

---

---

## POLICE EXECUTIVE OPINIONS OF LEGAL REGULATION

Roger Michalski\*  
Stephen Rushin\*\*

*By conducting a national survey, this Article empirically assesses how American police leaders perceive external legal regulation.*

*At various times, policymakers have decried external police regulations as too expensive, too complicated, or too difficult to apply to different factual scenarios. Critics have also alleged that police regulations change too frequently, inadequately consider input from the law enforcement community, and unduly risk the safety of officers or the broader community.*

*These complaints underscore an uncomfortable but unavoidable reality: efforts to regulate police behavior often require policymakers to make compromises. A rule that promotes one goal may necessarily compromise another important goal. So, what do police leaders actually care about most when faced with external legal regulation? To answer this question, this Article relies on a dataset of 489 survey responses collected from a random sample of law enforcement leaders across the country. With the help of a multidimensional preference-scaling model, this Article shows that the chief concern of police leaders is how external legal regulations impair the safety of officers and the public. Respondents rated the protection of constitutional rights and the prevention of crime as the second and third most important values. And, contrary to assumptions made by many policymakers, police leaders ranked cost, predictability, and consistency as relatively unimportant considerations.*

---

\* Roger Michalski is an Associate Professor of Law at the University of Oklahoma.

\*\* Stephen Rushin is an Assistant Professor of Law at Loyola University Chicago.

We thank all of the survey respondents who made this study possible. We also owe a debt of gratitude to the police leaders who assisted us in the preliminary administration of our survey instrument. This project would not have been possible without the generous financial assistance of the University of Alabama School of Law, the University of Oklahoma College of Law, and Loyola University Chicago School of Law. For their helpful comments, we thank John Bronsteen, Stephen Henderson, Joseph Thai, and Spencer Waller, as well as all of the participants in the University of Illinois College of Law symposium.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1842
II.	PROCEDURAL VALUES IN POLICING .....	1845
	<i>A. Frequently Cited Procedural Values in Police Regulation</i> .....	1846
	1. <i>Cost</i> .....	1847
	2. <i>Consistency</i> .....	1849
	3. <i>Efficacy</i> .....	1851
	4. <i>Participation</i> .....	1852
	5. <i>Predictability</i> .....	1853
	6. <i>Safety</i> .....	1854
	7. <i>Simplicity</i> .....	1857
	<i>B. The Need for Empirical Research</i> .....	1857
III.	METHODOLOGY .....	1858
	<i>A. Population, Sample, and Respondents</i> .....	1859
	<i>B. Survey Instrument and Administration</i> .....	1862
	<i>C. Timing</i> .....	1864
	<i>D. Survey Notables</i> .....	1864
	<i>E. Analysis</i> .....	1865
IV.	FINDINGS .....	1867
	<i>A. Initial Description of Survey Responses</i> .....	1867
	<i>B. Initial Model</i> .....	1868
	<i>C. The Effect of Department Type on Ranking</i> .....	1870
	<i>D. The Effect of Geographical Location on Rankings</i> .....	1871
	<i>E. The Effect of Department Size on Rankings</i> .....	1872
V.	IMPLICATIONS.....	1874
VI.	CONCLUSION.....	1876
	APPENDICES .....	1877

## I. INTRODUCTION

Soon after President Donald J. Trump took office, U.S. Attorney General Jeff Sessions released a short memorandum announcing a dramatic shift in the Department of Justice’s (“DOJ”) approach to reforming American police departments.<sup>1</sup> The DOJ memorandum stated that “[i]t is not the responsibility of the federal government to manage non-federal law enforcement agencies[,]” and it argued that “[t]he misdeeds of individual bad actors should not impugn or undermine the legitimate and honorable work that law enforcement officers and agencies perform in keeping American communities safe.”<sup>2</sup> Attorney Gen-

1. Memorandum from Jeff Sessions, Attorney General, for Heads of Department Components and United States Attorneys (Mar. 31, 2017) (on file with author).

2. *Id.* at 1–2.

eral Sessions then signaled that the DOJ would no longer utilize its authority to oversee problematic police departments, out of fear that such regulation puts at risk the “safety and protection of the public” and the safety of police officers who “perform uniquely dangerous tasks.”<sup>3</sup>

While politically contentious, Attorney General Sessions’s concern about the link between police regulation and public safety echoes similar sentiments expressed by other law enforcement leaders. Perhaps most notably, James B. Comey, then Director of the Federal Bureau of Investigations, told a group of law students at the University of Chicago that law enforcement officers might be reluctant to police the streets proactively because many feel “under siege.”<sup>4</sup> In the era of increased oversight and regulation, Director Comey worried that there is a “chill wind blowing through American law enforcement” that may be “changing behavior.”<sup>5</sup>

Attorney General Sessions and Director Comey are not alone. Since the onset of the criminal procedure revolution of the mid-twentieth century, critics have worried that external regulations of police officers come with significant costs or unexpected side effects. At various times, police leaders have decried external regulations as too expensive, too complicated, or too difficult to apply to different factual scenarios. Critics have also alleged that police regulations change too frequently or inadequately consider input from the law enforcement community. But perhaps the most common critique of police regulation is that it unduly risks the safety of officers or the broader community.

These complaints underscore an uncomfortable but unavoidable reality: efforts to combat police misconduct may require policymakers to make trade-offs and compromises. For example, rules that provide for the robust oversight or investigation of alleged police misconduct may lead to increased costs for local taxpayers. Similarly, rules that require officers to make nuanced, fact-specific judgments about how to apply the law to different circumstances may sacrifice the simplicity of a bright-line rule. It is often impossible for courts or legislators to craft police regulations without explicitly or implicitly making such trade-offs. Of course, this observation is not unique to policing. In virtually all fields, regulatory “perfection is unattainable.”<sup>6</sup> As previous scholars have

---

3. *Id.* at 2 (adding further that this approach can help local departments “focus on making law enforcement a rewarding career, and attracting and retaining well-qualified personnel.”); *see also* Jeff Sessions, *Avoid Harmful Federal Intrusion*, USA TODAY (April 17, 2017, 6:02 PM), <https://www.usatoday.com/story/opinion/2017/04/17/jeff-sessions-avoid-harmful-federal-intrusion-editorials-debates/100579848> (citing falling arrest rates and increasing crime rates in Chicago and Baltimore to, in part, justify the federal government pulling back enforcement of § 14141 in those communities).

4. James B. Comey, FBI Dir., *Law Enforcement and the Communities We Serve: Bending Toward Safety and Justice*, Remarks at the University of Chicago Law School (Oct. 23, 2015), <https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice>.

5. *Id.*

6. Lawrence Solum, *Procedural Justice*, 78 S. CALIF. L. REV. 181, 185 (2004).

---

---

recognized, “[d]rafting, amending, and interpreting procedural rules requires prioritizing some . . . values over others.”<sup>7</sup>

This raises an empirical question. What values should we care about most when regulating police behavior? While there is a considerable and growing body of literature on the regulation of police misconduct, and there is a significant amount of scholarship about the comparative importance of competing values in other regulatory contexts, there is a dearth of literature examining the comparative importance of competing values in police regulation.<sup>8</sup> Answering this question is particularly important today. Since the events in Ferguson, Missouri in 2014, there has been renewed national interest in—and pushback against—police reform. Scholars have been quick to offer a wide range of solutions to the problem of police misconduct in the United States. But in order to develop the most effective police regulations, it is important to first understand the relative importance of the competing values at stake during such regulation.

Of course, no single study could claim to definitively determine which values are most important during police regulation. The prioritization of competing values requires policymakers to make normative choices. These choices are driven by political, moral, and practical considerations. Instead, this paper makes a narrower but nevertheless important contribution to this discussion. By conducting a national survey, this Article empirically assesses how American police leaders perceive external legal regulation. There is widespread agreement in the policing literature that successful reform efforts require buy-in from both police leadership and rank-and-file officers. Thus, if courts, legislators, and community activists hope to bring about successful and sustainable reform in American police departments, it is important to understand the opinions of police.

So, what do police care about most when faced with external legal regulation? To answer this question, this Article relies on an original dataset of 489 survey responses collected from a random sample of law enforcement leaders across the country. Survey respondents come from forty-nine states and represent a demographically and geographically diverse cross-section of the American law enforcement community. We developed our survey instrument by examining the existing literature on police regulation. In doing so, we identified eight important values frequently cited by advocates and critics of police regulation: (1) *citizens’ rights*, defined as the extent to which rules protect citizens from potentially harmful police conduct; (2) *consistency*, defined as the extent to which rules established in the past remain in place over time; (3) *cost*, defined as the extent to which it is not too costly for a police department to comply with rules; (4) *efficacy*, defined as the extent to which rule promote effective crime detection and prevention; (5) *participation*, defined as the extent to which rules were developed with input from the law enforcement community;

---

7. Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 69 (2018).

8. *See id.* at 4–5, 11, 12 n.45.

(6) *predictability*, defined as the extent to which officers can predict how courts will apply the rules in different situations in the future; (7) *safety*, defined as the extent to which officers can abide by the rules without unduly reducing their own safety or the safety of others; and (8) *simplicity*, defined as the extent to which the rules are simple to understand and establish clear standards.

The existing literature suggests that each of these eight procedural values is an important consideration during the course of external police regulation. Our survey instrument asked law enforcement leaders to rank these values from most to least important. Using a multidimensional preference-scaling model,<sup>9</sup> we show that police leaders are most concerned about how external legal regulations impair the safety of their officers and the public. A strong majority of respondents—regardless of geographic location, department size, or other demographic characteristics—believe that safety is the most important value at stake when regulating police behavior. Respondents rated the protection of citizens’ rights as the second most important value, just ahead of crime prevention. And perhaps somewhat surprisingly, respondents ranked values like cost, consistency, and predictability at or near the bottom in comparative importance, behind other values like participation and simplicity. As we explain, these findings have important implications for the regulation of American police departments.

We have divided this paper into four parts. Part I discusses the existing literature on procedural values, and it explores a number of values that policymakers cite as particularly important when the law oversees police behavior. Part II discusses our methodology. Part III walks through the results of our study. Finally, Part IV considers the implications of our findings.

## II. PROCEDURAL VALUES IN POLICING

As various scholars have previously argued, “drafting, amending, and interpreting rules requires prioritizing some . . . values over others.”<sup>10</sup> Common sense tells us that regulation and rule-making require policymakers to make tough choices and trade-offs. But much of the existing literature on the prioritization of procedural values during rulemaking and regulation has focused on the civil justice system.<sup>11</sup> For example, in the civil system, scholars have ob-

9. Multidimensional scaling has been used effectively in other disciplines to analyze these sorts of questions. See, e.g., TREVOR F. COX & MICHAEL A.A. COX, *MULTIDIMENSIONAL SCALING* (2d ed. 2001); INGWER BORG & PATRICK GROENEN, *MODERN MULTIDIMENSIONAL SCALING: THEORY AND APPLICATIONS* (2d ed. 2005). For an example of multidimensional scaling used effectively in legal scholarship, see Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 *YALE L.J.* 258 (1976) (using multidimensional scaling to evaluate participants’ opinions on twelve different model procedures).

10. Michalski, *supra* note 7, at 69.

11. Paul D. Carrington, “*Substance*” and “*Procedure*” in the *Rules Enabling Act*, 1989 *DUKE L.J.* 281, 300 (1989) (stating that “[Rule 1] was and is the expression of an ideal; certainly no one would claim that the Federal Rules of Civil procedure have achieved such a purpose.”); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 *CORNELL L. REV.* 1, 1 (1983) (emphasizing the “central goal of the Federal Rules of Civil Procedure articulated in rule 1”); Michalski, *supra* note 7, at 69–70; Judith Resnick, *Tiers*, 57 *S.*

served that some stakeholders prefer rules that advance adjudication on the merits regardless of cost,<sup>12</sup> while others may prefer rules that save time, limit expenses, or protect the litigants' privacy.<sup>13</sup> These value choices have consequences, as they "radically alter[] the nature, feel, and mechanics of litigation" in the civil system.<sup>14</sup> Scholars studying criminal law and procedure, like Professor Herbert Packer, have made similar observations about the importance of procedure values.<sup>15</sup>

In the years since Professor Packer's seminal article, criminal law scholars have frequently cited the value trade-offs implicit in many criminal justice rules and regulations.<sup>16</sup> The regulation of police behavior is no different. As discussed in more detail in the next Section, courts and policymakers have frequently cited the clash of procedural values at stake in police oversight.

### A. Frequently Cited Procedural Values in Police Regulation

Much of the external regulation of police behavior is done with the goal of protecting the public's constitutional rights under the First,<sup>17</sup> Fourth,<sup>18</sup>

---

CAL. L. REV. 837, 842 (1984) ("The relative weight assigned to these features determine the makeup of procedural models and of the structure for court decision-making.").

12. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) ("Our adversary system rates truth too low").

13. See, e.g., E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 321 (1986) ("Nourishing the fiction that justice is a pearl beyond price has its own price."); Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1305 (2015) ("Non-trivial system costs must usually be incurred to obtain even an approximation of the truth. Attempting to move closer is increasingly costly, and perfect truth is unobtainable.").

14. Michalski, *supra* note 7, at 71.

15. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

16. See WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, *DEFINING CRIMES* (3d ed. 2017).

17. Police may violate the First Amendment by punishing someone for engaging in protected conduct, like recording public police activities or talking back to a police officer. See, U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 24* (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf); see also *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (striking down an arrest of a woman for disorderly conduct for calling a police officer an "asshole" and further explaining that an officer should exercise more restraint than the typical person). Additionally, police may violate the First Amendment by policing protests in a way that prevents members of the public from exercising their right to protest. See generally Clark McPhail et al., *Policing Protest in the United States: 1960–65*, in *POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES 51* (Donatella Della Porta & Herbert Reiter eds., 1998) (describing how police have policed the public's right to protest in the United States).

18. Police misconduct may violate the Fourth Amendment in several ways. First, police may engage in an unlawful search in violation of a person's reasonable expectation to privacy. U.S. CONST. amend. IV. Police need probable cause if they are to execute a search or arrest. Probable cause requires proof of "individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Conversely, if an officer lacks probable cause, the Fourth Amendment still permits limited detention when an officer has reasonable suspicion to believe that a person may be engaged in a crime. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Second, police may engage in an unlawful seizure, like an unlawful arrest or officer use-of-force. See *Graham v. Connor*, 490 U.S. 386, 394 (1989) (holding that use of force by police during an arrest or stop should be judged under the Fourth Amendment to determine whether the action constituted an "unreasonable" seizure); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that a police officer can only use deadly force against a fleeing suspect

Fifth,<sup>19</sup> and Eighth Amendments.<sup>20</sup> But efforts to protect these fundamental rights are not costless. For example, efforts to protect citizens from unreasonable uses-of-force by law enforcement in violation of the Fourth Amendment may, in the process, establish rules that rank-and-file officers believe impair their safety.<sup>21</sup> Attempts to protect criminal suspects' privilege against self-incrimination under the Fifth Amendment may require officers to read officers a set prophylactic, or *Miranda* rights, that critics claim decreases police clearance rates and increase crime rates.<sup>22</sup> And efforts to impose new oversight on police behavior may come with a high price tag.

The Subsections that follow discuss many of the most frequently cited procedural values at stake during police regulation. This list of values is by no means exhaustive. But each of these procedural values has received considerable attention during previous attempts to oversee police conduct. And, as we argue, regulation of police conduct designed to protect citizens' rights may necessarily require some compromise in each of these areas.

### 1. Cost

Policymakers and police leaders often claim that regulations impose significant, and sometimes unreasonable, costs on local governments. Conversely, supporters of police reform often argue that the failure to address police misconduct is itself unreasonably costly, as it exposes the municipality to civil liability under 42 U.S.C. § 1983. In either event, cost is clearly an important consideration when adopting police regulations.

There are, no doubt, many examples to choose from to illustrate this point. We will, however, discuss only a handful of prominent examples. First, efforts to install significant oversight and reform in local police departments face an uphill battle because of the high initial costs they impose on municipal

---

under the Fourth Amendment if the officer believes that the suspect poses an immediate threat to the safety or others).

19. Police may violate the Fifth Amendment by failing to notify a suspect of his or her privilege against self-incrimination before engaging in custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Police may also violate the Fifth Amendment in conducting certain lineup procedures, like failing to notify a suspect's attorney before conducting a lineup. *U.S. v. Wade*, 388 U.S. 218, 236–37 (1967).

20. Generally, the Eighth Amendment applies to punishment rather than actions by police officers. But some actions by police, like arresting individuals for so-called status crimes, may contribute unconstitutional behavior. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that a California statute criminalizing the status of being a drug addict to be an unconstitutional criminalization of status); see also Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 *FORDHAM L. REV.* 1 (2017) (arguing that police enforcement of bathroom prohibitions against trans people as criminal trespass may constitute a violation of the Eighth Amendment).

21. See, e.g., Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-Escalate*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html> (explaining how “hesitation might end up” getting an officer “killed or assaulted” and explaining that regulation of police may lead to hesitation).

22. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 *STAN. L. REV.* 1055, 1063–66 (1998) (linking *Miranda* to decreased clearance rates in the United States).

budgets. Take, as an example, communities targeted by the federal government pursuant to 42 U.S.C. § 14141 because of a “pattern or practice” of unconstitutional misconduct.<sup>23</sup> Section 14141 settlement agreements can be extensive, requiring police departments to make significant changes in policies, training procedures, and oversight mechanisms.<sup>24</sup> While this reform mechanism has proven to be among the most successful at encouraging constitutional policing,<sup>25</sup> it does not come cheap. In large communities like Los Angeles, the price tag of police reform has run over \$100 million,<sup>26</sup> and tens of millions of dollars in other communities.<sup>27</sup> In some cases, the cost of police reform has forced communities to raise taxes or to cut resources from other worthy municipal causes like schools, parks, and infrastructure.<sup>28</sup> Of course, reform under § 14141 is perhaps the most extreme example, since it typically involves dramatic overhauls to department policies and the hiring of an external monitoring team. But even less expansive reforms aimed at curbing officer misconduct, like the installation of body-worn cameras or the implementation of discrete training programs, can impose serious and politically contentious costs on localities.<sup>29</sup>

---

23. For a more detailed explanation of the history of this statute, see STEPHEN RUSHIN, *FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS* 67–86 (2017) (providing a detailed description of the historical events that led the statute’s passage, describing the legislative history of the statute, and outlining its initial importance).

24. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 *MINN. L. REV.* 1343, 1378–87 (2015) (providing a breakdown of some of the most common components of federal consent decrees and memorandums of agreement pursuant to § 14141).

25. See, e.g., ROBERT C. DAVIS ET AL., *CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? THE PITTSBURGH CONSENT DECREE* 10–11 (2005), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy\\_downloads/277\\_530.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy_downloads/277_530.pdf) (showing some of the improvements made by the Pittsburgh Bureau of Police); CHRISTOPHER STONE ET AL., *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* (2009), <http://www.assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> (showing some of the improvements made by the LAPD under federal oversight).

26. Rushin, *supra* note 24, at 1393, 1398–99.

27. See, e.g., Rich Exner, *How Much Cleveland Will Pay to Reform Its Police Department Under Consent Decree*, *CLEVELAND PLAIN DEALER* (June 2, 2015, 1:08 PM), [http://www.cleveland.com/datacentral/index.ssf/2015/06/how\\_much\\_it\\_will\\_cost\\_cleveland.html](http://www.cleveland.com/datacentral/index.ssf/2015/06/how_much_it_will_cost_cleveland.html)

(stating the City of Cleveland may end up spending over \$55 million over five years to comply with a federal consent decree); Jaquetta White, *City’s 2015 Budget Includes \$7.3 Million for NOPD Consent Decree*, *NEW ORLEANS ADVOCATE* (Nov. 4, 2014, 2:16 AM), [http://www.theadvocate.com/new\\_orleans/news/politics/article\\_1a1d7489-365e-523b-b35c-4489ea0d306a.html](http://www.theadvocate.com/new_orleans/news/politics/article_1a1d7489-365e-523b-b35c-4489ea0d306a.html) (stating that the New Orleans consent decree will likely cost around \$55 million over five years to enforce).

28. See, e.g., Tyler Bridges, *Legislature Approves Property Tax Hike for New Orleans Police & Fire; Now Heads to Voters*, *LENS* (May 29, 2014, 3:38 PM), <http://thelensnola.org/2014/05/29/legislature-approves-property-tax-hike-for-new-orleans-police-now-heads-to-voters>; Richard Rainey, *Mitch Landrieu Requests a Doubling of Tax Rates for New Orleans Police and Fire*, *TIMES-PICAYUNE* (May 1, 2014, 3:57 PM), [https://www.nola.com/politics/index.ssf/2014/05/mitch\\_landrieu\\_tax\\_hike\\_plan.html](https://www.nola.com/politics/index.ssf/2014/05/mitch_landrieu_tax_hike_plan.html)

29. See, e.g., Amanda Haggard, *Law Enforcement Complain Body Cameras Will Lead to Costly Records Requests*, *NASHVILLE SCENE* (Oct. 20, 2015, 3:00 PM), <http://www.nashvillescene.com/news/article/13061734/law-enforcement-complain-body-cameras-will-lead-to-costly-records-requests> (similarly citing the high cost of

Second, while police reform can be expensive, so too can the failure to address police misconduct. The failure to install adequate oversight can impose significant costs on municipalities, as they can face liability under 42 U.S.C. § 1983.<sup>30</sup> For example, one study estimated that the City of Chicago has paid out over \$280 million in damages for civil rights violations by their officers and over \$500 million in the last decade.<sup>31</sup> In sum, cost appears to be a point of contention during police regulation. Supporters of constitutional policing regulations often argue that such measures will drive down costs by limiting civil exposure under § 1983, while reform opponents cite the cost of oversight and policy changes.

## 2. Consistency

In a handful of cases, the U.S. Supreme Court has emphasized the need for regulations of law enforcement to remain relatively consistent or stable over time. This desire for consistency is perhaps most evident in the Justice Samuel Alito's dissent in *Arizona v. Gant*.<sup>32</sup> There, police arrested Rodney Gant for driving with a suspended license.<sup>33</sup> Officers then handcuffed Mr. Gant and locked him in the back of a patrol car as they searched his vehicle incident to arrest without a warrant.<sup>34</sup> Inside, the officers found a gun and a bag of cocaine.<sup>35</sup> Gant moved to suppress the evidence obtained from the search as a violation of his Fourth Amendment protection against unreasonable search and seizure.<sup>36</sup> In *New York v. Belton*, the Court had previously held that police could conduct a warrantless search of a suspect's jacket located inside his vehicle incident to arrest, provided that the jacket was "within the arrestee's imme-

---

complying with open record requests for body-worn camera footage kept on file); *Two US Police Departments Drop Body Cameras Over Costs*, AL JAZEERA (Sept. 11, 2016), <http://www.aljazeera.com/news/2016/09/police-departments-drop-body-cameras-costs-160911075457471.html> (explaining the high costs of video storage for body cameras has inspired some departments to rethink their use).

30. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978) (establishing that a plaintiff in a § 1983 case is permitted to recover from a government agency based on the actions of an employee, like a police officer); *City of Canton v. Harris*, 489 U.S. 378, 379 (1989) (concluding that a municipality may be liable for the actions of an employee under § 1983 if the municipality acted with deliberate indifference by failing to adequately train or oversee their employee in a way that contributed to the constitutional rights violation).

31. See Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CAL. L. REV. 263, 305 (2017) ("Over the last decade, the City of Chicago has paid out a jaw-dropping \$500 million in civil rights settlements, judgments, and legal fees all related to police misconduct. In 2013 alone, the city paid \$84.6 million—more than triple the amount that the city had anticipated in its budgetary projections."); Mercy Yang, *Chicago Police Settlements Cost Taxpayers \$210 Million Plus Interest*, HUFFINGTON POST (July 14, 2016, 6:30 PM), [http://www.huffingtonpost.com/entry/chicago-police-settlement-misconduct-210-million\\_us\\_5787f6a6e4b03fc3ee500a88](http://www.huffingtonpost.com/entry/chicago-police-settlement-misconduct-210-million_us_5787f6a6e4b03fc3ee500a88).

32. 556 U.S. 332 (2009).

33. *Id.* at 335.

34. *Id.* at 335–36.

35. *Id.* at 336.

36. *Id.*

diate control.”<sup>37</sup> Thus, the Court in *Gant* had to determine whether the logic from *Belton*—which justified the warrantless search of some vehicles incident to arrest—could be extended to a situation where police have handcuffed and locked a suspect in the back of a squad car.

The majority held that the Fourth Amendment only permits the warrantless search of an automobile incident to arrest when “(1) the arrestee is within reaching distance of the vehicle at the time of the search, and (2) the officer has reason to believe that the vehicle contains evidence of the offense of arrest.”<sup>38</sup> In his dissent, Justice Alito worried that the Court’s departure from *Belton* and its progeny represented an unreasonably quick shift in doctrine that police had come to rely upon.<sup>39</sup> As he explained, police departments across the country had trained officers to follow the *Belton* rule.<sup>40</sup> In previous cases, the Court had acknowledged that “a single familiar standard . . . [was] essential to guide police officers.”<sup>41</sup> But as Alito lamented, for the majority in *Gant*, “this seemingly counts for nothing.”<sup>42</sup> In defending the value of such adherence to stare decisis in other contexts, at least one justice has gone as far as stating that “[it] is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.”<sup>43</sup>

Rapidly or regularly changing rules handed down by courts may have a particularly negative effect on law enforcement. First, rapidly changing rules may impose a high cost on law enforcement agencies. Take *Gant* as an example. By overruling *Belton*, the Court shifted from a straightforward policy that permitted police officers to search a suspect’s vehicle incident to an arrest to a more fact-specific rule requiring officers to assess the ability of a suspect to reach into the vehicle and the type of evidence that may be found inside the vehicle. Even if this rule more thoroughly protects the Fourth Amendment rights of criminal suspects, such a change requires the nation’s roughly 18,000 federal, state, and local police agencies<sup>44</sup> to retrain officers in this new policy. Retraining officers across the country requires time, money, and coordination. Second, there is also a risk that the nation’s police departments (and their officers) may not be able to adequately keep up with the law if it changes too frequently. Failure to abide by rapidly changing rules can have serious consequences—namely evidentiary exclusion, which can contribute to the release of dangerous

37. 453 U.S. 454, 462 (1981) (quoting in part from *Chimel v. California*, 395 U.S. 752, 763 (1969)).

38. *Gant*, 556 U.S. at 355. In that case, an officer removed the occupants from a car and placed them under arrest but did not handcuff them. The officer then proceeded to search the back seat of the automobile and found drugs.

39. *Id.* at 361 (labeling this concern as “consistency with later cases” and emphasizing earlier the need for consistency over time).

40. *Id.* at 349 (“*Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years”).

41. *Belton*, 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213–214 (1979)).

42. *Gant*, 556 U.S. at 359.

43. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

44. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2008 2 (2011), <http://www.bjs.gov/content/pub/pdf/cslllea08.pdf>.

and guilty suspects.<sup>45</sup> Third, and relatedly, rapidly changing laws may contribute to other downstream, costly consequences. No rule, no matter how carefully crafted, can be easily applied to all different factual situations. As a result, with each rule change, police departments across the country will be faced with unanswered questions about how the new rule will apply to factually varied situations. Answering these questions will typically require years of additional experimentation and, in all likelihood, litigation.

### 3. *Efficacy*

Police leaders and courts have frequently expressed concern that external regulations may also impair officers' ability to fight crime effectively.<sup>46</sup> More recently, critics have come to describe this as the "de-policing" effect of regulation.<sup>47</sup> We use a somewhat less politically charged term to encapsulate this phenomenon: efficacy.

This theory stems from a belief that urban crime is best addressed with "aggressive policing targeting criminogenic hot spots."<sup>48</sup> Criminological research suggests that police may be able to not just displace, but also prevent a portion of criminal behavior by acting as a deterrent and disrupting situational incentives.<sup>49</sup> Under this theory, when police feel targeted by external regulations, they may act less aggressively, thereby emboldening criminals and preventing officers from aggressively policing hot spots in a way that may deter crime. Previous scholars and critics have given this phenomenon a number of

---

45. For a few examples of this concern, see *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates substantial social costs which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it . . .") (internal quotation marks omitted); see also *Herring v. United States*, 555 U.S. 135, 141 (2009) ("The principle cost of applying [the exclusionary rule] is, of course, letting guilty and possible dangerous defendants go free—something that offends basic concepts of the criminal justice system.") (internal quotation marks omitted).

46. See, e.g., Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 714–25 (2016) (discussing "[t]he [t]hreat of [d]e-[p]olicing").

47. *Id.* at 721; see also Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721 (2017) (using the term "de-policing" throughout the paper to describe the rising concern among law enforcement leaders that regulation causes officers to become less aggressive, thereby contributing to higher crime rates). It seems that Donald Black and M.P. Baumgartner may have been two of the first academics to use the term "depolicing," though they used it to mean something slightly different than its intended meaning in later work. Donald Black & M.P. Baumgartner, *On Self-Held in Modern Society*, 12 DIALECTICAL ANTHROPOLOGY 33, 34–35 (1987).

48. Rosenthal, *supra* note 46, at 714 ("These tactics require police to intervene at locations where suspects are most likely to be armed and involved in unlawful activities in order to increase the risks of facing offenders.").

49. See, e.g., Anthony A. Braga et al., *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 31 JUST. Q. 633, 634–35 (2014) (showing through a meta-analysis of existing research that hot spot policing strategies can produce a small, but noteworthy reduction in crime rates, and showing that problem-oriented policing strategies can contribute to an even larger decrease in crime).

different names, including “passive law enforcement,” “selective disengagement,” “tactical detachment,” or officer “retreat.”<sup>50</sup>

These modern de-policing concerns are hardly new. Although described in somewhat different terms, critics have long worried that any effort to regulate police may influence the ability of frontline officers to fight crime. These concerns go back as far as seminal criminal procedure cases like *Miranda v. Arizona*,<sup>51</sup> when police leaders and politicians predicted that external regulations would make it more difficult to solve crimes, thereby increasing crime rates.<sup>52</sup> Scholars, advocates, and politicians have raised similar concerns after several major cases handed down by the Supreme Court.<sup>53</sup> Similarly, police officers have expressed concerns about the de-policing effects of federal oversight of police departments pursuant to § 14141.<sup>54</sup> In sum, concerns about the de-policing effects of external regulation have resonated among critics for decades.

#### 4. Participation

Both rank-and-file officers and police leaders have frequently expressed a desire to participate in the development of regulations. Historically, as Professors David Sklansky and Monique Marks have explained, “[t]he dominant mindset of police departments, police reformers, appellate judges, and criminal justice scholars . . . has been that policing need strong, top-down management.”<sup>55</sup> But in recent decades, there has been a shift towards more participatory management. Police leaders have come to recognize the inclusion of rank-and-file officers in the process of cooperatively developing rules and policies may increase the likelihood that officers accept these regulations as legitimate. For example, Professors L. Song Richardson and Catherine Fisk have argued that the failure to give officers “any voice” in the development of internal poli-

---

50. Willard M. Oliver, *Depolicing: Rhetoric or Reality?*, CRIM. JUST. POL’Y REV. 437, 438 (2015) (using each of these different terminologies).

51. 384 U.S. 436 (1966).

52. See, e.g., *More Criminals to Go Free? Effect of High Court’s Ruling*, U.S. NEWS & WORLD REP., June 27, 1966, at 32, 33 (quoting the mayor of Los Angeles at the time as saying that the *Miranda* decision would impair police investigations and cause more criminals to go free); Rushin & Edwards, *supra* note 47, at 732 (describing similar objections by President Nixon and others).

53. Rushin & Edwards, *supra* note 47, at 732 (describing similar objections by President Nixon and others).

54. See, e.g., ROBERT C. DAVIS ET AL., VERA INST. JUST., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING? 16–21 (2005), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy\\_downloads/277\\_530.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/can-federal-intervention-bring-lasting-improvement-in-local-policing-the-pittsburgh-consent-decree/legacy_downloads/277_530.pdf) (finding that approximately nine out of ten officers felt that the threat of community complaints made officers less proactive on the streets, while around eight out of ten believed that the federal consent decree impaired their ability to fight crime).

55. David Alan Sklansky & Monique Marks, *The Role of Rank and File in Police Reform*, 18 POLICING & SOC’Y 1, 1 (2008).

cies may fuel resentment by communicating how “unimportant their views” are and how “low their status” is within the department.<sup>56</sup>

### 5. Predictability

Another seemingly important procedural value at stake during police regulation is predictability, which we define as the ability of a police officer to predict how courts will apply rules to factually different situations in the future. Policymakers cannot hand down rules that neatly dictate how police officers should act in every different factual circumstance. And police work, by definition, is unstructured and requires officers to make split-second decisions on how to apply legal rules to factually varied situations.<sup>57</sup> So, it is understandable that police may have a strong preference for rules that are predictable—or, at minimum, for rules that provide officers with sufficient notice about their applicability to new factual situations before holding officers accountable for rule violations.

In practice, courts and policymakers have been fairly sympathetic to the need for predictability in regulating police conduct. Two of the most prominent examples of policymakers emphasizing the importance of predictability can be found in the series of cases delineating the scope of federal criminal liability for police officer misconduct under 18 U.S.C. § 242 and the limits of the qualified immunity doctrine under 42 U.S.C. § 1983. In criminal cases against police officers facing charges under § 242, the U.S. Supreme Court has explicitly emphasized the importance of giving police officers fair notice of their legal obligations.<sup>58</sup> Under § 242, a state or local police officer is subject to federal criminal penalties in the event that he or she “under color of law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>59</sup> The Supreme Court interpreted the phrase “willfully” in *United States v. Screws*<sup>60</sup> to require a police officer to have intentionally violated a person’s civil rights in order to sustain a conviction under the statute. Put differently, a con-

56. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 773 (2017).

57. PRESIDENT’S COMM. ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91–92 (comparing police work to counseling and providing examples of the kind of counseling-type roles that must adopt). The report also elaborated that, “Policemen deal with people when they are most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, or when they are ashamed.” *Id.* at 91; see also MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 164 (2d ed. 2010) (recognizing how the “supervision of subordinates with broad discretion and responsibilities” is particularly difficult, and that it is nearly impossible to “hold officers accountable for everything all the time.”).

58. John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 814.

59. 18 U.S.C. § 242 (2012). It is worth noting that these cases have been fairly difficult to prove. Jacobi, *supra* note 58, at 809–11 (attributing this difficulty to the specific intent requirement established in *Screws*); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203 (2014) (showing that the DOJ only investigated around 30–40% of complaints under this statute and brought charges in around 1 or less percent).

60. 325 U.S. 91, 92 (1945).

viction under § 242 requires a police officer to act in “defiance of announced rules of law” and to know “precisely what [he or she] is doing.”<sup>61</sup> As the Court explained, this interpretation ensures that police officers are given “fair warning” so they can predict which behaviors may result in serious criminal sanctions.<sup>62</sup>

Relatedly, courts have held that police officers “sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.”<sup>63</sup> This desire to ensure police officers receive fair warning before becoming subject to civil penalties has contributed to the development of the qualified immunity doctrine. Under the modern understanding of the qualified immunity doctrine, a victim of police misconduct cannot hold the officer responsible under § 1983 unless the officer’s conduct violated “clearly established law.”<sup>64</sup> Thus, only if an officer has been given sufficient notice that certain conduct would violate the Constitution, should federal courts allow for victims to recover monetary damages from the officer.

## 6. *Safety*

Policymakers commonly worry about how external regulations may impair officer safety—either by limiting the ability of officers to defend themselves when facing imminent danger, or by inadvertently putting officers in potentially harmful situations. This concern for officer safety is perhaps more acute in the series of cases outlining the constitutional limits of officer use-of-force under the Fourth Amendment.

For example, in *Graham v. Connor*,<sup>65</sup> the Court considered the constitutional standard for judging whether an officer used excessive force in making an arrest, investigatory stop, or seizure under the Fourth Amendment.<sup>66</sup> The case stemmed from an incident when a diabetic man, Dethorne Graham, asked his friend, William Berry, to drive him to a nearby convenient store to purchase orange juice. On the way to the store, Graham “felt the onset of an insulin reaction.”<sup>67</sup> When the two men entered the store, they found the checkout line to be too long, so they hastily left.<sup>68</sup>

Officer Connor became suspicious when he saw the two men enter and leave the store so quickly, so he began following their automobile.<sup>69</sup> About a

---

61. *Id.* at 104–05.

62. *Id.* at 104; *see also* *United States v. Lanier*, 520 U.S. 259, 265 (1997) (also using the phrase “fair warning”).

63. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

64. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

65. 490 U.S. 386 (1989).

66. *Id.* at 388.

67. *Id.*

68. *Id.* at 388–89.

69. *Id.* at 389.

half-mile from the convenient store, Officer Connor made an investigatory stop.<sup>70</sup> Although Graham explained that he was having a “sugar reaction,” the officer ordered both men to stay in their car while he investigated whether anything had happened at the convenient store.<sup>71</sup> As Officer Connor was in his patrol car, Graham got out of the automobile, “ran around it twice, and finally sat down on the curb, where he passed out briefly.”<sup>72</sup>

A number of officers reported to the scene, and, “[i]n the ensuing confusion,” one of the officers rolled Graham over and cuffed him with his hands pulled tightly behind his back.<sup>73</sup> Berry objected to the officer’s treatment of Graham, but the officer responded that he had “seen a lot of people with sugar diabetes that never acted like this. Ain’t nothing wrong with the [expletive] but drunk. Lock the [expletive] up.”<sup>74</sup> As Graham regained consciousness, he instructed the officers to check for a diabetic decal that he carried in his wallet.<sup>75</sup> In response, one of the officers told Graham to “shut up” and shoved his face against the hood of the vehicle, before a group of officers threw Graham head-first into the police car.<sup>76</sup>

When the officers confirmed that Graham had done nothing wrong, they drove him home and released him, but only after he had suffered a broken foot, cuts on his wrist, a bruised forehead, and an injured shoulder.<sup>77</sup> Graham eventually filed a federal civil rights suit against the individual officers involved in the altercation, alleging they had used unconstitutionally excessive force.<sup>78</sup> Ultimately, the Court in *Graham* concluded that, in making such a determination, courts should examine the objective reasonableness of the officer’s actions by carefully balancing the “nature and quality of the intrusion on the individual’s Fourth Amendment interests” against the countervailing governmental interests at stake.<sup>79</sup> In conducting such a balancing test, courts are permitted to consider “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.”<sup>80</sup> Thus, the *Graham* decision explicitly includes a careful calculation of the effect of any regulation on the safety of the officer and others. Any rule that would unreasonably imperil the safety of others appears to be one the Court would view with greater skepticism.

Similarly, in *Scott v. Harris*, the Court examined whether police officers could put a fleeing motorist at serious risk of injury or death in order to prevent

---

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 389–90.

78. *Id.* at 390.

79. *Id.* at 396 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

80. *Id.*

that motorist from fleeing in a manner that may be dangerous to nearby bystanders.<sup>81</sup> The case started when a Georgia county deputy clocked a suspect traveling eighteen miles over the speed limit and began pursuit. As the chase continued, the suspect's speed exceeded eighty-five miles-per-hour.<sup>82</sup> At one point, the suspect also evaded officers by colliding with an officer's car as he exited a parking lot and proceeded down a two-lane highway.<sup>83</sup> About six minutes and ten miles later in the chase, Deputy Timothy Scott pushed his car's bumper into the rear of the fleeing vehicle, causing the suspect to lose control of his car, overturn, and crash into an embankment.<sup>84</sup> The accident severely injured the suspect, later identified as Victor Harris, and left him as a quadriplegic.<sup>85</sup> Mr. Harris filed suit against Officer Scott alleging that his use of the car maneuver to end the chase constituted an unreasonable seizure under the Fourth Amendment.<sup>86</sup> At issue on appeal was the question of whether Deputy Scott's actions, taken in the light most favorable to Mr. Harris, could constitute a Fourth Amendment violation.<sup>87</sup> In making this determination, the Court examined the video of the pursuit, and determined that Mr. Harris was driving in a manner that endangered human life.<sup>88</sup> Based on this, the Court determined that Deputy Scott did not violate Mr. Harris's Fourth Amendment rights.<sup>89</sup>

In *Scott*, the Court independently balanced the nature and quality of the intrusion against the importance of the governmental interest at stake.<sup>90</sup> In applying this test, the Court concluded that Deputy Scott was justified in pushing Mr. Harris off the road in order to ensure "public safety."<sup>91</sup> Given that Mr. Harris "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the other officers involved in the chase," Deputy Scott's actions did not violate the Fourth Amendment.<sup>92</sup> Thus, the Court in *Scott* was understandably concerned about the way that court regulation may impair the ability of police officers to ensure public safety. In addition to case law, officers have frequently cited concerns about safety when facing other forms of external regulations on officer use-of-force.<sup>93</sup>

---

81. 550 U.S. 372, 374 (2007).

82. *Id.* at 375.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 375–76.

87. *Id.* at 376.

88. *Id.* at 380 ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him.").

89. *Id.* at 381.

90. *Id.* at 373 (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

91. *Id.* at 383.

92. *Id.* at 384.

93. Approximately 125 officers brought the suit (which represents around 10% of the police force in Seattle). These officers did not have the support of the police union. Interestingly, these officers used crowdsourcing to get the funding for the suit. Tim Crushing, *Seattle Cops Crowdsourcing Legal Battle Against DOJ-Imposed Excessive Force Remedies*, TECH DIRT (Sept. 12, 2014, 9:18 AM),

Overall, though, there appears to be, both among courts and among police officers, a genuine concern that external legal regulation may contribute to officers being more hesitant to use necessary force, and further concern that “this hesitation might end up” causing an officer to be “killed or assaulted.”<sup>94</sup>

### 7. *Simplicity*

Finally, courts and other policymakers have emphasized that police regulations should be sufficiently simple so that law enforcement can easily understand and apply them to different factual scenarios.<sup>95</sup> According to this line of thinking, unclear and complex regulations increase the probability that law enforcement might, even if acting in good faith, misapply rules.

In the *Gant* case described earlier, Justice Alito emphasized the need for the Court to create workable rules for police that can be easily applied to different factual scenarios: “The *Belton* rule . . . was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply.”<sup>96</sup> Alito worried that the Court’s departure from the *Belton* rule would “reintroduce” the exact sort of “case-by-case, fact-specific decisionmaking [sic]” that it ought to avoid when regulating police.<sup>97</sup>

The Court expressed a similar concern in the majority opinion in *Atwater v. City of Lago Vista*.<sup>98</sup> There, a Texas state law permitted police officers to arrest offenders who violated traffic laws for failure to wear a seatbelt, even though the punishment for such an offense was a mere fine.<sup>99</sup> In upholding the legality of the arrest, the Court stressed the importance of “clarity and simplicity” in police regulations.<sup>100</sup>

### B. *The Need for Empirical Research*

Research about the relative importance of competing procedural values during external regulation is important. Courts and policymakers often speak in vague generalities, with little empirical evidence, about which values matter most to police. At various times, courts and policymakers have seemingly sug-

---

<https://www.techdirt.com/articles/20140910/06201228473/seattle-cops-crowdsourcing-legal-battle-against-doj-imposed-excessive-force-remedies.shtml>.

94. Rushin & Edwards, *supra* note 47, at 737.

95. Stephanie K. Pell & Christopher Soghoian, *Can You See Me Now?: Toward Reasonable Standards for Law Enforcement Access to Location Data That Congress Could Enact*, 27 BERKELEY TECH. L.J. 117, 124 (2012) (explaining that rules for police ought to be clear and articulable); Stephen Rushin, *The Legislative Response to Mass Police Surveillance*, 79 BROOK. L. REV. 1, 4 (2013); Charlie Savage, *Judges Divided over Rising GPS Surveillance*, N.Y. TIMES (Aug. 13, 2010), <https://www.nytimes.com/2010/08/14/us/14gps.html> (Professor Orin Kerr arguing that police need clear rules).

96. *Arizona v. Gant*, 556 U.S. 332, 360 (2009).

97. *Id.*

98. 532 U.S. 318, 350 (2001).

99. *Id.* at 323.

100. *Id.* at 347.

---

---

gested that police need rules that are simple, consistent, cheap, and predictable. No doubt, by themselves, each of these may be an important procedural value. But a rule that enhances one of these procedural values will often do so at the expense of another important value. Thus, the question is not whether these values are important. Instead, the challenge for policymakers is to determine which procedural values ought to take precedent when they are in conflict.

Of course, this is a normative question. It requires policymakers to make political, practical, and moral judgments. One way to assist courts and legislators in making these difficult decisions is to offer empirical evidence on how relevant stakeholders in the criminal justice system rank the comparative importance of these competing values. This is an enormous empirical undertaking, and this Article could not possibly study all relevant stakeholders affected by police regulation. Instead, we have chosen to study one subgroup within this field: police leaders.

We believe that police leaders are well positioned to provide useful insight into how police officers across the country rank the relative importance of these values. Virtually all police leaders have spent years working as rank-and-file officers before moving into management roles. But unlike rank-and-file officers, police leaders are more likely to have a holistic understanding of how regulations affect their agencies. For example, leaders within police departments may be more in tune to the costs that regulations impose on agencies or how they affect different constituencies within the larger population of rank-and-file officers. They have regular contact with rank-and-file officers.

We recognize, though, that police leaders may not always be representative of the entire population of police officers in the United States. We also recognize that other stakeholders may have drastically different opinions on the relative importance of these procedural values. This study should serve as the beginning of a broader exploration of the relative importance of procedural values during police regulation. Future studies may examine the opinions of rank-and-file officers, judges, prosecutors, defense attorneys, and members of the public.

### III. METHODOLOGY

The existing literature suggests that courts and policymakers consider a wide range of procedural values when handing down regulations of American police departments. The purpose of this study is to evaluate the comparative importance of each of these procedural values to American law enforcement leaders. To do this, our study relies on a survey taken by heads of law enforcement agencies from across the country conducted in late 2016. The Sections below describe the administration of the survey and profiles the respondents. It also provides background on the survey instrument and the timing of the survey administration. Finally, we describe the multidimensional preference-scaling model used in this study.

*A. Population, Sample, and Respondents*

Our survey sought opinions from the population of law enforcement leaders in the United States.<sup>101</sup> We defined law enforcement leaders as the head of a law enforcement agency at either the local, state, or federal level. Admittedly, our focus on law enforcement leaders does not capture the entire population of American law enforcement officers. There are an estimated 605,000 individuals who work for local law enforcement agencies alone—the vast majority of which do not fall into the category of law enforcement leaders.<sup>102</sup> It may be useful for future researchers to survey the entire population of law enforcement officers (or some subset therein) and examine how the views of law enforcement leaders differ from others. Similarly, our focus on law enforcement agencies leaves out many stakeholders in the debate over police regulation, ranging from community activities, nonprofits, judges, public defenders, prosecutors, to the general public. This study leaves substantial room for future studies. Nevertheless, we believe that our survey of law enforcement leaders provides a valuable starting point in understanding how relevant stakeholders value the comparative importance of procedural values in police regulation.

One of the first challenges we faced in conducting this survey was identifying a comprehensive list of American law enforcement leaders. This is challenging in part because American law enforcement is remarkably decentralized. As one commentator put it, “[w]e are not a nation of one police force. We are a nation of thousands of decentralized police departments.”<sup>103</sup> The federal government conducts semiregular surveys of American law enforcement agencies.<sup>104</sup> To overcome this challenge, we gained access to a private company’s compilation of all law enforcement agencies in the United States and their respective leaders.<sup>105</sup> This directory contained the contact information for nearly 26,000 law enforcement agencies.<sup>106</sup> The number of agencies included in this commercial database is approximately consistent with the number of agencies identified by the Bureau of Justice Statistics in its semiregular Census of State and Local Law Enforcement Agencies.<sup>107</sup> This gives us reasonable confidence

---

101. We did not include law enforcement agencies found in U.S. territories and possessions because of their unique legal status, history, and potentially culture.

102. BRIAN A. REAVES, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES, BUREAU OF JUSTICE STATISTICS 2 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf> (showing that around 477,000 of these individuals are sworn officers).

103. RUSHIN, *supra* note 23, at 5.

104. REAVES, *supra* note 102, at 1.

105. NAT’L PUB. SAFETY INFO. BUREAU, NATIONAL DIRECTORY OF LAW ENFORCEMENT ADMINISTRATORS (54th ed. 2018).

106. This database also contained the contact information for a number of individuals that did not necessarily work as a leader of a law enforcement agency. In fact, the overall database included nearly 36,000 individuals. We limited our survey to only individuals who served as leaders of identifiable law enforcement agencies, which is closer to 26,000 individuals.

107. For example, the 2008 Census of State and Local Law Enforcement Agencies identified nearly 18,000 such agencies in the United States. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2008 2 (2011). The commercial database included contact

---

---

that this commercial database represents a fairly complete population of American law enforcement leaders.

A commercial database such as this also comes with some potential benefits. For one thing, the company updates this database annually. This increases the likelihood that the sampled survey respondents actually receive the survey. Of course, it is unavoidable that some survey respondents move, retire, or resign from their position in the time-span between when the contact information is gathered and when we sent out the survey. Yet, the high response rate of the survey (discussed in more depth below) suggests that this was rarely the case. Also, a number of law enforcement agencies contacted us directly either by phone or email to update the contact information of the current head of their agency. Finally, in some instances an incoming head of a law enforcement agency answered the survey for the outgoing leader.

The compilation of contact information included many agencies that are not engaged in law enforcement-type actions or criminal investigations. We excluded those but retained agencies that complete criminal investigations, turn those investigations over to prosecutors for enforcement, and are overall substantially similar to local law enforcement in their job description.<sup>108</sup>

Once we established a reasonably accurate database of American law enforcement leaders, we drew a random sample of 2,000 agencies.<sup>109</sup> Law enforcement leaders are typically busy and potentially disinclined to respond to surveys. As such, the large sample size was meant to increase the likelihood that a sufficiently high number of surveyed law enforcement agencies would respond to the survey. Table 1 provides descriptive information about the population composition, the sample composition, the number of responses received in each category, and their response rates.

TABLE 1: SURVEY POPULATION, SAMPLE,  
RESPONSES, AND RESPONSE RATES

---

information for leaders from between 21,830 and 22,229 state and local agencies (depending on how you define law enforcement agencies that serve railroads, airports, and harbors).

108. Appendix A includes the list of types of agencies that are included in the survey. Appendix B lists agencies that we excluded from the survey.

109. We did not utilize a stratified sample because we had no a priori reason to believe that the sample would not be well-balanced, and we had no way to determine which groups might provide unduly small numbers of responses.

TYPE	POPULATION	SAMPLE	RESPONSES	RATE
Municipal Law Enforcement	12,147	1,180	293	24.6
County Law Enforcement	5,801	317	64	20.2
Campus Law Enforcement	2,145	210	55	26.2
Law Enforcement Training	751	62	22	28.2
Airport, Harbor, Railroad Police	399	39	7	17.9
State Police & Highway Patrols	1,737	109	30	27.5
Federal Law Enforcement Agencies	1,910	49	14	28.6
Homeland Security	1,040	22	3	13.6
Military Agencies and Installations	381	7	1	14.3
<b>TOTAL</b>	26,311	2,000	489	24.45

The overall response rate of 24.45% is significantly higher than expected. Of course, we would have preferred a higher response rate, but we do not have any reason to believe that the response rate incorporates systematic selection biases.

The respondents cover a wide range of department sizes, serving a broad spectrum of populations, and facing a broad range of challenges. For example, the population served by survey respondents ranges from less than a thousand to the millions. The number of sworn officers among responding departments ranges from one single officer to thousands. Some law enforcement agencies serve wealthy suburbs and others poor rural counties and urban areas.

Similarly, the responding agencies are spread throughout the nation.<sup>110</sup> Figure 1 plots the geographic distribution of survey respondents by their zip codes. The figure highlights the broad range of survey respondents in keeping with the simple fact that there are law enforcement agencies throughout the nation. That being said, demographically denser areas of the country tend to have law enforcement departments in closer geographic proximity to each other, a fact reflected in Figure 1 by the variation in dots between Boston and Washington, D.C. as compared to the dots between Minneapolis and Portland.

FIGURE 1: GEOGRAPHIC DISTRIBUTION OF SURVEY RESPONDENTS BY ZIP CODES

110. Except Alaska. There were respondents from Hawaii, but they are not represented in Figure 1.

Figure 1 lends confidence that the survey respondents reflect law enforcement agencies from across the country, ranging from dense Eastern urban cores to sparsely populated Western counties.

### B. *Survey Instrument and Administration*

Initially, we attempted to conduct the survey electronically. We emailed a random sample of law enforcement agency heads, asking them to fill out an online survey. To increase response rates and protect survey responses, we hosted the survey on our own servers rather than using a commercial provider.

The response rate for the internet-based survey was abysmal at roughly 3%. This response rate stands in sharp contrast to the response rate we eventually received using a paper-based survey.<sup>111</sup> Given the low response rate on the electronic survey, we decided to not use any of the data from it.<sup>112</sup>

Instead, we decided to conduct the survey again, this time sending physical letters to the heads of law enforcement agencies. The letter contained a cover letter explaining who we are, the nature of the research, an enclosed survey, and a stamped return envelope. Survey subjects could return anonymous survey responses that did not include their names. This method potentially increased response rates and the truthfulness of the responses.

The heart of the survey was a list of values important in police regulation matters. The survey asked respondents to rank these values from most important to least important to the agency that he or she administers. The survey instructions did not allow for ties or weighting.<sup>113</sup> Table 2 provides the list of values that we chose to include on the survey and brief definitions for each.

TABLE 2: VALUES AND DEFINITIONS AS PROVIDED IN SURVEY TO A RANDOM SAMPLE OF HEADS OF LAW ENFORCEMENT AGENCIES IN THE UNITED STATES\*

<b>PROCEDURAL VALUE DEFINITION</b>
<b>CONSISTENCY</b> - Rules established in the past remain in place over time.
<b>COST</b> - It is not too costly for a police department to comply with the Rules.
<b>PREDICTABILITY</b> - Police officers can predict how courts will apply the Rules in different situations in the future.
<b>CITIZEN RIGHTS</b> - The Rules protect citizens from potentially harmful police conduct.

111. See *infra* Part III.C.

112. We report our early and unused attempts here to assist future researchers when they decide about how to structure their research.

113. See *infra* Appendix C.

SAFETY - Police officers can abide by the Rules without unduly reducing their own safety or the safety of others.

SIMPLICITY - The Rules are simple to understand and establish clear standards.

EFFICACY - The Rules promote effective crime detection and prevention.

PARTICIPATION - The Rules were developed with input from the law enforcement community.

\* In the survey, the order of the values was randomized across respondents.

Of course, the brief definitions of each value are brief and simplistic. We included the definitions to increase the likelihood that the survey respondents had similar understandings of what each term meant. Also, keeping definitions short increased the likelihood that busy agency heads would read and complete the survey.

The substantive results of this Article must be understood in the context of trade-offs that are made when conducting a survey. We had to make choices in how we labeled and framed each procedural value. These framing choices may have unexpectedly affected or skewed the responses we received from law enforcement leaders. There were likely many different ways that we could have framed each procedural value. We tried to lessen this concern by testing our survey instrument on a smaller cohort of law enforcement leaders before we submitted it nationally. Based on this test round, we made some minor alterations to the way we framed the procedural values used in the final survey instrument. We hope that respondents found the final survey instrument to be clear and easily digestible.

While we attempted to survey the existing literature to identify as many relevant procedural values as possible, we recognize that our list is certainly not exhaustive. We could have included a host of other values but decided against doing so. One of the core reasons for not including more values (or splitting existing values into more subtle shades and differentiations) was to keep the survey manageable for the survey respondents. Including more than a handful of values would likely confuse some survey respondents and perhaps lead to arbitrary or erroneous responses.

We included a sample survey in Appendix C. When administering the survey, we randomized the order of the survey items to reduce the risks that the order of items could influence the rankings (*e.g.*, that survey respondents systematically pick “cost” over “participation” simply because it appears earlier/later on the survey).

---

---

### C. *Timing*

As with any survey, the timing of the survey administration might affect outcomes. Short-term deviations caused by momentary and dramatic effects can obscure the detection of more stable norms.

This possibility is of particular concern in the context of police regulation matters. A high-profile killing of an on-duty police officer might persuade some law enforcement leaders to rate values like safety higher than they would under different conditions. Similarly, an egregious and highly publicized incident of police misconduct against a civilian may motivate some law enforcement leaders to rate values like citizens' rights higher than they would under different conditions. Thus, *when* a law enforcement leader takes the survey may have some influence on their responses. Unfortunately, in the era of cell phone videos and body cameras, it is often difficult to find a time when police behavior is not in the headlines. We made our best efforts to not administer the survey close in time to any major policing event that received national attention. Nevertheless, we cannot discount the possibility that some law enforcement leaders' responses were influenced by local media coverage. Our initial email survey was initiated in late September of 2016. The physical mail survey was conducted in late November and early December. Participants returned roughly half of all replies to the survey before the end of 2016, roughly 90% of the surveys were returned before the end of January 2017, roughly 95% by the end of February, and no responses arrived after March 2017.

### D. *Survey Notables*

The survey asked only for the return of the ranked values without any identifying information like addresses or names. However, numerous survey respondents decided to waive anonymity by including their names on the survey or by calling on the phone.<sup>114</sup> Also, some survey respondents included comments and narratives as part of the returned surveys. The comments ranged from sensible ("Go Sooners!") to nonsensical ("Go Crimson Tide!").<sup>115</sup>

Some comments pointed out important limitations of the survey instrument. For example, one survey respondent pointed out, "Forced Choice responses do not allow for true evaluation."<sup>116</sup> We take this comment to mean that forcing respondents to assign unique values forces respondents to differentiate between values, even where they might be equal. This comment highlights that the survey methodology could affect substantive results. We chose to force respondents to rank values to prevent answers that would in effect say that all values are equally important. All these values *are* important, but forcing people

---

114. We did not keep such records to protect the anonymity of the survey responses. Also, one survey respondent scanned the survey page and emailed it to us rather than returning it by physical mail.

115. On file with authors. Stephen Rushin worked at the University of Alabama School of Law at the time that we administered the survey.

116. On file with authors.

to choose between them nudges respondents to think long and hard about which value they prefer when push comes to shove. When a situation arises when you have to choose between cost and simplicity, which one would you choose? Despite instructions to rank all values uniquely, some survey respondents chose to rank two or more values at the same rank. Given the survey instructions, such responses are invalid. Still, we ran the following analysis twice. Once we included such “invalid” responses, and once we did not. The substantive results of these two approaches are essentially identical. This suggests that, given the question we asked and the population we contacted, the forced rankings did not drive the substantive conclusions of this Article.<sup>117</sup>

Other survey respondents pointed out differences between the surveyed populations. For example, campus law enforcement officers pointed out that they are not typical police departments. Similarly, National Park System staff pointed out that their law enforcement responsibilities are markedly different than typical police departments and that “many sites within the National Park System, especially small parks, do not have any [explicitly designated] law enforcement staff.”<sup>118</sup> We are mindful of these and other differences. In fact, our analysis explicitly differentiated (in relevant sections) between different types of law enforcement agencies in an attempt to detect whether differences in mission, locale, and culture might affect priorities over police regulation values.

Another group of survey respondents included general comments on the survey, both good<sup>119</sup> and bad.<sup>120</sup> Others commented broadly on police regulation values. For example, one survey remarked that “[o]ur courts are ‘random event generators.’ Law enforcement has zero expectation of consistency or predictability, as we’ve seen a lifetime of judicial activism, five-four decisions, and dramatically changing rules and expectations. We can’t wait to see the next poorly-informed policy du-jour . . . .”<sup>121</sup> Such comments suggest that survey respondents recognized that the survey asked about values that are salient to them.

### *E. Analysis*

The survey described above yields for each survey respondent a ranking, from 1–8, describing which values in police regulations are most and least important to the respondent’s agency. For 489 respondents, this leads to 3,912

---

117. Researchers asking different questions to a different population might want to consider allowing respondents to rank multiple values the same. Alternatively, researchers might want to allow survey respondents to attach weights to their answers (e.g. ranking cost at 90, and safety at 2, predictability at 1, etc.). This would allow survey respondents to indicate a magnitude of difference (a huge difference between “cost” and “safety” in the example above, but only a slight difference between “safety” and “predictability”). We did not choose this approach because of its complexity. We feared that busy survey respondents might be confused by this approach. This could lead to lower response rates or erroneous responses.

118. On file with authors.

119. *E.g.*, “Thank you for the opportunity!” (on file with authors).

120. *E.g.*, “Cannot complete. I have no idea what this survey refers to.” (on file with authors).

121. On file with authors (emphasis in original).

value rankings. To analyze, comprehend, and check for the presence or absence of patterns, we must process this data.

We do so in this Article by utilizing a multidimensional preference-scaling model.<sup>122</sup> The model is analytically attractive because it represents value rankings in a common and intuitive space. We begin by treating each individual survey as a vector pointing in eight-dimensional space. Next, we utilize a least-squares optimal scaling strategy to arrange values and individual preferences, as far as possible, so that each vector points to values ranked highly by the respondent and away from values the respondent ranked low.

This process allows us to represent all respondent rankings in one joint space. The method allows us to reduce the complexity of eight-dimensional space to any lower-dimensional space (such as three, two, or one dimensions). As a general rule, more dimensions represent the complexity of higher-dimension space more faithfully than lower-dimensional spaces. However, this improved statistical fit comes at the cost of interpretive difficulty. In the analysis below, we represent the survey responses in two-dimensional space as a good compromise between accuracy and ease of use.

Perhaps the most intuitive analogy for multidimensional scaling comes from representations of the solar system. The actual solar system is absurdly complex, with multiple objects constantly moving in off-plane almost-ellipses around the sun, constantly affecting and altering each other's trajectories. A model that incorporates this complexity would not be useful for most purposes. As a result, the solar system is sometimes represented by a simplified three-dimensional model (familiar from middle school science fairs). Still, that representation is not suitable for printing. As such, two-dimensional models of the solar system adorn countless books. The two-dimensional model is less accurate than the three-dimensional model but is useful for many contexts. Also, notice that the two-dimensional "slice" of the three-dimensional model is typically chosen that best captures the true orbits. Finally, for discussions that simply focus on the order of the planets, a one-dimensional representation of the solar system is sufficient. Multidimensional scaling, at heart, formalizes the process of moving from higher-dimensional spaces to lower-dimensional spaces.

---

122. The method is well explained and utilized elsewhere, so we will keep the explanation short here. For more thorough accounts, consider SUSAN C. WELLER & A. KIMBALL ROMNEY, METRIC SCALING: CORRESPONDENCE ANALYSIS 44–54 (Michael S. Lewis-Beck ed., 1990); Wayne S. DeSarbo & Crystal J. Scott, *Multidimensional Scaling of Preference Data*, in 2 WILEY INTERNATIONAL ENCYCLOPEDIA OF MARKETING 198 (Jagdish N. Sheth et al. eds., 2010); GORDON G. BECHTEL, MULTIDIMENSIONAL PREFERENCE SCALING (1976); J.D. Carroll, *Individual Differences in Multidimensional Scaling*, in MULTIDIMENSIONAL SCALING: THEORY AND APPLICATIONS IN THE BEHAVIORAL SCIENCES (A. Kimball Romney et al., eds., 1972). We conducted our analysis in R, using, mostly, the SMACOF package. See generally Patrick Mair et al., *Package 'smacof'* (June 14, 2018), <https://cran.r-project.org/web/packages/smacof/smacof.pdf>; Jan de Leeuw & Patrick Mair, *Multidimensional Scaling Using Majorization: SMACOF in R*, J. STATISTICAL SOFTWARE, Aug. 2009, at 1. This Article's approach, presentation, and discussion were inspired by William Jacoby. See William G. Jacoby, *Is There a Culture War? Conflicting Value Structures in American Public Opinion*, 108 AM. POL. SCI. REV. 754 (2014).

The result of all of this is that hundreds of complex survey responses can be represented in a single and intuitive figure. Similar respondents cluster together. Respondents that value fundamentally different things are in opposite sides of the figure. Values that are ranked together appear in physical proximity. Values that are ranked apart are physically apart. In short, multidimensional scaling simplifies a mountain of data into one figure that represents preferences over a range of values important in police regulation matters.

#### IV. FINDINGS

Overall, we found that respondents were most concerned with the ways that regulation may impair safety. Law enforcement leaders generally ranked citizens' rights as the next most important procedural value. Very few respondents ranked values like cost, participation, and predictability near the top in comparative importance. This section begins by walking through the distribution of importance rankings for all survey respondents. We then use the multidimensional preference-scaling model to examine more nuanced trends in the data. Overall, this analysis reveals there to be remarkable uniformity in the responses by police leaders across the country, regardless of department type, size, or geographical location.

##### *A. Initial Description of Survey Responses*

Before discussing the results of the more sophisticated multidimensional preference-scaling model, it is first useful to look at trends in the raw data.<sup>123</sup>

To do this, Table 3 documents the percentage of respondents that placed the procedural values in the survey instrument at each ordinal ranking. Some clear trends emerge from this relatively straightforward recitation of the data. It seems that some procedural values rise to the top, while others sink to the bottom in apparent importance.

A little more than 64% of law enforcement leaders ranked safety as the most important procedural value—far ahead of citizens' rights, which received just under 20% of all first-place rankings. No other procedural value received more than 8% of first-place rankings, with some (like predictability and cost) receiving less than 1% of first-place ranks. Together, safety and citizens' rights account for around 84% of all top rankings. On the other end of the results, respondents generally ranked consistency, cost, and predictability as among the least important procedural values. Around two-thirds of respondents ranked consistency (65.67%) and cost (6.68%) as one of the three least important procedural values. And more than three-fourths of respondents ranked predictability (77.96%) similarly low in relative importance.

---

123. For an example of another empirical study that starts by examining basic trends in raw data before diving into more advanced analysis, see Rushin & Edwards, *supra* note 47, at 759.

TABLE 3: DISTRIBUTION OF IMPORTANCE RANKINGS OF THE PROCEDURAL VALUES FOR ALL VALID SURVEY RESPONDENTS<sup>124</sup>

Score	Consistency	Cost	Predictability	Citizen Rights	Safety	Efficacy	Participation	Simplicity
1	2.32	0.46	0.70	19.72	64.04	3.71	1.86	7.19
2	1.62	2.32	1.62	40.37	24.59	11.37	7.66	10.44
3	10.21	4.64	2.78	15.78	5.10	23.90	16.71	20.88
4	8.82	8.58	7.42	10.44	2.78	21.35	21.58	19.03
5	11.37	16.01	9.51	6.73	1.86	17.87	18.79	17.87
6	20.42	15.31	16.94	3.94	0.70	12.53	16.47	13.69
7	19.26	21.35	32.02	1.62	0.70	6.73	11.37	6.96
8	25.99	31.32	29.00	1.39	0.23	2.55	5.57	3.94

While this sort of analysis is useful, it fails to answer many important questions. Does a law enforcement leader's high ranking of one procedural value predict how that leader may value other procedural values? For example, when a law enforcement leader ranks safety or citizens' rights as the most important value at stake during police regulation, does this ranking predict how she might rank other procedural values thereafter? Does the type of law enforcement agency affect the responses of the law enforcement leader? For example, we may expect sheriffs or federal law enforcement leaders to rank the values differently than municipal law enforcement leaders. Do geography, department size, or other demographic differences affect responses by law enforcement leaders?

Unfortunately, it is difficult to answer these sorts of questions using a simple analysis like that in Table 3. Doing so would require us to reproduce potentially dozens of tables comparing how various factors influence the rankings given by police leaders. Instead, in the subsections that follow, we use a multi-dimensional preference-scaling model to examine more complex trends in the data.

### B. Initial Model

Our first model, displayed as Figure 2, provides a two-dimensional scaling of the value rankings from Table 3. The model shows the most highly ranked response from Table 3 (safety) nearest to the center of the figure. The procedural values are shown as solid circles. Moving outwards from the center of Figure 2, responses become lower ranked. The arrow represents a vector showing the mean of all survey responses when averaged together (-10.85 degrees from the top, pointing upwards). This vector represents the most "typical"

124. Note: "1" indicates most important, "8" indicates least important. Each cell entry indicates the percentage of survey respondents who ranked a value in a given rank. Only valid responses were included in this table.

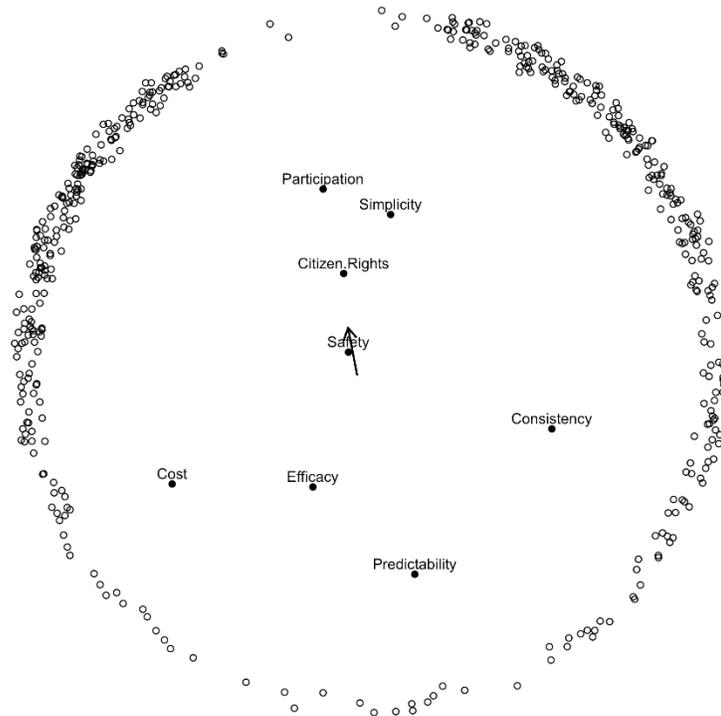
preference ordering by survey respondents. The open circles at the periphery are scaled responses from individual survey respondents. They have been normalized and jittered to de-clutter the figure and aid in the interpretation. This changes the length of the individual vectors but not the orientation. As such, it has no substantive effect on the interpretation.

One clear pattern emerges from this data. There is remarkable uniformity among the responses. Law enforcement leaders most frequently placed safety first, followed by citizens' rights. When respondents did not rank safety first, they typically ranked citizens' rights first, followed by safety.<sup>125</sup> The overall trend is clear—law enforcement across the country showed uniformity in their general responses to our survey—at least at the top.

---

125. As illustrated by the clustering of open circles near the top left and top right on the periphery of the figure, survey respondents largely clumped two patterns. We tried but were unable to detect any other sort of systematic explanation for this clumping.

FIGURE 2: TWO-DIMENSIONAL SCALING OF VALUE RANKINGS



While Figure 2 demonstrates remarkable consistency in the responses across the field of American law enforcement leaders, it leaves open many important empirical questions. For example, does the type of department affect the responses given by law enforcement leaders? Do municipal law enforcement leaders rank procedural values differently than sheriffs, federal law enforcement leaders, or university police leaders? Does geographical location influence the type of responses given by law enforcement leaders? Or does the size of the department have any effect on rankings given to these procedural values? The Sections that follow address these questions in turn.

### *C. The Effect of Department Type on Ranking*

It seems theoretically plausible that departmental type may influence the responses from police leaders. To test whether department type is correlated with changes in survey responses, Figure 3 uses the same multidimensional preference-scaling model to examine the clustering of responses according to department type. Again, the lines are the mean direction vectors for all survey responses with each type of department. Yet, the various departments are clustered too close together to allow for clear labeling. The lines represent, starting

on the left and going counter-clockwise, the following: National Park Services, Law Enforcement Training, Sheriff Departments, Police Departments, State Police Departments, U.S. Marshalls, Campus Law Enforcement, Transit Police (Air, Water, Rail).

FIGURE 3: TWO-DIMENSIONAL SCALING OF VALUE RANKINGS BY DEPARTMENT TYPE

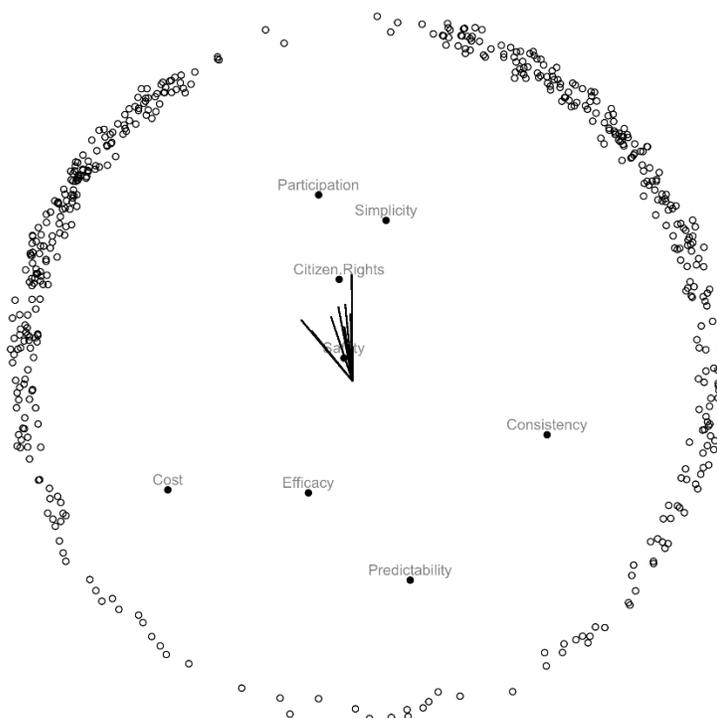


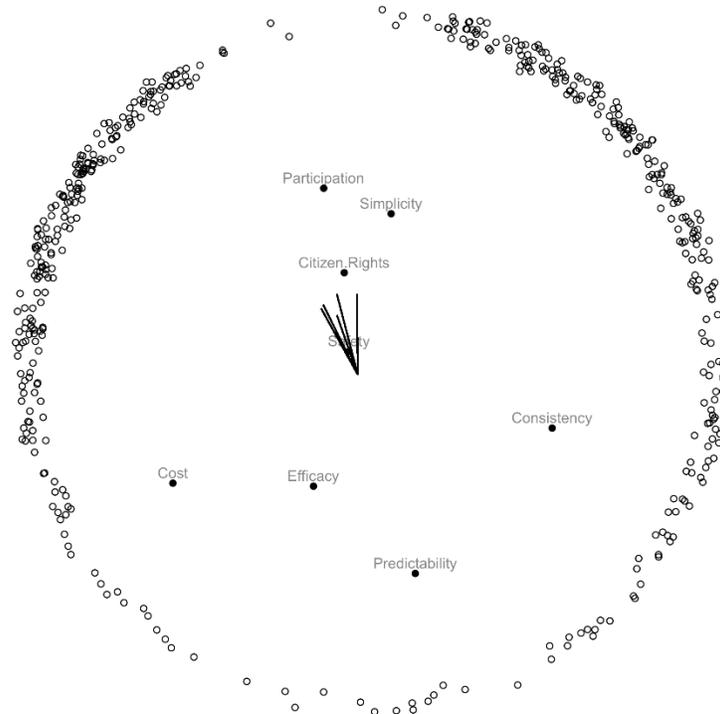
Figure 3 shows remarkable consistency in the answers given by police leaders regardless of the type of department they oversee. Virtually all law enforcement leaders across all different types of agencies ranked these values the same as the sample as a whole. Any minor variation appears to be statistical noise, rather than a measurable difference in responses.

*D. The Effect of Geographical Location on Rankings*

It also seems possible that the geographical location of the respondents may have influenced their answers. Again, Figure 4 uses this multidimensional preference-scaling model to look for any clustering of responses according to geographical region. Each line represents departments located in different areas

of the country. Labels have been removed to avoid clutter. The line on the left represents departments from the Midwest, followed, going counter-clockwise by departments from the Northeast, South, Southeast, and West.

FIGURE 4: TWO-DIMENSIONAL SCALING OF VALUE RANKINGS BY REGION



There appears to be no major difference in responses based on the geographical location. Respondents from all regions in the United States provided nearly identical responses.

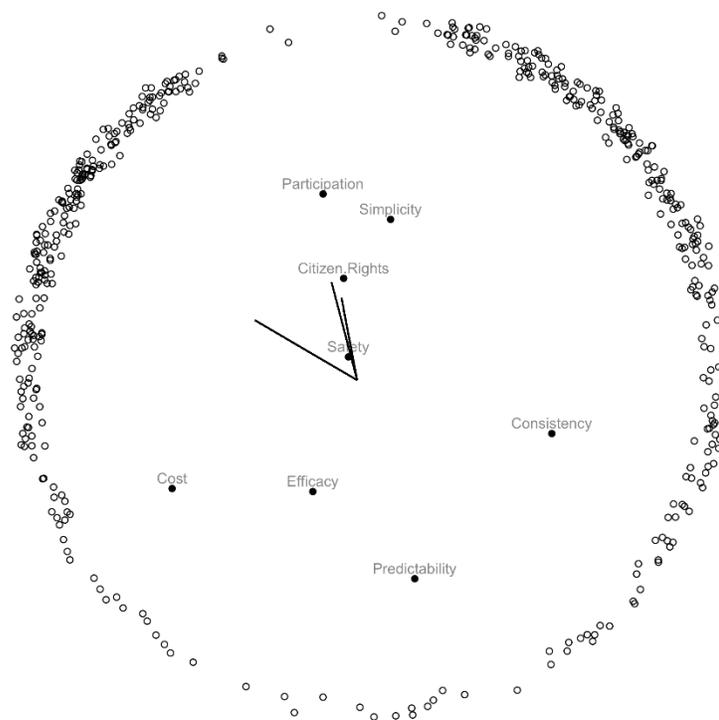
#### *E. The Effect of Department Size on Rankings*

Finally, we may expect the size of a law enforcement agency to affect the relative importance given to each procedural value by its leader. For example, smaller police departments may be more adversely affected than larger police departments by the upfront or fixed costs of implementing external police regulation. If this were the case, we may expect leaders of smaller police departments to rate values like cost as relatively more important than their peers in larger police departments. Alternatively, we expect larger police departments to be located in larger metropolitan areas with more politically progressive popu-

lations that place a higher value on citizens' rights. Thus, it may be that leaders from these larger agencies are more likely to value citizens' rights than smaller agencies.

To test the relationship between department size and rankings, Figure 4 mirrors the earlier figures, but with vectors that represent (from left to right) departments with more than (1) 1,000 sworn officers, (2) between 101 and (3) 1,000 sworn officers, (4) 11–100 sworn officers, and (5) fewer than 10 sworn officers.

FIGURE 5: TWO-DIMENSIONAL SCALING OF VALUE RANKINGS BY SIZE OF DEPARTMENT



Unlike the previous figures, Figure 5 reveals some separation. It appears that larger departments in our sample, or those with at least 1,000 sworn officers, offered somewhat different answers than their peers in smaller departments. On the whole, our data suggests that officers in larger departments were more likely to rank cost and efficacy higher than their counterparts elsewhere. But we have little confidence in the accuracy of this finding. There are simply too few departments of this size in the US, and even fewer in our sample that responded to our survey, to reach any strong conclusions. As such, we have lit-

the confidence that orientation of the leftmost line indicates that large departments are reliably different from smaller departments.

## V. IMPLICATIONS

Our findings suggest that police leaders are primarily concerned about the effects of police regulation on safety. Our results also indicate that police leaders recognize the comparative importance of protecting constitutional rights, even if doing so may risk crime prevention efforts. Finally, the results also demonstrate that policymakers may have previously overestimated the extent to which police are concerned about the cost, predictability, or consistency of legal regulations. These findings have several implications for the study of police accountability and criminal procedure.

First, these findings suggest that policymakers should take seriously the potential effects of external police regulations on officer safety. Courts and legislators may be wise to frame and administer police regulations in a way that reflects concern for this deeply held belief. Organizational and policing literatures have long argued that, while organizational reform requires “strategic planning, reorganization, reallocation of resources, recruitment and training of staff,” arguably the most important ingredient for successful reform is the receptivity of employees and those most affected by the reform efforts.<sup>126</sup> Doing so may increase the likelihood that police will accept legal regulations as legitimate. Further, if American police widely and uniformly perceive there to be a trade-off between safety and constitutional rights, this should serve as a call for academics to conduct more rigorous empirical evaluations of the link between police regulation and safety.

Second, the survey results also have important lessons for the ongoing depolicing debate. The comparatively high ranking given to the protection of constitutional rights ahead of values like crime prevention indicates that American police leaders appreciate the importance of constitutional policing—even if it may require compromising efforts to combat street crime. Over the last several years, critics have loudly claimed that efforts to regulate police misconduct may impair the ability of police officers to fight crime effectively.<sup>127</sup> One of the obvious questions, then, is whether this belief is widespread among American law enforcement. The data from this survey provides at least some insight into this question. It appears that efficacy—the variable we used to signify the relationship between regulation and crime control—was among the most salient values across American police leaders. Nevertheless, police leaders generally

---

126. John K. Cochran, Max L. Bromley & Matthew J. Swando, *Sheriff's Deputies' Receptivity to Organizational Change*, 25 POLICING: INT'L J. POLICE STRATEGY & MGMT. 507, 507 (2002) (citing Terry L. Amburgey, Dawn Kelly & William P. Barnett, *Resetting the Clock: The Dynamics of Organizational Change and Failure*, 38 ADMIN. SCI. Q. 51 (1993)). Of course, we cannot definitively say whether the opinions of police leaders are representative of all rank-and-file officers.

127. See, e.g., Mary Kay Mallonee & Eli Watkins, *DOJ Scaling Back Program to Reform Police Departments*, CNN (Sept. 15, 2017), <https://www.cnn.com/2017/09/15/politics/doj-police-program/index.html>.

ranked this value as secondary to the importance of protecting citizens' rights. Thus, our survey data suggests that, when in conflict, many police leaders in the United States may prefer that regulations protect civil rights, even if that means somewhat reducing the ability of police officers to fight crime aggressively.

Of course, opinions on this issue may vary among the wider field of American law enforcement. One regrettable, but unavoidable limitation of this study, is that it only surveyed the field of law enforcement leaders. Rank-and-file officers may be more inclined to worry about the effect of external police regulation on crime fighting efforts. They may also argue that they are better positioned to evaluate the relationship between regulation and efficacy than their peers in management positions. More research may be useful to explore how the opinions of management differ from those of rank-and-file officers on this issue. But one thing appears clear from our data: despite the heated and sometimes hyperbolic rhetoric that enters the national discussion about police regulation, many law enforcement leaders, just like civil rights advocates, claim to take the protection of constitutional rights seriously.

Third, the low rankings given to values like cost, predictability, and consistency should serve as a reminder to policymakers that our assumptions about police regulation are not always accurate. Policymakers have previously predicted that all three of these values were of particular importance to police leaders.<sup>128</sup> While we do not doubt that all three of these values may matter to some extent to police leaders, we can say with some certainty that they rank near the bottom relative to the other procedural values identified in our survey instrument. So why is this?

We have a few hypotheses. For one thing, the relatively low ranking given to cost may be the result of police leaders being insulated from the costs imposed by external regulations. In other contexts, policing scholars have recognized that the organization of local government structurally and organizationally separates the police leaders from the real costs imposed by regulatory mechanisms like civil judgments. As Professor Samuel Walker and Morgan Macdonald previously observed, in many governments, "one agency of government, the police department, commits abuses of rights, another agency, the city attorney's office, defends the conduct in court, and a third agency, the city treasurer, pays whatever financial settlements results from that litigation."<sup>129</sup> Thus, it may be that the typical police leader rates cost fairly low relative to other values because their department may not directly internalize the costs of regulation.

Additionally, the relatively low ranking given to predictability suggests that police leaders are more comfortable with ambiguity than some observers previously assumed. There are many plausible reasons why this may be the

---

128. *Id.*

129. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R.L.J. 479, 495 (2009).

case. Ambiguous rules may increase police power, which may be appealing to police leaders. When rules are ambiguous, police officers may have the ability to read them expansively until policymakers have instructed them otherwise.<sup>130</sup> This is particularly true because of the way that courts implement the qualified immunity doctrine. Unless an officer's conduct violates "clearly established law," qualified immunity protects that officer from civil liability under § 1983.<sup>131</sup> When it remains unclear how exactly a rule will apply to a future set of factual circumstances, the officer is generally protected from civil suit, as there is no "clearly established law."<sup>132</sup> So, rather than making police officers jobs more difficult, the qualified immunity doctrine may mitigate some of the negative side-effects of unpredictable regulations.

## VI. CONCLUSION

Across the country, communities are demanding that police become more accountable to the populations they serve, and the movement for police accountability shows no signs of letting up. As policymakers attempt to develop new regulations of police behavior, it is important that they not lose sight of the difficult compromises inherent in such regulation. At all levels of government, policymakers are currently crafting police regulations that require them to make value judgments—to regulate police behavior in a way that may promote one value at the expense of another. Before doing so, policymakers would be wise to understand the perspectives of stakeholders most affected by those regulations.

As this Article demonstrates, law enforcement leaders across the United States harbor serious concerns about the effect of regulation on safety. Nevertheless, these same leaders also recognize the importance of protecting constitutional rights, even if doing so impedes some crime prevention efforts. And our data suggests, courts and legislators may have overestimated the extent to which police demand consistent, predictable, and low-cost rules. These findings should have important implications to the doctrinal underpinnings of future criminal procedure cases.

It is important to remember, though, that police leaders are one of many constituencies affected by police regulation. It would be helpful for future researchers to replicate the methodology in this Article to examine the comparative importance of these values in the minds of other stakeholders, including rank-and-file officers, judges, and members of the general public. By carefully considering how stakeholders normatively rank the relative importance of these values, policymakers in the future can craft regulations that effectively balance the compromises required by constitutional police regulation. In politically contentious times, when the rhetoric surrounding police reg-

---

130. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2182 (2002).

131. *Pearson v. Callahan*, 555 U.S. 223, 243–44 (2009).

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

ulation frequently runs shrill, careful empirical work on this balance can help to provide a foundation for more nuanced commentary, doctrinal scholarship, court opinions, and legislation.

#### APPENDICES

##### APPENDIX A: TYPES OF LAW ENFORCEMENT AGENCIES INCLUDED IN SURVEY

Airport Police Departments  
Bureau of Alcohol, Tobacco, and Firearms  
Campus Law Enforcement  
City Sheriffs  
Conservation Law Enforcement  
County Police Departments  
Diplomatic Security Service  
Federal Bureau of Investigations  
Federal Protective Service  
Financial Crimes Enforcement  
Harbor Police Departments  
Homeland Security Investigations  
Law Enforcement Training (\*\*)  
Military Law Enforcement Agencies  
National Park Service  
Police Departments  
Railroad Law Enforcement  
Sheriff's Departments  
State Capitol Police  
State Criminal Investigation  
State Police/Highway Patrols  
U.S. Border Patrols  
U.S. Capitol Police  
U.S. Immigration & Customs  
U.S. Drug Enforcement Administration  
U.S. Marshals Service  
U.S. Secret Service

## APPENDIX B: TYPES OF LAW ENFORCEMENT AGENCIES EXCLUDED IN SURVEY

Adult Institutions  
Adult Probation & Parole  
Attorneys General  
Bureau of Indian Affairs  
Central Intelligence Agency  
Child Support Enforcement  
Citizenship & Immigration  
Coroners & Medical Examiners  
Corporation for National & Community Service  
Councils & Commissions  
County Attorney/Coroner  
County Jails  
County Jails (covered by Sheriff)  
Courts of Appeal  
District Courts  
Enforcement & Removal (ERO)  
Environmental Protection Agency  
Executive Office of the President  
Federal Bureau of Prisons  
Federal Correctional Institutions  
Federal Communications Commission  
Federal Emergency Management Agency  
Federal Railroad Administration  
General Services Administration  
Governors  
Hazardous Materials Safety  
Headquarters  
Internal Department Heads  
Internal Revenue Service  
Juvenile Probation & Parole  
Law Enforcement Associations (\*\*)  
Management  
Military Installations & Bases  
Military Law Enforcement Agencies (\*\*)  
Miscellaneous State Agencies  
Motor Vehicle Division Authorities  
Municipal Leagues  
National Institute of Justice

National Security Agency  
National Highway Traffic Safety Administration  
Office of Intelligence & Analysis  
Office of Domestic Preparedness  
Office of Air & Marine Operations  
Office of Field Operations  
Office of Homeland Security  
Office of Internal Affairs  
Ports of Entry  
Probation & Pretrial Services  
Prosecutors  
Related Associations  
Science & Technology  
Secretaries of State  
Sheriff/Coroner  
State Homeland Security Contacts  
State Law Enforcement Associations  
Strategic National Stockpile Programs  
Transit Authorities  
Transportation Security Administration  
Treasury Inspector General for Tax Administration  
U.S. Attorneys  
U.S. Coast Guard  
U.S. Consumer Protection Safety Commission  
U.S. Courts  
U.S. Department of Agriculture  
U.S. Department of Defense  
U.S. Department of Education  
U.S. Department of Energy  
U.S. Department of Health & Human Services  
U.S. Department of Housing & Urban Development  
U.S. Department of the Interior  
U.S. Department of the Treasury  
U.S. Department of Transportation  
U.S. Department of Veterans Affairs  
U.S. Forest Service  
U.S. Government Printing Office  
U.S. Postal Service  
U.S. Supreme Court Justices  
Women's Institutions  
Youth Institutions

## APPENDIX C: SAMPLE SURVEY INSTRUMENT

## INSTRUCTIONS:

This survey asks you to rank what is the most important and least important to your department/agency in police regulation matters.

For this study to be accurate, all items on the list need to be ranked, 1 for what you think is most important all the way through to 8 for the least important item, understanding that all of these items are important in their own right. Each item must have a unique number (in other words, please use all numbers 1-8, even if two items are close).

For example, if the survey was about ice cream and you liked Chocolate best, Vanilla second best, and Strawberry the least, you would fill out the survey like this:

Ranking	Item
2	Vanilla
1	Chocolate
3	Strawberry

Thank you again.



<b>Ranking</b> (1 is most important, 8 is least important)	<b>Value</b>	<b>Explanation</b>
	Consistency	Rules established in the past remain in place over time.
	Cost	It is not too costly for a police department to comply with the Rules.
	Predictability	Police officers can predict how courts will apply the Rules in different situations in the future.
	Citizen Rights	The Rules protect citizens from potentially harmful police conduct.
	Safety	Police officers can abide by the Rules without unduly reducing their own safety or the safety of others.
	Efficacy	The Rules promote effective crime detection and prevention.
	Participation	The Rules were developed with input from the law enforcement community.
	Simplicity	The Rules are simple to understand and establish clear standards.





