, or shows disregard for the rights of individuals. Such lesser sanctions may include a temporary suspension of certification, probation, or remedial retraining. Records of such misconduct and the lesser sanctions imposed also should be kept, and repeated instances of misconduct should be a basis for decertification.

f. Reporting misconduct to state commission. In order for decertifications to serve their purposes, state commissions responsible for decertification must be aware of officers who may be subject to decertification. Policing agencies should notify the state commission when they have reason to believe an officer has committed misconduct that warrants decertification, whether or not the agency takes disciplinary action or continues to employ the officer. Agencies also should report known arrests and convictions of officers. State commissions also should readily accept complaints from members of the public. To ensure effective reporting, states should mandate that agency heads report arrests, convictions, and other conduct that may warrant decertification, and should protect agencies, officers, and members of the public from civil liability for good-faith reporting of alleged misconduct to state commissions.

Agencies sometimes engage in voluntary dismissal agreements with officers who are suspected of or known to have committed misconduct that would support decertification. Some such agreements include language permitting officers to accept dismissal in exchange for an agreement by the law-enforcement agency to refrain from making a finding about misconduct or reporting alleged misconduct to the state decertification commission. Any agreement that requires an agency to refrain from reporting to the state commission officer misconduct it has reason to believe would justify decertification is inconsistent with this Section and should be prohibited by the state. Although voluntary dismissal agreements have the advantage of decreasing the

administrative burden on agencies in removing problematic officers, they also allow those officers to seek employment in other jurisdictions. This contravenes the purpose of decertification. Without regard to whether a state forbids such agreements, agencies should not enter agreements that prevent them from reporting misconduct potentially meriting decertification.

g. Checking state and national decertification records. State law should require that agencies check state decertification records and the National Decertification Index, or any future national database of decertified officers, before hiring officers. See § 14.14. Even if a state fails to require this, agencies nevertheless should check state decertification records and any national databases, and should contact prior employers, before hiring officers. This is necessary to determine whether an officer has committed misconduct warranting decertification or left employment after a complaint about or during an investigation into misconduct. Agencies receiving such inquiries should provide full and accurate information. In every instance, prior to certifying an officer, state commissions should check state and national decertification indices to determine whether an officer has been decertified.

h. Standards for hiring or certifying a previously decertified officer. State commissions should not recertify an officer who has been decertified in the same state, nor should they certify an officer who has been decertified in another state**,** except in exceptional circumstances, such as those detailed below. If states do choose to permit certification of a previously decertified officer, they should set by law clear and stringent conditions for such certifications. Similarly, no agency should hire a previously decertified officer unless doing so is consistent with written policies and hiring practices specifying stringent conditions under which a previously decertified officer may be hired. At a minimum, conditions for certifying or hiring a previously decertified officer should include: (1) a waiting period of not less than three years after decertification; (2) the recent completion of academy and field training mandated for entry-level hires (even if previously completed); and (3) evidence that the officer has taken responsibility for prior wrongdoing and has made appropriate restitution. States should not certify and agencies should not hire officers who have previously been decertified for intentional, serious abuses of the public trust.

REPORTERS' NOTES

1. Purpose. Decertification emerged as a tool for addressing police misconduct in the 1970s. When officers are deprived of their licenses or certifications, they cannot be retained as sworn law-enforcement officers by an agency or hired within the state by another agency. Thus, decertification

prevents a common problem in policing: that officers who are known to have committed serious misconduct and are separated from one department can easily be hired by another. See Roger L. Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 149 (2012).

Decertification may seem unnecessary. All departments engage in background checks of officers before they hire them, and effective investigations should uncover most previous misconduct in the line of duty. Once misconduct is uncovered, departments should have an incentive to avoid hiring officers who experience shows might be misconduct-prone.

Nevertheless, evidence suggests that officers fired for misconduct move from department to department, and that they are more likely than other officers to be fired for misconduct. See Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1716-1718 (2020) (finding in Florida from 1988 to 2016, nearly 800 officers who had been fired for misconduct were employed by new agencies in any given year); id. at 1747 (finding that previously fired officers are more likely to be fired for misconduct and to "incur complaints of serious misconduct"). First, departments may investigate inadequately or otherwise fail to uncover misconduct that is unreported by a previous employer. Second, agencies may discover misconduct and hire officers anyway. See id. at 1747-1757 (assessing reasons departments may hire officers with a history of misconduct); see also Goldman, supra, at 149-150. For instance, resource-constrained departments may hire officers who are already certified rather than pay for training new officers. Goldman, supra, at 149-150. In addition, officers with a history of misconduct may be willing to work at the lower wages offered by some departments. Loren T. Atherley & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE Q. 420, 421 (2013).

Although victims may have a cause of action against municipalities under 42 U.S.C. § 1983 for misconduct that arises from inadequately screened officers, see Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997), successful litigation of this sort is rare and unlikely to discourage agencies from hiring previously fired officers. See POLICE MISCONDUCT LAW AND LITIGATION § 4:19 (3d ed. 2020) ("Culpability requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged. Establishing municipal liability in the hiring context requires a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff.") (internal quotations omitted) (quoting Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998)). So perhaps it is not surprising that agencies do not consistently and vigorously detect and avoid hiring officers who may not be suitable for sound policing. Nor do they consistently screen officers to ensure that those who work for the agency continue to meet the qualifications and training standards established by law. See Philip Stinson, et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, CRIM. JUST. FAC. PUBL'NS (2016) (finding that many officers continue to serve after convictions that disqualify them from service under state law). Decertification therefore plays an important role in protecting the public from police misconduct, in promoting confidence in agencies and officers, and in maintaining high standards for policing. In addition, decertification signals a state's commitment to ensuring lawful and sound policing.

2. Providing for decertification. The provision in this Section that every state have a commission empowered to decertify officers is consistent with the practice in the overwhelming majority of states and with the Model Minimum State Standards for Professional Conduct developed by the International Association of Directors of Law Enforcement Standards and Training (IADLEST). See INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS & TRAINING, MODEL MINIMUM STANDARDS §§ 1.0.4, 6.0 (each state should have a commission with the power to revoke police-officer certifications). State commissions, often known as police officer standards and training boards or commissions (POSTs), have the authority to revoke officer certifications in all but a few states. The remaining states do not decertify officers; Hawaii has no POST, and POSTs in Massachusetts, New Jersey, New York, Rhode Island, and the District of Columbia do not have the authority to revoke an officer's certification, though New Jersey law provides for license forfeiture after some criminal convictions. See N.J. STAT. ANN. § 2C:51-2 (West 2007).

3. Grounds for decertification. Existing state laws on decertification vary substantially with respect to what conduct is decertifiable and how that conduct is specified. For example, some states permit decertification *only* upon conviction of a crime. See, e.g., ALA. CODE §§ 36-21-45(7), 36-21-46(5) (2001); MICH. COMP. LAWS ANN. § 28.609 (West 2019). This approach is administratively efficient because it allows POSTs to exist but without the capacity to investigate and adjudicate misconduct to determine whether it warrants decertification. However, because criminal convictions depend on prosecutorial discretion and proof beyond a reasonable doubt, this limitation also prevents decertification from serving its purposes fully. In fact, when decertification is limited to convictions, as it is in some states, it may be largely redundant of laws that prohibit felons from serving as officers or that require that officers be able to carry firearms, which they are barred from doing after they have been convicted of felonies or crimes of domestic violence. See 18 U.S.C. § 922(g). Among states with more expansive grounds for decertification, some use language such as "moral turpitude" or "engaging in conduct unbecoming a law enforcement officer," to set a standard for decertification. See, e.g., MO. REV. STAT. § 590.080.1(3) (West 2021) (allowing decertification for "any act while on active duty or under color of law that involves moral turpitude"); S.D. CODIFIED LAWS § 23-3-35(3) (2012) (allowing decertification for "conduct unbecoming of a law enforcement officer"). Though general and sometimes expansive, in most states such standards have provided clear notice to officers about conduct that may be grounds for decertification, as they should. Other states specify a narrower range of conduct for which decertification is justified. See, e.g., UTAH REV. STAT. § 53-6-211(1)(a)-(h) (West 2021); N.D. CENT. CODE ANN. § 12-63-12(1) to (2)(e) (West 2013). These approaches to decertification have their advantages and disadvantages, and this Section does not advocate a specific means of articulating the grounds for decertification in the law. Instead, each state should adopt a method for specifying decertifiable misconduct that best fits its needs in creating an effective, workable, and fair decertification system. States may also provide additional guidance about decertifiable misconduct through regulation.

A couple of states decertify officers whenever they are terminated from a law-enforcement agency or leave in lieu of termination. See, e.g., WIS. STAT. ANN. § 165.85(3)(cm) (West 2015)

(allowing the police officer standards and training board to "[d]ecertify law enforcement, tribal law enforcement, jail or juvenile detention officers who terminate employment or are terminated"). This approach is problematic because even a good-cause firing of an officer does not necessarily justify revocation of an officer's license. Goldman, supra, at 153. In addition, such an approach inhibits uniformity within the state about what constitutes misconduct warranting decertification, and muddies the message that other states should draw from a state's decision to decertify.

4. Fairness and procedural justice for officers. As Comment *d* indicates, state processes for investigating and adjudicating whether misconduct merits decertification should provide fair process for officers, including notice and an opportunity to be heard, and should adhere to the principles of procedural justice, as discussed in § 1.06. This recommendation is consistent with IADLEST's minimum standards. See INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS & TRAINING, MODEL MINIMUM STANDARDS § 6.1.1. Nevertheless, states should ensure that processes do not erect unnecessary or unjustifiable barriers to holding officers accountable.

5. Sanctions short of decertification. Most states presently grant POSTs authority to issue sanctions short of decertification. For example, 26 POSTs have the power to suspend an officer's certification temporarily. Atherley & Hickman, supra, at 424. Some agencies also have the power to suspend an officer from duty, to order additional training, to issue a reprimand, to place an officer on probation, to require counseling, or to impose a fine. Id. at 425. The recommendation in this Section that POSTs have sanction powers other than decertification also is consistent with § 6.1.0 of IADLEST's Model Minimum Standards.

6. Reporting misconduct to state commission. States that permit decertification for grounds other than criminal conviction necessarily are reliant on agencies to report officer misconduct. This has been a significant obstacle to effective use of decertification in some states. Goldman, supra, at 153-154. Some states require that only felonies be reported. Only 18 states require agencies to report awareness of any conduct that could lead to decertification. Atherley & Hickman, at 428. Even where reporting requirements exist, they may be disregarded if state POSTs lack the resources to assess and encourage reporting and to enforce the requirements. Providing more resources to POSTs would help to alleviate the problem, but it is unlikely to prove a panacea. Goldman, supra, at 154.

States that do not require reporting should mandate and encourage it, including by providing protection against civil liability for agencies that make good-faith reports of alleged misconduct to the state or to another agency. The reporting requirement proposed in this Section is consistent with § 6.0.7.1 of IADLEST's Model Minimum Standards. Similarly, IADLEST supports immunity from civil liability for agencies that engage in good-faith reporting of possible misconduct, as recommended in this Section. MODEL MINIMUM STANDARDS § 6.0.7.2 (IADLEST).

Presently, states overwhelmingly require agencies to report all separations of officers from departments to the state POSTs, not merely those involving misconduct. Atherley & Hickman, at 428. This Section supports this practice and recommends it to the remaining states. Separation reporting allows state POSTs to maintain better records concerning officers, and it can help POSTs identify agencies that avoid misconduct findings rather than report officers. One recent study

showed that while more than a quarter of separations of officers from agencies were retirements, more than half were resignations. Approximately 10 percent were expressly deemed dismissals, and another five percent were rejections of officers during their probationary period. Brian A. Reaves, *Hiring and Retention of State and Local Law Enforcement Officers, 2008 – Statistical Tables*, BUREAU OF JUST. STATS., Oct. 2012, at 6.

§ 14.14. National Database of Decertifications

(a) The federal government should ensure the existence of a mandatory, up-to-date, accurate, and complete repository of state decertification records.

(b) States should ensure the existence of similar state repositories, and should make timely reports on officer decertifications to appropriate national repositories of records on decertification.

Comment:

a. National database of decertifications. The federal government and the states share responsibility for ensuring that all policing agencies have access to accurate, complete, and timely information about officers who have been decertified. Having such information available is possible only with mutual cooperation and commitment to promoting state and national repositories of records on decertification.

Presently, national information about certification and license revocation is collected in the National Decertification Index (NDI), a searchable registry operated by a nonprofit organization, the International Association of Directors of Law Enforcement Standards and Training. The U.S. Department of Justice has, at times, provided some funding to support the NDI. However, participation by states is voluntary. Not all states contribute to the index, and many who do participate do not do so in a timely fashion. The result is that the NDI cannot provide hiring agencies complete and accurate information about whether an officer has previously been decertified.

The federal government should therefore either develop a federal decertification database or promote and support a stronger version of the NDI, for example, by making full participation in the NDI a condition of grant programs for policing and by setting national standards for decertification. The federal government also should consider supporting a national registry that extends beyond decertification to include other information about officer misconduct, including

civil judgments and settlements and terminations, which might be appropriately considered in officer hiring.

As long as the NDI is the primary national database for decertification information, states should participate fully in the NDI. In addition, each state should independently maintain up-to-date and accurate records on decertifications within the state; and those records should similarly be made easily available to policing agencies in a searchable registry.

REPORTERS' NOTES

Although effective state decertification laws can prevent officers from easily moving from department to department following misconduct within the state, state laws cannot prevent officers from seeking employment in another state. In fact, state decertification laws could generate spillover effects, as officers who have been decertified move to other states to continue to work in policing. In order for decertification to serve to protect the public and the profession without this consequence, Police Officer Standard and Training boards or commissions (POSTs) and law-enforcement agencies across the country must have access to complete, timely, and accurate decertification records from other states.

States should maintain registries of decertification and other misconduct, and they should fully report misconduct and decertification to the National Decertification Index (NDI), or similar national registry that replaces it. Because of the public-safety benefits and the low costs of reporting to states and agencies, states also should enshrine this best practice in law, requiring POSTs that decertify officers to contribute records, and requiring agencies to check state and national indices before hiring an individual to serve as a police officer. Federal support for a national decertification database could mitigate the challenges of states trying to coordinate efforts to generate a high-quality national repository for decertification information, and it would ensure that the country reaps the nationwide benefits of such an effort.

There have been several efforts to create an effective national repository for decertification information, but with limited success. See Roger L. Goldman, *State Revocations of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 122 ST. LOUIS PUB. L. REV. 121, 150 (2003). The present effort is the National Decertification Index, run by the International Association of Directors of Law Enforcement Standards and Training, a nonprofit organization devoted to developing professional standards of public safety, including by partnering with states and sharing information with agencies. State agencies provide records concerning decertifications and license revocation to the NDI. Law-enforcement officers and background investigators for law-enforcement agencies may search the database at no cost to obtain information on state decertifications. Int'l Ass'n of Dirs. of L. Enf't Standards & Training, *National Decertification Index—FAQs*, https://www.iadlest.org/Portals/0/Files/NDI/FAQ/ndi_faq.html (last visited Apr. 14, 2016). Although the index is not complete, state participation in contributing records has increased. Matthew J. Hickman, POST

Agency Certification Practices, 2015 (Apr. 5, 2016) (draft on file) (noting that 38 POSTs contribute to the NDI, an increase of eight since 2011).

Nevertheless, three ongoing problems discourage universal participation. First, the index is voluntary, and existing reporting is incomplete and often substantially delayed. Second, the index has had inconsistent funding and federal support, leaving its future in doubt for many years. And third, because there has been no effort to standardize state decertification recordkeeping, it can be onerous for states and agencies to provide information to the index. Nomaan Merchant, *Database of Problem Police Officers May Get Test in Ferguson*, AP (Mar. 9, 2016) ("Even states that are relatively aggressive in identifying bad officers, such as Georgia, do not participate because their record-keeping differs too much from the national index, and the effort to convert the information would be time-consuming and costly"); see also Raymond A. Franklin et al., 2009 Survey of POST Agencies Regarding Certification Practices (2009) https://www.ncjrs.gov/pdffiles1/nij/227927.pdf (surveying agencies on efforts to report to the national database). Similarly, many states do not to check the database before certifying a new officer. Matthew J. Hickman, POST Agency Certification Practices, 2015 (Apr. 5, 2016) (draft on file) (noting that 28 state commissions always or frequently query the NDI before certifying an officer, an increase of 6 POSTs since 2011).

Although efforts to create an effective nationwide database have faltered in the past, recent concerns about police misconduct have generated new consensus about the importance of federal-government support for an effective national program. Many commentators have strongly advocated for a national misconduct or decertification registry, and the President's Task Force on 21st Century Policing recommended both that national standards be developed for recordkeeping and that the U.S. Department of Justice work toward a national database. See FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, 30 (May 2015). The Task Force expressly recommended, "The U.S. Department of Justice, through the Office of Community Oriented Policing Services, should partner with the International Association of Directors of Law Enforcement Standards and Training (IADLEST) to expand its National Decertification Index to serve as the National Register of Decertified Officers with the goal of covering all agencies within the United States and its territories." FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, RECOMMENDATION 2.15.

§ 14.15. The Role of Private Actors in Fostering Sound Policing

(a) When engaging in policing-adjacent activities, private actors and entities should take steps to ensure that they embrace and promote the principles of sound policing and do not act to undermine sound policing.

(b) Governments should decline to utilize the products or services of private actors and entities whose products or services detract from, or do not promote, sound policing.

(c) Legislative bodies should regulate the conduct of private actors and entities that affect policing directly, as well as the ways in which public actors rely on and engage with private actors and entities that conduct policing-adjacent activities.

Comment:

a. Private actors and policing-adjacent activities, generally. The criminal system in general, and policing in particular, is heavily influenced by the conduct of private actors. Every day these actors make decisions—large and small—that determine policy and tactics across a range of policing issues. Individuals call 911 and serve as witnesses. Technology companies design investigative and surveillance tools, making essential decisions about the capabilities of the technology, its safeguards, and what training to offer policing customers. Nonprofit entities advocate for and administer community-based programming, sometimes as an alternative to police, other times as an extension of them.

Many of these influences are inevitable parts of the policing ecosystem. We expect victims and witnesses to report crimes. We permit individuals to hire private security and install private surveillance devices on their property. Government cannot possibly design and manufacture police weapons, body cameras, records-management systems, and much more, without private participation.

Although the participation of private actors and entities in policing is inevitable, private actors pose unique challenges regarding governance of their conduct and participation. Constitutional restrictions and statutory obligations like open-records laws often do not apply to these actors. Although there are some laws that regulate private actors, such as prohibitions on making false reports to the police, many of the actions of private actors and entities at present fall largely or entirely outside the scope of regulation.

b. The harms of private activity. Although private action is inevitable, too often it imposes harms and detracts from sound policing. There are many documented instances of individuals calling 911 to complain or express concern with people—all too often people of color—who seem to be doing nothing inappropriate other than living their lives in ordinary ways. There are also false reports that lead to police enforcement. Vendors manufacture and sell technologies that increase the scope of police surveillance without adequate safeguards. This may be technology sold directly to policing agencies, such as mobile forensic-data terminals or license-plate readers. Or it could

be technology sold to private individuals, which then is connected to police, such as video doorbells. Private foundations finance the acquisition by police of equipment that may include weaponry, tactical gear, and surveillance tools. It is possible that some of these technologies serve to make society safer, but often claims of enhanced public safety are not established through any empirical testing.

c. For-profit entities. Many private actors engaged in for-profit activities have the potential to support, or to undermine, the principles of sound policing. Among other things, for-profit entities develop surveillance technologies used by policing agencies, shape the behavior of police personnel through training programs, collect and sell vast amounts of personal and sensitive information regarding the populace, and take on investigative duties as hired security. All for-profit actors engaged in such policing-adjacent activities should ensure that their actions do not undermine the Principles spelled out in the preceding Chapters, and, when applicable, should ensure that their actions adhere to those Principles. For example, producers of technologies used by policing agencies should ensure that their technologies are designed in ethical ways, including, for example, that their algorithms do not exacerbate or engrain racial disparities. Technology companies should not obscure how their products work in ways that risk fair-trial rights, by, for example, forcing policing agencies to sign nondisclosure agreements. Private entities that offer trainings to police agencies and their personnel should ensure that their curricula are aligned with the principles of sound policing, promote evidence-based police practices, and do not risk undermining constitutional protections. For-profit entities that collect sensitive information about individuals should make all efforts to aggregate and anonymize data, and they should hand over information containing identifiable personal information to the government only upon court order. Those entities should never sell personal, identifiable information to policing agencies. See § 6.01 (limiting use by policing agencies of private databases for investigative purposes). And finally, companies that hire their own security personnel should recognize the potential for their security to invade personal rights and create harmful collateral consequences, both through direct interactions between security personnel and individuals and through the involvement of local police for low-level offenses. Companies employing security teams should abide by all Principles in this project that are applicable to their work.

d. Nonprofit entities. There is a tendency to think that nonprofits, because they do not have the same financial incentives as for-profit companies, pose no threat to sound policing. But much

like for-profit entities, many nonprofit organizations can, through their actions, either support and promote or undermine sound policing. Charitable foundations can award grants to policing agencies that, at best, allow agencies to increase their toolkit for promoting sound policing, such as by purchasing transparency-enhancing devices, and, at worst, allow agencies to circumvent the democratic process and obtain invasive technologies or militarized equipment. Think tanks and other institutes can conduct research to support and develop evidence-based policing practices that also are rights-protective. Community organizations can offer services that can lessen the need for police intervention, such as by providing mental-health services and crisis-response teams as a first line of interaction with citizens in need; but local watch associations also can serve as extensions of police that foster low-level enforcement. In carrying out activities that can affect police agencies and police–community interactions, nonprofit organizations should consult and follow the principles of sound policing laid out in this project.

e. Individuals. Individuals have constant and unique opportunities to promote sound policing. When an individual witnesses police misconduct, he or she should document the misconduct and report it promptly to relevant authorities. Individuals concerned with promoting sound policing should take advantage of opportunities to do so, such as by serving on police-oversight bodies. At the very least, individuals should endeavor to do no harm and, when circumstances allow, should think critically about the need to engage policing agencies in a situation if the situation can be resolved without police involvement. Similarly, individuals should familiarize themselves with other social services in the area and should contact those services when appropriate instead of defaulting to calling on the police.

f. The need for, and benefit of, regulation. Regulation is needed with regard to the role of private actors in fostering sound policing, including but not limited to regulation of: (1) governmental contracting with private actors and entities; (2) government actors engaging with private entities outside of formal contracting; and (3) the conduct of private actors more generally. Regulation of this sort can enable policing agencies to obtain the benefits of working with or purchasing material from private actors, while mitigating some of the harms. For example, regulations could require the manufacturers of surveillance technologies to build in certain transparencies, such as recording automatically when the technology is used and providing audit trails. They could require that before police agencies accept private funding or donated equipment, the agencies go through the same approval processes as if they were being allocated funds for that

purchase. And regulation of training can ensure that it is evidence-based and makes no unproven claims.

REPORTERS' NOTES

Although these Principles primarily are focused on the role of governmental actors, including policing agencies, the reality is that private actors influence policing in a number of ways. See generally Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696 (2022). For-profit entities may train police agencies in policing techniques, such as use of force, interrogations, and social-media investigations. See, e.g., Blue to Gold Training, https://www.bluetogold.com (offering trainings for officers in Fourth Amendment principles); Covert Media Consulting, https://www.covertmediaconsulting.com/social-media-open-source-investigations (offering courses "designed to teach law enforcement personnel how to legally utilize and exploit Open Source and Social Media intelligence in their respective roles."); Wicklander-Zulawski & Associates, Inc., https://www.w-z.com/law-enforcement/ (offering seminars instructing law-enforcement officers on interview and interrogation techniques). These entities also may generate information on individuals that police can access or that can be shared easily with police. See Sarah Zhang, *How a Tiny Website Became the Police's Go-To Genealogy Database*, THE ATLANTIC (June 1, 2018) (explaining how investigators used genealogy website GEDmatch to identify perpetrators of unsolved crimes); Kim Lyons, *Amazon's Ring Now Reportedly Partners with More than 2,000 US Police and Fire Departments*, THE VERGE (Jan. 31, 2021) (describing Ring's partnership with thousands of first-responder departments and noting that law enforcement asked for video concerning over 22,000 incidents in 2020). And, by insuring policing agencies, private insurance companies can alter law enforcement's incentives, making it more or less costly to violate civil rights. See Joanna Schwartz, *How Governments Pay*, 63 UCLA L. REV. 1144, 1188 (2016) (noting that "[t]he premiums paid by jurisdictions are usually . . . experience rated, such that reducing the costs of litigation will also reduce the costs of those premiums."). Some large corporations, like Walmart and Target, run their own forensic labs to investigate criminal activity that affects them or occurs in their stores; those companies may share the information they gather in their own investigations—unconstrained by the laws and policies that apply to governmental actors—with law-enforcement agencies. See Kaveh Waddell, *CSI: Walmart*, THE ATLANTIC (Apr. 3, 2017), https://www.theatlantic.com/technology/archive/2017/04/csi-walmart/521565/. Non-profit entities similarly influence policing through their actions. Money from private philanthropic foundations has made it possible for policing agencies to purchase surveillance and investigative tools, as well as to offer mental-health services. See, e.g., Marcus Garner, *12K Cameras to Give Atlanta Police Broader Window to City*, ATLANTA JOURNAL-CONSTITUTION (Feb. 27, 2014) (discussing expansion of surveillance-camera network supported by the Atlanta Police Foundation); Spirit of Blue, https://www.spiritofblue.org/ (private foundation explaining that "[t]hrough our fundraising, the foundation is able to provide grants in partnership with law enforcement safety equipment manufacturers ranging from illumination to ballistic protection to firearms."). They also may lobby agencies for policy changes and legislative

changes in the law surrounding policing. See, e.g., Emily Birnbaum, *Tech's Favorite Lobbyists Want to End Qualified Immunity for Cops*, PROTOCOL (June 17, 2020), https://www.protocol.com/big-tech-police-reform (reporting on an announcement by the Internet Association, a technology trade association, "that it will lobby Congress and state legislatures to eliminate qualified immunity for police officers and to demilitarize police departments across the country."); FSA and the Legislative Process, Florida Sheriffs Association, https://www.flsheriffs.org/law-enforcement-programs/legislative (describing lobbying efforts "to support and monitor legislation that ensures public safety in Florida" and linking to past priorities like expanding drone laws to allow law enforcement to use them more readily). Private individuals, too, play an important role in policing. Through activities like serving in neighborhood-watch associations, making initial contacts with police, serving on civilian-review boards, or getting involved in restorative-justice programs, individuals can be involved in nearly every step of the policing process.

Some degree of private involvement in policing is inevitable. Police use tools that are made by private companies. Individuals initiate police involvement by dialing 911. Law enforcement relies on individuals to assist investigations and participate in criminal proceedings as witnesses. This inevitable involvement can be either beneficial or detrimental. It therefore is important to recognize the ways in which private actors can support sound policing, as well as how they may detract from it.

It is vital to recognize that involvement by some private actors already does promote sound policing. Nonprofit entities, including research institutions, can and do conduct research into the efficacy of policing practices, and may promote ways to reduce violence in a community while respecting civil rights. See Evidence-Based Policing, George Mason University Center for Evidence-Based Crime Policy, https://cebcp.org/evidence-based-policing/current-projects/ (describing studies on policing practices, including the cost-benefit effectiveness of license-plate-recognition technology and problem-oriented policing); Police Executive Research Forum, *How PERF's Use-of-Force Guiding Principles Were Developed*, https://www.policeforum.org/how-perf-s-use-of-force-guiding-principles-were-developed (explaining that proposed guiding principles on the use of force was "based on years of work involving hundreds of police officials . . . and field work" in various locations). Groups of individuals may organize, either formally or not, to serve as observers and document police misconduct—documentation that can play a key role in holding police and agencies accountable when they are not acting in accordance with sound policing. See, e.g., NLG Legal Observer Program, National Lawyers Guild, https://www.nlg.org/legalobservers/ (explaining that the Legal Observer® program is "designed to enable people to express their political views as fully as possible without unconstitutional disruption or interference by the police" and offering trainings for individuals to become NLG Legal Observers®). Private entities also can offer trainings or engage directly with populations in ways that adhere to the Principles set forth in this project. See, e.g., MH First Sacramento, https://www.antipoliceterrorproject.org/mh-first-sac (organization dedicated to "interrupt[ing] and eliminat[ing] the need for law enforcement in mental health crisis first response by providing mobile peer support, de-escalation assistance, and non-punitive and life-affirming interventions"); *What is CIT?*, CIT

International, https://www.citinternational.org/What-is-CIT ("The Crisis Intervention Team program is . . . an innovative first-responder model of police-based crisis intervention training to help persons with mental disorders and/or addictions access medical treatment rather than place them in the criminal justice system due to illness-related behaviors."). And technology providers can publish transparency reports, documenting the number and scope of government requests for information about their customers. See, e.g., Google Transparency Report, transparencyreport.google.com (listing the number and type of requests for user information from governments).

Although private actors can, and often do, promote sound policing through their actions, this is not always the case. Private actors have a variety of incentives, and these incentives may not promote—or even align with—sound policing. Private individuals could act maliciously, utilizing the police for their private motives. See U.S. v. Garcia, No. 21-20309, 2022 WL 1014146 (5th Cir. Apr. 5, 2022) (affirming federal felony conviction of person whose knowingly false reports of their neighbors' supposed dangers to the public resulted in tragedy). Or they could operate out of simple ignorance, still with malign effects. Regrettable are the number of individuals calling 911 to report perfectly innocent activities of Black and brown individuals simply living their lives. See, e.g., Janice Gassam Asare, *Stop Calling the Police on Black People*, FORBES (May 27, 2020) (recounting instances in which the police were called because Black people were barbecuing, selling water in a park, renting an Airbnb, and napping in a dorm room); Maria Sacchetti et al., *Public Outrage, Legislation Follow Calls to Police About Black People*, WASH. POST (May 27, 2020) (reporting on similar instances). Unlike police agencies, whose guiding principle is to serve the community, private actors may be answerable to groups outside of the community at large. Companies with shareholders are beholden to them, and these companies often will prioritize profits over sound policing. Creators and purveyors of policing technologies will respond to demand and distribute investigative tools even if those tools are incompatible with principles of sound policing, and they may distribute "educational" materials regarding these tools that reflect a one-sided view of the utility of such tools. Private entities may employ private security personnel who are not trained in the principles set forth in this project concerning public interactions, and whose priority is to protect the entities against financial loss, even if that means using intrusive methods or hiring officers with records of misconduct. Companies also may collect and store a tremendous amount of personal data, then sell it to policing agencies. See Lauren Sarkesian & Spandana Singh, *How Data Brokers and Phone Apps Are Helping Police Surveil Citizens Without Warrants*, ISSUES IN SCI. & TECH., https://issues.org/data-brokers-police-surveillance/ (Jan. 6, 2021) (describing how data brokers collect personal data, and noting that "recent reporting suggests that government law enforcement agencies are rapidly becoming major buyers.").

Fiscal incentives are not the only ones that lead private actors to act in a manner that is not in accord with these Principles. Public-interest groups may be guided by constituents or board members concerned with a limited subset of issues, or focused on how issues influence a specific group of people, rather than the community at large. For example, police unions, representing law-enforcement officers in disciplinary proceedings, can influence police discipline in a way that protects wrongdoers inappropriately. Private individuals interact with police in ways that reflect

their own biases, such as the phenomenon of people calling 911 about individuals "living while Black."

Despite the tremendous and wide-ranging influence private actors can have in the policing sphere, monitoring and regulating their conduct is complex and done all too infrequently. The reasons for this are manifold, but they are rooted in the difficulties in enacting and enforcing rules that regulate private actors. As a threshold matter, most constitutional mandates and existing laws that apply to government agencies and can be invoked to hold actors accountable when they violate an individual's rights simply do not apply to private actors, even when they are engaged in policing-adjacent activities. For example, the Fourth Amendment of the U.S. Constitution applies to "invasions on the part of the government," Boyd v. United States, 116 U.S. 616, 630 (1886), and 42 U.S.C. § 1983 provides liability for violations of rights when the violator is acting "under color of" state law. Of course, legislatures at the local, state, and federal level could and should regulate some actions by private actors. Although there are laws such as prohibitions on making false police reports, legislatures could, for example, pass hate-crime legislation regulating or providing recourse for calls to law enforcement that are motivated by discriminatory animus. See, e.g., Maria Cramer, *San Francisco Takes Action on Racial Profiling in 911 Calls*, N.Y. TIMES, https://www.nytimes.com/2020/10/20/us/san-francisco-caren-911.html (Oct. 21, 2020) (describing legislation approved by San Francisco Board of Supervisors that would allow the subject of a false or frivolous 911 call to sue the caller and recover damages if the police responded and the subject was harmed); Los Angeles Times, *Proposed Grand Rapids Ordinance Would Outlaw 911 Calls Based on Racial Profiling*, KTLA, https://ktla.com/news/nationworld/new-laws-could-outlaw-racially-motivated-911-calls/ (May 27, 2019). They could actively prohibit policing agencies from contracting with companies found to engage in behavior that is at odds with the goals of sound policing. See Adi Robertson, *Lawmakers Propose Ban on Police Buying Access to Clearview AI and Other Data Brokers*, THE VERGE, https://www.theverge.com/2021/4/21/22395650/wyden-paul-fourth-amendment-is-not-for-sale-act-privacy-data-brokers-clearview-ai ("A bipartisan group of lawmakers has proposed banning police from buying access to user data from data brokers, including ones that "illegitimately obtained" their records—like, its sponsors say, the facial recognition service Clearview AI.").

Although legislatures should act to regulate private actors engaged in policing-adjacent activities, the reality may well be that, between the slow pace of lawmaking and the efforts of private actors to avoid regulation, much private behavior that influences policing will remain unregulated. It therefore is incumbent upon private actors to be thoughtful about whether and how their actions and conduct promote sound policing. At a minimum, private actors whose work is related to policing should review the Principles of this project and should follow the standards and guidance set forth for law-enforcement agencies when those actors are engaged in similar activity.

APPENDIX

BLACK LETTER OF COMBINED REVISED TENTATIVE DRAFTS

§ 1.01. Scope and Applicability of Principles

(a) These Principles are intended to guide the conduct of all government entities whenever they search or seize persons or property, use or threaten to use force, conduct surveillance, gather and analyze evidence, or question potential witnesses or suspects. Entities that perform these functions are referred to as "agencies" throughout these Principles.

(b) A subset of these Principles is intended primarily to guide the conduct of traditional law-enforcement agencies, such as police departments, sheriffs' offices, and federal and state investigative agencies. Entities that perform these functions are referred to as "law-enforcement agencies" throughout these Principles.

(c) These Principles are intended for consideration by an informed citizenry, and adoption as deemed appropriate by legislative bodies, courts, and agencies. They are not intended to create or impose any legal obligations absent such formal adoption, and they are not intended to be a restatement of governing law, including state or federal constitutional law.

§ 1.02. Goals of Policing

The goals of policing are to promote a safe and secure society, to preserve the peace, to address crime, and to uphold the law.

§ 1.03. Constitutional Policing

Agencies and officers must respect and protect the constitutional rights of all members of the public, including people suspected of crimes.

§ 1.04. Reducing Harm

Agencies that exercise policing powers should, to the extent feasible, pursue the goals of policing in a way that reduces attendant or incidental harms. Toward that end, agencies should adopt rules, policies, and procedures that promote the preservation of life, liberty, and property; reduce the risk of injury to both members of the public and officers; avoid

unnecessary intrusions on individual privacy, autonomy, and dignity; minimize the discriminatory impact of policing on communities of color and other marginalized groups; minimize collateral harms to both individuals and communities; and promote the well-being of officers and community members alike.

§ 1.05. Transparency and Accountability

Agencies should, consistent with the need for confidentiality, be transparent and accountable, both internally within the agency and externally with the public.

§ 1.06. Written Rules, Policies, and Procedures

(a) Agencies should operate subject to clear and accessible written rules, policies, and procedures. At a minimum, agencies should have rules, policies, or procedures on all aspects of policing that meaningfully affect the rights of members of the public or implicate the public interest.

(b) Agency rules, policies, and procedures should—to the extent feasible and consistent with concern for public safety—be made available to the public, be formulated through a process that allows for officer and public input, and be subject to periodic review. The presumption is that these materials will be available to the public.

§ 1.07. Promoting Police Legitimacy in Individual Interactions

(a) Agencies should ensure that individuals both outside and inside the agencies are treated in a fair and impartial manner, and are given voice in the decisions that affect them.

(b) Agencies and officers should be truthful in their interactions with the public, with other government officials, and with the courts.

§ 1.08. Community Policing

Policing agencies should work in partnership with their communities to jointly promote public safety and community well-being. Agencies should adopt a comprehensive organizational strategy that promotes and facilitates police−community partnerships through officer training, patrol assignments, metrics and performance evaluation, and department programs and initiatives.

§ 1.09. Furthering Legitimate Policing Objectives

All investigative and enforcement activity by officers or agencies should be based on, and should further, a legitimate policing objective.

§ 1.10. Policing for the Purposes of Revenue Generation

Agencies may not engage in policing actions in order to generate revenue, and municipalities and states should not incentivize such actions.

§ 1.11. Policing on the Basis of Protected Characteristics or First Amendment Activity

Investigative activities should not be based on a person's:

(a) race, ethnicity, national origin, gender, sexual orientation, religion, or other protected characteristic, unless these characteristics are part of a sufficiently specific suspect description; or

(b) expressed or perceived belief, absent a plausible basis to conclude that the person is advocating conduct that poses a threat to public safety.

§ 1.12. Interacting with Vulnerable Populations

(a) The term "vulnerable populations" refers to individuals or groups who, by virtue of their age, identity, status, disability, or circumstance, may be particularly susceptible to criminal victimization and may face special challenges in their interactions with the police.

(b) Officers should treat all members of the public, including those who are in vulnerable populations, with sensitivity and respect.

(c) Agencies should ensure, through policies, training, and supervision, that officers are prepared to recognize potential vulnerabilities on the part of individuals with whom they are likely to come in contact, to interact safely and respectfully with different vulnerable populations, and to respond to individuals in crisis in ways that minimize the risk of harm.

(d) Agencies should engage proactively with vulnerable populations—as well as with the organizations and advocates who work with them—in order to build trusting relationships, identify issues of concern, and take care that policing occurs in a manner that addresses the unique needs of different vulnerable populations.

(e) Agencies should work with partners outside law enforcement—including criminal-justice system professionals, social-services providers, health practitioners, and courts—to identify and address the challenges facing different vulnerable populations, create alternatives to police interaction with these populations, and reduce their involvement in the criminal-justice system.

§ 1.13. Interacting with and Supporting Victims of Crime

(a) Officers should treat all victims or potential victims of crime with respect, empathy, and compassion.

(b) Officers should conduct interviews with victims using trauma-informed techniques, and they should implement a streamlined reporting process in order to minimize re-traumatization.

(c) Officers should accurately record and appropriately classify all reported crimes. Officers should treat all crime reports fairly and without bias, and they should avoid engaging in premature credibility assessments or relying on stereotypes in evaluating victim reports.

(d) Agencies should maintain open and active lines of communication with victims during the course of an investigation in order to keep them informed about the status of the investigation and to follow up on their welfare.

(e) Agencies should form collaborative partnerships with those individuals who provide victim assistance and advocacy, and should facilitate the involvement of such individuals from the beginning of an investigation to see that victims receive the support they require.

§ 2.01. Suspicion-Based and Suspicionless Policing Activity

(a) A policing activity is "suspicion-based" when it is conducted with any cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety, or that an individual is in need of aid.

(b) A policing activity is suspicionless when it is conducted in the absence of cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety, or that an individual is in need of aid.

§ 2.02. Information Gathering

For the purposes of these Principles, "information gathering" is any governmental action designed to acquire evidence of, or to deter, prohibited conduct that involves:

(a) taking action that constitutes a "search" within the meaning of the Fourth Amendment;

(b) using technology that enhances the natural senses to detect or to record information;

(c) obtaining personally identifiable information or records from a nongovernmental entity through purchase or compulsory process;

(d) accessing a database controlled by another government agency to obtain personally identifiable information;

(e) using an undercover agent or informant to obtain information; or

(f) engaging in behavior that would be unlawful if carried out by a member of the public.

§ 2.03. Establishing Prior Justification for Government Action through Warrants and Recordings

(a) The use of any information-gathering technique, as defined in § 2.02, which rises to the level of a constitutional "search" or "seizure" should be conducted pursuant to a judicially issued warrant, absent the ability to obtain one in a timely fashion.

(b) When conducting a stop, search, frisk, or arrest, or engaging in other information-gathering activity (as defined in § 2.02) in the absence of a warrant, officers should, insofar as is practicable and consistent with the safety of officers and others, document in advance the grounds for their action.

(c) Legislative, executive, and judicial actors should work to simplify and streamline the warrant-acquisition process without reducing any jurisdiction's substantive legal threshold for acquiring warrants.

§ 2.04. Use of Pretextual Policing

(a) Officers engage in pretextual policing when they take action for which they lack authority or justification by relying instead on another reason for which they do have

authority or justification, even though they would not have taken the action but for the primary motivation.

(b) Agencies and officers should not use pretextual policing as a general strategy to address unlawful or undesirable conduct.

(c) Officers should not engage in pretextual policing except when they are investigating a specific serious offense, and even then only when they are able to articulate specific facts to support the belief that the target of the pretextual action may have been involved in such offense.

§ 2.05. Acquiring or Accessing Data, Records, or Physical Evidence Held by Third Parties

(a) Absent federal, state, or local law to the contrary, agencies may request that a third party (an individual or an entity) turn over, or provide access to, data, records, or physical evidence that either belong to, or contain personally identifiable information about, an individual who is the target of an investigation. When making such a request, agency officials should provide written or oral notice to the third party that makes clear whether there is any legal obligation to comply and, if not, that the third party will face no negative consequences for declining the request.

(b) Legislatures should adopt statutes regulating agency access to personally identifiable data, records, or physical evidence held by nongovernmental entities, as well as to data gathered by government agencies for purposes other than the investigation of unlawful conduct. In doing so, legislatures should consider:

(1) whether the entity or agency that holds the data should be permitted to disclose the information to law-enforcement officials in the absence of a court order, a warrant, or a written request;

(2) the predicate or level of cause that an agency must have in order to request data or records;

(3) the process, if any, with which the agency must comply to obtain the information, including whether a warrant, subpoena, or other order is required;

(4) the circumstances pursuant to which the entity or agency that holds the data should be permitted or required to notify the individual whose personally

identifiable information is contained in the data or records at issue regarding the order or request; and

(5) whether to impose any limitations on how any data that are acquired may be used or retained.

(c) Orders prohibiting third parties from disclosing to the target of an investigation that a government agency has requested or demanded the target's personally identifiable information should be issued only by a court of law, should be subject to challenge by the entity that holds the records, should be used sparingly, and should be limited to a set period of time. Such orders should be based on a showing that disclosure would significantly impair a specific and ongoing investigation and, absent extraordinary circumstances, should be used only to delay notification rather than to prohibit it entirely.

§ 2.06. Police Use of Algorithms and Profiles

An agency should not use an algorithm or profile to direct police resources to a particular location, to identify potential targets for further investigation or surveillance, or to assess the risk of harm that individuals may pose to others unless:

(a) the algorithm or profile has been shown to perform with acceptable accuracy, and it is sufficiently transparent that agency officials can explain the factors on which it relies and how they are weighted;

(b) the agency has provided adequate training to all agency officials who are authorized to use the algorithm or profile in interpreting the results and has provided appropriate guidance on the limits on the permissible inferences that may be drawn;

(c) any use of protected characteristics, such as race or ethnicity, is consistent with § 1.11(a) and (b);

(d) the agency avoids the use of inputs, such as police-initiated contacts, or arrests and convictions for low-level offenses, that may reflect prior discriminatory enforcement practices and therefore could exacerbate racial or other disparities; and

(e) the agency routinely audits both the algorithm and the underlying data to minimize inaccuracy and bias, and makes appropriate changes in response to any issues identified by the audits.

§ 2.07. Heightened Intrusions

(a) A policing action constitutes a heightened intrusion if it raises special privacy or dignitary concerns, poses a substantial risk of serious bodily injury to an individual, or significant damage to property.

(b) A policing action that involves a heightened intrusion only should be used when society's interest in its use clearly outweighs the harm that is reasonably likely to result from the intrusion. Even then, it should be conducted in a manner that minimizes the risk of harm so that the extent of the intrusion is proportionate to the law-enforcement goal that justifies it.

(c) Agencies should develop clear written policies to limit the use of heightened intrusions and should require officers to minimize the risk of harm that may result from their use.

§ 2.08. Limiting the Impact of Outstanding Warrants

(a) All government actors, including policing agencies, should take steps to mitigate the harms attendant to unnecessary, inaccurate, or stale warrants.

(b) Legislative bodies and courts should limit the use of arrest warrants as an automatic response to an individual's failure to appear in court, and they should promote the use of alternative strategies to ensure that individuals appear.

(c) Courts, prosecution agencies, and policing agencies should audit existing warrant databases regularly to ensure the databases are accurate and up to date, to dismiss stale or aged warrants, and to dismiss warrants in cases in which it no longer serves the public interest to compel the appearance of an individual or to prosecute an individual for an underlying offense.

(d) Policing agencies should have rigorous procedures to ensure, before taking an individual into custody on an outstanding warrant, that the warrant is still active and that the individual is in fact the person sought.

(e) Officers should not stop an individual for the purpose of checking for outstanding warrants absent reasonable suspicion that a valid warrant exists.

§ 3.01. Definition and Legality of Suspicion-Based Searches, Seizures, and Information Gathering

(a) For purposes of this Chapter, policing activity includes information gathering, seizures, and encounters, as those terms are used in Chapters 2, 3, and 4 of these Principles.

(b) As stated in § 2.01(a), a policing activity is "suspicion-based" when it is conducted with any cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety, or that an individual is in need of aid.

(c) In addition to any other limitations imposed by the U.S. Constitution, suspicion-based policing activities should occur only if they are conducted pursuant to the Sections in this Chapter and, to the extent applicable, the more specific Sections governing encounters in Chapter 4.

§ 3.02. Appropriate Safeguards

(a) Suspicion-based policing activities should be conducted only pursuant to a written policy that makes clear:

(1) which personnel are authorized to utilize the method or technique in question;

(2) what training is required before personnel are authorized to utilize it;

(3) the predicate or level of cause that must be present to justify its use;

(4) whether advance permission is required from a supervisor or other third party, including a court, and what form that advance permission must take;

(5) specific steps that officials should take in order to limit the scope of the intrusion, consistent with § 3.03; and

(6) the manner in which use of the suspicion-based technique will be documented, audited, and reported to the public, consistent with § 3.04.

(b) In developing the policy, agencies should consider:

(1) the intrusiveness of the technique at issue, as well as the sensitivity of the information that its use is likely to obtain;

(2) other potential harms that its use could impose, including the potential to exacerbate racial disparities, chill the exercise of constitutional rights, undermine police legitimacy, or be deployed toward illegitimate ends;

(3) the feasibility of obtaining approval in advance of its use, as well as the likelihood that any potential misuse of the technique could be identified through after-the-fact review; and

(4) the degree to which any particular safeguard would impose undue burdens on the agency or unduly impede legitimate law-enforcement investigations.

(c) The written policy should, consistent with § 1.06(b) (policy transparency), be made available to the public, except when there is a substantial and articulable risk that doing so would compromise the agency's ability to carry out its policing obligations.

§ 3.03. Minimization

Agencies should limit the scope of suspicion-based policing activities to that which is no broader than necessary to acquire the information or evidence that justifies the intrusion in question; and they should take steps to minimize the acquisition of information from third parties who themselves are not properly subject to investigation.

§ 3.04. Documentation, Auditing, and Reporting

In order to facilitate agency supervision and public accountability, policing agencies should, when practicable:

(a) require agency officials to document their use of suspicion-based policing activities;

(b) periodically review agency use of suspicion-based activities to determine compliance with agency policy, assess their efficacy, identify any potential concerns associated with their use, and make appropriate changes to agency policies and practices in response;

(c) periodically inform the public of which suspicion-based activities the agency is engaging in, with what regularity and to what degree of efficacy.

§ 3.05. Notice to Courts and Targets of Investigations

(a) Agency requests for a court order or warrant should identify the policing activities used to obtain the information underlying the request, as well as the methods and techniques to be used in executing the order requested.

(b) In cases in which the target is prosecuted, the agency or prosecutor should inform the target about any policing activities that produced evidence against the target.

(c) In a case in which the target is not prosecuted, the agency should inform the target of any particularly invasive methods or techniques that were used to gather information about the individual, although the agency may delay providing notice in so far as it would impede an ongoing investigation of either the individual or the broader criminal enterprise of which the individual is believed to be a part.

§ 4.01. Officer-Initiated Encounters with Individuals

An encounter is a face-to-face interaction between an officer and a member of the public, conducted for the purpose of investigating unlawful conduct or performing a caretaking function. It does not include social, non-investigative, or non-caretaking interactions between a police official and a member of the public.

Consistent with current law, this Chapter adopts the following terms and definitions:

(a) "Initial encounter": An encounter in which the officer does nothing to impede the individual from leaving or otherwise terminating the encounter—and a reasonable person would in fact feel free to do so.

(b) "Stop": An encounter that is brief in duration and does not constitute an arrest and that a reasonable person would not feel free to leave or otherwise terminate.

(c) "Frisk": A pat-down search of an individual's body during a stop, conducted over the individual's clothing for the purpose of finding a weapon.

(d) "Custodial arrest": An encounter in which an individual is taken into custody and transferred to a stationhouse or other temporary holding facility.

§ 4.02. Justification for Encounters

(a) Absent state or federal law to the contrary, an officer may, in any location in which the officer is lawfully present:

(1) conduct an initial encounter with an individual without any suspicion that the individual is involved in or has evidence of a crime;

(2) conduct a stop of an individual based on reasonable suspicion to believe that the individual is involved in or has evidence of unlawful conduct;

(3) issue a summons or a citation to an individual based on probable cause that the individual has engaged in unlawful conduct; and

(4) conduct a custodial arrest of an individual based on probable cause that the individual has committed a felony or a misdemeanor, so long as an arrest is permitted under state law.

(b) Agencies should ensure that officers exercise this authority consistent with §§ 4.03 to 4.07.

(c) Encounters that would not be permissible under this Section because officers lack the required level of suspicion should not occur at all, unless they are conducted consistent with the requirements of Chapter 5, dealing with suspicionless searches and seizures.

§ 4.03. Ensuring the Legitimacy of Police Encounters

(a) Officers should exercise their authority to approach, stop, and arrest individuals, recognized in § 4.02, in a manner that promotes public safety and positive police–community relations, and minimizes harm.

(b) Officers should establish the legitimacy of their encounters with members of the public by treating individuals with dignity and respect, explaining (insofar as is not inconsistent with investigative objectives) the basis for the officers' actions, giving individuals an opportunity to speak and be heard, and engaging in behaviors that convey neutrality, fairness, and trustworthy motives.

(c) Agencies should ensure that officers carry out these principles through policy, recordkeeping, and training and supervision of officers.

§ 4.04. Permissible Intrusions During Stops

(a) During a stop, an officer may:

(1) request identification and make other inquiries as necessary to investigate the crimes or violations for which the officer has reasonable suspicion; and

(2) conduct a frisk of a person, or a protective sweep of the passenger compartment of a vehicle, based on reasonable suspicion to believe that the person is armed and dangerous.

(b) Unless an officer receives information that supports probable cause of a crime or violation, the officer must terminate the encounter upon completion of these investigative efforts.

§ 4.05. Minimizing Intrusiveness of Stops and Arrests

(a) An officer should make an arrest or issue a citation only when doing so directly advances the goal of public safety. When authorized under governing law, an officer should issue a citation in lieu of a custodial arrest, or a warning in lieu of a citation, unless the situation cannot be effectively resolved using the less intrusive means.

(b) In conducting a stop or arrest, officers should minimize undue intrusions on the liberty, time, and bodily integrity of the person stopped.

(c) Legislatures and agencies should promote the use of less intrusive procedures, and should consider restricting the use of arrests for certain categories of offenses.

§ 4.06. Consent Searches

(a) During any encounter, an officer may ask for permission to search a person or a person's property.

(b) Agencies should adopt policies to ensure that consent searches are used sparingly and only in circumstances in which they are likely to be productive. Specifically, agencies should consider:

(1) prohibiting officers from seeking consent to search absent reasonable suspicion to believe that the search will turn up evidence of a crime or violation;

(2) requiring officers to explain (when not inconsistent with investigative objectives) why they want to conduct a search and that the individual has the right to refuse consent; and

(3) requiring officers to obtain and document, either in writing or in some other reliable form such as body-worn-camera video, acknowledgement that consent was sought and provided.

(c) The scope of a consent search must not exceed the scope of the consent given, and should be no broader than necessary to achieve the investigative objective motivating the request for consent.

§ 4.07. Searches Incident to a Lawful Custodial Arrest

(a) A search incident to a lawful custodial arrest is justified in order to protect the safety of officers or others, or to prevent the destruction of evidence.

(b) Agencies should develop policies to ensure that searches incident to arrest are no broader than necessary to serve these purposes, and that they are not used as pretext to look for evidence of a crime or violation that is unrelated to the offense for which the individual was arrested.

(c) A search conducted at the time of arrest generally should be limited to a pat-down search of the arrestee and a search of the immediately surrounding area from which the arrestee could access a weapon or evidence. Agencies should limit the use of more intrusive searches to circumstances in which there is reasonable suspicion to believe that the arrestee is concealing a weapon or evidence that would not be uncovered through a pat-down search.

(d) An officer may conduct a more thorough search of the arrestee's person or property after transport to the stationhouse or to a detention facility. Such search should either:

(1) consistent with Chapter 5, be conducted pursuant to a written policy that specifies the scope of the search and is applied evenhandedly, see §§ 5.01 to 5.06; or

(2) be based on reasonable suspicion, documented in advance, that the search will turn up evidence or contraband.

§ 4.0x. Police-Involved Pursuits

(a) Officers should consider a person to be "fleeing" only when it is reasonably apparent that the person is attempting to elude or evade capture by a police officer, after the officer has attempted to conduct a lawful stop or custodial arrest of that person.

Officers should not consider a person to be fleeing when such person has no legal obligation to stop or submit and engages in lawful avoidance of contact with a police officer.

(b) Police should pursue a fleeing person, whether by foot or vehicle, only when:

(1) the nature and severity of the conduct or offense for which the person would be pursued are such that the person's immediate apprehension directly advances the goal of public safety; and

(2) the pursuit would not subject the officer, the fleeing person, or a member of the public to an undue risk of harm.

The decision to continue or terminate a pursuit should be based on an ongoing evaluation of these factors.

(c) All pursuits should be conducted in a manner commensurate with the considerations above and consistent with the principles set forth in § 1.04. A pursuit should cease immediately once the pursuit poses an undue risk of harm to any person or when immediate apprehension is no longer necessary to advance the goal of public safety.

(d) If a pursuit results in the apprehension of a fleeing person, the person should, as soon as reasonably practicable, be placed in the custody of officers who were not involved in the pursuit, to minimize the risk of retaliation or reprisals by any pursuing officers. Any use of force during or after a pursuit should be applied according to the principles set forth in Chapter 7.

(e) Agencies should develop policies dedicated specifically to addressing how pursuits should be conducted, including which tactics are permitted and prohibited. Policies should recognize the distinctions between pursuits conducted on foot and those conducted in vehicles, and should account for the different risks posed by each to participants and bystanders.

§ 5.01. Definition and Legality of Suspicionless Policing Activity

(a) For purposes of this Chapter, policing activity includes information gathering, seizures, and encounters, as those terms are used in Chapters 2, 3, and 4 of these Principles.

(b) As stated in § 2.01(b), policing activity is suspicionless when it is conducted in the absence of cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conducted or threatens public safety.

(c) In addition to any other limitations imposed by the U.S. Constitution, suspicionless policing activity should occur only if it is conducted pursuant to the Principles in this Chapter or the Principles governing consent or searches incident to arrest in Chapter 4.

§ 5.02. Requirement of Written Policies

Suspicionless policing activity should be authorized by written policies developed through the process described in § 1.06 that identify, for each program:

(a) the specific harm sought to be detected or prevented;

(b) the permissible scope of the suspicionless policing activity;

(c) the persons, entities, or activities subject to the policing activity;

(d) if persons or entities will be selected from among the target group, the manner in which that will occur;

(e) the manner in which the effectiveness of the program will be evaluated;

(f) a finite period at the end of which any data generated by the program regarding identified or identifiable individuals will presumptively be destroyed or rendered inaccessible, consistent with § 6.02; and

(g) sanctions for violating the policy's provisions.

§ 5.03. Justification

Legislatures and agencies should authorize suspicionless policing activities only when there is a sound basis for believing that they will accomplish an important law-enforcement or regulatory objective, and when achieving that objective outweighs their infringement on individual interests such as privacy, dignity, property, and liberty.

§ 5.04. Nondiscrimination in Determining the Targeted Group

Any suspicionless policing policy that targets a particular group of persons or entities rather than the entire relevant population should be justified by a sound basis in fact.

§ 5.05. Constraining Discretion

(a) A suspicionless policing policy should be implemented evenhandedly according to criteria developed in advance.

(b) Evenhandedness requires that, within the group targeted for a suspicionless policing action under § 5.04, the procedure be applied to:

(1) every person or entity within that group;

(2) a subset of that group that is selected on a random or neutral basis; or

(3) a subset of that group that there is sound basis for believing is more likely to be engaged in unlawful conduct or pose a greater risk of harm than the rest of the target group.

§ 5.06. Suspicionless Police Activity Beyond the Authorized Scope

Suspicionless policing activity should neither exceed the scope of the authorization that is required under § 5.02 nor exceed the justification for that authorization that is required under § 5.03.

§ 6.01. Authorization

(a) A policing database is an electronic or paper database controlled by a government agency that contains information resulting from, or used as a basis for engaging in, any of the policing functions identified in § 1.01.

(b) A policing database should be created only if necessary to facilitate a legitimate policing objective.

(c) Any policing database that contains information about identified or identifiable individuals should be governed by written policy or policies that specify:

(1) the purpose of the data collection, including the criteria for inclusion in the database;

(2) the scope of data to be collected, including the types of individuals, locations, or records that will be the focus of the database; and

(3) the limits on data retention, the procedures for ensuring the accuracy and security of the data, the circumstances under which the data can be accessed, and mechanisms for ensuring compliance with these rules, consistent with the Principles in the remainder of this Chapter.

(d) Databases that aggregate data from more than one jurisdiction generally should be authorized by statute or ordinance governing all affected jurisdictions.

§ 6.02. Purging of Databases

(a) Agencies should destroy or render inaccessible any information that is irrelevant to the designated purpose of a database.

(b) Programs implementing subsection (a) should include policies requiring that policing databases be purged:

(1) after a finite period specified in the authorization creating the database, which may be extended only if the agency can show that the specific type of data, or the data in a particular individual's case, continues to be necessary for the purpose for which it was originally obtained, or for a separate purpose authorized pursuant to § 6.01;

(2) when necessary to make a correction to the database pursuant to § 6.03(c); or

(3) when otherwise required by law.

§ 6.03. Accuracy

(a) Policing databases should be as accurate, complete, and current as reasonably possible.

(b) A policing database should not be considered to have met this standard unless, at a minimum, the agency controlling it requires:

(1) standardized procedures for entering data;

(2) training of and supervision over those who enter data; and

(3) periodic determinations, by an auditor outside the agency when possible, of whether the information in the database is accurate and is authorized to be retained in policing databases under §§ 6.01 and 6.02.

(c) Policing agencies should establish a procedure that allows persons identified in policing databases to correct or delete inaccurate information pertaining to them, as promptly as possible.

(d) To facilitate use of the correction procedure described in subsection (c), individuals whose information is in a policing database:

(1) should be notified of that fact whenever the information is used as a basis for an adverse action against them involving a deprivation of liberty or property; and

(2) should be entitled to obtain through open records laws or other appropriate channels the information pertaining to them, unless such access would demonstrably compromise legitimate policing objectives.

§ 6.04. Security

Policing databases should be secure and protected from unauthorized access. At a minimum, this requires:

(a) protection against access by non-police personnel, unless authorized by law;

(b) identification of an officer who is responsible for security;

(c) storage of the data on closed-network systems, when feasible;

(d) continuous monitoring of the database for security breaches;

(e) a plan for corrective action if a data breach occurs, and

(f) penalties for breach of these rules.

§ 6.05. Police Access to Databases

(a) Agency personnel should be permitted to access a policing database only for legitimate policing objectives, which should be specified in a written policy governing the use of the database that meets the requirements of § 6.01(c).

(b) The policy should make clear:

(1) the predicate level of cause that must be present to justify access and how that predicate should be documented;

(2) whether advance permission from a supervisor or court is required;

(3) which personnel are authorized to access the database and to review data that has been accessed; and

(4) what training is required before personnel are authorized to utilize it.

§ 6.06. Accountability

(a) Policing agencies should maintain an unalterable record of every instance in which policing databases have been accessed. The record should include:

(1) when the access occurred;

(2) the purpose of the access and the type of data accessed;

(3) who accessed the data; and

(4) the method of access (in particular whether an algorithm was used).

(b) The records kept pursuant to subsection (a) should be audited routinely to ensure compliance with the policies developed pursuant to this Chapter.

(c) When feasible, policing agencies should maintain and periodically make available to the public statistics about the purposes and uses of policing databases, the numbers of people in each database, and the extent to which the databases have been accessed, including any violations of access rules.

(d) If an unauthorized data breach occurs, policing agencies should provide immediate and adequate notice of the breach to the affected individuals, although such notice may be delayed if it would compromise a legitimate law-enforcement investigation.

§ 7.01. Scope and Applicability of Principles

The following Principles:

(a) are intended to guide the conduct of all agencies that possess the lawful authority to use force, which are referred to throughout this Chapter as "agencies";

(b) are intended for consideration by an informed citizenry, and for adoption as deemed appropriate by legislative bodies, courts, and agencies;

(c) are not intended to create or impose any legal obligations or bases for legal liability absent an expression of such intent by a legislative body, court, or agency.

§ 7.02. Objectives of the Use of Force

Officers should use physical force only for the purpose of effecting a lawful seizure (including an arrest or detention), carrying out a lawful search, preventing imminent physical harm to themselves or others, or preventing property damage or loss. Agencies should promote this objective through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 7.03. Minimum Force Necessary

In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 7.04. De-escalation and Force Avoidance

Agencies should require, through written policy, that officers actively seek to avoid using force whenever possible and appropriate by employing techniques such as de-escalation. Agencies should reinforce this Principle through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 7.05. Proportional Use of Force

Officers should not use more force than is proportional to the legitimate law-enforcement objective at stake. In furtherance of this objective:

(a) deadly force should not be used except in response to an immediate threat of serious physical harm or death to officers, or a significant threat of serious physical harm or death to others;

(b) non-deadly force should not be used if its impact is likely to be out of proportion to the threat of harm to officers or others or to the extent of property damage threatened. When non-deadly force is used to carry out a search or seizure (including an arrest or detention), such force only may be used as is proportionate to the threat posed in performing the search or seizure, and to the societal interest at stake in seeing that the search or seizure is performed.

§ 7.06. Instructions and Warnings

Officers should provide clear instructions and warnings whenever feasible before using force. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 8.01. General Principles for Evidence Collection, Analysis, and Preservation

Agencies should adopt policies to ensure that all evidence is collected, analyzed, and retained in a manner that is impartial, consistent, and thorough and that is designed to minimize any contamination or alteration of information.

§ 8.02. Documenting Evidence

Agencies should have written policies requiring that officers thoroughly, accurately, and intelligibly document evidence that is collected.

§ 8.03. Disclosure of Evidence

Except when information must be redacted for confidentiality, privacy, and safety purposes, agencies should share all relevant evidence with prosecutors, in an ongoing fashion, regardless of the status of an investigation or criminal case.

§ 8.04. Preservation and Retention of Evidence

Agencies should adopt policies setting out the circumstances and manner in which evidence is to be retained and preserved, both before and after adjudication, taking into account factors such as the nature of the offense, the potential probative value of the evidence, the interests of the defense and others, and storage costs.

§ 8.05. Human Factors and Evidence Collection

Agencies should develop policies and procedures to minimize the negative effects of human factors that can reduce accuracy in evidence collection.

§ 9.01. General Principles for Forensic Evidence

Agencies should ensure, to the best of their abilities, that the methods used to collect, analyze, present, and preserve forensic evidence are sufficiently repeatable, reproducible, and accurate. As much as is practicable—to the extent permitted by legal rules and court orders—forensic-evidence work should be conducted independent of law enforcement, and the results should be made available to the prosecution and the defense on equal terms.

§ 9.02. Forensic-Evidence Collection

Agencies should collect forensic evidence in an impartial, consistent, and thorough manner, designed to maximize accuracy. In doing so, agencies should rely on:

(a) the participation of, and guidance from, scientists and crime laboratories;

(b) specialists in conducting crime-scene-evidence collection; and

(c) written evidence-collection policies.

§ 9.03. Policies for Forensic Testing

Agencies should adopt policies for determining when and whether evidence should be submitted for forensic testing, and should set priorities to ensure that, when feasible, probative evidence is tested in a prompt manner.

§ 9.04. Quality Controls and Performance Testing

(a) Agencies should ensure the ongoing use of quality controls for forensics work, including accreditation, certification, blind testing of forensic analysts, and routine audits of cases.

(b) When errors in testing or analyzing forensic evidence are detected, agencies should correct the errors and notify the affected parties of the errors.

§ 9.05. Minimizing Human Factors in the Evaluation of Forensic Evidence

Agencies should develop policies and processes to minimize the negative effects of human factors that can undermine the accuracy of forensic evidence.

§ 9.06. Disclosure of Forensic Evidence

Agencies should ensure that all forensic records, including conclusions and underlying bench notes, are:

(a) documented in reports that

(1) use consistent, accurate, and straightforward terminology,

(2) include complete and thorough explanations of methods and results,

(3) distinguish data from interpretations, opinions, and conclusions,

(4) disclose relevant laboratory-wide data, including protocols and procedures, proficiency results, and quality reports, and

(5) disclose all known limitations, measures of uncertainty, and error rates; and

(b) disclosed to the prosecution and defense on equal terms and on an ongoing and timely basis, to the extent permitted by legal rules and court orders.

§ 9.07. Forensic-Evidence Preservation

(a) Agencies should have minimum standards to ensure that forensic evidence is properly preserved and retained for a defined period of time.

(b) Before discarding or destroying forensic evidence, when feasible, notice should be provided by the evidence custodian to the court, prosecution, victim(s), criminal defendant(s), and legal counsel, along with an opportunity to respond.

§ 10.01. General Principles for Eyewitness Identification Procedures

Agencies should be cognizant of the scientific research regarding eyewitness perception and memory, and the limits of eyewitness evidence.

§ 10.02. Eyewitness Identification Procedures

Police agencies should adopt standard, written eyewitness identification procedures to regulate the use of showups, lineups, photo arrays, and any other eyewitness identification techniques they employ, whether in the field or the station. Agencies should ensure that the specific procedures they use to test the memory of an eyewitness are informed by extant research. Those procedures should include:

(a) direction to conduct any identification as early as possible in the course of an investigation;

(b) instructions to explain the procedure to the eyewitness in easily understood terms;

(c) procedures for fairly selecting non-suspect or "filler" persons or images to display to the eyewitness;

(d) procedures for presenting persons or images to the eyewitness in a nonsuggestive manner;

(e) procedures for documenting any identification or nonidentification by the eyewitness; and

(f) procedures that employ sequential or simultaneous presentation of photos in photo lineups.

§ 10.03. Threshold for Conducting Eyewitness Identifications

Policing agencies should not conduct eyewitness identifications unless they have:

(a) a substantial basis to believe that the suspect committed the crime and should therefore be presented to the eyewitness, and

(b) a substantial basis to believe that the eyewitness can reliably make an identification.

§ 10.04. Showup Procedures

Agencies should minimize the use of showup procedures and should adopt standard procedures for conducting prompt showups in a neutral manner and location.

§ 10.05. Blind or Blinded Procedures

For all identification procedures other than showups, agencies should adopt procedures in which the person administering the identification procedure does not know which person is the suspect. There are two options:

(a) blind procedures, in which the person who administers the procedure does not know the suspect; or

(b) blinded procedures, in which the person who administers the procedure cannot see which persons or photographs the suspect is examining. This can be accomplished with techniques such as the use of folders, or computerized presentation of images, that shield the images from the person administering the procedure.

§ 10.06. Obtaining and Documenting Eyewitness Confidence Statements

Agencies should ask eyewitnesses to express verbally how confident they are in their identification at the time it is made and should document that verbal representation.

§ 10.07. Reinforcement or Feedback

Officers should not provide feedback, encouragement, or reinforcement to eyewitnesses before, during, or after an identification procedure.

§ 10.08. Recording Eyewitness Identification Procedures

As a matter of standard practice, eyewitness identification procedures should be recorded when feasible.

§ 11.01. Objectives of Police Questioning

The goal of police questioning should be to obtain accurate and reliable information, while seeking to eliminate undue coercion, and treat persons with dignity and fairness.

§ 11.02. Recording of Police Questioning

Written policies should set out the procedures for the recording of questioning, and for the disclosure and the retention of recorded evidence, and should provide that:

(a) absent exigent circumstances, officers should record questioning of suspects in its entirety;

(b) officers should record questioning of witnesses whenever feasible; and

(c) in situations in which recording is not conducted, officers should document questioning, taking notes contemporaneously when possible, and memorializing conversations immediately thereafter.

§ 11.03. Informing Persons of Their Rights Prior to Questioning

Officers should inform suspects—whether in formal custody or not—of any right to refrain from speaking with the officers or right to counsel, and ensure that any waivers of those rights are knowingly and voluntarily made. Any invocation of rights must be respected, and if there is any uncertainty as to whether rights are being invoked, officers should take the time to clarify that. Waivers of rights should be documented using appropriate agency forms, and should be recorded in accordance with § 11.02.

§ 11.04. Conducting Police Questioning

When questioning individuals, officers should:

(a) minimize the length of questioning;

(b) avoid leading questions and disclosing details that are not publicly known;

(c) avoid threats of harm to the individual or others or, conversely, avoid making promises of benefits to the individual or others;

(d) avoid the use of deceptive techniques that are likely to confuse or pressure suspects in ways that might undermine accuracy of evidence;

(e) ensure the individual has access to basic physical and personal needs, including food, water, rest, and restrooms; and

(f) not question the individual in an environment that is unduly uncomfortable.

§ 11.05. Questioning of Vulnerable Individuals

(a) Officers should assess carefully a person's background, age, education, language access, mental impairment, and physical condition, in order to determine vulnerability to coercion and suggestion.

(b) Officers should minimize the need to question vulnerable people and members of vulnerable populations, such as minors, people with mental illness, people with developmental disability, and people affected by substance-related impairment. If they do question vulnerable individuals, they should do so with minimal coercion and the utmost care.

(c) Hearing-impaired and sight-impaired individuals should be provided with necessary assistance prior to the reading of rights or any questioning.

(d) Persons of limited English proficiency should be provided with translators prior to the reading of rights or any questioning.

(e) A minor age 14 or younger may give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

§ 12.01. General Principles for Informants and Undercover Agents

(a) Agencies should adopt written rules and policies that govern the use, approval, reward, and oversight of informants and undercover agents. These rules and policies should take into account:

(1) the degree of tolerable risk to the safety of informants, undercover agents, and the public;

(2) the permissible level of intrusiveness involved in the use of informants and undercover agents;

(3) the value and reliability of information obtained;

(4) whether the informant is represented by counsel;

(5) the nature and magnitude of incentives expected from government; and

(6) the potential for and consequences of criminal activity such use might foster.

(b) Agencies should document information regarding the foregoing factors and how they influence decisions to use informants and undercover agents, and should document all informant agreements.

§ 12.02. Assessing the Propriety of Using an Informant

An agency's initial decision to use, and to continue to use, a particular informant should be based on careful review of:

(a) safety concerns, regarding the public and the informant, in light of ongoing and potential criminal activities;

(b) the intrusiveness of the use of the informant;

(c) the value of the information sought or provided by the informant;

(d) the reliability of the information provided by the informant, both at present and in the past;

(e) the informant's background and ongoing conduct, including criminal history and prior relationships with law enforcement;

(f) whether the informant is represented by counsel;

(g) adequate, independent supervisory approval; and

(h) verification to ensure the informant's existence.

§ 12.03. Assessing the Reliability of Evidence from Informants

The decision to use evidence provided by an informant should be made on a continuing basis, after careful scrutiny of such information. Such scrutiny should be documented, and should include an assessment of:

(a) the reliability of the information provided, determined by the nature of information in question, the type of crime, the specificity of the information, and the extent to which the information is corroborated; and

(b) the credibility of the informant, evaluated based on the circumstances under which the information was provided; the incentives provided to the informant; the informant's prior relationship with law-enforcement agencies, and prior criminal history; the informant's membership in a vulnerable population; and any other information bearing on reliability.

§ 12.04. Documentation and Disclosure of Informant Evidence

(a) At a minimum, agencies should ensure documentation of:

(1) the informant's name, age, demographic information, and prior criminal history;

(2) all current and previous arrangements with the informant, including any incentives offered;

(3) all statements made by the informant, including the substance thereof and the time and place they were made;

(4) information regarding any prior use of the informant or the informant's testimony, including any prior cooperation agreements, benefits provided or offered, erroneous statements, recanted previous statements, and violation of agency guidelines for informants;

(5) whether the informant suffers from substance-abuse issues, mental-health issues, or other characteristics that would make the informant especially vulnerable or unreliable; and

(6) whether the informant was formerly or is currently involved in criminal activity.

(b) All conversations with informants should be recorded, when feasible, and otherwise should be documented as close to contemporaneously as possible.

(c) Agencies should share documentation of information concerning informants with prosecutors in an ongoing fashion, regardless of the status of an investigation or criminal case.

§ 12.05. Involvement by Informants in Criminal Activity

(a) Agencies should establish clear boundaries regarding the involvement of informants in criminal activity, including the extent to which it is permissible. Such involvement should be restricted to acts that are of substantial value to agency efforts to achieve public safety, and should be based on advance, written authorization.

(b) Any involvement of informants in criminal activity should be conducted in a manner that minimizes harm to the public and the informant.

(c) All criminal activity by informants, whether authorized or not, should be reported by informants to the agencies with which they work. Agencies should monitor and document such activity.

§ 12.06. Oversight of Benefits to Informants

Agencies should conduct oversight to ensure that any benefits offered or provided to informants, including financial compensation, are proportional to the public's interest in securing reliable information.

§ 12.07. General Principles for Undercover Officers

In light of the range of interests implicated by their use, agencies should take great care in relying on undercover officers during investigations. In particular, agencies should:

(a) ensure that the use of undercover officers does not unduly risk the undercover officers' safety or the safety of others;

(b) carefully regulate undercover officers' participation in illegal activities;

(c) to the extent possible, limit the intrusiveness of the use of undercover officers; and

(d) document and report on the use of undercover officers.

§ 13.01. Agency Role in Promoting Sound Policing

(a) Agencies should create and maintain systems and policies that further the goals of sound policing.

(b) For the purposes of this Chapter and Chapter 14, "sound policing" refers to the practices called for by these Principles, and in particular those called for in Chapter 1.

§ 13.02. Recruitment and Hiring

(a) Agencies should recruit and hire individuals who reflect a spectrum of perspectives and experiences, reflect the diversity of the communities they serve, and who are well-suited to sound policing.

(b) Agencies should undertake proactive efforts to hire only individuals who are suitable for sound policing and to avoid hiring officers who are unsuitable because they have been terminated from or left previous positions due to misconduct.

§ 13.03. Adequate Training for Agency Employees

All agency employees should receive adequate, relevant, timely, continuing, and effective training and evaluation, both before and during service, to provide and maintain the knowledge and skills necessary for engaging in sound policing.

§ 13.04. Promoting Officer Well-Being

Agencies should promote officer and employee well-being, including by developing policies, training, and programs that protect their physical safety, support their mental and physical health, and reduce the stress on them and their families that results from performing their job.

§ 13.05. Supervision

(a) Agencies should require that supervisors encourage and incentivize officers to engage in sound policing, and that supervisors guide officers and hold them accountable when they do not engage in sound policing;

(b) Agencies should select supervisors who are willing and able to promote sound policing, give them the tools and training to do so, and hold them accountable when they do not promote sound policing.

§ 13.06. Individual Responsibility to Promote Sound Policing

(a) All employees of an agency should:

(1) engage in and promote sound policing;

(2) intervene to prevent or stop acts inconsistent with sound policing, and mitigate harm resulting from such acts, when feasible, unless unreasonable under the circumstances;

(3) report violations by officers of any laws or agency policies relating to sound policing; and

(4) cooperate with incident reviews and investigations of misconduct, including by being truthful and forthright and by protecting complainants and witnesses from retaliation.

(b) Agencies should incorporate these responsibilities into their policies and training practices and reinforce them with supervision, incentives, and, when necessary, corrective action.

§ 13.07. Responding to Allegations of Misconduct

(a) Agencies should readily accept complaints about officer, employee, and agency conduct, and should minimize barriers to filing them.

(b) Agencies should engage in thorough, fair, and timely investigations of allegations of misconduct, conducted by well-trained and highly competent investigators.

(c) Agencies should adjudicate misconduct allegations fairly, based on careful consideration of available evidence, and should find allegations proven when a preponderance of the evidence supports them.

(d) Agencies should impose consequences for misconduct fairly and consistently, as appropriate to promote sound policing, and discipline should be the presumed response to a proven allegation of misconduct.

(e) In deciding whether to disclose complaints, investigations, and adjudications of misconduct, agencies should balance the value of transparency against the privacy needs of the parties and witnesses.

§ 13.08. Incident Review

Agencies should have in place systems for routinely evaluating:

(a) uses of force;

(b) significant adverse events; and

(c) patterns of events that involve risk of physical harm, the deprivation of constitutional rights, or a substantial threat to community confidence and trust in the police.

§ 14.01. The Responsibility of Other Actors Regarding Sound Policing

(a) Each branch of government—legislative, judicial, and executive—should take steps (including enacting policies and procedures) to ensure that, to the extent policing is necessary, it occurs in a manner that is lawful and advances the principles of sound policing.

(b) Private actors—for-profit and nonprofit entities, as well as private individuals—also can influence policing with the actions they take. Such private actors should take care that their activities advance sound policing.

§ 14.02. Legislative Responsibilities to Ensure Sound Policing

(a) Legislative bodies at all levels of government should take steps to promote sound policing and should avoid taking actions that impede accountability, undermine sound policing, or encourage practices that are inconsistent with these Principles.

(b) The local legislative body in any jurisdiction that has a policing agency should, at a minimum:

(1) acquire, on an ongoing basis, the information it requires about agency and officer conduct, as well as its impact on communities, in order to provide effective legislative oversight of policing;

(2) adopt legislation to further sound policing and take steps to ensure that agency policies, practices, and procedures are consistent with the principles of sound policing;

(3) ensure that there are effective mechanisms in place to hold officers accountable for misconduct and to identify systemic problems that may require policy change; and

(4) allocate public funds in a manner that promotes adherence to the principles of sound policing within the agency, and facilitates a holistic approach to public safety within the jurisdiction.

(c) State legislatures should:

(1) adopt legislation to regulate specific areas of policing that would benefit from state-level guidance and uniformity;

(2) establish, or direct a state agency to establish, minimum qualifications, training requirements, and standards of conduct for all officers in the state, and provide for the decertification of officers who no longer meet these requirements;

(3) consistent with § 14.03, provide statutory remedies for violations of both statutory and constitutional rights sufficient both to deter unlawful conduct on the

part of both officers and agencies, and to provide compensation to those who are harmed; and

(4) ensure that state-level policing agencies adhere to the principles of sound policing by using the various legislative tools and strategies outlined in subsection (b).

§ 14.03. Statutory Remedies for Violations

Federal, state, and local legislative bodies should adopt effective remedies for violations of common-law, statutory, and constitutional rights by agencies and their officers. In doing so, legislative bodies should ensure that immunities from liability do not vitiate remedial goals.

§ 14.04. Judicial Responsibilities with Regard to the Policing Function

(a) Judges foster lawful policing when they:

(1) evaluate thoroughly, fairly, and impartially, without any presumption of credibility, all evidence offered by officers, including testimony in pretrial hearings, trials, and other formal proceedings, in sworn statements, and in affidavits associated with applications for warrants and other orders;

(2) enforce fully legal requirements that obligate prosecutors' offices and policing agencies to disclose information to a criminal defendant;

(3) assess thoroughly, fairly, and impartially whether police officers and prosecutors have complied with their obligations of truthfulness and disclosure, document diligently any noncompliance with those obligations, and—as appropriate—impose sanctions for violations;

(4) assess thoroughly, fairly, and impartially any assertions officers make of legal privileges or immunities; and

(5) scrutinize applications for warrants or other like court orders with care, giving them the attention and deliberation they are due in light of the significant individual interests at stake.

(b) The judiciary, as an institution, can foster sound and lawful policing by identifying, evaluating, and adopting systemic practices such as:

(1) establishing case-assignment procedures to eliminate or minimize judge-shopping at any stage of proceedings, including the warrant docket;

(2) fostering transparency in the adjudicative process, including providing to the public data relevant to sound policing, see § 14.10, and minimizing nondisclosure orders regarding policing practices, see § 2.05(c);

(3) developing mechanisms and protocols by which individual judges can take note of, and report, instances of unlawful conduct by officers in the performance of their official duties; and

(4) providing judges with useful educational resources, including training, to help them adhere to the responsibilities set out in subsection (a).

§ 14.05. Prosecutor and Other Attorney Responsibilities for Ensuring Sound Policing

(a) Prosecutors should promote agency and officer compliance with the law and with principles of sound policing, and should avoid undermining sound policing. Their efforts with respect to sound policing should include:

(1) documenting and reporting to policing agencies and appropriate state and federal authorities officer conduct that they reasonably suspect to be inconsistent with sound policing;

(2) declining to bring charges in appropriate cases in which officer conduct has been inconsistent with sound policing, and taking appropriate action if officer misconduct is discovered after charging;

(3) ensuring that investigations and charging decisions concerning potentially criminal conduct by officers are thorough, timely, fair, and impartial;

(4) collecting and disclosing evidence concerning officers that may be subject to discovery in criminal cases; and

(5) educating officers about their legal obligations, and promoting sound policing in interactions with officers.

(b) Other attorneys, including those hired or appointed to represent criminal defendants, government attorneys who advise agencies or jurisdictions, and attorneys employed or appointed to represent jurisdictions, should promote agency and officer compliance with the law and with principles of sound policing, and avoid undermining sound policing.

§ 14.06. The Federal Government's Role in Policing

The federal government should engage in sound policing, exercise its authority to promote sound policing nationwide, and avoid actions that undermine sound policing.

§ 14.07. External Oversight of Policing Agencies

To promote sound policing and accountability, states and localities should consider developing and maintaining formal external oversight entities to:

(a) elevate the values, concerns, and community-safety priorities of the public, particularly in communities most impacted by policing, so that these views can inform decisions relating to sound policing and accountability;

(b) increase transparency and understanding of policing policies, practices, outcomes, and decisions;

(c) facilitate the development of policing policies and practices that are effective, consistent with sound policing, and reflective of the values and priorities of communities, including those most impacted by policing; and

(d) provide independent evaluation of policing policies, practices, incidents, and disciplinary decisions to determine whether they are consistent with sound policing and accountability.

§ 14.08. Minimizing Interference with Officer Accountability

(a) Legislative and executive bodies at each level of government—federal, state, and local—should not adopt laws or promulgate regulations that undermine sound policing or officer accountability within agencies, and they should repeal or amend current laws and regulations that do so.

(b) Legislative bodies, the executive branch, and policing agencies should not agree to collective-bargaining-agreement provisions that unduly interfere with officer accountability or sound policing, and they should seek to renegotiate agreements, formal or informal, that do so.

§ 14.09. Promoting a Holistic Approach to Public Safety

(a) Recognizing that government plays a critical role in advancing public safety, all branches of government should consider and call upon the entire range of public and private institutions and resources available to achieve this goal.

(b) Legislative and executive officials should recognize the proper role that policing and law enforcement can and should play in achieving public safety, and they should consider and adopt alternative approaches that are effective and equitable, and that minimize any attendant harm.

§ 14.10. Data Collection and Transparency

(a) Governments should require—through legislative or executive action—that agencies and courts collect, analyze, and release to the public data and information about the following, in a form that easily can be accessed, understood, analyzed, and compared to the data and information of other agencies and courts:

(1) crime rates or reported crimes and calls for service;

(2) enforcement actions;

(3) reportable uses of force;

(4) policing policies, strategies, techniques, and mechanisms for public input;

(5) allegations and outcomes of citizen complaints of officer misconduct, civil suits filed against agencies and officers, and, in criminal proceedings, motions to suppress;

(6) organizational structure, employment standards, and staffing, including staff demographics;

(7) requests for and executed search warrants and court surveillance orders;

(8) collective-bargaining agreements; and

(9) civil settlements and judgments.

(b) Governments should require that courts collect, analyze, and release to the public data and information—in a form that easily can be accessed, understood, analyzed, and compared to other like data—about:

(1) requests by agencies for search warrants, executed search warrants, and court surveillance orders;

(2) motions to suppress evidence and their resolution; and

(3) civil settlements and judgments regarding officers or agencies.

(c) Governments should require—through legislative or executive action—that agencies using body-worn cameras and other video technologies to record police encounters:

(1) make relevant footage available on the agency website within a reasonable time following a significant adverse incident; and

(2) make footage available to any individual who it captures on video and who requests to review that video.

(d) Governments should ensure agencies and courts have the capacity, training, technology, and other resources necessary to collect, retain, analyze, and release this data.

(e) Governments should establish a process by which data collected is regularly analyzed and used to inform policies and practices.

§ 14.11. Research in Support of Sound Policing

(a) Agencies should facilitate, participate in, and collaborate on research concerning policing, including by allowing researchers access to agency employees, data, and other information.

(b) Local, state, and federal governments should support the production and advancement of research, and adopt policies that support making research transparent to the communities agencies serve.

(c) The needs of agencies and the communities they serve are integral to high quality research relevant to sound policing, which individuals and entities should consider in pursuing research projects. Making such relevant research readily available to agencies and to the public is especially important to sound policing and policy.

§ 14.12. Criminal Investigation of Officers

(a) Police conduct that may involve physical harm, a deprivation of constitutional rights, or public corruption should be investigated and evaluated in a thorough, timely, fair, and impartial manner to determine whether criminal charges are warranted.

(b) When an investigation of an officer concerns a significant use of force or deprivation of rights, the public should be timely apprised of the status of the investigation,

decisions about whether to bring charges, and—to the extent permitted by law—an explanation of any actions taken.

(c) Officer conduct should be investigated, and charging decisions made, by actors outside the officer's agency or jurisdiction when doing so is necessary to:

(1) ensure thoroughness, fairness, or impartiality;

(2) promote community trust; or

(3) comply with policy or law.

(d) Officers accused or suspected of crimes in their private capacities—not under color of law—should be investigated and charged in the same manner as individuals who are not officers would be for the same offenses.

§ 14.13. Certification and Decertification of Law-Enforcement Officers

(a) State Certification and Decertification of Officers.

(1) States should only permit officers certified to exercise policing powers to do so, and they should certify only those officers who meet carefully considered state standards for qualifications and training. Except in exceptional circumstances, states should not certify an officer who has been decertified in that state or in another state.

(2) States should decertify officers who fail to meet ongoing requirements for certification or who commit acts warranting decertification.

(b) Agency Reporting and Hiring Obligations.

(1) Agencies should report arrests of, convictions of, or serious misconduct by officers, as well as officer terminations, to the state agency responsible for decertification, and states should mandate that they do so.

(2) Except in exceptional circumstances, agencies should not hire an officer who has been decertified in another state.

§ 14.14. National Database of Decertifications

(a) The federal government should ensure the existence of a mandatory, up-to-date, accurate, and complete repository of state decertification records.

(b) States should ensure the existence of similar state repositories, and should make timely reports on officer decertifications to appropriate national repositories of records on decertification.

§ 14.15. The Role of Private Actors in Fostering Sound Policing

(a) When engaging in policing-adjacent activities, private actors and entities should take steps to ensure that they embrace and promote the principles of sound policing and do not act to undermine sound policing.

(b) Governments should decline to utilize the products or services of private actors and entities whose products or services detract from, or do not promote, sound policing.

(c) Legislative bodies should regulate the conduct of private actors and entities that affect policing directly, as well as the ways in which public actors rely on and engage with private actors and entities that conduct policing-adjacent activities.