INTRODUCTION

The deaths of Michael Brown and Eric Garner, two unarmed African American men killed by white police officers in the summer of 2014, and the subsequent nonindictments of the officers who killed them, have ignited a firestorm of responses, many engaging with and critiquing the law of policing. On August 9, 2014, Officer Darren Wilson shot Michael Brown, an eighteen-year-old resident of Ferguson, Missouri, at least six times, resulting in Brown’s death. In the immediate aftermath, protests, and then riots, swept the streets of Ferguson — resulting in confrontations with the local police that in turn precipitated public debates on police militarization, as well as

1 Defining what constitutes “the law of policing” is more challenging than it may seem. Cf. Seth W. Stoughton, The Incidental Regulation of Policing, 98 MINN. L. REV. 2179, 2180–81 (2014) (“A small but growing cadre of scholars have begun [to recognize] . . . that ‘the law of the police’ is broader than conventional accounts acknowledge.”). For the purposes of these Chapters, the following suffices: there are legal frameworks and adjudicatory systems in place that collectively enable or limit an officer’s discretion to initiate interactions with citizens and that define how she, and the citizens with whom she interacts, can and must act. Such a definition, if imperfect, is sufficient to unify the following Chapters around a singular explicative project.

2 Larry Buchanan et al., What Happened in Ferguson?, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/interactive/2014/08/14/us/ferguson-missouri-town-under-siege-after-police-shooting.html. The circumstances surrounding this altercation were not immediately, and in some respects are still not, clear: In a press conference one week after Brown’s death, Ferguson Police Chief Thomas Jackson stated that Officer Wilson had confronted Brown because he was walking in the middle of the street and “blocking traffic.” Hours later, Chief Jackson amended this account, stating that the officer had initially stopped Brown for this reason but subsequently recognized him as a suspect in a robbery. See Yamiche Alcindor et al., Chief: Officer Noticed Brown Carrying Suspected Stolen Cigars, USA TODAY (Aug. 15, 2014, 9:50 PM), http://www.usatoday.com/story/news/usananow/2014/08/15/ferguson-missouri-police-michael-brown-shooting/14098369 [http://perma.cc/835K-XLCJ]. Officer Wilson later testified that Brown had reached for the officer’s gun through the patrol car window, and when the officer exited the vehicle, Brown had charged him. Some witnesses corroborated the officer’s account; others contradicted it. See Buchanan et al., supra. The Department of Justice conducted its own investigation into whether Officer Wilson had violated Brown’s civil rights, ultimately deciding not to bring charges against the officer. See Matt Apuzzo & Erik Eckholm, Darren Wilson is Cleared of Rights Violations in Ferguson Shooting, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html; but see also Matt Apuzzo, Ferguson Police Routinely Violate Rights of Blacks, Justice Dept. Finds, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html (describing a Department of Justice report released on the same day finding systematic racial bias in the Ferguson police department).


comparisons to the civil rights movement. On November 24, as President Obama publicly called for a peaceful response, a grand jury in St. Louis announced its decision not to indict Officer Wilson, reigniting tensions on the Ferguson streets.

Nine days later, a grand jury in New York decided not to indict Officer Daniel Pantaleo for his involvement in the death of Eric Garner, a forty-three-year-old African American man killed during a street-corner arrest in Staten Island in July. A bystander had taken footage of Officer Pantaleo appearing to put Garner in an illegal chokehold, as well as taped his final words, “I can’t breathe.”

Protests following the nonindictment quickly spread beyond Staten Island to Manhattan, spawning national discussions about accountability structures governing officer misconduct and renewed critiques of the increasing breadth of the criminal law. This protest movement — in concert with that in Ferguson — quickly attained national scope. Politicians from both parties responded with calls for policing reforms; debates erupted on social media platforms and engulfed

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7 See id.


9 Id.


university campuses; legal scholars, religious leaders, and conservative and liberal personalities added their voices to the mix; the Attorney General announced plans to create new Department of Justice guidelines to “end racial profiling and ensure fair and effective policing”; and, on December 18, 2014, President Obama announced the creation of a Task Force on 21st Century Policing, the first national commission on systemic policing reform in more than fifty years.

Synthesizing this accumulation of protests, editorials, speeches, articles, and, surely, private debates, many have suggested we are currently having, or are about to have, a “national conversation” on policing. President Obama has gone so far as to promise that such a conversation will occur, seeing in it a mechanism not just for debate


but also for reform. Putting aside the aptness of the term “conversation” to characterize events that have included protest movements and violent encounters with the police, there is surely something aspirational in this framing. Yet even as many commentators have called for a national conversation on policing, few have engaged with essential, unanswered questions about its contours, purpose, and potential: If there is to be such a conversation, what exactly will it be about? Who will it include, or exclude? And does it have any chance — as no doubt many of its proponents would hope — of changing the landscape of American policing?

The answer to the first question — what this conversation is about — may seem obvious, yet an analysis of the current discussion suggests otherwise. Much of the immediate national debate surrounding the nonindictment of Officers Wilson and Pantaleo pertained to what factually occurred on the streets of Ferguson and Staten Island and whether the officers should have been punished. Surely a meaningful conversation about policing must go beyond these initial, though significant, questions — and it has. Yet it remains unclear how far the conversation will reach. Some scholars have proposed reforms directly related to the violent interactions that killed Brown and Garner and the grand jury results that followed. President Obama has described the mission of his Task Force as seeking to investigate “how to . . . foster strong relationships between local law enforcement and the communities that they protect.” In so doing, he has focused the Task Force’s lens not just on the violent interactions themselves but also on the community dynamics that may help to precipitate them. Others have sought to frame the conversation with an even wider lens, seeing these nonindictments and ensuing protests as metonyms for broader struggles for racial and economic justice and accordingly

25 Martosko & Chambers, supra note 24.
28 Hudson, supra note 22.
connecting these events to calls for reform in other policy areas, such as voting rights.\footnote{30} It is of course not necessary that a conversation restrict itself to any given lens or framing. Nevertheless, as a descriptive matter, these disparate lenses suggest a meta-debate is emerging over how to define the deaths of Brown and Garner, how to frame this conversation about policing, and what, accordingly, its outcome should be.

Second, who will have this conversation? There has long raged an extensive and critical conversation about criminal law, in the academy. The late Professor William Stuntz suggested that this extensive criticism, focusing on the normative incoherence of the law of policing, has failed to meaningfully sway legislators or enforcers: “Criminal law scholars may be talking to each other . . . but they do not appear to be talking to anyone else.”\footnote{31} The current conversation may be different — it has surely evolved beyond the academy to include politicians and ordinary citizens — yet key questions of inclusion and exclusion remain. First, will this conversation involve the citizens protesting on the streets of Ferguson? Recent developments suggest that, absent dialogue between these citizens and the municipalities that police them, it is unlikely that such local governments will successfully address the core frustrations animating these protests.\footnote{32} Second, will the conversation involve the police themselves? Conflicts in late 2014 and early 2015 between the New York City Police Department (NYPD) and Mayor Bill de Blasio over the Mayor’s comments in tacit support of protest movements\footnote{33} suggest the importance of involving police in
these conversations if they are to successfully precipitate reform.\textsuperscript{34} Indeed, insofar as Mayor de Blasio has struggled to balance support for both protestors and the NYPD,\textsuperscript{35} the conception of a “national conversation” as a singular phenomenon immediately seems problematic: it is perhaps more accurate to suggest that one conversation — between the Mayor and his citizens — has made another — between the Mayor and the police — far more challenging. The question of who will participate in this “national conversation,” then, speaks not only to potential exclusions but also to internal tensions. As disparate conversations interfere with one another in challenging ways, it may become increasingly inapt to describe them as part of the same overarching dialogue.

Finally and perhaps most pressingly, can this conversation result in meaningful change to the law of policing? The protestors, officials, and scholars who have publicly weighed in on the events in Ferguson and Staten Island have not done so merely to make an expressive point; they see in this conversation a mechanism for reform. If indeed reform is the goal, a vital question follows: can such a conversation possibly succeed in changing the law of policing? Reform in policing law is notoriously challenging. For decades, institutional incentives have compounded problems and prevented reform;\textsuperscript{36} political dynamics have historically rewarded politicians for taking stances that are tough on crime regardless of empirical realities;\textsuperscript{37} and crippling backlashes have either ended such conversations before they can result in


\textsuperscript{36}According to Stuntz, institutional incentives drive legislators to continuously expand the criminal law, an expansion that provides prosecutors and police officers with more and more discretion. Armed with that discretion, these enforcers, in turn, shield legislatures from the negative political consequences of that overcriminalization through disparate enforcement. See Stuntz, supra note 31, at 546–47.

\textsuperscript{37}Stuntz also argued that “conventional political forces [usually] push toward broader liability,” though he hypothesized that this phase of American politics may be coming to an end. Id. at 510. Indeed, insofar as the political will to reform law enforcement may turn on low crime rates, see id. at 523–24, it may be relevant to the success of a modern reform movement that such rates are currently at a historic low, see J. David Goodman, \textit{New York Crime Keeps Falling, Mayor de Blasio Says; City’s Years of ‘Momentum,’} N.Y. TIMES (Dec. 2, 2014), http://www.nytimes.com/2014/12/03/nyregion/violent-crime-in-new-york-has-dropped-to-historic-low-mayor-de-blasio-says.html.
reform, or subverted the effects of initially promising transformations. These formidable obstacles stand in the way of would-be reformers; less dramatically, however, it is just as possible that this conversation will simply fizzle out as the events that directly inspired it become more remote. It is not easy to retain the attention of the American people, if indeed this movement has it now.

These questions are not meant to be cynical. They attempt, rather, to frame the challenges facing those who, in the wake of a number of significant deaths, seek to both engage in a national conversation about policing and use that conversation to catalyze a movement toward reform. This edition of *Developments in the Law* is not the place to answer these questions, if indeed such answers can be arrived at in advance. Instead, the edition speaks not to how this conversation may end, as important as that may be, but to where it must begin: with a clear explication of the state of the law and a nuanced understanding of the steps necessary to reform it. It is to this project that the Chapters are directed.

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Individually, the following Chapters analyze four discrete developments in the law of policing, in some cases directly engaging with key issues at the heart of the present conversation, in other cases explicitly widening its scope.

Chapter I takes as its starting point the protests in Ferguson following the death of Michael Brown, suggesting that the community’s reaction to Brown’s death may in part be understood as an expression of frustration caused by a key development in modern policing: the emergence of profit motives in law enforcement. The Chapter suggests

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40 Cf. DePinto et al., supra note 26 (noting that only “[t]hirty-nine percent of Americans] have heard or read a lot . . . about [the] grand jury decision not to indict police officer Daniel Pantaleo in the death of Eric Garner”). Those numbers, of course, may have substantially increased since the poll.

41 In framing this conversation around Brown and Garner, this Introduction does not seek to minimize the significance of other recent tragic deaths, see, e.g., Ray Sanchez, *Four Mothers Share Pain of Losing Sons*, CNN (Dec. 12, 2014, 9:12 PM), http://www.cnn.com/2014/12/12/us/martin-rice-brown-garner-mothers/index.html [http://perma.cc/AyCS-TFKQ], many of which might similarly have been used as a narrative frame or described as a significant catalyst.
that this development is transforming the relationship between police departments and low-income communities from one of cooperation and protection to one of harassment and revenue generation.\footnote{See infra ch. I, pp. 1723–25 (identifying hostility produced by this trend as “the tinder that helped set [Ferguson] on fire after Mike Brown was killed,” id. at 1724).} It further argues that certain structural innovations that are driving this shift may be unconstitutional.\footnote{See infra ch. I, pp. 1736–37.}

The Chapter begins by illustrating how for-profit policing operates in practice, focusing on three examples. Many cash-strapped municipalities have: (1) imposed extensive fees on arrestees and defendants,\footnote{Infra ch. I, pp. 1727–29.} (2) sold their probation systems to private, for-profit corporations,\footnote{Infra ch. I, pp. 1729–30 (describing these companies as “debt collector[s] backed by carceral power,” id. at 1729).} or (3) employed civil forfeiture statutes to seize billions in assets that are purportedly linked to crime.\footnote{Infra ch. I, pp. 1730–33.}

The Chapter argues that this integration of profit motives into policing is normatively harmful and, in some cases, unconstitutional. Normatively, profit motives distort the incentives and enforcement priorities of courts and the police — the latter of which use their extensive discretion to disproportionately target low-income citizens through de facto regressive taxation regimes.\footnote{See infra ch. I, pp. 1733–36.} Legally, the Chapter argues that profit motives produce punitive structures that can violate (1) the Due Process Clause,\footnote{The Supreme Court has suggested that enforcement actors cannot have a financial stake in the outcome of cases in which the risk of bias is sufficiently severe. See Marshall v. Jerrico, Inc., 446 U.S. 238, 250–52 (1980).} (2) the Equal Protection Clause,\footnote{When combined with the Due Process Clause, the Equal Protection Clause may bar incarceration and additional punitive regimes that turn on the wealth of the offender. See Bearden v. Georgia, 461 U.S. 606, 605 (1983).} and (3) the Excessive Fines Clause of the Eighth Amendment.\footnote{The Court has found that fines may not be grossly disproportionate to a defendant’s culpability, United States v. Bajakajian, 524 U.S. 321, 336 (1998); the Chapter thus suggests that fines supporting private businesses or tailored to a defendant’s poverty are not retributively proportional, see infra ch. I, p. 1744.}

Chapter II examines the rising incorporation of law enforcement in schools. Over the past two decades, schools have increasingly turned to criminal law and its enforcers to help maintain order, while police departments have turned to school administrators to assist in the investigation of crimes — a dual trend resulting, in part, in the “wholesale
incarceration” of low-income and minority American youth. Chapter II argues that an outdated Fourth Amendment framework facilitates and exacerbates this problem and should thus be reexamined.

The Chapter begins by describing the rise of the “school-to-prison pipeline”: seeking to maintain order in schools, to respond expressively to highly publicized school shootings, and to comport with new, more hard-line theories of policing, schools and municipalities have increasingly attached criminal consequences to breaking school rules, used police officers to respond to and investigate internal school disturbances, and created mandatory reporting requirements that transform school administrators into deputies for the police. These trends have collectively resulted in “a disturbing number of children . . . being pushed . . . into the criminal justice system,” despite little evidence that such policies have improved school safety. They have also had disproportionate effects on minority and low-income communities.

The Chapter argues that current Fourth Amendment jurisprudence facilitates the collusion between law enforcement and schools — de facto permitting officers and administrators to conduct the great majority of searches in schools with merely reasonable suspicion. It further suggests that this jurisprudence is both outdated and doctrinally flawed for two reasons: (1) it ignores the way that “entanglement” of schools and police departments blurs the distinction between educational and investigatory purposes; and (2) it undervalues students’ privacy interests — interests made far more powerful by the increasing probability of criminal consequences for even minor rule-breaking.

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54 See infra ch. II, p. 1754.
56 See, e.g., TOLEDO, OHIO, MUN. CODE § 537.16 (2014) (making it a crime to disrupt a class).
58 See, e.g., TEX. EDUC. CODE ANN. § 25.094 (West 2013); infra ch. II, p. 1755.
60 See NELL BERNSTEIN, BURNING DOWN THE HOUSE 182–84 (2014).
64 See infra ch. II, pp. 1761–63.
Given these problems with the status quo, the Chapter argues for a more robust probable cause standard for all police-conducted searches in schools, as well as for searches conducted by school officials when the official is required to report evidence found to law enforcement.  

Chapter III examines key developments in immigration policing, a topic that thus far has played a subordinate role in this national conversation. The Chapter argues that the increasingly blurred lines between civil and criminal immigration consequences — in concert with the diffusion of immigration enforcement across multiple parties, including federal, state, and local enforcers — have left massive accountability gaps in the policing of immigrant communities. The Chapter suggests that consolidating the enforcement of immigration law into the hands of the federal government could mitigate these accountability concerns and thereby help end enforcement practices that are subverting the relationships between local police and the communities they serve.

The Chapter begins by highlighting the effects of two key trends in the law of “crimmigration”:

1. The increasing attachment of immigration consequences to criminal offenses and criminal consequences to immigration offenses;
2. The increasing use of state policing regimes to enforce immigration policy.

The blurred lines between civil and criminal enforcement, the diffusion of enforcement power across both federal and state actors, the de jure paucity of constitutional safeguards in removal proceedings, and the de facto paucity of such safeguards in criminal immigration adjudications combine to create an “accountability deficit.” This deficit, in turn, permits practices that drive a wedge between police and immigrant communities, sub-

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66 See infra ch. III, p. 1772.
67 See infra ch. III, pp. 1785–86.
70 State police departments enforce immigration policy pursuant to three enabling devices: (1) delegations of enforcement authority by the federal government, see, e.g., 8 U.S.C. § 1357(g) (2012); (2) “inherent authority” to enforce federal law derived from the Tenth Amendment, see infra ch. III, pp. 1776–77; and (3) state laws designed to target illegal immigration, see infra ch. III, p. 1777.
71 Although the federal government has plenary authority to set immigration policy, see Arizona v. United States, 132 S. Ct. 2492, 2498 (2012), the Tenth Amendment bars direct federal control over state police officers, see infra ch. III, p. 1792.
73 Infra ch. III, p. 1777.
verting trust and thereby undermining competing law enforcement aims.\textsuperscript{74}

The Chapter offers a solution: consolidation of immigration enforcement at the federal level. Centralizing policymaking and enforcement within one governmental entity could create opportunities for political reform, make it easier to acquire effective court orders, and permit local police to repair their relationships with Latino communities.\textsuperscript{75} Legally, such consolidation could be effected through preemption: the Supreme Court’s 2012 opinion in \textit{Arizona v. United States}\textsuperscript{76} strongly suggests that current state enforcement practices and human-smuggling laws subvert federal policies and should be struck down accordingly.\textsuperscript{77}

Chapter IV turns its lens back to the events in Ferguson and Staten Island, engaging directly with a key policy proposal at the heart of this national conversation: in the wake of Michael Brown’s death, numerous politicians and commentators have publicly called for police to wear body cameras\textsuperscript{78} — a reform that many believe would create greater accountability and transparency in policing. The Chapter suggests that a careful examination of the benefits and detriments of such a fundamental transformation is necessary before municipalities pursue this reform.\textsuperscript{79}

Having framed the context, the Chapter turns to the examination it recommends. First, it investigates four interrelated benefits that together demonstrate how body cameras could improve the accountability and transparency of modern policing: body cameras could (1) reduce rates of police misconduct;\textsuperscript{80} (2) reduce frivolous and expensive civilian complaints; (3) improve officer training; and (4) help provide clearer evidence for trials and negotiations.\textsuperscript{81}

These potential benefits, however, provide only half of the story. The Chapter next examines five policy issues and unanswered questions that hint at the potential side effects of body cameras: (1) officers and departments will likely retain power over cameras and footage, creating issues of access and control that may transform body cameras into enabling devices for the police;\textsuperscript{82} (2) extensive public footage could

\begin{itemize}
\item \textsuperscript{74} See infra ch. III, pp. 1784–85.
\item \textsuperscript{75} See infra ch. III, pp. 1785–86.
\item \textsuperscript{76} 132 S. Ct. 2492.
\item \textsuperscript{77} See infra ch. III, pp. 1787–91.
\item \textsuperscript{78} See, e.g., McAuliff, supra note 27.
\item \textsuperscript{79} See infra ch. IV, pp. 1796–97.
\item \textsuperscript{80} Studies suggest, in particular, that such cameras may reduce officers’ use of force. See Michael D. White, Police Officer Body-Worn Cameras 17 (2014).
\item \textsuperscript{81} See infra ch. IV, pp. 1800–03.
\item \textsuperscript{82} See infra ch. IV, pp. 1806–08.
\end{itemize}
undermine the privacy rights of ordinary citizens and arrestees; 83 (3) adoption may be expensive, pushing cash-strapped municipalities to recoup costs through programs that extract revenue from the very low-income citizens such reforms are implemented to protect; 84 (4) widespread camera use could, under the guise of a transparency regime, transform communities into surveillance states; 85 and (5) purportedly objective evidence may skew courtroom adjudications by causing jurors to dismiss other testimony that could paint a fuller picture of events. 86

On the whole, the Chapter cautions against reflexive adoption of such powerful technology. It suggests instead that policymakers should carefully consider the legal contours of any such reform and remember that, while such cameras could serve as a limitation on police misconduct, so too could they ultimately enable and empower the very enforcers they are designed to restrain. 87

Individually, then, these Chapters examine discrete and often problematic ways that policing law has changed in recent decades and offer tailored reforms (or in the case of Chapter IV, a cautious admonition). Collectively, they paint a broader picture, highlighting four overarching themes that reveal key challenges at the heart of modern policing.

First, the Chapters explore how police practices alienate police from the communities they protect. “Community policing” has become the dominant orthodoxy of modern law enforcement, focusing reform efforts around creating “closer and more personal working relationships between police officers and citizens.” 88 Beyond symbolic benefits, departments emphasize that such relationships help officers work with witnesses and victims 89 and may reduce tensions that can lead to violent encounters with the police. 90 These Chapters — joining an array of related literature 91 — detail the enormous costs that modern en-

83 See infra ch. IV, pp. 1808–09.
84 See infra ch. IV, pp. 1809–10 (citing ch. I).
85 See infra ch. IV, pp. 1810–12.
86 See infra ch. IV, pp. 1812–14.
87 See infra ch. IV, pp. 1816–17.
90 See CMTY. RELATIONS SERV., U.S. DEP’T OF JUSTICE, POLICE USE OF EXCESSIVE FORCE 3 (2002) (“[A] healthy relationship between the police and the community diminishes the prospect of the police using excessive force at all.”).
91 Modern policing — or more broadly, criminal justice — is defined by vast racial gaps in incarceration rates, see NAOMI MURAKAWA, THE FIRST CIVIL RIGHT 6–7 (2014), as well as disparate racial outcomes in police enforcement, see generally Robin S. Engel, Introduction to RACE, ETHNICITY, AND POLICING 3 (Stephen K. Rice & Michael D. White eds., 2010) (examining “the role of race/ethnicity on multiple coercive outcomes, including police stops, searches, arrests, and use of force”).
forcement practices have on low-income and minority communities, just as they hint at the political dynamics that produce — or allow — these disparate effects. In exposing these disparate burdens, the Chapters reveal how police practices alienate such communities, illuminating the wide gap between the ideals of community policing and the realities of modern enforcement.

Second, these Chapters highlight two problematic, interrelated trends in the modern law of policing: the increasing proliferation of criminal law and the increasing use of police officers to solve problems that would once have been dealt with through civil enforcers. Stuntz suggested that the institutional politics of criminal justice create a one-way ratchet toward more and more criminalization of conduct. This overcriminalization, in turn, provides enforcers extraordinary discretion to decide whom to arrest, transferring to the police — rather than the legislature — the true power to define the criminal law. Other scholars have described a related trend: modern society “overrel[i]es on the criminal justice system,” forcing the police to use the “crude tools of criminal law enforcement” to address a myriad of social problems for which such tools are ill suited.

These Chapters speak to both trends: Chapters II and III detail ways in which infractions that would even recently have been civil in nature are increasingly becoming criminal and describe the increasing use of the police to solve problems once addressed by civil authori-

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93 See infra ch. I, p. 1734 (“Attempts to raise revenue through policing have been described as a regressive tax, turning the poorest segments of the population into an easy source of revenue . . . .”); cf. David Alan Sklansky, Police and Democracy, 103 MICH. L. REV. 1699, 1801–02 (2005) (identifying as a chief problem with community policing the erroneous assumption that the community has a “coherent, unified public will,” id. at 1801 — a problem that can result in so-called “community policing” lending democratic legitimacy to practices that benefit one subsection of the community at the expense of another).  
94 See infra ch. I, p. 1746 (suggesting that for-profit policing causes “communities like Ferguson . . . to see police not as trusted partners but as an occupying army,” an image evoking James Baldwin’s similar description of an officer in Harlem as “an occupying soldier in a bitterly hostile country,” JAMES BALDWIN, NOBODY KNOWS MY NAME 66 (1961); infra ch. III, p. 1784 (“Latino communities trust police less now that police increasingly perform the functions of federal immigration officers.”)).  
95 Stuntz, supra note 31, at 511 (“Until [institutional] changes happen, we are likely to come ever closer to a world in which the law on the books makes everyone a felon . . . .”); cf. Whren v. United States, 517 U.S. 806, 818 (1996) (acknowledging the argument that “the multitude of applicable traffic and equipment regulations is so large and so difficult to obey perfectly that virtually everyone is guilty of violation” before suggesting that jurisprudential and judicial competency concerns prevent the Court from addressing it (internal quotation marks omitted))

96 See Stuntz, supra note 31, at 511.  
97 Scott, supra note 88, at 178.  
98 Id. at 183; see also Murakawa Interview, supra note 23.  
ties. This latter narrative is further enhanced by Chapter I’s chronicle of for-profit policing — the de facto use of police officers in a new civil capacity, not as traditional enforcers but as debt collectors. In describing these interrelated trends, the Chapters discuss key dangers of both forms of proliferation, highlighting: (1) how extensive enforcement discretion can result in racially biased enforcement or empower specific departments to bend the purpose of the criminal law; and (2) how the conflation of civil and criminal enforcers and purposes can subvert constitutional rights designed to restrain the police in their conventional investigatory roles. Finally, Chapter IV — in suggesting that body cameras could lead to a de facto surveillance state — intersects with these narratives in a vital way: in a world in which almost every act is criminal, such surveillance could provide police officers unprecedented power over the populace.

Explicating a third theme, these Chapters push us to think critically about the relationship between democracy and policing, in particular by highlighting ways in which modern police practices may undermine ideals of participatory democracy. Collectively, the Chapters elucidate the disparate racial burdens of policing, burdens that themselves have clear democratic implications. Beyond this broad narrative, Chapter I asks whether for-profit policing can truly be consistent with democratic ideals; Chapter II details how policing in schools can have psychological effects on citizens’ inclination to participate in democratic institutions; and Chapter IV worries that a tool designed to create more democratic accountability may itself result in the creation of a surveillance state. Together, these Chapters il-

100 See infra ch. II, p. 1755.
101 See infra ch. II, p. 1758 (noting that “racial disparities are largest where the offense” is discretionary).
102 See infra ch. I, p. 1738 (arguing there may be a constitutional problem “when executive agents use their discretionary enforcement authority to choose who will fund their activities”).
103 See infra ch. III, p. 1781. See generally infra ch. II.
104 See infra ch. IV, pp. 1810–12.
105 See Sklansky, supra note 93, at 1797.
106 See Engel, supra note 91, at 5 (“Equitable treatment of citizens across racial/ethnic groups by police is one of the most critical components of a successful democracy.”); Sklansky, supra note 93, at 1815–16 (“[R]acial profiling could alienate [racial minorities] from the whole project of collective self-government.”).
107 See infra ch. I, p. 1733 (criticizing the “idea that policing can be a source of revenue rather than a broadly socialized public good”).
108 See infra ch. II, p. 1770; see also Aaron Kupchik with Nicole L. Bracy, A New Regime, in AARON KUPCHIK, HOMEROOM SECURITY 38–40 (2010) (arguing that harsh disciplinary policies, including policing in schools, “erode[] democratic dialogue,” id. at 38, and “alienate students in a way that teaches them to be passive citizens,” id. at 40).
109 See infra ch. IV, pp. 1810–12. The Chapter stresses the importance of citizen surveillance of the police — a process that may better “empower traditionally powerless individuals to document and expose police abuses within their communities.” Infra ch. IV, p. 1816.
luminate the potential of certain police practices to subvert effective democratic participation in complex, sometimes unanticipated, ways.\textsuperscript{110} Finally, having clarified discrete problems with the current state of policing, the Chapters illuminate the complexity of reform. Reform efforts in the law of policing invariably confront steep institutional and political hurdles.\textsuperscript{111} Yet even if reform is possible, these Chapters reveal key difficulties in selecting effective mechanisms for that reform. One such difficulty lies in determining which agents are best positioned to effect change.\textsuperscript{112} This question, on the one hand, is one of institutional competency.\textsuperscript{113} On the other, it is an empirical question, turning on the politics of the moment.\textsuperscript{114} Another difficulty lies in predicting the consequences of such change. History demonstrates how well-meaning changes to the law of policing can have disastrous side effects.\textsuperscript{115} So too does it suggest that reforms designed to limit the police can have the opposite effect, further increasing their discretion.\textsuperscript{116}

\textsuperscript{110} Cf. Sklansky, supra note 93, at 1808 (“[T]he police are both a uniquely powerful weapon against private systems of domination and a uniquely frightening tool of official domination.”).

\textsuperscript{111} See supra pp. 1712–13.

\textsuperscript{112} Most of the Chapters, at least indirectly, focus on the Court as an agent for reform. Chapter II advocates for a new understanding of the Fourth Amendment, see infra ch. II, p. 1747; Chapter III advocates for federal consolidation of immigration enforcement, see infra ch. III, pp. 1785–86, yet also suggests such consolidation is beneficial partly because it would facilitate reforming the law through the Court, see infra ch. III, p. 1786; and Chapter I suggests for-profit policing may be unconstitutional, directing its arguments largely at the Court, see infra ch. I, pp. 1736–37, though the argument that a given practice is unconstitutional need not be directed only at courts, see Michael J. Klarman, From Jim Crow to Civil Rights 5 (2004) (suggesting that the Court’s understanding of the Constitution reflects the consensus view of the public).

\textsuperscript{113} See Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 782 (2012) (“Scholars have long challenged the normative conclusion of the Warren Court — that courts and the Constitution should serve as the primary legal mechanism for regulating the police.”).

\textsuperscript{114} Even as it calls for federal consolidation of immigration enforcement, Chapter III makes explicit that anticommandeering principles protect a state’s ability to underenforce, see infra ch. III, p. 1792, perhaps anticipating a time when the federal government’s stance on immigration enforcement shifts and calls for federal consolidation become less appealing.

\textsuperscript{115} See infra ch. IV, pp. 1809–10 (noting how increased expenses from body cameras could push towns to make the problem Chapter I elucidates even graver). The school-to-prison pipeline, which Chapter II examines, is an example of such a side effect, traceable in part to the Federal Safe Schools Act of 1994. See Kupchik with Bracy, supra note 108, at 29–30. Another powerful example emerges from scholarship that recasts the central policing reforms of the twentieth century, designed to protect minorities, as ultimately responsible for the disparate impacts extant under the present law. See Murakawa, supra note 91, at 26 (“With each administrative layer to protect African Americans from lawless racial violence, liberals propelled carceral development that, through perverse turns, expanded lawful racial violence.”); William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 784 (2006) (“The constitutional law of policing widens the gap between the cost of investigating middle- and upper-class suspects and the cost of investigating poor ones.”). Professor Naomi Murakawa has further suggested that recently proposed reforms, such as body cameras, may similarly end up enabling the police and aggrandizing the carceral state. See Murakawa Interview, supra note 23.

\textsuperscript{116} See infra ch. IV, pp. 1810–12 & n.111.
Chapter IV’s ultimate admonishment is of particular significance to the present national conversation: the Chapter describes our “human tendency, in times of tragedy, to latch on to the most readily available solution to a complex problem.”\textsuperscript{117} It may be that the events of 2014 will indeed lead to changes in the law of policing. Yet it is vital to remember that such changes, however well-intentioned, can have unintended effects — shaping the law for decades to come.

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In a 2009 essay, Professor Michael Scott assessed the way that American policing has changed since President Lyndon Johnson famously inaugurated a 1967 national commission to address it.\textsuperscript{118} On the one hand, Scott suggested, the law and practices of the police have changed tremendously, often in positive ways.\textsuperscript{119} On the other, key problems identified by the 1967 commission — in particular, the problems of extensive police discretion and the “strained and distrustful relationship between police and minority-group citizens” — have persisted, suggesting that, “in some deeper respect, little has changed.”\textsuperscript{120}

The Chapters in this edition of \textit{Developments in the Law} echo Scott’s thesis. Even as they describe modern legal developments — the emergence of the profit motive, policing in schools, immigration policing, and the ramifications of new technologies on police accountability — they return to seemingly timeless themes: the problems of unfettered discretion and the burdens such discretion imposes on minority communities.

Taking a broad view of history, Scott suggested that “every thirty or forty years,” usually in response to “widespread police misconduct of one sort or another,” Americans become “intensely interested in the local police institution.”\textsuperscript{121} A few years behind schedule, President Obama has created a Task Force on 21st Century Policing. The purpose of the task force seems clear: to frame an emerging national conversation around defining the policing of the future. It will take careful examination of the state of the law if we are to succeed in fixing the problems of the past.

\begin{itemize}
\item \textsuperscript{117} \textit{Infra} ch. IV, p. 1796.
\item \textsuperscript{118} See Scott, supra note 88, at 172.
\item \textsuperscript{119} See \textit{id.} at 178 (“[At their best, [these changes] hold tremendous potential for addressing some fundamental challenges in the police institution . . . .”).
\item \textsuperscript{120} \textit{id.} at 174.
\item \textsuperscript{121} \textit{id.} at 172.
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