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Policing Facts

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Policing Facts

Seth W. Stoughton*

The United States Supreme Court's understanding of police practices plays a significant role in the development of the constitutional rules that regulate officer conduct. As it approaches the questions of whether to engage in constitutional regulation and what form of regulation to adopt, the Court discusses the environment in which officers act, describes specific police practices, and explains what motivates officers. Yet the majority of the Court's factual assertions are made entirely without support or citation, raising concerns about whether the Court is acting based on a complete and accurate perception. When it comes to policing facts, the Court too often gets it wrong.

This Article explores the influence that the Court's conception of policing has on the creation and modification of constitutional norms. It demonstrates that misunderstandings about law enforcement have led to constitutional rules that fail to align with the world that they were designed to regulate. Confusion about the facts upon which a rule is built creates a gap between the conceptual justification of the rule and its practical consequences, between the effect that the rule was intended to have and the effect it actually has. Thus, misalignment results in the under- or overregulation of officer behavior and, correspondingly, the under- and overprotection of liberty and privacy interests. This observation offers one explanation for why the Court's constitutional pronouncements often fail to have the anticipated result. Having identified the effects that follow from basing a rule on a faulty factual premise, I explore ways to narrow the gap. When constitutional rules are predicated on empirical information, a more accurate understanding of police practices will better align those rules with reality, leading to both more precise constitutional rule making and more efficacious liberty protections.

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I. INTRODUCTION

The constitutional rules that regulate policing firmly reject guesswork as a justification for official action. The constitutional protections afforded to individual liberty and privacy interests cannot be satisfied by "mere hunches,"¹ subjective beliefs,² and speculation.³ Instead, intrusions are permissible only when they are based on objectively reasonable conclusions drawn from specific and articulable facts.⁴

When it comes to developing the factual basis for the constitutional rules that regulate the police, however, the Court is less

1. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

2. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

3. *Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("[P]robable cause . . . turn[s] on the assessment of probabilities in particular factual contexts.").

4. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that an officer's "inarticulate hunches" will not support an investigative detention); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881)) (holding that suspicion, without more, does not justify an arrest).

demanding. In Fourth, Fifth, and Sixth Amendment cases, it is common for the Court⁵ to make an assertion about some broadly applicable aspect of policing—the environment in which officers operate, police practices, or what motivates officers, for example—and to rely on that assertion as it develops or justifies the scope and contours of constitutional law.⁶ Yet the Court only rarely provides external support or citation for its assertions. This practice raises a series of serious questions. What does the Court say about the police and why? If a constitutional doctrine is built on a factual foundation that is incomplete or inaccurate, how does that affect the rule? What could the Court do to improve its fact-finding processes to reduce the possibility of factual misunderstandings? This Article begins to answer these questions, which are both important in their own right and a critical part of the broader conversation about how to regulate the police.

The facts that the Court relies on in any given case fall into one of two categories. “Adjudicative facts” are case-specific details: the who, what, when, where, why, and how of a particular suit. In *Terry v. Ohio*, for example, the Court’s recitation of adjudicative facts included a description of how Officer McFadden approached men he suspected of “casing” a jewelry store, frisked them, and recovered two firearms.⁷ This Article is focused on the second category: “legislative facts.” In contrast to case-specific adjudicative facts, legislative facts are “generalized facts about the world” that “transcend” the case at bar.⁸ For example, the *Terry* Court’s assertion that “American criminals have a long tradition of armed violence” against police officers is a statement of legislative fact.⁹ *Terry* is hardly unusual; many cases include both adjudicative and legislative facts.¹⁰ *Florida v. Jardines* provides a convenient illustration; in that case, the Court used both

5. I acknowledge that speaking of “the Court” as a singular entity is something of a fiction. See Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005). Nevertheless, the practice of making broad factual suppositions is so common among the Justices that despite the inherent inexactitude, speaking of “the Court” seems accurate in this context.

6. Cf. Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 GONZ. L. REV. 157, 191 (2004/05) (distinguishing between the Court’s rule-creation function and its dispute-resolution capacity).

7. 392 U.S. at 5-7.

8. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1255-57 (2012) (internal quotation marks omitted).

9. 392 U.S. at 23.

10. The Federal Rules of Evidence have taken a permissive approach to legislative facts, exempting them from the restrictions on judicial notice. FED. R. EVID. 201 advisory committee’s note (1972 Proposed Rules).

adjudicative facts, describing how a police canine was walked up to the front door of a suspected drug house,¹¹ and legislative facts, stating that “a visitor knocking on the door is routine.”¹² The Federal Rules of Evidence have taken a permissive view of legislative facts, exempting them from the restrictions on judicial notice.¹³

Police-related legislative facts find their way into judicial opinions as generalizations about the environment in which police services typically are delivered, statements about common police practices, and assertions about what motivates individual police officers. The Court’s use of legislative facts about policing has gone largely unnoticed by commentators. There has been no shortage of criticism about resulting doctrines, of course. For more than forty years, academics have turned their attention to the “deeply impoverished”¹⁴ “mess”¹⁵ of “embarrass[ing]”¹⁶ rules that govern law enforcement behavior.¹⁷ With remarkably few exceptions, scholars set about chopping a path through the tangled skein by proposing new constitutional rules¹⁸ or modifications to the way that the courts apply existing standards,¹⁹ by identifying a thematic structure or background theory for constitutional decision making,²⁰ or by offering suggestions about how to improve compliance with constitutional norms.²¹ The

11. 133 S. Ct. 1409, 1413 (2013).

12. *Id.* at 1416.

13. FED. R. EVID. 201 advisory committee’s note (1972 Proposed Rules).

14. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) (discussing the Fourth Amendment rules governing police uses of force).

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

16. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (criticizing how complicated Fourth Amendment jurisprudence has become and arguing for a pure reasonableness analysis).

17. The criticisms appear to be vocalized most often in the Fourth Amendment context. See *Ker v. California*, 374 U.S. 23, 45 (1963) (Harlan, J., concurring) (“[T]his Court’s decisions in the realm of search and seizure are hardly notable for their predictability.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974) (“For clarity and consistency, the law of the fourth amendment is not the Supreme Court’s most successful product.”).

18. See, e.g., Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565 (1983).

19. See, e.g., Harmon, *supra* note 14 (advocating that courts change the way they approach determining whether an officer’s use of force was constitutionally reasonable).

20. See, e.g., Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

21. See, e.g., John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010).

body of scholarship dedicated to identifying how constitutional norms influence or should influence police behavior is vast indeed, but it is incomplete. In our localist legal tradition, the Court is the sole centralized regulator of police conduct; before we can engage with the normative aspects of police regulation, we must better understand how the Court views police and the role that those views play in its regulatory decisions. If it is true that “[t]he Court’s conclusions about how the world operates . . . shape the contours of its constitutional [rule making],”²² it is a mistake to focus on the contours to the exclusion of the Court’s conclusions about the world.

When the Court engages in its “law declaration” function—creating, modifying, or striking down a legal rule²³—it does so based on its understanding of how events play out in the world, how things actually happen. The Court’s perceptions can be—and often are—incomplete or inaccurate. In the context of policing facts, the risk of inaccuracy is particularly cogent. Liberty stands at the core of Western conceptions of government and is directly implicated by the limits we place on the government’s authority to police the citizenry. Those limits are demarcated largely through the rules of criminal procedure, and liberty values are threatened when those rules fail to align with the way that government authority is actually exercised. Those rules are more likely to suffer from misalignment when they are built on a shaky factual predicate. Thus, even if one were to take a permissive view of the Court’s use of legislative facts generally, the privileged position that liberty has in our social and legal tradition makes the Court’s casual approach to policing facts deeply troubling. The Court’s use of legislative facts about police deserves more scrutiny than it has yet received.

This Article provides such scrutiny in three parts. Part II describes the Court’s practice of referring to and relying on information about the policing environment, law enforcement practices, officer motivations, and the anticipated reaction of officers to judicial decisions as a predicate for the development of the constitutional rules that regulate police.

22. Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 510 (2001).

23. Under the now familiar taxonomy of “basic adjudicatory models,” the Court engages in “law declaration” when it “say[s] what the law is.” In contrast, the Court engages in “dispute resolution” when it resolves a dispute between the parties to a case. Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

Part III identifies the problems that can arise when the Court bases the justification for a constitutional norm on an inaccurate factual predicate. Unlike the proverbial house built on sand, a constitutional decision that rests on an unsound factual foundation will not necessarily collapse. Instead, it will result in a rule that is misaligned with the world that it is intended to regulate. When rules *do* collapse, it is often because experience has proven that a rule once thought appropriate, then considered ill-fitting, has become simply unworkable. Using examples from three important criminal law doctrines—uses of force, consent searches, and the exclusionary rule—I demonstrate the potential for misunderstandings about legislative facts that result in ill-fitting rules.

With regard to uses of force, the Court believes that officers use violence in an environment that demands “split-second judgments,” justifying significant deference to an officer’s decision of whether to use force and what force to use. However, only a very small percentage of use-of-force incidents resemble the Court’s intuitions, suggesting that the standard used to review police violence may not often fit the circumstances of the incident itself.

In the context of consent searches, the Court has held that officers need not inform individuals of the right to refuse consent, stating that such a requirement would be “thoroughly impractical.” A close review of the circumstances that typically precede a request for consent, though, suggests that it may not be as impractical as the Court believes; indeed, several states and police agencies require officers to issue just such a warning.

The modern exclusionary rule is predicated solely on the Court’s belief that the suppression of evidence, and the corresponding reduction in the possibility of conviction, can meaningfully deter officer malfeasance. But there are no formal mechanisms that would encourage officers to reevaluate the quality of their arrests based on the conviction results, and informal pressures actively discourage officer interest, leading officers to pay less attention to convictions than the Court assumes.

In Part IV, I suggest ways to narrow the knowledge gap and improve the alignment between what the Court expects a rule to do and what it actually does. Fundamentally, the development of constitutional rules predicated on a more accurate understanding of police practices will better align those rules with the practices and incentives of the officers that they are intended to regulate, leading to both more precise and efficacious constitutional rule making.

II. POLICE-RELATED LEGISLATIVE FACTS

In this Part, I describe the Supreme Court's practice of referring to and relying on information about policing as a predicate or justification for the development of the constitutional rules that regulate police. We live in an increasingly empirically driven society. Marketing companies rely on consumer analytics to maximize the efficiency of their advertising across broad segments of the population,²⁴ and retailers track personal shopping behavior to develop a sophisticated understanding of individual consumers.²⁵ Individual consumers now make personal decisions based on information that did not exist in easily accessible forms a decade ago: a significant majority of people—now over 80%—rely heavily on consumer reviews when making purchasing decisions.²⁶ Hollywood scriptwriters can use statistics to evaluate their ideas in light of prior films, both successful and unsuccessful.²⁷ Even lawyers have gotten in on the game, using data-driven analytics to set their fees, predict case results, and hire new employees.²⁸ The political world has followed suit; President Obama's reelection campaign relied on social science research and behavioral economics to boost his image, deal with negative information, and promote voter turnout.²⁹ Nor is the public sector lagging behind; police agencies have used statistics to develop targeted enforcement priorities since the development of CompStat in the mid-1990s.³⁰

24. Christine Moorman, *Spending on Marketing Analytics*, CMO SURVEY (Mar. 28, 2012), <http://www.cmosurvey.org/blog/spending-on-marketing-analytics/>.

25. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?pagewanted=1&_r=3&hp& (discussing Target's ability to identify when a woman is pregnant based on changes in her shopping patterns).

26. Helen Leggatt, *What Reaction Do Consumers Have to Negative Reviews?*, BIZREPORT (Feb. 4, 2009), http://www.bizreport.com/2009/02/what_reaction_do_consumers_have_to_negative_reviews.html.

27. Brooks Barnes, *Solving Equation of a Hit Film Script, with Data*, N.Y. TIMES (May 5, 2013), <http://www.nytimes.com/2013/05/06/business/media/solving-equation-of-a-hit-film-script-with-data.html?>.

28. Joe Dysart, *The Dawn of BIG DATA*, 99 A.B.A. J. 42, 43-45 (2013).

29. Benedict Carey, *Academic 'Dream Team' Helped Obama's Effort*, N.Y. TIMES (Nov. 12, 2012), <http://www.nytimes.com/2012/11/13/health/dream-team-of-behavioral-scientists-advised-obama-campaign.html?pagewanted=all>.

30. CompStat is a management philosophy that focused on increasing the authority of middle managers and has led to the widespread use of computer analysis of geographical crime information to identify repeat problems and develop "[h]ighly focused enforcement activities." VINCENT E. HENRY, *THE COMPSTAT PARADIGM: MANAGEMENT ACCOUNTABILITY IN POLICING, BUSINESS AND THE PUBLIC SECTOR* 25-27 (2003).

Considered in this context, it is no surprise that, now more than ever, litigants and courts rely on empirical information to support arguments and justify opinions.³¹ The Supreme Court's practice of using legislative facts about law enforcement fits neatly into this background picture of having and using more information. The way that the Court presents and uses police-related legislative facts is hardly standardized, of course. In its opinions, for example, the Court depicts the environment in which police services are delivered, provides details about police practices, describes the factors that motivate law enforcement officers, and predicts how rules will affect police and civilians alike. The Court's factual suppositions range from the painstakingly precise³² to the hopelessly vague,³³ from the unassailable³⁴ to the highly suspect,³⁵ and from the value-neutral³⁶ to the value-laden.³⁷ Police-related legislative facts include backward-looking historical analysis of police practices,³⁸ forward-looking predictions about how a particular rule will change police behavior,³⁹ and contemporary observations about the abilities⁴⁰ and motivations⁴¹ of law enforcement officers.

The focus of this Article is less about the types of facts that the Court uses than it is about how the Court develops and presents those facts. The relevant distinction for current purposes, then, is the use of external support for a given legislative fact. In this regard, the Court's

31. Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 853-54.

32. In *Tennessee v. Garner*, the Court stated that 86.8% of departmental and municipal policies expressly prohibit the use of deadly force against nondangerous felons. 471 U.S. 1, 19 (1985).

33. The Court has, for example, described policing as "dangerous." *Jaffee v. Redmond*, 518 U.S. 1, 11 n.10 (1996) ("Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger."); *Roberts v. Louisiana*, 431 U.S. 633, 636 n.3 (1977) (per curiam) ("We recognize that the life of a police officer is a dangerous one.").

34. Consider the uncontroversial statement that "most law enforcement officers are armed." *United States v. Drayton*, 536 U.S. 194, 205 (2002).

35. See discussion *infra* Part II.B.

36. Descriptions of historical police practices, for example.

37. For example, factual assertions about the authority that police need to have to fulfill the role that society expects.

38. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 445-55 (1966).

39. See, e.g., *United States v. Watson*, 423 U.S. 411, 431 (1976) (declining to require a warrant in certain circumstances because such a requirement would "hamper effective law enforcement").

40. See, e.g., *Ryburn v. Huff*, 132 S. Ct. 987, 991 (2012) (suggesting that police are aware of "many circumstances in which lawful conduct may portend imminent violence").

41. *Kansas v. Ventris*, 556 U.S. 586, 593 (2009).

practice is sporadic at best. In the following sections, I provide illustrative examples of the Court's statements about police, grouping together various types of assertions under the admittedly generic term "fact." In the first section, I describe occasions on which the Court has bolstered its factual assertions with an explicit citation. In the second, I turn to the Court's unsupported suppositions.

A. *Supported Statements*

In two seminal cases, the Court relied extensively on a range of sources to develop a sense of what police do and how they do it. In *Miranda v. Arizona*, the Supreme Court instituted the now familiar warnings only after first engaging in an extensive analysis of police interrogation procedures.⁴² It first set the stage by discussing historical and contemporary interrogation practices, including the use of the "third degree" and psychological ploys such as isolation, confrontation, and deception. To prove its point, the Court relied on no less than six police training manuals; three texts about policing; eight academic articles; three news articles; reports by the Wickersham Commission, the Commission on Civil Rights, and the American Civil Liberties Union (ACLU); fifteen prior Supreme Court cases; two additional federal cases; and five state cases.⁴³ Once it concluded that interrogation practices create an inherently coercive atmosphere, the Court crafted a solution—the *Miranda* warnings—by drawing inspiration from the interrogation practices used by the Federal Bureau of Investigation (FBI) as well as the laws governing police interrogations in England, Scotland, India, and Ceylon (now known as Sri Lanka).⁴⁴ And less than a decade ago, the Court again referred to police manuals, training resources, and a number of reported cases as proof that officers were commonly either dancing around *Miranda*'s warning requirement or ignoring it entirely.⁴⁵

The second landmark case demonstrating the Court's extensive use of hard facts is *Tennessee v. Garner*, in which the Court rejected the common law rule that authorized the use of force, including deadly force, to stop all fleeing felons.⁴⁶ The Court concluded that officers simply did not *need* that authority, relying for support on "the policies

42. 384 U.S. at 445-55, 483-89.

43. *Id.* at 445-56.

44. *Id.* at 483-89.

45. *Missouri v. Seibert*, 542 U.S. 600, 609-11 & nn.2-3 (2004).

46. 471 U.S. 1, 19-22 (1985).

adopted by the police departments themselves.”⁴⁷ The Court explicitly discussed the policies of the FBI and the New York City Police Department (NYPD), which “forb[ade] the use of firearms except when necessary to prevent death or grievous bodily harm.”⁴⁸ It also referred to the written policies of forty-four police departments that had enacted similar prohibitions. The Court cited the results of research by the Boston Police Department Planning and Research Division, which reported that a “majority” of police departments in large cities had adopted restrictive deadly-force policies that cut back on the common law “fleeing felon” rule. Going beyond individual agencies, the Court looked to a report by a trade organization, the International Association of Chiefs of Police, which stated that 86.8% of “departmental and municipal policies” expressly prohibited the use of deadly force against nondangerous felons.⁴⁹ Finally, the Court referred to the accreditation criteria of the Commission on Accreditation for Law Enforcement Agencies and to an amicus brief filed by the Police Foundation, which identified a restrictive deadly-force policy as an industry best practice.⁵⁰

Miranda and *Garner* stand out as perhaps the strongest examples of the Court’s use of citations and support for its factual assertions. They are not entirely unique, though. In other cases, the Court has explicitly identified a source of information for its conclusions. In *Arizona v. Gant*, for example, the Court relied on “[t]he experience of . . . 28 years” when it rejected the idea that the passenger compartment of a vehicle is typically accessible to recent vehicle occupants who have been arrested.⁵¹ As proof of that experience, the Court cited a concurrence in a prior case—which, in turn, cited seven circuit court cases⁵²—and quoted a search-and-seizure treatise for the proposition that “it will be the rare case in which an officer is unable to fully

47. *Id.* at 18.

48. *Id.*

49. *Id.* at 18-19. Here, as in other areas, the Court seems to base constitutional doctrine on what a majority of relevant industry players actually do in practice. For more on the widespread use of “evolving standards,” which is often thought of as limited to Eighth Amendment jurisprudence, see Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365 (2009).

50. *Garner*, 471 U.S. at 18-19.

51. 556 U.S. 332, 350-51 (2009) (calling the prior generalization “unfounded” and “faulty”).

52. *Id.* at 341-42.

effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."⁵³

As *Gant* suggests, prior cases serve as a common source of information about police. When the Court stated that even individuals lying naked in bed may have ready access to a weapon and thus could present a danger to officers serving a search warrant at a residence, it cited three circuit court cases and two state cases.⁵⁴ And when it noted that, for officers trying to contact an individual at a residence, "[a] forceful knock [by officers] may be necessary to alert the occupants that someone is at the door," the Court cited a single case in which a showering occupant did not hear officers' knocks.⁵⁵

On occasion, the Court explicitly relies on the *lack* of empirical support to make its point. In *Garner*, for example, the Court noted that there was no "available evidence" to support the contention that "the meaningful threat of deadly force . . . discourage[ed] escape attempts"⁵⁶ or reduced crime.⁵⁷ And when it held that the Fourth Amendment prohibited officers from engaging in "discretionary spot checks"—stopping vehicles at random and without suspicion to check the operator's license and the vehicle's registration in an effort to promote roadway safety—it did so in part because the government had introduced no empirical data suggesting that the "contribution to highway safety" would be more than "marginal at best."⁵⁸

B. Unsupported Suppositions

Through *Miranda*, *Garner*, and other cases, the Court demonstrated its facility to use a range of sources as support for its factual assertions about policing. As this section exhibits, however, its more common practice is to make a statement without citation or support. My intent in this section is to draw attention to the sheer breadth of the suppositions that the Court has referred to or relied upon without regard to the lack of support. That is not to say that the Court is invariably wrong when it lacks support; clearly, that is not the case. Instead, my point is that despite the significant role that police-related legislative facts play across a broad doctrinal spectrum, it remains true

53. *Id.* at 343 n.4 (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1(c), at 525 (4th ed. 2004)).

54. *Los Angeles County, California v. Rettele*, 550 U.S. 609, 614 (2007) (per curiam).

55. *Kentucky v. King*, 131 S. Ct. 1849, 1861 (2011) (citing *United States v. Banks*, 540 U.S. 31, 33 (2003)).

56. *Tennessee v. Garner*, 471 U.S. 1, 10 (1985).

57. *Id.* at 19.

58. *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979).

that “most constitutional fact-finding depend[s] on the [Court’s] best guess about the matter.”⁵⁹

As the Court sees it, law enforcement is a dangerous business. Not only does the general environment present threats to both physical safety and mental well-being,⁶⁰ but specific actions have been identified as particularly risky, including traffic stops,⁶¹ approaching stopped vehicles,⁶² investigative detentions,⁶³ and making unannounced entries into homes.⁶⁴ Given this background understanding, it is not surprising that “most law enforcement officers are armed” and that this “fact [is] well known to the public.”⁶⁵ Circumstances require officers to act quickly and with limited information in a variety of situations: deciding to arrest,⁶⁶ detain,⁶⁷ or search⁶⁸ someone; writing out affidavits in support of a warrant application;⁶⁹ approaching a residence;⁷⁰ executing a search warrant;⁷¹ conducting a protective

59. David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 545 (1991); see also Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 15 (1986) (“When the Court lacks the needed information, it usually makes guesses.”).

60. Jaffee v. Redmond, 518 U.S. 1, 11 n.10 (1996) (“Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger.”); Roberts v. Louisiana, 431 U.S. 633, 636 n.3 (1977) (per curiam) (“We recognize that the life of a police officer is a dangerous one.”). There are many more examples where the perception of dangerousness is implied rather than explicitly discussed; among other things, that perception justifies the search incident-to-arrest doctrine, *Chimel v. California*, 395 U.S. 752, 764 (1969) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)), and deference to an officer’s use-of-force decisions, *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

61. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009); *Michigan v. Long*, 463 U.S. 1032, 1047 (1983).

62. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam).

63. *Long*, 463 U.S. at 1047.

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

65. *United States v. Drayton*, 536 U.S. 194, 205 (2002).

66. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

67. *City of Chicago v. Morales*, 527 U.S. 41, 109 (1999) (Thomas, J., dissenting).

68. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Terry v. Ohio*, 392 U.S. 1, 17 n.15 (1968) (discussing the need for clear rules that an officer must apply “in the heat of an unfolding encounter on the street”).

69. *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

70. *Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011).

71. *Muehler v. Mena*, 544 U.S. 93, 109 (2005) (Stevens, J., concurring).

sweep in a home;⁷² searching⁷³ or frisking⁷⁴ a vehicle; and making use-of-force decisions;⁷⁵ among others.

Without disputing the need for alacrity, the Court has also encouraged officers to pause long enough to knock and announce their presence before they force entry into a house, noting that “an unannounced entry may provoke violence in supposed self-defense by the surprised resident.”⁷⁶ At the same time, however, waiting *too* long after knocking could “produc[e] preventable violence against the officers in some cases, and the destruction of evidence in others.”⁷⁷ The Court has even estimated the amount of time necessary to destroy evidence with some precision, guessing that fifteen to twenty seconds is “sufficient” for someone in a house to “get[] to the bathroom or the kitchen to start flushing [narcotics] down the drain.”⁷⁸

When police officers *do* force entry, they are likely to cause some damage “[s]ince most people keep their doors locked.”⁷⁹ Once inside, the inherent dangerousness of the situation justifies officers in exercising “unquestioned command” by detaining occupants who might otherwise attempt to flee, harm officers, or refuse to facilitate the search.⁸⁰ This need is particularly acute when the search warrant involves suspected narcotics.⁸¹ Handcuffs, of course, are one way to “minimize[] the risk of harm to both officers and occupants.”⁸² Officers can restrict an individual’s movement even outside the execution of a search warrant. Such control is also necessary—and expected—during traffic stops⁸³ and at the scene of any “crime, arrest, or investigation.”⁸⁴ But the Court has not found the exercise of control to be a perfect solution; until recently, the Court generalized about the circumstances that followed the arrest of a vehicle occupant by stating that “articles inside . . . the passenger compartment of an automobile

72. *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

73. *Carroll v. United States*, 267 U.S. 132, 153 (1925).

74. *Michigan v. Long*, 463 U.S. 1032, 1052 (1983).

75. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

76. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006); *see also* *Katz v. United States*, 389 U.S. 347, 355 n.16 (1967) (noting the danger of entering without knocking).

77. *Hudson*, 547 U.S. at 595.

78. *United States v. Banks*, 540 U.S. 31, 40 (2003) (calling the estimate “not . . . an unrealistic guess”).

79. *Id.* at 37.

80. *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Michigan v. Summers*, 452 U.S. 692, 703 (1981) (internal quotation marks omitted)).

81. *Summers*, 452 U.S. at 703.

82. *Muehler*, 544 U.S. at 100.

83. *Arizona v. Johnson*, 555 U.S. 323, 325 (2009).

84. *Brendlin v. California*, 551 U.S. 249, 258 (2007).

are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item[.]'.⁸⁵ It concluded that the same applied in the arrest of *recent* vehicle occupants⁸⁶ before eventually changing course and rejecting the generalization for both current and recent vehicle occupants.⁸⁷

The Court also uses its understanding of police practices in part to determine whether regulation would undermine or complement law enforcement goals. Fear of "appreciably impair[ing]" "[e]ffective law enforcement" has led the Court to permit officers to search any containers in a vehicle if they have probable cause that the vehicle itself contains contraband.⁸⁸ In the arrest context, officers may make a felony arrest without a warrant or exigent circumstances because the Court believes that a contrary rule would "hamper effective law enforcement."⁸⁹ At the same time, however, the Court refused to allow officers who lack a warrant or exigent circumstances to force entry into a suspect's home to make a felony arrest even when there is probable cause, in part because of "the absence of any evidence that effective law enforcement has suffered" in the states that require a warrant or exigent circumstances.⁹⁰ Similarly, the Court requires officers to obtain a search warrant before forcing entry into the home of a third party when they have probable cause to arrest an individual believed to be in the home, holding that such a requirement "will not significantly impede effective law enforcement efforts."⁹¹

At times, the Court adopts a rule specifically intended to curtail a particular police practice. The exclusionary rule, which permits the suppression of evidence seized in contravention of the Constitution, serves as a particularly cogent example. The modern exclusionary rule is premised *solely* on its ability "to deter future Fourth Amendment violations."⁹² Here, the Court has adopted the view, at least implicitly, that officers will respond if courts reduce or eliminate the possibility of conviction. When it opines that a particular application of the exclusionary rule will or will not deter police conduct, the Court is

85. *New York v. Belton*, 453 U.S. 454, 460 (1981) (alteration in original) (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

86. *Thornton v. United States*, 541 U.S. 615, 621 (2004) ("In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.").

87. *See supra* notes 51-53 and accompanying text.

88. *Wyoming v. Houghton*, 526 U.S. 295, 304 (1999).

89. *United States v. Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring).

90. *Payton v. New York*, 445 U.S. 573, 602 (1980).

91. *Steagald v. United States*, 451 U.S. 204, 221 (1981).

92. *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011).

making an unsupported factual assertion about both the information available to officers and about their motivations.⁹³

The Court also makes statements about law enforcement officers themselves. It credits officers with special knowledge and insight on a range of topics, including an “almost instinctive” ability to distinguish between questions that they need to ask in order to ensure their own safety and questions intended to obtain testimonial evidence.⁹⁴ Further, officers who observe even facially lawful conduct are capable of identifying characteristics of imminent danger⁹⁵ or criminality.⁹⁶ Indeed, the Court has stated that the “experience and specialized training” that officers receive permit them “to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”⁹⁷ At the same time, however, officers “have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”⁹⁸

The Court has only rarely credited fears that police officers will attempt to circumscribe the constitutional limits to their authority. Given the “increasing professionalism of police forces,” the Court has asserted that “police forces across the United States take the constitutional rights of citizens seriously.”⁹⁹ In *Davis v. United States*, the Court stated, “Responsible law-enforcement officers . . . take care to learn ‘what is required of them’ under Fourth Amendment precedent and . . . conform their conduct to these rules.”¹⁰⁰ So, for example, officers who seek authorization for a wiretap do so only to detect “crime-related conversations.”¹⁰¹ Notably, however, the Court *has* suggested that police are more likely to engage in gamesmanship than court employees.¹⁰²

93. See, e.g., *Herring v. United States*, 555 U.S. 135, 144 & n.4 (2009) (stating that the risk to convictions may deter “deliberate, reckless, . . . grossly negligent conduct, or . . . recurring or systemic negligence,” but not isolated acts of mere negligence).

94. *Davis v. Washington*, 547 U.S. 813, 829 (2006).

95. *Ryburn v. Huff*, 132 S. Ct. 987, 991 (2012) (“[T]here are many circumstances in which lawful conduct may portend imminent violence.”).

96. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

97. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *Cortez*, 449 U.S. at 418).

98. *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

99. *Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006).

100. 131 S. Ct. 2419, 2429 (2011) (quoting *Hudson*, 547 U.S. at 599).

101. *United States v. Grubbs*, 547 U.S. 90, 95 (2006).

102. *Herring v. United States*, 555 U.S. 135, 142 (2009).

Further, the Court has not generally been sympathetic to the possibility that officers will abuse the powers that the Constitution clearly grants. In *Atwater v. City of Lago Vista*, for example, the Court held that officers could constitutionally make an arrest for *any* criminal infraction, even those punishable only by a fine.¹⁰³ That decision was motivated in part by the understanding that officers had not yet abused their discretion by causing “anything like an epidemic of unnecessary minor-offense arrests.”¹⁰⁴ Similarly, the Court held that statements elicited in violation of *Massiah v. United States*—which forbids officers from obtaining a defendant’s testimony after the Sixth Amendment right to counsel attaches—may still be used to impeach the defendant.¹⁰⁵ Because officers already have “significant incentive to ensure that they . . . comply with the Constitution’s demands,” the Court held, not allowing the statements to be used for impeachment would have no deterrent value.¹⁰⁶

At times, the Court indicates that police are motivated to take or refrain from action based not out of professionalism or altruism, but because of their limited resources or other practical obstacles. In *Illinois v. Lidster*, the Court permitted officers to conduct roadblocks intended to gather information about a criminal incident, noting that “[p]ractical considerations—namely, limited police resources and community hostility to related traffic tieups”—made the “proliferation” of such roadblocks unlikely.¹⁰⁷ Similarly, in *Florida v. Powell*, the Court concluded that even if the courts did permit police departments to change the way they issued *Miranda* warnings, the agencies were unlikely to do so because such a change would impose litigation risks.¹⁰⁸

Though it typically projects a positive view of law enforcement as unlikely to engage in gamesmanship,¹⁰⁹ the Court has acknowledged the possibility that raising the burdens of satisfying particular rules will drive officers to find ways around those rules. In this vein, the Court has rejected the idea that the existence of probable cause should

103. 532 U.S. 318, 354 (2001).

104. *Id.* at 353.

105. *Kansas v. Ventris*, 556 U.S. 586, 593 (2009).

106. *Id.*

107. 540 U.S. 419, 426 (2004).

108. 559 U.S. 50, 62-64 (2010). The Court quoted the amicus brief of the United States, but that brief contributed more in the way of persuasive language than factual support; it mentioned only that federal agencies had not “relax[ed] their *Miranda* practices.” Brief for the United States as Amicus Curiae Supporting Petitioner at 6, *Powell*, 559 U.S. 50 (No. 08-1175).

109. See *supra* notes 99-108 and accompanying text.

be limited “to offenses closely related to (and supported by the same facts as) those identified by the arresting officer,” stating that under such a rule, police officers would either cease providing the reasons that underlie their arrest decision or “simply give every reason for which probable cause could conceivably exist.”¹¹⁰ In the same context, the Court has suggested that judicial review of an officer’s subjective intent would deter officers from making arrests or taking other actions that benefit society.¹¹¹ And if the Constitution imposed more demanding requirements before a search warrant could issue, the Court has said that “police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search.”¹¹² Similarly, the Court has posited reasons why officers would prefer one course of action over another; in *Kentucky v. King*, the Court gave five reasons why an officer with probable cause to search a house may prefer to conduct a consensual knock-and-talk instead of obtaining and serving a search warrant.¹¹³ On rare occasions, the Court has expressed concern about police gamesmanship. In *Brendlin v. California*, the Court held that passengers in a stopped car were seized for Fourth Amendment purposes; holding otherwise, the Court said, would create an incentive for officers to conduct suspicionless traffic stops to find evidence that could be used against the passengers, who would lack standing to object to the seizure.¹¹⁴

III. POLICING THE COURT’S USE OF LEGISLATIVE FACTS

In the previous Part, I identified a nonexhaustive set of factual statements that the Court has made in the context of regulating police, demonstrating that, although the Court has supported some of its assertions about law enforcement, the majority go unsupported. With regard to the constitutional regulation of police, as elsewhere, it may well be true that “[m]uch of our law is based on wrong assumptions about legislative facts.”¹¹⁵ Though an exhaustive analysis of the practice is beyond the scope of this Article, this Part seeks to draw readers’ attention to the Court’s use of questionable factual predicates.

110. *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004).

111. *Virginia v. Moore*, 553 U.S. 164, 175 (2008).

112. *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

113. 131 S. Ct. 1849, 1860-61 (2011).

114. 551 U.S. 249, 263 (2007).

115. *Davis*, *supra* note 59, at 15.

To demonstrate my point, I provide detailed examples from three important Fourth Amendment doctrines: the deference with which courts review police uses of force, the absence of any requirement that officers inform individuals of the right to refuse consent to a search, and the deterrence justification for the exclusionary rule. Each of these rules has sparked considerable controversy among commentators on doctrinal or normative grounds, but the factual suppositions that underlie the rules have thus far largely evaded academic scrutiny.

A. *Police Uses of Force*

In the context of determining whether a police use of force was constitutionally permissible, the Court has concluded that the circumstances in which police use force justify deference to the officers' decisions. Reviewing the data on use-of-force incidents reveals an apparent gap; only a small minority play out the way that the Court envisions.

One of the realities of modern law enforcement is "the potential for suspect resistance and police use of or threatened use of force."¹¹⁶ To help lower courts evaluate whether a given use of force was constitutionally permissible, the Court has established a totality-of-the-circumstances reasonableness test that "is not capable of precise definition or mechanical application."¹¹⁷ Instead, the inquiry demands "careful attention to the facts and circumstances of each particular case," with particular attention to "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."¹¹⁸ However, "[t]he calculus of reasonableness must embody allowance 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."¹¹⁹ Deference to officer judgments is justified by the inherent nature of use-of-force incidents: the compressed time in which an officer must decide whether to use

116. Office of Justice Programs, *Use of Force*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=703> (last visited Mar. 27, 2014) (calling that potential an "essential element" of law enforcement operations).

117. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

118. *Id.* That these factors have been soundly criticized as "irrelevant and prejudicial" demonstrates that the Court does not have a sound understanding of how officers make use-of-force decisions. Harmon, *supra* note 14, at 1123.

119. *Graham*, 490 U.S. at 396-97.

force, determine what type of force to use, and translate those decisions into action.

Were some future anthropologists to turn to the federal reporters to form an opinion about the environment in which law enforcement officers use force, they would have little choice but to conclude that those “circumstances [were] tense, uncertain, and rapidly evolving,” requiring “split-second judgments . . . about the amount of force that is necessary.”¹²⁰ Since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2300 occasions.¹²¹ It features widely in briefs and trial court documents and has made its way into federal and state pattern jury instructions.¹²² It is, by any measure, the accepted depiction of the environment in which police officers use force.

As a description, though, this account is misleading. To see why, we must first understand more about (1) the manner in which officers approach civilian encounters, (2) typical uses of force, and (3) the types of resistance that force is most often used to overcome. In the world of policing, few things are more important than officer safety. From the time they are in the police academy, officers are taught that their single overriding goal every day is going home at the end of the shift.¹²³ One of the most popular police training texts instructs officers to make tactical thinking a constant part of their working lives by considering, as they approach each encounter, their response to possible resistance.¹²⁴ Police operating procedures enshrine the

120. *Id.* at 397.

121. A WestlawNext search for “split-second judgments” in the same paragraph as “use of force” yields these results. This description of the environment in which police officers make decisions appears in just under 1600 briefs and more than 3000 trial court documents.

122. 3 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE 1-41 (4th ed. 2007) (citing *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999)); Harmon, *supra* note 14, at 1144 n.119 (citing MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 4.40 (2013)); Ninth Circuit Jury Instructions Comm., *Ninth Circuit Manual of Model Jury Instructions: Civil*, U.S. COURTS FOR THE NINTH CIRCUIT 186 (2006), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Civil_Jury_Instructions_2013_10.pdf. Some state courts have adopted this language into their model instructions as well. *E.g.*, *Civil Jury Instructions: 5.1-1 Use of Excessive Force (Violation of 42 U.S.C. § 1983)*, STATE OF CONN. JUDICIAL BRANCH § 5.1-1 (Oct. 8, 2010), <http://www.jud.ct.gov/ji/Civil/part5/5.1-1.htm>.

123. PETER MOSKOS, COP IN THE HOOD 22 (2008).

124. RONALD J. ADAMS ET AL., STREET SURVIVAL: TACTICS FOR ARMED ENCOUNTERS 155 (1980) (“As you approach any situation, you want to be in the habit of looking for cover, so you can react automatically to reach it should trouble erupt.”); *id.* at 395 (“On patrol, you can turn ‘routine’ observation into a survival-oriented game. As you watch people in a crowd or on the sidewalk, pick out certain ones at random and assume that they are armed suspects.

concept of tactical awareness.¹²⁵ Suspicion is not reserved for suspects; a safety-conscious officer approaches witnesses and victims with similar care.¹²⁶ An officer will take steps to control a scene well before they initiate contact with someone. For example, an officer who is going to conduct a traffic stop may delay by following the target vehicle until they reach an area that will provide some tactical advantage.¹²⁷ Officers are trained to approach pedestrian stops in a similar manner; they select the location and environment, so far as possible, before commanding a civilian to stop.¹²⁸ When force is used, it has been premeditated; the situation has already been shaped by the officer's preparation and tactical approach.¹²⁹

Officers use force to overcome civilian resistance, and most agencies instruct officers to use force in proportion to the amount of resistance offered.¹³⁰ Most civilians, of course, do not resist at all,

How would you deploy to approach them? What cover might you use? How could you best protect yourself and/or shoot back if they suddenly displayed aggressive behavior?").

125. *Denver Police Department Operations Manual*, DENVER POLICE DEP'T § 105.01(1)a. (Mar. 2010), <http://www.denvergov.org/Portals/720/documents/OperationsManual/105.pdf> ("Officers should ensure that they do not engage in unreasonable actions that precipitate the use of force as a result of tactical, strategic, and procedural errors that place themselves or others in jeopardy.").

126. ADAMS ET AL., *supra* note 124, at 75 (describing how to interview a witness or complainant).

127. *Id.* at 76-79. Ronald J. Adams and others accompany their tactical suggestions with the warning: "Dangerous motorists and passengers cannot always be identified in advance. [That] is why it is so critical to *control* your stop." *Id.* at 77; CHARLES REMSBERG, *THE TACTICAL EDGE: SURVIVING HIGH-RISK PATROL* 274-77 (1986); *see also Motor Vehicle Stops: Model Policy*, MO. POLICE CHIEFS § III.A (2002), <http://www.mopca.com/mpca.nsf/ContentPage.xsp?action=openDocument&documentId=F1642CC8306279AF8625770B00586E6D> (follow "Motor Vehicle Stops" hyperlink under "Volume Two") ("2. Once an initial decision has been made to stop a motorist, the officer shall select an area that provides reasonable safety 3. When a location has been selected for the stop, the officer shall notify the communications center of [the stop]. 4. At the desired location, the officer should signal the operator to stop"); Strategic Servs. Div., *Manual of Policy and Procedure*, PORTLAND POLICE BUREAU 134 (Jan. 2010), <http://www.portlandoregon.gov/police/article/32482> ("Before making a traffic stop, [the officer shall] give the following information by voice or [in-car computer]: 1. Unit number and [radio signal indicating a traffic stop]. 2. Vehicle license plate or description. 3. Location.").

128. *See, e.g.*, ADAMS ET AL., *supra* note 124, at 69-76.

129. Indeed, a leading scholar has suggested that courts take into account the totality of officer actions leading up to the use of force, rather than focusing exclusively on the point at which force was used. Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 1, 8-10 (William A. Geller & Hans Toch eds., 1996).

130. As early as the 1960s, law enforcement agencies have used "force matrices" to communicate when they expect officers to use force. KÄREN M. HESS & CHRISTINE HESS ORTHMANN, *CRIMINAL INVESTIGATION* 235 (9th ed. 2010). Force matrices are presented in various ways, but all instruct officers which types of force are appropriate to overcome certain types of resistance. *See id.* at 236 (providing examples of both a linear force matrix

making the use of force relatively rare: in 2008, officers used or threatened force in less than 2% of approximately forty million civilian interactions.¹³¹ Passive resistance—nonresponsiveness to an officer's orders¹³²—and active resistance—nonviolent physical resistance such as tensing up, pulling away, or fleeing¹³³—are by far the most common types of opposition that officers must overcome.¹³⁴ Correspondingly, the most common officer responses involve the use of nonphysical force: shouting, cursing, and threats of force.¹³⁵ When officers do use physical force, they use relatively little. A recent Department of Justice report documents that the most common use of physical force involves pushing or grabbing.¹³⁶ This finding is fully consistent with prior research, all of which suggests that, when officers use force, the least severe force options are the most commonly used.¹³⁷ For example, one study found that police use of force “consist[s] almost exclusively of grabbing and restraining,”¹³⁸ and another concluded that “84 percent of forcible incidents [are limited to] grabb[ing], push[ing], or restrain[ing] a citizen.”¹³⁹ Injuries are relatively uncommon, and those injuries that officers cause are typically minor.¹⁴⁰

and a circular force matrix); Ross Wolf et al., *Police Use of Force and the Cumulative Force Factor*, 32 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 739, 744 fig.1 (2009) (displaying a ladder-style force matrix); John G. Peters, Jr. & Michael A. Brave, *Force Continuums: Are They Still Needed?*, POLICE & SECURITY NEWS, Jan./Feb. 2006, at 1, 3, *available at* <http://ecdllaw.info/outlines/forcecontinuums.pdf>.

131. Christine Eith & Matthew R. Durose, *Contacts Between Police and the Public, 2008*, BUREAU OF JUSTICE STATISTICS 11 (Oct. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp08.pdf>.

132. Going limp is the classic example of passive resistance. *See, e.g.*, *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 118 (2d Cir. 2004) (discussing “passive resistance techniques” employed by antiabortion protestors).

133. *See, e.g.*, *Chaney v. City of Orlando*, 291 F. App'x 238, 244 (11th Cir. 2008) (noting the distinction drawn by the Orlando Police Department between passive resistance and active resistance).

134. GEOFFREY P. ALPERT & ROGER G. DUNHAM, *UNDERSTANDING POLICE USE OF FORCE: OFFICERS, SUSPECTS, AND RECIPROCITY* 88-93 (2004).

135. Eith & Durose, *supra* note 131, at 11-13.

136. *Id.* at 12-13.

137. Geoffrey P. Alpert & Roger G. Dunham, *The Force Factor: Measuring and Assessing Police Use of Force and Suspect Resistance*, in *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA* 45, 45-47 (1999).

138. Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE*, *supra* note 129, at 23, 35 (internal quotation marks omitted).

139. Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE*, *supra* note 129, at 52, 62.

140. Nat'l Inst. of Justice & Bureau of Justice Statistics, *Executive Summary*, in *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA*, *supra* note 137, at vii, viii.

The vast majority of the time, then, officers use force aggressively, not defensively. That is, they act forcefully to establish control over a suspect rather than to defend themselves, a third party, or the suspect from some imminent harm.¹⁴¹ Injury to the officer—which can be uncommon even when police use force to defend themselves¹⁴²—is unlikely. Considering that the vast majority of use-of-force incidents involve the use of aggressive force by police officers—typified by tactical preparation, a degree of premeditation, low levels of resistance, low levels of force, and a low probability of injury—the Court’s description of “split-second judgments” is simply wrong almost all the time.¹⁴³ When someone goes limp, pulls away, or turns to run, officers have time to think through their response. Indeed, departmental training or policies might well *require*, or at least suggest, a tactical delay, the better to consider the range of options available.¹⁴⁴ The Portland Police Bureau, for example, advises officers to be careful when moving people who are passively resisting, noting that “[l]ifting and/or carrying people can pose a safety risk and should be avoided whenever safer options are available and appropriate.”¹⁴⁵ Similarly, the same agency instructs its officers *not* to try to overtake a running suspect by themselves; instead, they should “keep the suspect in sight” until it is safe to make an arrest.¹⁴⁶ In the meantime, they are to provide the dispatcher with information about the suspect and the chase itself.¹⁴⁷

141. I do not mean to suggest that the use of aggressive force is unjustified or in any way illegitimate. In these situations, officers are promoting the state’s interest in apprehending suspects; the use of force is “necessary to effectuate criminal proceedings against a suspect.” Harmon, *supra* note 14, at 1152.

142. Most assaults on officers result in no or minor injuries. The FBI reports that over the last ten years, between 71.7% and 74.1% of assaults on officers resulted in no or minor injuries. *Table 70: Law Enforcement Officers Assaulted*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/tables/table70-leo-assaulted-type-weapon-percent-injured-01-10.xls> (last visited Mar. 27, 2014). Some departments report even lower rates of injury. See *Annual Report 2010: A Year in Review*, CHI. POLICE DEP’T 60 (2011), <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports/10AR.pdf> (reporting no or minor injuries in 98.6% of assaults on officers in 2009 and 2010).

143. This is true even if we acknowledge that a situation may be “tense, uncertain, and rapidly evolving,” *Graham v. Connor*, 490 U.S. 386, 397 (1989), a description so vague that it may be fairly applied to *all* officer/civilian encounters and any other stressful environment, from a first date to a high-stakes poker game.

144. See Strategic Servs. Div., *Manual of Policy and Procedure*, PORTLAND POLICE BUREAU § 630.15 (July 2006), <http://www.portlandoregon.gov/police/article/126296>.

145. Strategic Servs. Div., *Manual of Policy and Procedure*, PORTLAND POLICE BUREAU 199 (Mar. 2006), <http://www.portlandoregon.gov/police/article/117876>.

146. Strategic Servs. Div., *supra* note 144, § 630.15.

147. *Id.*

I do not want to overstate my point; it is certainly true that the time in which an officer must make a force decision *can* be compressed, particularly in cases where the officer is using force defensively rather than aggressively. It is also true that police work itself is often tense and uncertain, with the potential to change dramatically from moment to moment. With characteristic hypervigilance, officers must remain alert to the possibility that someone who has gone limp could still reach to their waistband for a weapon or that a running suspect may turn and fight.¹⁴⁸ However, in responding to the resistance *actually* presented, the realities of police violence are such that the circumstances in which officers must make a truly split-second decision are highly unusual, which militates against the Supreme Court's generalization.

B. Consent Searches

The Court has rejected procedural protections in the consent-search context, refusing to require that officers advise the individuals whom they wish to search of the right to withhold consent. The Court has justified the refusal in part with the explanation that officers would find it “thoroughly impractical” to issue a *Miranda*-like consent warning.¹⁴⁹ As with use-of-force situations, though, analyzing when and how officers ask for consent calls into question the accuracy of the Court's assertion in the vast majority of cases.

Throughout the criminal law, consent functions as an effective bypass mechanism, an efficient end run that either satisfies or waives whole swaths of constitutional text. An amorphous concept, consent can convert what would be an unlawful suspicionless seizure into a permissible consensual encounter¹⁵⁰ and can render admissible what may otherwise be a presumptively coerced confession.¹⁵¹ In the context of warrantless Fourth Amendment searches, consent represents a deft dodge around the complicated maze of rules that have grown up around—and perhaps in an attempt to define—the standard of reasonableness. And it is quite a popular dodge; although precise data are unavailable, consent searches are reputedly the most commonly

148. See Richard Fairburn, *Cooper's Colors: A Simple System for Situational Awareness*, POLICEONE.COM (Aug. 9, 2010), <http://www.policeone.com/police-trainers/articles/2188253-Cooper-s-colors-A-simple-system-for-situational-awareness/> (advising officers to be at “condition White” only when asleep).

149. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

150. See *Florida v. Bostick*, 501 U.S. 429, 434-36 (1991); *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980).

151. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

exercised exception to the Fourth Amendment's warrant requirement,¹⁵² estimated to make up at least 90% of warrantless searches by law enforcement officers.¹⁵³

And why not? It is almost ludicrously easy for a prosecutor to establish that an encounter or search was consensual and difficult for a defendant to prove that it was not.¹⁵⁴ That difficulty arises in part from the lack of procedural protections in consent-search situations. In *Schneckloth v. Bustamonte*, the Court rejected a rule that required the government to demonstrate that the consenting individual *knew* they had the right to refuse consent.¹⁵⁵ Although the Court recognized that "[o]ne alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent," it rejected such a requirement as "thoroughly impractical."¹⁵⁶ The Court described its view of when officers asked for consent in vague terms, stating:

Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police

152. 4 LAFAVE, *supra* note 53, § 8.1, at 4-5; JOHN M. MACDONALD & JERRY KENNEDY, CRIMINAL INVESTIGATION OF DRUG OFFENSES 276 (1983). There are some limited instances in which more precise data are available. See, e.g., Molly Totman & Dwight Steward, *Searching for Consent: An Analysis of Racial Profiling Data in Texas*, ACLU OF TEX. 2 (Feb. 17, 2006), <http://www.aclutx.org/download/4/> (reporting that consent searches made up approximately 30% of all searches conducted at traffic stops in Texas during 2004).

153. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005).

154. Steinbock, *supra* note 22, at 541.

155. 412 U.S. 218, 223, 230 (1973).

156. *Id.* at 231. The practicality point is the first and last justification the Court offered in its opinion, but it also provided additional reasons for its holding. The Court read prior cases to mean that an individual can voluntarily consent even when ignorant of their right to refuse consent. *Id.* at 233-34. It concluded that the right to refuse consent, as a Fourth Amendment right, was of a "wholly different order," *id.* at 242, from "those rights that protect a fair criminal trial" and so did not require the same "'knowing' and 'intelligent'" waiver, *id.* at 236. Further, the Court's description reflects its conception of consensual encounters as essentially free of inherent coercion. "Implicit in [consensual encounter] cases is the assumption that when an individual agrees to police requests to engage in conversation, she is not submitting to a 'show of authority' of the kind that would convey the message that she is not free to leave." Steinbock, *supra* note 22, at 515. It is *this* assumption that has received the lion's share of academic criticism. See, e.g., Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, in OXFORD HANDBOOK ON LINGUISTICS AND LAW 326, 326 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) ("By ignoring the pragmatic features of the police-citizen encounter, judges are engaging in a systematic denial of the reality of the social meaning underlying these encounters, and are thereby constructing a collective legal myth designed to support current police practices in the 'war on drugs.'").

questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime.¹⁵⁷

As the Court articulated it, the environment in which police ask for consent simply was “a far cry from the structured atmosphere of a trial” and “immeasurably far removed” from custodial interrogation,¹⁵⁸ both circumstances where it had approved of explicit warnings. Here, in contrast, requiring officers to warn individuals that they had the right to refuse consent would “hamper the traditional function of police officers in investigating crime.”¹⁵⁹

Similar reasoning motivated the Court to come to a similar conclusion some twenty-three years later when it held in *Ohio v. Robinette* that police officers did not have to inform a lawfully seized individual that the seizure had ended—that they were “free to go”—before asking for consent to search.¹⁶⁰ Quoting from *Schneckloth*, the majority concluded its opinion by stating that “it [would] be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”¹⁶¹ And six years after that, the Court cited *Schneckloth* and *Robinette* when it rejected a rule that effectively required officers engaged in drug interdiction on cross-country buses to inform passengers that they could refuse to consent to the search requests.¹⁶²

Much ink has been spilled over the concept of consent, most of it in the argument that true voluntariness is unlikely in officer/civilian encounters. Scholars and popular-media commentators have roundly criticized the way that the courts have failed to appreciate the patently asymmetrical power dynamic between an armed authority figure and a submissive civilian, as well as the ease with which the doctrines of consensual encounters and consensual searches—practically related if conceptually distinct—can be pressed into service as tools of racial

157. *Schneckloth*, 412 U.S. at 231-32.

158. *Id.*

159. *Id.* at 232 (quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966)). The Court did not do a good job of explaining in clear terms what drove its perception of impracticality, leading Justice Marshall, writing in dissent in *Schneckloth*, to “conclude . . . that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights.” *Id.* at 288 (Marshall, J., dissenting).

160. 519 U.S. 33, 35 (1996).

161. *Id.* at 39-40.

162. *United States v. Drayton*, 536 U.S. 194, 206 (2002).

profiling¹⁶³ in a way that substantially undermines public faith in law enforcement.¹⁶⁴ My criticism is quite distinct and focuses on the Court's use of empirical language to describe the impracticality of consent warnings. The Court used an apparently factual assertion to smuggle in a normative preference about law enforcement, but the two are at odds with each other. The statement that practical difficulties make it unreasonable to require officers to issue consent warnings is highly suspect.

Regardless of whether the circumstances that prompted the police interest "develop[ed] quickly" or resulted from "a logical extension of investigative police questioning,"¹⁶⁵ there is no pressing exigency that precludes a consent warning. Certainly there is no safety rationale for such preclusion. Consent, in many cases, follows on the heels of a detention because asking for consent during the stop risks impermissibly extending it.¹⁶⁶ When this is true, the officer has either conducted a pat down as early into the interaction as possible¹⁶⁷ or concluded that they lack reasonable suspicion that the detainee is armed or dangerous.¹⁶⁸ By the time the officer ends the detention and asks for consent, they have "no further need to control the scene"¹⁶⁹ because they have already taken steps to make it as safe as they can. Even when there is no detention—and thus no opportunity to frisk—officers are trained to approach each encounter tactically, taking steps

163. Nadler & Trout, *supra* note 156, at 327-28; Steinbock, *supra* note 22, at 510; see also Justin Peters, *How About a Friendly Frisking?: The Myth of the "Consensual" Police Encounter*, SLATE (Nov. 30, 2012, 2:02 PM), http://www.slate.com/blogs/crime/2012/11/30/stop_and_frisk_florida_is_there_such_thing_as_a_consensual_police_encounter.html ("Florida is making it harder for you to carry drugs by making it easier for the police to stop you for any reason. There's nothing consensual about that.").

164. 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. 759 (2012).

165. *Schneekloth v. Bustamonte*, 412 U.S. 218, 232 (1973).

166. Asking for consent or taking other actions that prolong the detention beyond the time "reasonably required to complete" the purposes of the detention can render unreasonable an initially justified stop. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

167. *Cf. ADAMS ET AL.*, *supra* note 124, at 112 ("From the outset, you want to maintain an offensive position, not a defensive one." (emphasis omitted)).

168. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). At times, the officer may conduct a search even if they cannot satisfy the legal standard by articulating reasonable suspicion, as when they respond to an anonymous call about a person with a gun. Such an anonymous call will not support reasonable suspicion, *Florida v. J.L.*, 529 U.S. 266 (2000), but, for their own safety, officers may still "search the suspect, knowing that any case probably would not hold up in court." *MOSKOS*, *supra* note 123, at 116.

169. See *Arizona v. Johnson*, 555 U.S. 323, 325 (2009) (stating that in the context of traffic stops, "[n]ormally, the stop ends when the police have no further need to control the scene").

to maximize safety even before initiating contact.¹⁷⁰ Regardless of whether the encounter is consensual or involuntary, police are taught to maintain their awareness vigilantly and to take pains to mitigate potential threats.¹⁷¹ If there are multiple civilians on scene, as with a vehicle stop, the officer may request backup before interacting with the group or asking for consent to search.¹⁷² Some departments train officers to call for backup when they intend to ask for consent to search even a single civilian and to not search until backup arrives.¹⁷³ These measures ensure that at the point at which officers ask for consent, they have taken appropriate precautions to make the environment safe as they can.

In addition to what we might call the environmental realities, the fact that certain courts, legislatures, and law enforcement agencies require officers to provide consent warnings also supports the conclusion that the Court erred by describing such warnings as “thoroughly impractical.” For more than a quarter century, the Supreme Court of New Jersey interpreted a provision of the state constitution textually identical to the Fourth Amendment¹⁷⁴ to require police officers to provide consent warnings to individuals they wanted to search.¹⁷⁵ The Arkansas Supreme Court has adopted a similar requirement with regard to house searches,¹⁷⁶ again under a state constitutional provision textually identical to the Fourth Amendment.¹⁷⁷

170. See *supra* notes 123-129 and accompanying text.

171. REMSBERG, *supra* note 127, at 295.

172. See *id.* (“With multiple suspects, *wait for backup*”).

173. This was the case in the department that I worked for. The tactical ideal was to have at least one more officer than civilian on scene.

174. Compare N.J. CONST. art. I, § 7 (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.”), with U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

175. *State v. Johnson*, 346 A.2d 66 (N.J. 1975). The New Jersey Supreme Court later banned the practice of suspicionless consent searches altogether, expressing concerns about racial profiling and deep skepticism that “a consent to search . . . truly can be voluntary or otherwise reasonable” even after being warned of the right to refuse consent. *State v. Carty*, 790 A.2d 903, 911 (N.J. 2002).

176. *State v. Brown*, 156 S.W.3d 722, 724 (Ark. 2004).

177. Compare ARK. CONST. art. II, § 15 (“The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the

A Colorado statute requires that law enforcement officers inform the subject that they are “being asked to voluntarily consent to a search” and that they have “the right to refuse the request to search.”¹⁷⁸ The targeted individual must consent verbally or in writing before the officer is allowed to search.¹⁷⁹ Similar legislation was proposed and passed in Texas before being vetoed by Governor Rick Perry.¹⁸⁰

Some police agencies have determined that consent warnings are not only plausible, but mandatory even when they are not required by state law. The Austin Police Department, one of the largest police departments in the country,¹⁸¹ now requires officers both to inform civilians that they may withhold their consent and to obtain written consent before conducting a vehicle search.¹⁸² The Chicago Police Department has adopted a more limited policy, requiring written consent (or the presence of a supervisor) before an officer may conduct a consent search of a residence or private property other than vehicles.¹⁸³ For vehicles, officers are encouraged to have civilians fill out written consent forms that include a consent warning.¹⁸⁴ Further, some police training manuals suggest that officers provide consent warnings even in the absence of a legal or administrative directive. A popular text dedicated to the investigation of drug crimes states that a consent warning “is not legally required in all attempts to get a consent to search, but it is helpful to so advise every suspect, as it not only

person or thing to be seized.”), with U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

178. COLO. REV. STAT. § 16-3-310(1) (2013).

179. *Id.*

180. S.B. 1195, 79th Leg., Reg. Sess. (Tex. 2005); Proclamation by the Governor of the State of Texas, Tex. S. Journal, 79th Leg., Reg. Sess., at 5129 (May 30, 2005) (vetoing the bill in part because there was “insufficient information available . . . to determine whether signed or [video or audio recorded] consent requirements place too onerous a burden on law enforcement”).

181. Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, BUREAU OF JUST. STAT. BULL. app. tbl.8 (July 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea08.pdf>.

182. See Patrick George, *Acevedo: Officers Need Written Consent for Vehicle Searches*, STATESMAN.COM (July 19, 2012, 9:20 PM), <http://www.statesman.com/news/local/acevedo-officers-need-written-consent-for-vehicle-1/nRqF3/>.

183. Philip J. Cline, *Consent To Search Incidents: Special Order S04-19-01*, CHI. POLICE DEP’T § III C-D (June 1, 2007), <http://directives.chicagopolice.org/directives/data/a7a57be2-12a76ce1-24512-a773-3e562b92ee0b017f.html?hl=true>.

184. *Consent To Search Form CPD-11.483*, CHI. POLICE DEP’T, <http://directives.chicagopolice.org/forms/CPD-11.483.pdf> (last updated May 2007).

helps balance the facts in favor of a voluntary consent but will save a consent given during an unlawful detention or arrest.”¹⁸⁵

Both the circumstances in which officers ask for consent and the practices of a significant minority of police departments raise doubts about the Court’s conclusion that it is impractical to demand that officers issue a consent warning. There may be other social and legal justifications for or against consent searches,¹⁸⁶ but a practical bar seems unlikely.

C. *The Exclusionary Rule*

The modern incarnation of the exclusionary rule is firmly grounded in a deterrence rationale, with the Court implicitly but necessarily concluding that reducing or eliminating the possibility of a conviction by suppressing evidence will matter to police officers, who are personally invested in obtaining convictions. A gap exists here because officers do not concern themselves with exclusion.

The exclusionary rule allows for the suppression of illegally gathered evidence when the social costs of suppression—the dangers of “setting the guilty free and the dangerous at large”—are outweighed by the value of deterring future illegality by police.¹⁸⁷ The Court now views the rule cautiously, noting that the “[s]uppression of evidence . . . has always been [its] last resort, not [its] first impulse.”¹⁸⁸ Over the past forty years, scholars have hotly debated the origins and precise scope of the exclusionary rule.¹⁸⁹ Perhaps the most intense point of academic contention is the rule’s theoretical justification: whether it is

185. MACDONALD & KENNEDY, *supra* note 152, at 278.

186. There remains a difference between the lack of a legal requirement to consent and the lack of a social expectation of acquiescence, *see* Nadler & Trout, *supra* note 156, at 332, and it seems likely that the social pressure will largely survive even when the individual has been informed that they have no *legal* obligation to consent. Consider the high rate at which suspects waive their *Miranda* rights. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996) (reporting more than 83% of suspects waived *Miranda*); Kit Kinports, *The Supreme Court’s Love—Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375, 379–80 (2011) (“[T]he overwhelming majority of suspects waive their rights and agree to talk to the police without the assistance of counsel.”).

187. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

188. *Id.*

189. *See generally* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2009/10) (examining the application of exclusion-like remedies during the Founding Era); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) (discussing the history and present status of the exclusionary rule).

a constitutional directive, a prudential rule, or something else altogether.¹⁹⁰ A related body of literature, nearly as intense and only slightly smaller, has contested that the suppression of evidence and the corresponding elimination or reduction of the possibility of conviction can deter police misconduct.¹⁹¹ Many commentators have pointed out the lack of evidence for the proposition that the exclusion of evidence has any real deterrent value; such an effect must be taken “largely [as] a matter of faith.”¹⁹² Drawing on existing criticisms of the exclusionary rule, Eugene R. Milhizer recently enumerated seven reasons to be skeptical of the rule’s deterrent effect: (1) officers’ violations are often unintentional rather than malicious, (2) exclusion is typically too remote or attenuated from the violation, (3) a majority of the most questionable seizures avoid judicial review by being “buried” by police or during the plea bargaining process, (4) officers who commit violations can avoid exclusion by being deceptive, (5) the violating officer may never be told that their evidence was suppressed, (6) officers may find the effect of suppression on the potential for conviction outweighed by the effect of searching and arresting the defendant, and (7) officers can avoid suppression by gaming the legal doctrines surrounding the exclusionary rule, such as standing requirements.¹⁹³

I do no more than dip a toe in the turbulent waters of the debate; I remain skeptical of the exclusionary rule’s efficacy as a deterrent, but not (just) for the reasons recited by Milhizer. While scholars have done a creditable job of identifying problems with the rule, they either

190. See Brooks Holland, *The Exclusionary Rule as Punishment*, 36 RUTGERS L. REC. 38 (2009); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981); Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 182 (2012) (contending that the exclusionary rule is “simply the form that judicial review takes in the Fourth Amendment context”); Stewart, *supra* note 189.

191. See Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373, 379-80 (2010) (contrasting the views of jurists and scholars who doubt the deterrent effect of the exclusionary rule and seek to eliminate or limit it from that of jurists and scholars who support its continued application).

192. Dworkin, *supra* note 15, at 333; see also Yale Kamisar, Gates, “*Probable Cause*,” “*Good Faith*,” and *Beyond*, 69 IOWA L. REV. 551, 613 (1984) (discussing the relationship between probable cause and good faith in search-and-seizure cases); Posner, *supra* note 190, at 54 (“No one actually knows how effective the exclusionary rule is as a deterrent.”); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 275-77 (1973) (concluding that the exclusionary rule is not an effective deterrent of police misconduct).

193. Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 229-30 (2012).

overlook or share the Court's foundational assumption that when officers engage in investigative activity, their "focus is . . . upon obtaining convictions of those who commit crimes."¹⁹⁴ I am not so sure; officers are under no formal pressure to concern themselves with convictions, and there is informal discouragement of such concern.

Consider first the formal mechanisms that could shape officer interest. The most obvious, of course, is a supervisor's performance evaluation of individual employee conduct. Officer evaluation forms used by both large and small police departments do not mention, let alone put weight on, convictions, though most include some evaluation of arrests.¹⁹⁵ Even agencies that use—or previously used—hard quotas that require officers to make a certain number of arrests or issue a certain number of tickets in a given amount of time do not evaluate their officers based on convictions.¹⁹⁶ Nor do police management texts encourage supervisors to consider convictions when evaluating officer performance; most do not mention it at all. The most recent edition of *Supervision of Police Personnel* advises supervisors to evaluate many aspects of patrol officers' performance, including the quality of their arrests, their report writing, and their poise in court, but it omits any mention of conviction rates.¹⁹⁷ In *Police Performance Appraisals: A Comparative Perspective*, the authors list twelve "core competencies"

194. Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 368 (1998); see RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 22 (2008) (identifying conviction as the goal of police interrogators). There is occasional disagreement, but it is rarely fully fleshed out. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 220 (2011) ("[S]uppression of illegally seized evidence is a particularly poor sanction to apply to the police, because police officers lose nothing when evidence is excluded at defendants' trials."); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 795 (2012) ("The exclusionary rule cannot work if officers do not care about securing convictions, and only departments can make them care, whether through formal or informal incentives.").

195. NATHAN F. IANNONE ET AL., SUPERVISION OF POLICE PERSONNEL 234-35, 245-47 (7th ed. 2009) (containing copies of the Los Angeles Police Department Performance Evaluation Report and the Palm Beach Police Department Sworn Employee Evaluation Report); Balt. Police Dep't, Performance Evaluation Report, Form 397/98 (n.d.); Tallahassee Police Dep't Employee Evaluation Form (on file with author); Truro Police Dep't, *Employee Performance Evaluation (Patrol Division)*, TOWN OF TRURO, <http://www.truropolice.org/On%20Line%20Manuals/Performance%20Evaluations.pdf> (last updated Apr. 7, 2005); Vienna Police Dep't, *Performance Appraisal Form*, TOWN OF VIENNA, VA., <http://www.viennava.gov/DocumentCenter/Home/View/614> (last visited Mar. 26, 2014). I was not able to obtain the evaluation forms used by the NYPD or the Chicago Police Department, but conversations with current and former officers establish that convictions play no role in officer evaluation at those departments.

196. See SERDAR KENAN GUL & PAUL E. O'CONNELL, POLICE PERFORMANCE APPRAISALS: A COMPARATIVE PERSPECTIVE 72 (2013) (describing a Washington, D.C., Police Department performance evaluation plan).

197. IANNONE, *supra* note 195, at 238-39.

upon which most police departments evaluate officers; convictions did not make the list.¹⁹⁸ Anecdotal reports make the same point. Describing his tenure as a Baltimore police officer, Peter Moskos, a professor at John Jay College of Criminal Justice, explains that officers routinely make arrests that they know are unlikely to result in conviction, writing, “[O]fficers are rewarded for arrests, not convictions.”¹⁹⁹

Like the evaluation of individual officers, the success of a particular police program is not measured by reference to the number of convictions generated. Instead, law enforcement operations are evaluated by referring to the number of arrests that they generate, the reduction in crime generally or in particular types of crime, or less quantifiable quality-of-life factors.²⁰⁰ This is particularly true in the era of community-oriented policing, which tends to devalue the number of arrests as an appropriate metric of performance.²⁰¹

To be sure, not all police employees will be entirely uninterested in seeing their arrestees successfully prosecuted; investigators and detectives, particularly those in high-profile units like homicide or sex crimes²⁰² or in heavily publicized cases, may follow postarrest dispositions more closely than uniformed patrol officers. This observation does little to support the general deterrent value of the exclusionary rule, though. Detectives and investigators make up a small percentage of sworn personnel: only about 15% of officers even in the largest police departments and typically less in smaller departments.²⁰³ In contrast, patrol officers—those whose regular duties include responding to calls for service—make up between 60% and

198. GUL & O'CONNELL, *supra* note 196, at 60-62.

199. MOSKOS, *supra* note 123, at 59; *see also id.* at 55 (describing how officers in two different jurisdictions—New York City and Baltimore—use low-level misdemeanor arrests as a stand-alone solution to a problem, noting that “the point [of these] arrests is not to convict people”).

200. Kristin Ward et al., *Measuring Excellence: Planning and Managing Evaluations of Law Enforcement Initiatives*, U.S. DEP'T OF JUSTICE (June 2007), http://www.cops.usdoj.gov/Publications/e06072996_web.pdf (reporting on “the importance of program evaluation to law enforcement” without even mentioning convictions).

201. *See* Stephen D. Mastrofski et al., *Law Enforcement in a Time of Community Policing*, 33 CRIMINOLOGY 539, 539-40 (1995).

202. IANNONE, *supra* note 195, at 239 (suggesting that supervisors may find it useful to refer to conviction rates for “investigative personnel”).

203. Brian A. Reaves & Matthew J. Hickman, *Census of State and Local Law Enforcement Agencies, 2000*, BUREAU OF JUST. STAT. BULL. 2 (Oct. 2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea00.pdf>; *see also* Raymond W. Kelly, *Crime and Enforcement Activity in New York City*, CITY OF N.Y. POLICE DEP'T app. C-1 (2012), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/yearend2011enforcementreport.pdf (estimating detectives make up 14.4% of the NYPD).

90% of sworn employees in a given department.²⁰⁴ This breakdown matters because it is the patrol officers, not investigators, who have the most impact on whether an arrest is made and conviction obtained. According to a RAND Corporation study, investigators are responsible for “clearing” less than 3% of criminal incidents.²⁰⁵ And, though not itself entirely conclusive, a Westlaw search is telling: searching for federal district court cases in which the phrase “exclusionary rule” appears with the word “officer” or “deputy” returns more than twice as many results as searching for “exclusionary rule” and “investigator” or “detective.”²⁰⁶ As a text on the allocation and deployment of police resources states, “[P]atrol is the mainstay of police work.”²⁰⁷ And the involvement of a patrol officer in a particular case ends when the arrest paperwork is turned in; at this point, the officer or a supervisor formally “closes” the case, meaning that no further action is necessary.²⁰⁸

If formal pressures do not encourage officers to care about convictions, informal pressures actively *discourage* officer interest. Law enforcement is not a career that lends itself to emotional closure. Police interact with most people only briefly, often during a crisis, and they will not typically interact with that individual again. Informally, the culture of law enforcement is such that a patrol officer’s involvement in a criminal incident ends when they drop an arrestee off at the jail. An officer who took part in James Q. Wilson’s study of

204. ERIC J. FRITSCH ET AL., POLICE PATROL ALLOCATION AND DEPLOYMENT 7 (2009) (“[W]e know that patrol is important because it consumes the bulk of officer personnel resources.”); Brian A. Reaves, *Local Police Departments, 2007*, BUREAU OF JUSTICE STATISTICS 6 (Dec. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd07.pdf>.

205. Jan M. Chaiken et al., *The Criminal Investigation Process: A Summary Report*, RAND CORP. 6-7 (June 1976), <http://www.rand.org/content/dam/rand/pubs/papers/2006/P5628-1.pdf>; Frank Horvath et al., *A National Survey of Police Policies and Practices Regarding the Criminal Investigation Process: Twenty-Five Years After Rand*, NAT’L CRIM. JUST. REFERENCE SERVICE 7-8 (Nov. 2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/202902.pdf> (“[T]he role of the patrol officer in solving crimes . . . remain[s] unchallenged as [a] critical element[] underpinning the police criminal investigation process”).

206. WestlawNext searches conducted July 10, 2013. Notably, a search for “suppression” and “officer” or “deputy” and a search for “suppression” and “investigator” or “detective” both returned over 10,000 results.

207. FRITSCH ET AL., *supra* note 204, at 17.

208. For purposes of the FBI’s Uniform Crime Reporting Program, a police department reports a crime “cleared by arrest” when at least one person has been arrested, charged, and “[t]urned over to the court for prosecution.” *Crime in the United States, 2010: Offenses Cleared*, UNIFORM CRIME REP. 1 (Sept. 2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearancetopic.pdf>. As the FBI acknowledges, this definition of “cleared by arrest” is a more restrictive definition than applied administratively by police agencies. *Id.*

police behavior in the late 1960s made this point in the context of combating organized crime by saying, "We keep [pressure] on these gamblers because we feel that's our job. We mug 'em, we print 'em, we book 'em. And what happens after that is not our business. We have to keep reminding ourselves of that or we would get discouraged."²⁰⁹ Some fifty years later, a Baltimore officer made a similar point to Moskos: "[My supervisor] really likes arrests, and I give them to him. . . . I don't give a shit if they [state's attorney] won't take it. That's their problem."²¹⁰ A Baltimore police sergeant echoed the sentiment, saying, "After it happens to you, you don't care. It's your job to bring [a drug dealer to court]. What happens after that is their problem. You can't take this job personal!"²¹¹ Another contemporary account is consistent; a former officer of a midsize police agency outside of Seattle told me, "[I]t was somewhat difficult to find out what happened with your cases [arrests]—you had to call the prosecutor yourself. Normally we didn't bother. You handled your case, launched it into the black hole, and went on to your next call."²¹² Though documentation of the phenomenon is likely nonexistent, it is common for officers to receive informal guidance from more senior colleagues advising them not to concern themselves with convictions. As one former officer states in a personal blog:

It gets frustrating to an officer that spends hours on investigating, paperwork and doing the foot work for a case to charge someone for something to only see them get probation in court when in fact they should have gotten some jail time. . . . I used to let this bother me very much until an older officer came to me told me that if I continue to worry about things like that I would end up having a heart attack. He told me that the system isn't going to change over night and that all I needed to worry about was doing my job right. After working a few years I seen he was right and was able to pass that same information down to other newer officers that were getting frustrated over the same thing.²¹³

This informal culture exists largely because of a lack of information and control over the postarrest process. After making an arrest, officers typically receive no or very little information on the

209. JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 106 (1968).

210. MOSKOS, *supra* note 123, at 44 (second and third alterations in original).

211. *Id.* at 78.

212. E-mail to author (Jan. 28, 2013, 11:42 EST) (on file with author).

213. Rowland C. Carper, Jr., *A Convenient Store Worker's Job Is More Dangerous Than a Police Officer's Job!*, YAHOO! VOICES (Aug. 31, 2011), <http://voices.yahoo.com/a-convenient-store-workers-job-more-dangerous-than-9044179.html?cat=17>.

ultimate disposition; officers may obtain some information from form letters sent by the prosecutor's office and more from sitting in court when the verdict is read, as the previous quote suggests, but neither appears common. Officers typically have no say in the prosecution decision, plea bargaining, or sentencing, even when they are the victim of a criminal incident such as battery.²¹⁴ They develop a disinterested attitude that has been described as a "protective mantle of cynicism," which follows from an officer "los[ing] faith in their own capacity to make a difference."²¹⁵ Given their inability to impact the postarrest process, officers often find it simpler and healthier to wash their hands of the case as they drive away from the jail. As an extreme illustration of officer indifference, consider the example of officers from the Louisville Metro Police Department, a large police agency with some 1,200 sworn employees. In 2007 alone, over a thousand criminal cases, including about 600 felonies, were dismissed because several hundred officers simply did not bother to attend court proceedings.²¹⁶ This was not an isolated problem; similar issues had been identified in 1999, 2001, and 2002. This informal disregard for convictions was at least tacitly approved of by the agency, which did not discipline the officers in most cases.²¹⁷

In short, the largest group of officers, those whose actions are most closely correlated with investigative results and convictions, have no professional incentives to concern themselves with convictions, and the nature of the job and the culture of law enforcement itself informally discourage officers' interest in postarrest proceedings. Not to mention that officers commonly make arrests not as a formal invocation of the criminal justice system, but to advance some other goal.²¹⁸ For example, an officer may make or threaten an arrest to

214. There may be important exceptions, particularly in smaller cities and towns where the low number of prosecutors and police officers make collaboration easier. I have heard of at least one prosecutor's office in which attorneys formally check with the arresting officer before offering or accepting a plea deal, but I have been unable to obtain supporting documentation. I have no reason to believe that such an arrangement is widespread, but I acknowledge that officers in these jurisdictions are likely to be much more heavily invested in the postarrest process than my thesis suggests.

215. HENRY, *supra* note 30, at 48.

216. Jason Riley & R.G. Dunlop, *Hundreds of Cases Dismissed Because Police Officers Don't Come to Court*, COURIER-JOURNAL.COM (Mar. 15, 2009), <http://www.courier-journal.com/article/20090315/EXTRAS04/903150413/Hundreds-cases-dismissed-because-police-officers-don-t-come-court>.

217. *Id.*

218. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437 (1965) (dedicating an entire section to "[a]rrest[s] for [p]urposes [o]ther than [p]rosecution").

induce a person to do something that the officer lacks the legal authority to order them to do,²¹⁹ to establish the relative social standing of the officer vis-à-vis the civilian they are dealing with,²²⁰ or to facilitate the delivery of noncriminal social services.²²¹ In these circumstances, the officer is supremely unconcerned about whether the arrest ultimately ends in conviction because the arrest itself advanced or accomplished the officer's ends.

If convictions are unimportant to officers, then the exclusion of evidence and the corresponding reduction in the possibility of conviction only serves to take away something that officers do not care about—hardly an effective strategy for deterrence.²²²

219. Officers can use arrests as "leverage ... to control a suspect's behavior," threatening to make an arrest for some minor offense unless the person takes some action unrelated to the offense. MOSKOS, *supra* note 123, at 119. For example, an officer may use the threat of arrest for disorderly conduct to get an angry spouse to spend the night at someone else's house after a nonviolent domestic dispute, where the officer lacks the formal authority to order someone to leave the house.

220. See generally Diana Roberto Donahoe, "Could Have," "Would Have:" What the Supreme Court Should Have Decided in *Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1208 (1997) ("[A]n individual often is jailed for a minor offense because he fails the 'contempt of cop' test by refusing to show the officer proper respect.").

221. Arrest is not a good way to get people the services that they need—from anger management classes to drug treatment programs—but it is the only compulsory action that officers have available that could increase the chances of obtaining social services.

222. One might object to my contention that officers are unconcerned with postarrest events by pointing out that, most of the time, officers both comply with the legal rules governing police behavior—searches, seizures, and interrogations—and show up for depositions, suppression hearings, and other court proceedings. Why, one might ask, would they do so absent any interest in ensuring an eventual conviction? What the lack of formal regard for convictions and the informal view that arrest is the end stage of an officer's investment in a case tell us is that police officers adopt a deontological approach to rules rather than a consequentialist perspective; rules are followed because they are rules, rather than because they make a conviction more likely. In the context of arrests, officers may value making a "good arrest," and one factor in determining the quality of an arrest involves assessing whether it was done the "right" way, whether the rules were obeyed. But the relevant assessment of whether an arrest was done the "right" way occurs at the time of arrest or shortly thereafter, as the arresting officer's immediate supervisor(s) signs off on the probable-cause statement or the arrest report. Once made, this determination resists ex post reassessment, particularly by someone outside of the police department such as a prosecutor or judge. To officers, the external judgment that results in the suppression of evidence represents a failure of the legal system, and one that they largely disregard. Thus, the announcement of a new rule that officers must follow has the potential to change officer behavior in a way that a reduction in the possibility of conviction, without more, will not. The deontological thesis effectively precludes basing a formal evaluation on convictions and supports the informal approach of "handl[ing a] case, launch[ing] it into the black hole, and [going] on to [the] next call." See *supra* note 212 and accompanying text.

IV. IMPROVING THE CONSTITUTIONAL REGULATION OF POLICE

The preceding Part provided three examples of the gap that can separate a constitutional rule from the world that it regulates. This Part first explains why that gap raises concerns about the constitutional rules that regulate police. I then discuss several mechanisms that could be of use in narrowing the gap.

A. Reasons for Concern

General concerns about the Court's use of legislative facts are more expansive than this Article will address, reaching beyond the Court's frequent police-related assertions to the use of legislative facts more generally. Regardless, they are especially cogent in the context of the constitutional regulation of police because of the threat to liberty attendant to inaccuracy. Liberty has a privileged position in our social and legal tradition. As one of the three unalienable rights upon which our fledgling country was built,²²³ it remains a core value enshrined in the Bill of Rights and central to the concept of justice that the rules of criminal procedure seek to protect. Those rules are built to a significant extent on the Court's conception of what police officers do and the environment in which they do it. Thus, policing facts are an important aspect of our legal system; when the Court gets them wrong, liberty is threatened. In seeking ways to mitigate this threat, we must be cognizant of the formal and informal obstacles that complicate the task of gathering accurate facts about police.

1. The Risk of Inaccuracy

There is a potential for inaccuracy whenever the Court makes a factual assertion, but that risk is especially high with regard to legislative facts, which do not go through the pressure testing of the adversarial process. And, for multiple reasons, the already-elevated risk may run even higher in the context of policing. Information about police practices is quite difficult to come by. Police culture has a well-known insularity; officers' adoption of an "us versus them" attitude is common enough to have been a central feature of the Mollen Commission Report, which investigated corruption at the NYPD in the mid-1990s,²²⁴ and an Anti-Corruption Report about the Chicago Police

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

224. *See, e.g.*, MILTON MOLLEN ET AL., COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICY DEP'T, N.Y.C.,

Department published in the first few weeks of 2013.²²⁵ The “blue code of silence” not only “prevent[s] police supervisors and civilian authorities from effectively eliminating police corruption,”²²⁶ it also advances a strong informal norm that makes agencies and officers reluctant to share detailed information about police practices with outsiders.²²⁷ These barriers, already difficult to penetrate, have been bolstered by technology²²⁸ and, to a more significant extent, codified to limit public access to information. The federal Freedom of Information Act, for example, exempts from public disclosure “records or information compiled for law enforcement purposes” when, inter alia, that information “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law” or when that information “could reasonably be expected to endanger the life or physical safety of any individual.”²²⁹ Many state laws follow suit, and police departments use such exceptions to avoid providing information about police practices²³⁰ and internal misconduct investigations,²³¹ which would both be useful sources of information about what officers are actually doing.

Even when law enforcement agencies or individual employees are willing to share information about police practices, relatively little is available in written form at a useful level of specificity. A substantial amount of formal and informal information about policing practices is only communicated between officers orally.²³² Agencies maintain voluminous policy and procedure manuals that, for example, instruct officers to “use only that degree of force necessary and

ANATOMY OF FAILURE: A PATH FOR SUCCESS 60 (1994) (“The Commission found the code of silence and the ‘Us vs. Them’ mentality present wherever we found corruption.”).

225. JOHN HAGEDORN ET AL., UNIV. OF ILL. AT CHI. DEP’T OF POLITICAL SCI., CRIME, CORRUPTION AND COVER-UPS IN THE CHICAGO POLICE DEPARTMENT 9-10 (2013).

226. *Id.* at 21.

227. See Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 664.

228. Jamison S. Prime, Note, *A Double-Barrelled Assault: How Technology and Judicial Interpretations Threaten Public Access to Law Enforcement Records*, 48 FED. COMM. L.J. 341, 354-57 (1996) (describing how the police’s use of in-car computers disrupted the status quo of the media’s capturing of police dispatch information by listening to police scanners).

229. 5 U.S.C. § 552(b)(7) (2012).

230. See Moskovitz, *supra* note 227, at 664.

231. Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 COMM. LAW. 34, 35 (2004).

232. See Moskovitz, *supra* note 227, at 664.

reasonable under the circumstances” and to “either escalate or de-escalate the use of force as the situation progresses or circumstances change,”²³³ but officers are likely to learn how to make reasonableness determinations—Is it appropriate to use a baton on a fleeing misdemeanor? When should pepper spray be deployed?—and how to escalate or deescalate by listening to more experienced peers and training officers. Of course, even when the rules are meaningfully documented by an authoritative source—a departmental policy manual rather than, say, a privately published training manual—they may not reflect actual police practice if an informal rule has largely replaced the formal rule.²³⁴ Further complicating matters is the tremendous variation in police practices; different patrol units in the same department in the same city might operate quite differently depending on the neighborhoods in their beat, the timing of their shift, and their unit supervisors. There may be even more variation between departments in different parts of the country, departments with a different number of employees, or departments responsible for jurisdictions of different sizes.

Although there is little authoritative information about police practices available to courts or commentators, there is no shortage of readily available depictions of what police officers do. Few people have not seen a few episodes of *CSI: Crime Scene Investigation* or *Law & Order*, watched a summer blockbuster like the *Lethal Weapon* or *Die Hard* series, or read a novel that featured a police officer or investigator. Not to mention the dominant role that crime stories—most of which feature police—play in the news media. The combination of limited information and colorful portrayals in the media lends itself to the use of a questionable availability heuristic.²³⁵ Yet, because “[p]eople are chronically overconfident in judging the probability of their correctness on factual questions,”²³⁶ intuitions about what police work looks like in practice are too easily taken as fact.

233. *Denver Police Department Operations Manual*, *supra* note 125, § 105.01(1)(a).

234. MOSKOS, *supra* note 123, at 26-27. I resist the implication that this observation necessarily undermines my contentions in Part II, which argue that there is reason to doubt the accuracy of several of the Court's unsupported factual assertions about police.

235. Cf. Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1297 (2003) (“Under the availability heuristic, people assess probabilities by asking whether examples readily come to mind. Lacking statistical information, people substitute an easy question (Can I think of illustrations?) for a hard question (What realities do the data actually show?).” (footnote omitted)).

236. J.D. Trout, *Paternalism and Cognitive Bias*, 24 LAW & PHIL. 393, 396 (2005); *see also id.* at 401 (“People are notably unaware of the influence that outcome [bias] has on them.”).

Thus, individuals are comfortable accepting and relying on what may turn out to be an inaccurate assessment of police practices. This may be particularly acute among members of the judiciary, for whom police officers are guards, escorts, and court officers.²³⁷

2. The Effect of Inaccuracy on Liberty

Inaccuracy is troubling not just in its own right, but because of the role that legislative facts can play in the framing of the Court's inquiry, the tailoring of a regulatory solution, and how the Court's factual assertions often go beyond the particular opinion in which they are made.

a. Framing

The Court's background understanding of the world shapes constitutional rule making, serving as a threshold determination that effectively limits the set of questions that the Court will reach within a particular case. Inaccuracy can preclude the Court from engaging with the world as it exists. For example, after concluding that use-of-force incidents involve split-second decision making, the Court hardly needs to engage with "counterfactual" inquiries by addressing how to regulate police force in circumstances that do *not* require split-second decision making. If facts serve to focus the Court's inquiry, inaccuracies only distort the deliberative process.

b. Unintended Consequences

A rule based on a factual misapprehension is less likely to have the effect that the Court intended. When the Court considers a given rule, it makes the decision to adopt or reject that rule based on the expected result. When a rule is designed around an accurate understanding of the world, we might expect the Court's expectations to align with the result.²³⁸ Correspondingly, a rule grounded in a misunderstanding may not align with the world it was designed to

237. *Cf. United States v. I.E.V.*, 705 F.3d 430, 444 (9th Cir. 2012) (Kozinski, C.J., dissenting) (stating that judges are "protected by U.S. Marshals with guns and dogs, surrounded by concrete barriers and security cameras").

238. This may well be true, even though we could identify that it might be under- or overinclusive in some relevant way; that the law of unintended consequences may come into play at some point; or that changing circumstances may, at some indeterminable point in the future, reduce the rule's fit. *Cf. FREDERICK SCHAUER*, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 26-27 (2009) (discussing under- and overinclusive rules).

regulate, resulting in either more or less regulation than the Court intended. The exclusionary rule illustrates this effect; to the extent that suppression is based on deterrence, there are good reasons to believe that it does not have the deterrent value that the Court anticipated and thus overregulates the police. Additionally, the failure of “fit” raises federalism concerns when one considers that policing is a particularly localized exercise of government power. When the Court bases a regulatory decision on a factual misunderstanding, it obstructs local control without providing the benefit that theoretically justifies such obstruction.

c. “Factual Precedent”

The effects of inaccuracy can be far more widespread than a single regulatory decision by the Court. Once a particular assertion has been set out in an opinion, both the Court and others may view that statement in the future as particularly apt or reliable, becoming what Allison Orr Larsen calls a “factual precedent.”²³⁹ The assertion may be recycled by the Court itself in future opinions,²⁴⁰ as well as by lower court judges. Recall that the Court’s description of use-of-force incidents as involving “split-second decisions” has been quoted in more than 2300 lower court opinions,²⁴¹ features in model jury instructions,²⁴² and is echoed outside of the judiciary by police departments,²⁴³ industry authorities,²⁴⁴ and popular-media sources.²⁴⁵

239. Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 59 (2013).

240. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 342 (2009) (relying on a prior concurrence to assess the probability that an individual could gain access to their vehicle after being arrested).

241. See Larsen, *supra* note 239; *supra* note 121 and accompanying text.

242. The description of police use-of-force incidents as requiring “split-second judgments,” for example, has been incorporated into model jury instructions in both state and federal courts. See *supra* note 122 and accompanying text.

243. The Denver Police Department’s Use of Force Policy, for example, recites the Court’s assertion about “split-second judgment[] in circumstances that are tense, uncertain, and rapidly evolving” almost verbatim, omitting only two em dashes. Compare *Denver Police Department Operations Manual*, *supra* note 125, § 105.01(1)a. (tracking *Graham*’s language), with *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[P]olice 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.”).

244. A senior instructor at the Federal Law Enforcement Training Center, for example, uses a statement by the Court in *Graham*—that there can be no “precise definition or mechanical application” to determine whether force was reasonable, 490 U.S. at 396—to advocate for the elimination of agency force matrices that seek to guide officers’ force decisions. John Bostain, *Training Without Force Continuums: Learn To Love the Law*, POLICEONE.COM (Mar. 19, 2009), <http://www.policeone.com/law-enforcement-newsletter/Calibre-Press-Newsline-03-19-09#Story1> (Secure Law Enforcement Log-in) (subscription

B. *Improving the Accuracy of Legislative Facts*

Even with the elevated potential for inaccuracy and the attendant risks, one may conclude that the Court's use of police-related legislative facts is typically desirable. Arguably, it provides a degree of transparency by making explicit the unavoidable assumptions that would otherwise go unobserved, and compiling a body of police-related factual assertions can give the attentive reader a more sophisticated understanding of how the Court views the institution and practice of law enforcement. Such an understanding may aid the challenges of doctrinal analysis and prediction. They may also provide a lever upon which future legal reform can be based; when *Gant* modified the rules governing vehicle searches incident to arrest, the primary justification for the change was the Court's rejection of the factual assumption that motivated the prior version of the rule.²⁴⁶ If one believes that there are benefits that justify the Court's use of police-related legislative facts such that they are problematic only when inaccurate, the question becomes how best to ensure the accuracy of the Court's factual assertions about police. This section suggests methods of improving the current system of top-down constitutional regulation of police by increasing the accuracy of the facts upon which the Court relies.

1. Relying on the Parties

Perhaps the most pertinent source of information is the parties themselves. Before even turning its attention to a particular case, the Court could prompt the parties to provide relevant legislative facts by amending the rule that governs the content of merits briefs. Currently, Supreme Court Rule 24(1)(g) directs parties to include in their briefs "[a] concise statement of the case, setting out the facts material to the

required); see also Fed. Law Enforcement Training Ctrs., *Use of Force—Myths and Realities Part I*, DEP'T OF HOMELAND SECURITY, <http://www.fletc.gov/training/programs/legal-division/podcasts/hot-issues-podcasts/hot-issues-transcripts/use-of-force-myths-and-realities-part-i-podcast-transcript.html> (last visited Mar. 27, 2014) (advocating more of a reasonableness standard for evaluating use-of-force decisions).

245. See, e.g., Steve Schmadeke, *Dolton Police Officer's Excessive-Force Trial Underway*, CHI. TRIB. (May 7, 2013), http://articles.chicagotribune.com/2013-05-07/news/ct-met-colton-cop-beating-20130508_1_Police-officer-chief-robert-fox-dolton (reporting that an officer's attorney was arguing, in a criminal prosecution of the officer for excessive force, "that prosecutors were attempting to second-guess a police officer's split-second decision while working a dangerous beat").

246. *Arizona v. Gant*, 556 U.S. 332, 350-51 (2009) (rejecting the factual predicate that the Court relied upon in *New York v. Belton*, 453 U.S. 454 (1981)).

consideration of the questions presented, with appropriate references to the joint appendix.”²⁴⁷ The existing language could be modified to prompt the inclusion of legislative facts that the parties believe relevant to the favorable interpretation or development of a rule. Alternatively, the Court could expand the brief requirements so as to require parties to identify relevant legislative facts in a separate portion of their brief. This information could serve as a starting point for the Court, which would be beneficial even if a party is unable to provide a fully fleshed-out empirical statement. Thus, the rules could be used to prompt a litigant raising a Fourth Amendment excessive-force claim to identify the prevalence of a particular weapon among law enforcement agencies as a relevant legislative fact even if the party does not itself have exact data.

Of course, the Court itself might not know what facts are relevant until it has begun to explore the case. It may be appropriate for the Court to take an active role in soliciting from the parties the factual information that it seeks. These requests could take one of several forms. First, the Court could remand the case for additional fact-finding. The benefits of this approach mesh well with the existing structure of modern litigation, and the parties’ control over the details and the presentation of facts would align to some extent with the perceived benefits of the adversarial system.²⁴⁸

Second, the Court could forgo remand and instead direct the parties to provide additional factual information in a supplemental brief. Currently, the Court can seek supplemental briefing both before²⁴⁹ and after²⁵⁰ oral argument. The current practice of soliciting supplemental briefing when the Court seeks the parties’ input on various legal questions could easily be extended to factual questions. Indeed, the Court has occasionally taken steps in this direction. During oral argument in *Miranda v. Arizona*, for example, Justice Fortas requested that the Solicitor General provide information about the

247. SUP. CT. R. 24(1)(g).

248. See generally Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 13-25 (2011) (“[T]here is no reason to worry about the quality of the factual findings that underlie the decisions the U.S. judicial system reaches, at least insofar as the adversarial system can be relied upon as a rigorous means of testing factual claims.”).

249. See, e.g., *Lozman v. City of Riviera Beach, Florida*, 133 S. Ct. 89 (2012) (mem.) (directing the parties and inviting the Solicitor General to file supplemental briefs on the issue of mootness).

250. See, e.g., *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 927 (2013) (mem.) (granting a petitioner’s request to file a postargument supplemental brief).

interrogation practices of the FBI; the response was later incorporated into the Court's opinion.²⁵¹

A third option relies on the observation that the Court may be better suited to administer fact-finding than is often thought.²⁵² When it exercises original jurisdiction, as in litigation between the states, the Court appoints a Special Master to take evidence and, if necessary, issue subpoenas.²⁵³ A corresponding procedure could be adopted when the Court exercises appellate jurisdiction, at least for the limited purpose of gathering legislative facts.²⁵⁴ A fourth option would be to order a second round of oral argument, as is occasionally done for questions of law.²⁵⁵

The final three options—requesting supplemental briefing, appointing a Special Master, and ordering additional oral argument—impose costs on the Court but relieve the burdens of remand, which “may be a drain on the resources of the court and litigants and a disservice to societal interests.”²⁵⁶ Further, these options avoid what may be an exercise in futility; appellate courts do not defer to a trial court's determinations of legislative fact,²⁵⁷ relegating trial courts to a largely administrative task that would serve a similar role to a magistrate's report and recommendation on dispositive motions.²⁵⁸

251. 384 U.S. 436, 483 (1966).

252. See, e.g., Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 38-39 (1969) (reflecting the long-standing common wisdom that the Court is not well-suited for fact-finding).

253. See, e.g., *New Jersey v. Delaware*, 546 U.S. 1147 (2006) (mem.).

254. I take no position on whether such a step is within the Court's prerogative absent legislation specifically authorizing the practice.

255. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.) (ordering reargument and directing the parties to file supplemental briefs about the scope of a statute).

256. John C. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 368 (1982).

257. Robert E. Keeton, *Legislative Facts and Similar Things: Decided Disputed Premise Facts*, 73 MINN. L. REV. 1, 41 (1988) (“[H]igher courts owe no deference to a trial court and may make their own determinations of [legislative] facts.”). Robert Keeton uses the term “premise facts,” meaning “facts that explicitly or implicitly serve as premises used to decide issues of law,” instead of the term “legislative facts,” which he uses to mean facts found by a legislature. *Id.* at 8-9. Keeton's definition of “premise facts” is analogous to my use of Davis's term “legislative facts.”

258. See FED. R. CIV. P. 72(b) & advisory committee's note (1983 Addition) (“[T]he rule requires the district judge to whom the case is assigned to make a de novo determination of those portions of the report, findings, or recommendations to which timely objection is made. The term ‘de novo’ signifies that the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required.”).

This Subpart has mapped some possible party-dependent avenues for improvement, but attention must be given to a prominent “Caution!” sign. Some parties—individual criminal defendants and constitutional-tort plaintiffs—are unlikely to be in a position that lends itself to high-quality fact gathering. “[I]n many cases, [litigants] will not do a good job [presenting legislative facts] because they do not have the expertise or the resources to gather the relevant evidence.”²⁵⁹ Even assuming that the Court could speak with some precision about *which* facts it wanted the parties to provide, which may mitigate the expertise problem, nothing serves to correct the problem of limited resources. Further, relying on the parties for legislative facts raises potential principal/agent problems among individual litigants such as criminal defendants and constitutional-tort plaintiffs. Individual litigants are unlikely to have any vested interest in shaping the legal rule beyond its impact in their case, an observation that raises questions about a criminal defendant’s or a constitutional-tort plaintiff’s commitment to gathering policing facts.²⁶⁰ The benefits of relying on litigants, passively or actively, may be most fully realized with repeat players who either have a particular expertise or face lower barriers to obtaining the relevant information,²⁶¹ but this, too, is not without complication. Police agencies and unions representing individual officers may be motivated to maintain a degree of obscurity or to take an extremely selective approach to revealing “insider” information, particularly when they benefit from the status quo and are concerned about the Court limiting their authority.

2. Going Beyond the Parties

It is now widely recognized that appellate courts, including the Supreme Court, do a substantial amount of independent fact-finding.²⁶² Because of their institutional limits, the most common refrain is to limit this function or shift it to an administrative agency.²⁶³ But even if we retain the traditional role of the trial court with regard to

259. Gorod, *supra* note 248, at 10.

260. Francis A. Allen, *Preface* to ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION, at xxvii (2d ed. 1965) (“When interests are litigated in particular cases, they not only appear as scattered and isolated interests, but their social incidence is obscured by the adventitious personal factor which colors every controversy.”).

261. For example, police agencies that are notoriously unresponsive to researchers may be more inclined to share information with other agencies.

262. See Gorod, *supra* note 248, at 26-35; Larsen, *supra* note 8, at 1264-71.

263. See Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1248-50 (2011).

adjudicative facts, it is worth exploring the possibility of formally revising the Court's capacity as a fact-finding body.

In contemporary litigation, the Court receives submissions from interested nonparties in the form of amicus briefs. This provides another avenue for the Court to solicit and obtain factual information. In one respect, this avenue is already well-traveled. Noting the dramatic increase in the sheer number of amicus briefs filed in recent years, Larsen has stated that "Supreme Court Justices cannot help but be inundated with factual research presented from within the adversarial process."²⁶⁴ As far as we can tell, though, the Court does not rely extensively on contemporary amicus briefs.²⁶⁵ This may be attributable to the presentation or content of the briefs, which "tend to be duplicative, poorly written, or merely lobbying documents not grounded in sound argument"²⁶⁶ and "seldom offer insights or arguments not already available to those to whom they are submitted."²⁶⁷ Policing facts justify increased attention to relevant amici; policing should be included among the highly technical, particularly specialized, or obscure topics that amicus briefs are considered especially good at illuminating.²⁶⁸

By taking an active position calling for the submission of amicus curiae briefs on a specific factual issue, the Court could make clear that it sought elucidation on legislative facts rather than on points of law, making its request as broad or narrow as it deems useful.²⁶⁹ Nor would this necessarily entail an open call for *all* interested amici to provide responsive legislative facts; instead, it could do so selectively. In the legal context, it is not at all uncommon for the Court to appoint a

264. Larsen, *supra* note 8, at 1272 (emphasis omitted).

265. *Id.* at 1274 (identifying that using the most conservative estimate, more than half of the 120 most salient Supreme Court cases between 2000 and 2010 include at least one "factual source" that had not been presented by the parties or amici). It is worth noting, however, that there is no academic consensus on the "utility and impact of amicus briefs." Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745 (2000).

266. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 45 (2004).

267. Philip B. Kurland & Dennis J. Hutchinson, *With Friends Like These . . .*, 70 A.B.A.J. 16, 16 (1984).

268. *Cf.* Lynch, *supra* note 266, at 41.

269. This could be used not just to identify specific questions of legislative fact ("What types of force do police departments instruct officers to use to overcome passive resistance?"), but also at a broader level of generality to determine *what* factual considerations might be relevant to apply a constitutional regulation ("Describe the considerations that inform officers' use-of-force decisions.").

specific amicus to argue a particular point of law²⁷⁰ or to seek legal advice from the Solicitor General.²⁷¹ This procedure could be easily co-opted; should the Court identify a particular nonparty that it believes has or has access to relevant information—law enforcement agencies, police trade associations, or civil liberties groups, for example—it could invite that entity's participation by posing a specific factual question or seeking information about a particular police-related subject. In essence, the Court could gather reliable data by certifying a factual question to a specific source or group of sources. Indeed, the Court has already engaged in this practice to a limited extent, having actively directed the Supreme Court librarians to seek out certain information and relying on what they find in at least nine opinions between 2000 and 2010.²⁷²

In this way, the Court has already accepted that expert insight into complex or abstruse factual areas can both help identify the scope of relevant legislative facts and assist with the fact-gathering process. This observation leads naturally to the idea of using Court-appointed subject matter experts or a panel of experts to provide or vet legislative facts. This proposal, though not yet widely adopted, has received considerable attention from appellate judges; Judge Posner has spoken about the need to appoint neutral experts to help the court navigate complicated technological concepts.²⁷³

Expanding on this possibility, the Court could go beyond the ability to gather existing information by *developing* new legislative facts. The Court could be given the authority to order an expert study of particular police practices, to require police departments to gather

270. See Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae To Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 909-10 (2011) (identifying forty-three occasions on which the Court appointed an attorney to argue a position abandoned by one of the parties and calculating that such an appointment occurs approximately twice each term).

271. Neal Devins & Saikrishna B. Prakash, Essay, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 880-86 (2013) (describing the Supreme Court's practice of requesting that the Solicitor General provide legal advice when the government is not a party to the case).

272. Larsen, *supra* note 8, at 1289-90.

273. Ameet Sachdev, *Federal Judge Richard Posner Takes on Science and Law*, CHI. TRIB. (May 11, 2012, 5:30 AM), http://articles.chicagotribune.com/2012-05-11/business/ct-biz-0511-chicago-law-20120511_1_judges-law-clerks-7th-circuit-bar-association. Sitting by designation as a trial court judge over a patent dispute between Apple and Motorola, Judge Posner took his own advice by appointing an expert to "provide information to judges and juries on technical issues." Debra Cassens Weiss, *Judge Posner, Presiding at Patent Trial, Will Use Court-Appointed Experts To Explain Terms*, A.B.A. J. (May 14, 2012, 5:30 AM), http://www.abajournal.com/news/article/posner_presiding_at_patent_trial_will_use_court-appointed_experts_to_explai/.

certain data, or to order econometric models to trace the impact of a particular rule on officer behavior. This could be done externally, through the use of experts, or through the creation of a research apparatus within the Court itself.²⁷⁴ The Court could task the Federal Judicial Center, “the education and research agency for the federal courts,”²⁷⁵ with developing materials that could be used to elucidate police practices.

C. Rethinking the Use of Unsupported Police-Related Legislative Facts

Each of the preceding suggestions is grounded in the need to provide the Court with better facts that are supported by something other than intuition and guesswork. A more radical solution presents itself, though, in the form of a diminished use of police-related legislative facts by the Court. Under the stronger version of this solution, the Court would adopt a minimalist approach to factual suppositions about the policing environment and officer practices. Legal principles and constitutional protections could be applied to individual cases, and new principles could be announced to guide future litigation, but neither the rules nor the ruling would be predicated on general facts about the world except in the most basic sense. Under the strong version, then, Fourth Amendment determinations would rest on what Akhil Amar calls “ordinary common-sense reasonableness” and the analysis of the facts of a particular case, rather than on the factual generalizations that dominate the current, squishy, pseudoempirical evaluation of the various quanta of proof.²⁷⁶ Similarly, the exclusionary rule could not rest on assumptions of its deterrent value, though it could be retained as a variant of the legal principle that no entity, including the government, should benefit from its own wrongdoing. This approach would push the Court to favor heavily the use of legal standards rather than the development of bright-line rules. If clear rules play an important role in informing civilians of “the scope of [their] constitutional protection[s]” and identifying for officers “the scope of [their] authority,”²⁷⁷ a strong aversion to the Court’s use of legislative facts could displace its regulation of the police by shifting it to entities—the

274. Davis, *supra* note 59, at 5 (advocating for the creation of a Supreme Court equivalent of the Congressional Research Service).

275. FED. JUD. CENTER, <http://www.fjc.gov> (last visited Mar. 27, 2014).

276. Amar, *supra* note 16, at 801.

277. New York v. Belton, 453 U.S. 454, 460 (1981).

legislature and administrative agencies both seem plausible—that may have a greater institutional competence for gathering and assessing legislative facts.

A weaker aversion to the Court's use of police-related legislative facts, in contrast, would seek to rein in the indiscriminate recitation of unsupported factual suppositions. If one believes that the regulation of police is properly or inevitably within the Court's purview, it follows that the Court's background understanding of the world will, and perhaps should, play a role in its analyses. Here, the Court would be free, and even encouraged, to use police-related legislative facts for which it can provide external support. The need for attribution could have a constraining effect on the Court that may lead to greater accuracy, or at least a more defensible conclusion, than intuition alone.

D. Going Beyond the Court

This Article has focused on the Court's practice of using police-related legislative facts and on methods of improving the accuracy of the facts that it recites. It would be remiss, though, not to acknowledge the potential for gathering policing facts beyond the Court and outside of the judicial process. The Court's fact-heavy rhetoric, combined with the relative difficulty of obtaining such facts, suggests that organizations interested in police reform could benefit by extending their research efforts. The ACLU, for example, could add a "policing project," and government agencies and academic institutions could develop or partner with specialized research centers like the National Police Research Platform, which is currently conducting limited research on thirty of the nation's law enforcement agencies.²⁷⁸

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. For a recent example, consider the way that concerns about racial profiling drove the collection of traffic-stop data. A decade ago, few agencies bothered to collect data about a driver's race or officer actions. Starting with a North Carolina statute passed in 1999,²⁷⁹ state legislatures and individual police departments began requiring their officers to track racial characteristics of the people they were stopping

278. See *Participating Agencies*, NAT'L POLICE RES. PLATFORM, <http://www.nationalpoliceresearch.org/agency-profiles-phase-1/> (last visited Mar. 27, 2014).

279. N.C. GEN. STAT. § 114-10.01 (2013).

and any enforcement or investigative actions taken during the stop.²⁸⁰ Today, this body of data enables empirical examination of the extent of racial profiling, the better to combat such abuses.²⁸¹

A similar metric could be implemented by state legislatures or individual police agencies to evaluate various aspects of officer performance.²⁸² This may prove particularly useful in assessing investigative detentions, as the recent NYPD “Stop and Frisk” litigation has shown.²⁸³ Under *Terry*, a stop is justified only when an officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.”²⁸⁴ Yet despite the apparent limiting principle, we have little foundation on which to judge whether a particular observation is unusual or whether it lends itself to the belief that “criminal activity may be afoot.” Consequently, reasonable suspicion has become quite a low standard, “to the point that a few innocent activities grouped

280. At the time of writing, twenty-five states had passed statutes requiring or encouraging officers to record a range of biographical data as well as officer actions taken during the traffic stop. *Background and Current Data Collection Efforts: Jurisdictions Currently Collecting Data*, RACIAL PROFILING DATA COLLECTION RESOURCE CTR., <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php> (last visited Mar. 27, 2014). Agencies in another twenty-two states and the District of Columbia collect such data voluntarily. *Id.* Now, only three states—Vermont, North Dakota, and Mississippi—do not collect data on traffic stops.

281. See, e.g., Frank R. Baumgartner & Derek Epp, *Final Report to the North Carolina Advocates for Justice Task Force on Racial and Ethnic Bias*, UNIV. N.C. CHAPEL HILL (Feb. 1, 2012), <http://www.unc.edu/~fbaum/papers/Baumgartner-Traffic-Stops-Statistics-1-Feb-2012.pdf>. North Carolina now makes agency traffic stop reports available via the Internet, searchable by agency, date, and report type. *Traffic Stop Reports*, N.C. DEP’T OF JUSTICE, <http://trafficstops.ncdoj.gov/Default.aspx?pageid=2> (last visited Mar. 27, 2014).

282. The actual entity that mandates the tracking of data is, for my purposes, relatively unimportant. Such a requirement may come down from several sources. Two possibilities are administrative (departmental) regulation and conditions on grant funding. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 30-33 & n.109 (2009) (discussing the collection of data on police misconduct). Another possibility is the imposition of conditions for accreditation through an organization like the Commission on Accreditation for Law Enforcement Agencies, see *Law Enforcement Accreditation*, CALEA, <http://www.calea.org/content/law-enforcement-accreditation> (last visited Mar. 27, 2014) (describing itself as a widely used independent accrediting body), or a state accrediting body, see, e.g., FLA. STAT. § 943.125 (2013) (establishing the Commission for Florida Law Enforcement Accreditation, Inc.). Regardless of which mechanism is ultimately chosen, there is a role for the Court in *motivating* that choice.

283. *Floyd v. New York*, 283 F.R.D. 153, 166-69 (S.D.N.Y. 2012) (describing the NYPD’s “UF-250” form, on which NYPD officers must describe, inter alia, the circumstances that gave rise to each *Terry* stop they initiate).

284. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

together, or even no suspicious activities at all, can be enough.”²⁸⁵ As the United States Court of Appeals for the Seventh Circuit has observed, “Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.”²⁸⁶ And they need not be. As a decade of data about traffic stops shows, investigative detentions are susceptible to better analyses than currently exist; the collected data could be used to quantify the extent to which factors, individually or collectively, are indicative that criminal activity really *is* afoot.

V. CONCLUSION

This Article identified how the Court’s perceptions of police-related facts—the environment in which police services are provided, the details of police practices, and the considerations that motivate police actions—mold the constitutional rules that regulate law enforcement. The Court’s understanding is often reflected in the form of factual assertions made without citation or support, raising fundamental questions about their accuracy.

Using three examples—the use of force, consent searches, and the exclusionary rule—I demonstrated ways that erroneous factual predicates have resulted in rules that are badly aligned with the world that they purport to regulate. By concluding that most use-of-force situations require officers to make “split-second judgments,”²⁸⁷ the Court has adopted a more deferential standard for reviewing police violence than the circumstances typically require. By concluding that it would be “thoroughly impractical” for officers to inform civilians of the right to refuse consent, the Court has encouraged police to rely on informational asymmetry rather than the knowing surrender of constitutional protections.²⁸⁸ And by incorrectly assuming that officers are concerned with convictions, the Court exaggerates the extent to which the exclusion of evidence will deter future violations.

There are a variety of mechanisms that could enable the Court to narrow the gap between any given constitutional rule and the world that it regulates. The Court could better leverage the parties, amici,

285. David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 669 (1994).

286. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

287. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

288. *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

experts, and independent judicial fact-finding so as to improve the process of identifying and gathering relevant and accurate legislative facts.

The essential focus in this Article, at the risk of oversimplification, was how the Court's perception of policing affects its regulation of police. Though there is ample reason to hope for improvement, this Article provides an important touchstone in the ongoing discussion about the role that the constitutional regime should play in the regulation of police.²⁸⁹ The observations in the preceding pages should prompt further exploration of this phenomenon and set the stage for further research into how courts affect police officers. Future work could explore how police respond, at both an institutional and individual level, to regulation. Understanding the parameters of the feedback loop between courts and law enforcement and knowing how police departments operationalize constitutional standards are critical to understanding how to regulate law enforcement.

289. See, e.g., Harmon, *supra* note 194, at 761.