

August 31, 2026

Early Career Scholars Medal Selection Committee
The American Law Institute

Dear Members of the Selection Committee:

It is my great privilege to nominate Farhang Heydari, Associate Professor of Law at Vanderbilt Law School, for the American Law Institute's Early Career Scholars Medal. Professor Heydari joined our faculty in 2023 and has held a tenure-track appointment since that time, placing him within the Medal's eligibility window. In my seventeen years as Dean of Vanderbilt Law School, I have reviewed and recruited a large number of junior scholars. I can say with confidence that few have arrived with a research agenda as fully formed as Professor Heydari's, and fewer still have executed it so deftly.

Professor Heydari's scholarship proceeds from a deceptively simple observation: The law of policing has trained its attention on the municipal patrol officer. Yet that focus leaves most of the machinery of American policing unexamined and unregulated. Professor Heydari's project is to identify the institutional actors and incentive structures that generate policing on the ground. His scholarship seeks to explain why existing law has failed to reach the many other sources of policing besides the municipal officer, and it specifies the legal architecture to reach them. Each of Professor Heydari's articles locates an overlooked source of enforcement power, describes it in previously undocumented detail, and suggests a novel, concrete regulatory design for the future. The result is a body of scholarship that is both descriptively original and directly usable by legislators and agency officials. That combination is precisely what this Medal is designed to recognize.

Two early articles established the method. In *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696 (2022), Professor Heydari mapped the breadth of private influence across the criminal process, from crime prevention and emergency response through traditional investigation and adjudication procedures. There, Professor Heydari argued that public safety law must also govern those private inputs, rather than treat them as background conditions. In *The Invisible Driver of Policing*, 76 STAN. L. REV. 1 (2024), Professor Heydari demonstrated how the National Highway Traffic Safety Administration spent decades training state and local police how to use traffic stops to find drug traffickers, violent offenders, and even terrorists. That campaign, which proceeded almost entirely without public oversight, pulled the agency away from the systemic regulation of automakers—its actual mission. Professor Heydari then generalized this case study as a broader account of how non-law-enforcement agencies abandon regulatory duties in favor of individual criminal enforcement. Both of these articles were selected for review in JOTWELL, a distinction rarely accorded a scholar at this early stage.

Professor Heydari's article, *Rethinking Federal Inducement of Pretext Stops*, 2024 WIS. L. REV. 181, moves from a single agency to the federal apparatus as a whole. There, he catalogues the grants, training programs, and asset forfeiture arrangements through which federal agencies induce local departments to make pretextual stops. He further demonstrates how this practice of pretextual stops solves few crimes and imposes substantial social costs. Professor Heydari proposes that the federal government subject these stops to rigorous cost-benefit analysis; he further calls for greater monitoring of the incentives that drive these stops by Congress and the executive branch.

The Sheriff's Constitution, 113 GEO. L.J. 1041 (2025), then turns to another problem of constitutional urgency: the "constitutional sheriff" who declines to enforce the laws of which he disapproves. Professor Heydari situates the phenomenon within the long, understudied history of the sheriff's office. He shows that the principal features distinguishing sheriffs from police chiefs—direct election, countywide jurisdiction, and minimal supervision—can be corrosive to the rule of law. Professor Heydari's suggested remedy pairs reviving state judicial review of sheriff discretion with legislative reforms setting clearer enforcement parameters for sheriffs. As with all Professor Heydari's articles, the article produces ambitious, but feasible, solutions for state actors to regulate the less well understood forms of policing.

Professor Heydari's newest solo article, *Weird Cops*, 79 VAND. L. REV. (forthcoming 2026), may prove the most consequential of all. The article also closes the circle on the administrative-state thread running through his earlier work. *Weird Cops* identifies a category of law enforcement officials that legal scholarship has essentially ignored: over 130,000 officers employed by *regulatory agencies*, rather than police departments. These officers (i.e., the "weird cops") operate routinely alongside municipal police and federal agents. Furthermore, they are an integral part of the administrative state, rather than a curiosity at its margins. Professor Heydari further demonstrates how these officers carry broad police powers, despite facially narrow mandates. According to Professor Heydari, their signature risk is mission drift—the tendency of these officers, who are commissioned for a discrete regulatory purpose, to expand into the enforcement priorities of conventional policing. He additionally demonstrates how these officers are subject to even less oversight than the municipal police officers they increasingly resemble. Professor Heydari's proposed "limited cop" model would confine the authority of agency officers to enforcement actions tied to the agency's actual mission. Although the article will not be published until later this year, I expect it to define a field.

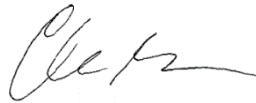
Professor Heydari's influence on public policy is not merely prospective. Before joining us at Vanderbilt, he served as the founding Executive Director of the Policing Project at New York University School of Law, where he built a staff of thirty and directed an advocacy program on policing technology. Professor Heydari chaired the Subcommittee on AI and Law Enforcement of the National Artificial Intelligence Advisory Committee. Under his leadership, the Subcommittee issued recommendations on public summary reporting for high-risk AI, public use policies for high-risk AI, and field testing of law enforcement AI tools. In addition, Professor Heydari served on the Axon AI and Policing Technology Ethics Board, where he authored the Board's reports on facial recognition and automated license plate readers. He is a principal author of the Department of Justice guidebook on collecting and analyzing police-stop data. Furthermore, Professor Heydari's evaluations of cutting-edge police technologies, which he has documented with coauthors in both *Putting Police Body-Worn Camera Footage to Work: A Civil*

Liberties Evaluation of Truleo's AI Analytics Platform, 46 CARDOZO L. REV. 2247 (2025), and *Regulating Police Robots*, 16 U.C. IRVINE L. REV. (forthcoming 2026), give regulators a framework for governing innovations adopted faster than the law can absorb them. Professor Heydari's scholarship consistently provides grounded, well-researched recommendations on novel topics directly to the officials best positioned to act upon them.

I should add that Professor Heydari is an exceptional teacher and colleague. He has won Vanderbilt's Hall-Hartman Outstanding Professor Award four times in three years of teaching. In addition to teaching the law school curricular staples Criminal Law and Criminal Procedure: Investigation, Professor Heydari has built two additional courses—Administering the Carceral State and Policing, Technology, and Artificial Intelligence—and has constructed his own materials for both courses. Professor Heydari is an active figure on campus, serving the law school and university through active committee work, presenting frequently at faculty workshops, and engaging in the broader Nashville community (including serving as a board member of a local nonprofit, Open Table Nashville). Not surprisingly, our faculty voted in December 2025 to promote him to Associate Professor of Law in one of the most enthusiastic proceedings I have ever witnessed.

Professor Heydari produces precisely the kind of scholarship the American Law Institute exists to encourage. He finds the parts of the legal system that no one is watching, describes them with rigor, and tells lawmakers what to do about them. For all these reasons, I recommend Professor Farhang Heydari for the Early Career Scholars Medal with great enthusiasm.

Sincerely,

A handwritten signature in dark ink, appearing to read "Chris Guthrie", with a stylized, flowing script.

Chris Guthrie
Dean
University Distinguished Professor
John Wade-Kent Syverud Professor of Law

Farhang Heydari

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ACADEMIC APPOINTMENTS

Vanderbilt Law School

Associate Professor, 2026 – present

Assistant Professor, 2023 – 2026

Criminal Law

Hall-Hartman Outstanding Professor Award 2025, 2026

Criminal Procedure: Investigation

Hall-Hartman Outstanding Professor Award 2024, 2025

Administering the Carceral State

Policing, Technology & Artificial Intelligence

New York University School of Law

Adjunct Professor, 2018 – 2023

Policing Externship

The Past and Present of Big Brother Policing

Columbia Law School

Lecturer-in-Law, 2015 – 2017

Consequences of Mass Incarceration Clinic

Advanced Federal Prison Litigation

Civil Rights Litigation

EDUCATION

COLUMBIA LAW SCHOOL, J.D.

James Kent Academic Scholar

Editor-in-Chief, *Columbia Law Review*

Outstanding Public Interest Student of the Year

Public Interest Initiative of the Year

HARVARD UNIVERSITY, B.A. Government

Phi Beta Kappa Honor Society

SERVICE

Open Table Nashville

Board Member (2025 – present)

U.S. Dep't of Treasury, National AI Advisory Committee, Subcommittee on AI & Law Enforcement

Chair (2024 – 2025)

Member (2023 – 2024)

Columbia Law School

Public Interest / Public Service Fellow Practitioner Board (2019 – 2023)

Public Interest / Public Service Fellow Selection Committee (2019 – 2022)

LEGAL SCHOLARSHIP

America's National Police (work in progress)

Genetic Frontiers (work in progress)

[Weird Cops \(Agency Police\)](#), 79 VANDERBILT L. REV. (2026) (forthcoming)

[Regulating Police Robots](#), 16 UC IRVINE L. REV. (2026) (forthcoming) (with Max Isaacs & Barry Friedman)

[Putting Police Body-Worn Camera Footage to Work: A Civil Liberties Evaluation of Truleo's AI Analytics Platform](#), 46 CARDOZO L. REV. 2247 (2025) (with co-authors)

[The Sheriff's Constitution](#), 113 GEORGETOWN L.J. 1041 (2025)

[Rethinking Federal Inducement of Pretext Stops](#), 2024 WISCONSIN L. REV. 181 (2024)

[The Invisible Driver of Policing](#), 76 STANFORD L. REV. 1 (2024)

Reviewed by Wendy Wagner, [NHTSA's Incredible Journey from Industry Regulator to Surrogate Cop](#), JOTWELL (June 2023)

[The Federal Government's Role in Local Policing](#), 110 VIRGINIA L. REV. 1527 (2023) (with Rachel Harmon & Barry Friedman)

[Policing Police Tech: A Soft Law Solution](#), 37 BERKELEY TECHNOLOGY L.J. 701 (2023) (with Barry Friedman, Katie Kinsey, Max Isaacs)

[The Private Role in Public Safety](#), 90 GEORGE WASHINGTON L. REV. 696 (2022)

Reviewed by Mary Fan, [Regulating Private Influences on Policing](#), JOTWELL (May 2023)

OTHER PUBLICATIONS & WRITINGS

[A Fear About Holistic Justice](#), 78 VANDERBILT L. REV. 1743 (2025) (symposium contribution)

[Why privatizing surveillance is the wrong move for Nashville](#), Op-ed, THE TENNESSEAN (Dec. 2025)

The National Artificial Intelligence Advisory Committee (NAIAC), Recommendation: [Field Testing of Law Enforcement AI Tools](#) (Sept. 2024)

The National Artificial Intelligence Advisory Committee (NAIAC), Law Enforcement Subcommittee, [Discussing a Framework for the Responsible Use of Facial Recognition Technology in Law Enforcement](#) (July 2024)

The National Artificial Intelligence Advisory Committee (NAIAC), Recommendation: [Require Public Summary Reporting on Use of High-Risk AI](#) (May 2024)

The National Artificial Intelligence Advisory Committee (NAIAC), Recommendation: [Require Public Use Policies for High-Risk AI](#) (Feb. 2024)

The National Artificial Intelligence Advisory Committee (NAIAC), Recommendation: [Expand the AI Use Case Inventory by Limiting the 'Common Commercial Products' Exception](#) (Feb. 2024)

[Biden just quietly took a key step to ‘decriminalize’ traffic safety policy](#), Op-ed, THE HILL (May 2024)

[If the feds are serious about police reform, they should stop encouraging bad policing](#), Op-ed, THE HILL (Aug. 2023)

[Report on Axon’s Project ION](#), POLICING PROJECT (Jan. 2023)

[Ring & Neighbors Public Safety Service: A Civil Rights & Civil Liberties Audit](#), POLICING PROJECT (Dec. 2021)

[Understanding Police Reliance on Public Data](#), HOOVER INSTITUTION (Oct. 2021)

[Collecting, Analyzing & Responding to Stop Data: A Guidebook for Law Enforcement Agencies, Government & Communities](#), U.S. Dep’t of Justice, Office of Community Oriented Policing Services grant award 2016-CK-WX-KOJ6 (Sept. 2020)

[Civil Rights & Civil Liberties Audit of Baltimore’s Aerial Investigation Research \(AIR\) Program](#), POLICING PROJECT (May. 2020)

[Second Report of the Axon AI Ethics Board: Automated License Plate Readers](#), AXON AI & POLICING TECHNOLOGY ETHICS BOARD (Oct. 2019)

[First Report of the Axon AI Ethics Board: Face Recognition](#), AXON AI & POLICING TECHNOLOGY ETHICS BOARD (June 2019)

[Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions](#), 110 COLUM. L. REV. 1526 (2010) (student note)

OTHER PROFESSIONAL EXPERIENCE

The Policing Project, New York University School of Law

Senior Advisor, 2023 – present

Executive Director, 2019 – 2022

Deputy Director, 2017 – 2019

Inaugural Executive Director of multi-disciplinary center focused on improving police accountability. Led a staff of approximately 30, fundraised and managed an annual budget of over \$4 million, and spearheaded [litigation campaign](#) and advocacy around [policing technologies](#). Named to *Government Technology*'s 2021 Top 25 Doers, Dreamers & Drivers.

Neufeld, Scheck & Brustin, LLP

Associate, 2015 – 2017

Johnnie L. Cochran Fellow, 2013 – 2015

Litigated complex civil rights actions representing victims of police, prosecutor, and other official misconduct, many with an emphasis on forensic science issues. Named a *Super Lawyers*, New York Rising Star in Civil Rights in 2017 and 2018.

Hon. Kimba M. Wood

U.S. District Court for the Southern District of New York

Law Clerk, 2012 – 2013

Hon. Diana G. Motz

U.S. Court of Appeals for the Fourth Circuit

Law Clerk, 2011 – 2012

BAR ADMISSIONS

New York

U.S. Courts of Appeals, including Second, Fourth, and Fifth Circuits (inactive)

U.S. District Courts, including SDNY, EDNY, WDNY, and D. Md. (inactive)



ARTICLE

The Invisible Driver of Policing

Farhang Heydari*

Abstract. This Article connects the administrative state and the criminal system—two dominant modes of governance that too often are discussed in isolation. It presents an original account of how the policies and the failures of federal administrative agencies drive criminal law enforcement at the local level. In doing so, this Article exposes a significant driver of criminal policy and possible interventions to correct some of its failures.

The primary vehicle for this analysis is an in-depth case study of the National Highway Traffic Safety Administration (NHTSA)—the federal agency best known for crash test dummies and five-star ratings as part of its traffic-safety mission—and its support for pretextual traffic stops. This Article unearths a series of NHTSA programs that have, for decades, trained state and local police to use traffic stops to ferret out drug traffickers, violent criminals, and even terrorists. NHTSA's embrace of a policing mindset has become an unexpected enabler of pretextual stops, one that has pulled agency resources away from systemic regulation of the auto industry. The impact of NHTSA's quiet campaign has been significant, engraining its view of traffic stops within policing agencies across the country without public visibility or oversight. These revelations come at a critical moment for a nation struggling with twin crises of traffic safety and policing.

* Assistant Professor, Vanderbilt Law School. This paper benefited tremendously from feedback received during talks at Boston University, Cardozo School of Law, University of Connecticut, Cornell University, George Washington University, University of Maine, University of Minnesota, University of San Diego, University of Texas, Texas A&M University, Vanderbilt University, and University of Washington. For their insight and feedback, a special thank you to Deborah Archer, Rachel Barkow, Hannah Bloch-Wehba, Ryan Calo, Brett Dignam, Donald Dripps, Andrew Ferguson, Daniel Francis, Barry Friedman, Brandon Garrett, Rachel Harmon, Alissa Marque Heydari, Olatunde Johnson, Emma Kaufman, Jennifer Laurin, Christy Lopez, Gillian Metzger, Tejas Narechania, Michael Pollack, Maria Ponomarenko, Sarah Seo, Chris Slobogin, Vincent Southerland, and Seth Stoughton. As always, I am grateful to the staff and interns of The Policing Project, past and present, especially Julian Clark, Eleanor Citron, Alice Hindanov, Annie Hudson Price, Helen Griffiths, Kate Mather, Jonte-Deandre Simpson, Lauren Spiegel, Sylvie Watts, and Marissa Zanfardino. A special thank you to S. Foley, who first alerted me to the DDACTS program, and to the Transportation Equity Caucus and our coalition partners for their tireless advocacy efforts. Finally, my immense gratitude to the editors of the *Stanford Law Review*, who performed wonders with this Article.

The Invisible Driver of Policing
76 STAN. L. REV. 1 (2024)

Learning from NHTSA and moving to the broader administrative state, this Article draws on a diverse set of agencies to identify a pattern of non-law-enforcement agencies shirking their systemic regulatory duties in favor of individual criminal law enforcement. The result is that parts of the administrative state have become systemic drivers of over-policing and criminalization in ways that have, until now, received virtually no attention.

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Introduction

On January 7, 2023, Tyre Nichols was driving after photographing the sunset in a park in Memphis, Tennessee.¹ He was stopped by a specialized criminal interdiction unit of the Memphis Police Department, purportedly for reckless driving.² Within minutes of the stop, Mr. Nichols was viciously beaten, repeatedly tased, pepper sprayed, and left handcuffed and immobilized.³ Mr. Nichols died from his injuries a few days later.⁴

In the aftermath of this killing, as in the aftermath of countless other lethal pretextual traffic stops,⁵ community leaders and policymakers called for critical reforms. There were demands to fire and prosecute the officers involved,⁶ to open a federal investigation into the department,⁷ to disband the plainclothes unit that initiated the stop,⁸ to pass federal police reform legislation,⁹ and to generally remove police from traffic enforcement.¹⁰

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1. *A Timeline of Events in Tyre Nichols Arrest, Death*, ASSOCIATED PRESS (Jan. 27, 2023, 8:47 PM PDT), <https://perma.cc/4MET-H422>; Adam Beam, Travis Loller & Claire Galofaro, *Tyre Nichols Remembered as Beautiful Soul with Creative Eye*, ASSOCIATED PRESS (Feb. 3, 2023, 11:31 AM PDT), <https://perma.cc/GL2N-44ZH>.
 2. Robin Levinson-King, *Unanswered Questions from Videos of Tyre Nichols' Arrest*, BBC (Jan. 30, 2023), <https://perma.cc/2LSG-KT94>; Mike Baker, *Special Memphis Police Unit Was Supposed to Stop Violence*, N.Y. TIMES (Jan. 27, 2023), <https://perma.cc/H7SR-95AQ>.
 3. Robin Stein, Alexander Cardia & Natalie Reneau, *71 Commands in 13 Minutes: Officers Gave Tyre Nichols Impossible Orders*, N.Y. TIMES (updated Feb. 1, 2023), <https://perma.cc/4VDM-26XB>; see also *City of Memphis*, VIMEO, <https://perma.cc/KVB9-2HKQ> (archived Oct. 10, 2023) (posting four official videos compiling footage of Nichols's death and the surrounding events).
 4. Bernd Debusmann Jr., *Tyre Nichols Autopsy Shows He Died of Blunt Force Injuries*, BBC (May 5, 2023), <https://perma.cc/9JTP-5PCH>.
 5. A pretextual stop is a traffic stop in which the officer has an ulterior, crime-fighting purpose. The killings of Daunte Wright and Philando Castile are recent high-profile examples. See Max Carter-Oberstone, *Opinion, America's Traffic Laws Give Police Way Too Much Power*, TIME (May 11, 2022, 4:45 PM EDT), <https://perma.cc/3UH5-8Y8Q>.
 6. *NAACP Memphis Calls for Prosecution, Termination of Those Involved in Tyre Nichols' Death, Urges Police Reform*, TENN. TRIB. (Jan. 30, 2023), <https://perma.cc/JZA3-KBHV>.
 7. Dakarai Turner, *Lawmaker Calls for DOJ to Investigate Memphis Police Department for 'Systemic' Policing Issue*, FOX13 MEMPHIS (Jan. 29, 2023), <https://perma.cc/55K8-8SSK>.
 8. Myracle Evans & Jacob Gallant, *Attorneys Call for Police Chief to Eliminate SCORPION Unit in Wake of Tyre Nichols' Death*, ACTION NEWS 5 (updated Jan. 27, 2023, 10:45 AM PST), <https://perma.cc/MM4J-2MW2>.
 9. Paul LeBlanc, *Public Outrage over Nichols' Beating Collides with Washington Bureaucracy on Police Reform*, CNN (updated Jan. 30, 2023, 12:59 PM EST), <https://perma.cc/MJM3-FG59>; see also Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527 (2023).
 10. Derecka Purnell, *Opinion, What Would Have Saved Tyre Nichols' Life?*, GUARDIAN (Jan. 30, 2023, 6:18 AM EST), <https://perma.cc/QYN6-TEZJ> (discussing demands from community-based group DeCarcerate Memphis).

These measures are vital, but what they have missed—indeed, what responses to the harms of widespread pretextual traffic stops have missed for decades—is the role of non-law-enforcement administrative agencies in promoting the practice. There is substantial literature exploring the legal rules that permit pretextual stops, the crime-control policies that encourage them, and the rampant harms and discrimination that result.¹¹ Despite all this study and public attention, a surprising proponent of pretextual stops has gone overlooked: the National Highway Traffic Safety Administration (NHTSA),¹² the federal administrative agency whose mission is to “[s]ave lives, prevent injuries and reduce economic costs due to road traffic crashes.”¹³

This Article has two primary aims:

First, it strives to shed light on NHTSA’s embrace of pretextual, crime-fighting traffic stops and to situate the agency’s use of this controversial policing tactic within the agency’s broader regulatory failures.¹⁴

Second, it seeks to use NHTSA’s invisibility in the world of pretextual traffic stops to reveal a larger myopia in our understanding of the relationship between the federal administrative state and crime-control agencies. Through a case study of NHTSA, as well as analysis of several other administrative agencies that have adopted crime-control mentalities, this Article identifies a pattern of agencies shying away from exercising their civil regulatory authority over private industry and instead addressing the social problems under their respective purviews through criminal law enforcement. By highlighting the connection between regulatory failure and policing, this Article seeks to bring attention to the administrative state’s role in driving our society’s overreliance on policing and criminalization.

* * *

NHTSA’s role in promoting the widespread use of pretextual, crime-fighting traffic stops is remarkable both because it has gone largely unexamined and because the agency’s history and mission are so distinct from

11. See *infra* Part I (collecting and summarizing this literature).

12. References to NHTSA in relevant scholarship are rare. Jordan Blair Woods discusses one of NHTSA’s programs in passing when discussing potential objections to the decoupling of traffic and criminal enforcement. See Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1540-41 (2021). In the social science literature, Xiaoyun Wu and Cynthia Lum mention this same NHTSA program as part of their assessment of the impact of traffic enforcement on crime. Xiaoyun Wu & Cynthia Lum, *The Practice of Proactive Traffic Stops*, 43 POLICING 229, 231-32 (2020). But to date no one has explored the agency’s longstanding support for pretextual traffic stops.

13. NHTSA’s *Core Values*, NHTSA, <https://perma.cc/BD6G-3FNE> (archived Oct. 22, 2023).

14. For a broader discussion of how federal policies encourage state and local police to use traffic stops as a crime-fighting tactic, see Farhang Heydari, *Rethinking Federal Inducement of Pretext Stops*, 2024 WIS. L. REV. (forthcoming 2024) (on file with author).

crime control. Congress established the agency during the Great Society, in the wake of mounting carnage on the roadways, to compel the auto industry to design and install safety features that might not otherwise serve the industry's bottom line.¹⁵ To accomplish this, Congress endowed NHTSA with significant forward-looking regulatory authority.¹⁶ And yet, over time, for a complex set of reasons discussed below, the agency took an increasingly deferential approach toward the auto industry and instead relied on policing to try to improve individual driver behavior.

The result has been three decades of programs that fund and train state and local police across the country to use high-volume traffic stops, ostensibly as a tactic both to improve traffic safety *and* to fight crime. These previously unexplored programs began as well-intentioned—though misguided—attempts to promote traffic safety. But NHTSA soon encouraged police to conduct traffic stops in order to ferret out drug traffickers and violent criminals and even argued that police could catch terrorists with this same strategy—all a long way from NHTSA's core regulatory mission.¹⁷

Although pretextual stops have long been part of policing, NHTSA's invisible campaign has had a considerable impact. NHTSA and its partners have trained tens of thousands of officers across the country.¹⁸ Its view of the traffic stop as a one-size-fits-all tool for traffic safety and crime fighting¹⁹ is deeply ingrained in policing.²⁰ And yet, there is reason to doubt that NHTSA's

15. Stephen D. Sugarman, *Nader's Failures?*, 80 CALIF. L. REV. 289, 290 (1992) (reviewing JERRY L. MASHAW & DAVID L. HAREFT, *THE STRUGGLE FOR AUTO SAFETY* (1990)) ("*The Struggle for Auto Safety* is one of several substantial recent studies covering traffic safety. None dissent from this simple vision behind the Motor Vehicle Safety Act: that auto makers, who concentrate more on styling and performance, have the capacity to design and manufacture safer cars, and that the new NHTSA would force them to do so."); *see also infra* note 114; Richard F. Weingroff, *A Great Day in America: USDOT's 50th Anniversary*, FED. HIGHWAY ADMIN.: PUB. ROADS (Sept./Oct. 2016), <https://perma.cc/9GZZ-42XT> (discussing the National Traffic and Motor Vehicle Safety Act of 1966).

16. *See infra* notes 111-14, 120-23 and accompanying text.

17. *See infra* Part II.B.3 (discussing NHTSA's evolving messaging regarding the crime-fighting impact of traffic stops).

18. *See infra* notes 193-96.

19. *See infra* Part II.B.1 (discussing NHTSA's earliest attempts to link traffic enforcement, traffic safety, and crime fighting).

20. *See, e.g.*, John Hall, *Why Police Need to Enforce Traffic Laws*, MANHATTAN INST. (Sept. 14, 2021), <https://perma.cc/4QFB-XYCR> ("Police traffic enforcement saves lives, reduces street disorder, and plays an important role in criminal investigations."); John Greenfield, Opinion, *Ex-CDOT Chief: Focusing on Crash Hot Spots Could Save Lives, Reduce Profiling*, CHI. READER (Jan. 25, 2017), <https://perma.cc/H6YN-6XY2> (discussing remarks by Gabe Klein, former commissioner of the Chicago Department of Transportation, advocating for police traffic enforcement); Joel Bolton, *Savings Lives, One Stop at a Time*, POLICE CHIEF, Mar. 2009, at 66, 66 ("In addition to increasing safety and improving public attitudes, the simple traffic stop is also a powerful tool in the

footnote continued on next page

approach is an effective solution to either traffic safety or crime.²¹ And while the agency does not collect or publish data on these programs, there is evidence that NHTSA's tactics generate serious social harms, including skyrocketing numbers of stops and attendant racial disparities. All of this has occurred with virtually no public visibility or oversight.

Disentangling NHTSA's traffic-safety mission from its embrace of pretextual policing comes at a critical moment for the nation. Our country faces a "crisis on our roadways."²² Road deaths, long a persistent national problem, have spiked to levels not seen in over a decade.²³ More Americans die in traffic crashes than in gun homicides.²⁴ This includes children under age eighteen, for whom traffic crashes are the leading cause of death.²⁵ This toll falls disproportionately on communities of color and communities experiencing economic hardship.²⁶

agency's crime fighting arsenal."); Steven Casstevens, *Traffic Enforcement Is Real Police Work*, LAW & ORD., Aug. 2008, at 44, 45 ("Criminals come and go in cars. If you have a problem with gangs, drugs, burglaries, etc., quite often you can be successful mitigating these problems with an aggressive traffic enforcement policy. . . . Aggressive and proactive traffic enforcement is the greatest tool law enforcement has in preventing crashes, preventing deaths and injuries as a result of crashes, as well as preventing crime."); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 10 (2014) ("Although police departments differ in many ways . . . the investigatory stop has spread widely among these agencies.").

21. See *infra* Part II.C.

22. Pete Buttigieg (@SecretaryPete), X (Jan. 27, 2022, 5:45 AM), <https://perma.cc/FD7P-G5H7>.

23. Ian Duncan, *U.S. Traffic Deaths Jumped in Early 2022, Hitting 20-Year High*, WASH. POST (Aug. 17, 2022, 2:44 PM EDT), <https://perma.cc/R5K7-BW7A>; KARA MACEK, GOVERNORS HIGHWAY SAFETY ASS'N, PEDESTRIAN TRAFFIC FATALITIES BY STATE: 2022 PRELIMINARY DATA 3 (2023), <https://perma.cc/U4VZ-6NLV>; *Motor Vehicle Deaths in 2020 Estimated to Be Highest in 13 Years, Despite Dramatic Drops in Miles Driven*, NAT'L SAFETY COUNCIL (Mar. 4, 2021), <https://perma.cc/68JH-PZZ7>; Press Release, NHTSA, 2020 Fatality Data Show Increased Traffic Fatalities During Pandemic (June 3, 2021), <https://perma.cc/7BCB-B77F>.

24. *Transportation Safety*, CDC, <https://perma.cc/2PMM-ZEUZ> (last updated June 29, 2023); *Assault or Homicide*, NAT'L CTR. FOR HEALTH STAT., <https://perma.cc/WHN5-ERKP> (last updated Sept. 14, 2023).

25. Joe Murphy, *President Biden Claims More Kids Are Dying from Guns than Cars. That's Not the Whole Story*, NBC NEWS (June 3, 2022, 10:38 AM PDT), <https://perma.cc/F6VF-ET5A>.

26. GOVERNORS HIGHWAY SAFETY ASS'N, AN ANALYSIS OF TRAFFIC FATALITIES BY RACE AND ETHNICITY 8 fig.2 (2021), <https://perma.cc/7NJB-FGX8> (finding that the traffic fatality rate for American Indians/Alaska Natives and Black Americans outpaced that for the general population); see also NHTSA, EARLY ESTIMATES OF MOTOR VEHICLE TRAFFIC FATALITIES AND FATALITY RATE BY SUB-CATEGORIES IN 2020, at 4 (2021), <https://perma.cc/GGL9-3VPG> (showing a 23% increase in traffic fatalities among Black people from 2019 to 2020); CITY OF CHICAGO, VISION ZERO CHICAGO: ACTION PLAN

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The Department of Transportation (DOT), NHTSA's parent agency, is poised to respond.²⁷ Flush with Congress's massive infrastructure investment, the DOT has the mandate and the means to transform the nation's approach to traffic.²⁸ But if the DOT's coming response reflects NHTSA's consistent embrace of crime-fighting traffic stops, it would stand in tension with a renewed national conversation over pretextual policing and the role of police in traffic enforcement.²⁹ President Biden's executive order on police reform called for "ending discriminatory pretextual stops."³⁰ A number of jurisdictions are rethinking the role of police in traffic safety and have taken action to limit pretextual stops or stops for certain minor traffic offenses.³¹

Beyond the immediate policy implications for pretextual stops and traffic safety, this Article explores broader issues around the relationship between

2017-2019, at 17 (2017), <https://perma.cc/DM57-QZEG> (finding that Black people and people living in "High Economic Hardship Communities" had disproportionately high traffic fatality rates in Chicago).

On the racialized effects of transportation policy generally, see, for example, Deborah N. Archer, Essay, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125 (2021); and Deborah N. Archer, "White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259 (2020).

27. See Pete Buttigieg, *Letter from the Secretary in U.S. DEP'T OF TRANSP., NATIONAL ROADWAY SAFETY STRATEGY*, at ii (2022), <https://perma.cc/7KF2-KE96>.

28. See Press Release, U.S. Dep't of Transp., President Biden, U.S. DOT Announce \$2.9 Billion of Bipartisan Infrastructure Law Funding for Major Infrastructure Projects of Regional or National Significance (Mar. 23, 2022), <https://perma.cc/27AR-S75X>.

29. See, e.g., Jared Goyette & Andrea Salcedo, *Police Fatally Shoot Man, 20*, in *Suburban Minneapolis, Sparking Protests*, WASH. POST (Apr. 12, 2021, 3:52 AM EDT), <https://perma.cc/Q9YM-BK86>.

30. Exec. Order No. 14074, 3 C.F.R. 371, 372 (2023).

31. On jurisdictions limiting pretextual stops legislatively, see, for example, David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022), <https://perma.cc/AB3M-S73R>; Sean Collins Walsh, *Philly Has Become the First Big City to Ban Minor Traffic Stops Said to Criminalize 'Driving While Black'*, PHILA. INQUIRER (updated Oct. 14, 2021, 6:42 PM ET), <https://perma.cc/LNG9-R7DB>; and Simone Weichselbaum, Emily R. Siegel & Andrew Blankstein, *Police Face a 'Crisis of Trust' with Black Motorists. One State's Surprising Policy May Help.*, NBC NEWS (Oct. 7, 2021, 2:00 AM PDT), <https://perma.cc/MM69-X35L> (discussing the impact of Virginia's ban on low-level traffic stops).

Some have explored removing police from traffic enforcement altogether. See, e.g., Woods, *supra* note 12, at 1477-78. Some policing agencies have voluntarily ceased making stops for minor infractions. See, e.g., Libor Jany, *Minneapolis Police to Scale Back Low-Level Traffic Stops*, STAR TRIB. (Aug. 12, 2021, 8:29 PM), <https://perma.cc/3TNG-LGQ7>.

Some prosecutors are declining to prosecute cases arising from pretextual stops. See, e.g., Amir Vera & Christina Harrega, *Minnesota County Attorney to Stop Prosecuting Non-Public Safety Traffic Stops in Honor of Philando Castile*, CNN (Sept. 9, 2021, 7:50 PM EDT), <https://perma.cc/B5GJ-L3EA>.

policing and the administrative state. How is it that, with persistent attention on pretextual stops since at least the mid-1990s, NHTSA's efforts flew under the radar for so long? The answer, at bottom, is that we view NHTSA as a civil regulatory agency, not one that influences crime-control tactics. The agency is best known for crash test dummies, five-star ratings, and vehicle recalls.³² But it embraced the pretextual traffic stop in an effort to convert state and local police into its agents.³³ In the process, the agency shifted its own limited resources away from systemic regulatory efforts and toward individual criminal law enforcement.³⁴

NHTSA's reliance on police is hardly unique within the administrative state. Drawing on a diverse set of examples, this Article identifies a pattern of administrative agencies being unable or unwilling to exercise their systemic regulatory authority over private industry and instead pivoting to individual criminal law enforcement. Although their motives and mechanisms for doing so vary, each agency justified adopting a crime-control approach by reframing the underlying social problem as one to be addressed through individualized criminal law enforcement.³⁵

This dynamic is of critical importance. The modern administrative state tasks agencies with tackling some of our nation's most complex social problems and grants them significant authority to do so. But there are a multitude of forces that make exercising that authority difficult. When agencies respond to these headwinds by turning to criminal law enforcement against individual actors, they drive both deregulation and mass incarceration.

Turning to the criminal law in lieu of civil regulation fuels an overreliance on police to address issues for which policing is ill-suited. Police have long served as the default government agency for addressing all sorts of social problems.³⁶ Yet, because of the tools they bring to bear, police rarely *solve* those

32. On crash test dummies, see, for example, *NHTSA's Crash Test Dummies*, NHTSA, <https://perma.cc/T4BU-QNP7> (archived Oct. 22, 2023). On vehicle safety ratings, see, for example, *Government 5-Star Safety Ratings for Motor Vehicles Advertising and Communication Usage Guidelines*, NHTSA, <https://perma.cc/937Y-S5UT> (archived Oct. 22, 2023). On recalls, see, for example, *NHTSA Recalls by Manufacturer*, U.S. DEP'T OF TRANSP., <https://perma.cc/95Y5-JBX6> (archived Oct. 22, 2023) (to locate, select "View the live page").

33. See *infra* Part II.B.1-.2.

34. See *infra* Part II.A.3.

35. See *infra* Part III.

36. See, e.g., EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 43 (1970) ("Many [police activities], perhaps most, consist of addressing situations in which people simply do not seem to be able to manage their own lives adequately."); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 118-22 (1968) (discussing the policing of public intoxication).

problems (nor should we expect them to).³⁷ In fact, policing-oriented solutions too often create significant harm in ways that drive our current system of overincarceration.³⁸ As scholars consider what right-sized policing might look like, the role of administrative agencies in encouraging and facilitating criminal law enforcement must be part of the conversation.

This Article proceeds in three parts:

Part I sets the stage for a case study of NHTSA by providing a brief background on pretextual traffic enforcement and its previously identified drivers.

Part II details NHTSA's previously unexplored support for traffic stops as a crime-fighting tool. Beginning with NHTSA's original mission and eventual failure to regulate the auto industry, this Part documents the circumstances in the early and mid-1990s that led NHTSA to begin promoting pretextual traffic stops. This Part also traces the mechanics of NHTSA's campaign, including its reliance on private law enforcement membership associations, and discusses its uncertain benefits and stark potential harms.

Part III then begins to generalize from NHTSA's turn toward policing. Using NHTSA's evolution, as well as other examples from across the administrative state, this Part discusses how and why some agencies turn to individual criminal law enforcement in lieu of systemic regulation. In doing so, this Part explores the depths to which crime-control approaches have penetrated parts of the administrative state and how administrative agency failure can create an underappreciated driver of criminalization.

I. A Brief Primer on Pretextual Traffic Stops

This Part details the incentives that drive police to conduct pretextual traffic stops and the social harms that often result. This background is essential to Part II, which explores NHTSA's transformation from an agency focused primarily on vehicle design, to one that promoted pretextual, crime-fighting traffic stops to improve driver behavior.

37. See, e.g., Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 942 (2021); see also *infra* note 462 (citing recent scholarship on this issue).

38. See, e.g., S. REBECCA NEUSTETER, RAM SUBRAMANIAN, JENNIFER TRONE, MAWIA KHOGALI & CINDY REED, VERA INST. OF JUST., GATEKEEPERS: THE ROLE OF POLICE IN ENDING MASS INCARCERATION 2 (2019), <https://perma.cc/GX22-9ZKW> ("With a growing consensus that local jails are a primary locus of mass incarceration, data on arrest trends points to an urgent need to focus more deliberately on one of the problem's primary points of origin: policing practices Police officers, as gatekeepers of the criminal justice system, hold almost exclusive authority—by way of citations, arrests, and even physical force—to enforce and regulate the law.").

Police have come to view the traffic stop as a core crime-fighting tactic—one of “professional policing’s most effective crime-fighting tools.”³⁹ This view of the traffic stop as a crime-fighting opportunity, in turn, encourages police to make pretextual traffic stops. Also referred to as “pretext stops,” “investigative stops,” or “discretionary stops,” pretextual traffic stops occur when police legally stop a vehicle for a traffic infraction that is not the actual motive for the stop.⁴⁰ In most pretextual stops, the officer’s ulterior motive is to investigate unrelated criminal activity for which the officer has no individualized suspicion.⁴¹

Pretextual (crime-fighting) traffic stops bear certain hallmarks. They often are initiated under circumstances in which the traffic infraction does not meaningfully implicate traffic safety: low-level speeding, rolling through a stop sign at an empty intersection, expired registration tags, or an air freshener hanging from a rearview mirror.⁴² From this initial stop, police take steps to

39. EPP ET AL., *supra* note 20, at 27; *see infra* note 45.

40. Elizabeth E. Joh, Essay, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 209 (2007) (“These abuses occur in the form of pretextual stops: occasions when the justification offered for the detention is legally sufficient, but is not the actual reason for the stop.”); *see also* EPP ET AL., *supra* note 20, at 59 (distinguishing between traffic-safety and investigatory stops); Marco Conner, *Traffic Justice: Achieving Effective and Equitable Traffic Enforcement in the Age of Vision Zero*, 44 FORDHAM URB. L.J. 969, 980 (2017) (distinguishing between “traffic injury responses, traffic safety violations, and discretionary traffic stops”). *Cf.* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 128 (2016) (defining “four overlapping types of government abuse: (1) *capricious* searches and seizures that are based on inarticulate hunches or whim . . . ; (2) *biased* searches and seizures, based on irrelevant criteria associated with discriminatory abuse or simple malice; (3) *pretextual* searches and seizures . . . ; and (4) *ultra vires* searches and seizures that go beyond the original investigative purpose of the search or seizure”).

41. One could also imagine a “mixed-motive” traffic stop, in which the officer is motivated by both traffic-safety and crime-fighting reasons. *See, e.g.,* State v. Arreola, 290 P.3d 983, 991 (Wash. 2012); *see also* Heydari, *supra* note 14 (manuscript at Part I.A) (exploring the definition of a pretextual traffic stop).

42. *See* Conner, *supra* note 40, at 983 (“Discretionary traffic stops mimic stop-and-frisk tactics common in major U.S. cities, and are part of a policy of so-called ‘quality of life’ or ‘broken windows’ policing, where minor offenses are targeted under the theory that this prevents major crimes.”); Janelle Bouie, *Broken Taillight Policing*, SLATE (Apr. 8, 2015, 2:53 PM), <https://perma.cc/96FL-KXJ8> (“[Investigatory stops are for] exceedingly minor violations—driving too slowly, malfunctioning lights, failure to signal—which are used as pretext for investigations of the driver and the vehicle.”). For specific examples of such stops, *see, for example*, Andy Mannix, *After Daunte Wright’s Killing, Criticism of ‘Pretextual’ Traffic Stops Grows*, STAR TRIB. (Apr. 17, 2021, 4:26 PM), <https://perma.cc/TL26-Z5KE>; Jackson’s Investigations, *The Right Turn of Tae-Ahn Lea . . . That Turned Ugly!! Soooo What Happened Again?*, YOUTUBE, at 04:30-04:43 (Jan. 31, 2019), <https://perma.cc/87HE-UPRB> (to locate, select “View the live page”) (police officers telling Lea they will stop “30 more people after you”); Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <https://perma.cc/AJF7-DMYB>; David Zucchino, *Reason I Stopped You Is Your Brake Light Is Out*, L.A. TIMES (Apr. 9, 2015, 5:23 PM PT), <https://perma.cc/S2UX-VVZQ>.

extend the encounter to ferret out criminal activity unrelated to the original traffic violation.⁴³ Common tactics police use to extend the encounter include probing questions and searches.⁴⁴ Use of these tactics can transform a stop initiated for a traffic-safety purpose into an investigative opportunity.

Proponents of the crime-fighting benefits of traffic stops point to high-profile criminal interdictions that result from ordinary stops.⁴⁵ No tale is more ubiquitous than the arrest of Oklahoma City bomber Timothy McVeigh, who was apprehended many miles from the scene after an officer noticed his van did not have a license plate.⁴⁶ The story of McVeigh's encounter has been repeated countless times, including by Justice Kennedy in his opinion justifying the DNA cataloging of arrestees.⁴⁷ "It is a common occurrence," Justice Kennedy observed, "that '[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.'"⁴⁸ There is no shortage of anecdotes to support Justice Kennedy's observation.⁴⁹ But these

43. See generally Woods, *supra* note 12, at 1480-88 (discussing the state of traffic policing in this country, with special attention to traffic enforcement as a crime-fighting tactic).

44. See, e.g., Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874 (2004) (listing criminal-records checks, interrogation on unrelated subject matter, seeking consent to a search, and use of drug-sniffing dogs as four investigative activities used to extend traffic stops).

45. E.g., Chuck Wexler, *What to Do About a Drop in Traffic Enforcement?*, POLICE EXEC. RSCH. F. (May 6, 2023), <https://perma.cc/788R-2W9Q> (recounting the traffic stop of Timothy McVeigh and noting that "[t]he traffic stop has been a staple of policing as long as there have been cars and cops"); Bolton, *supra* note 20, at 66, 66 (using McVeigh as an example); Richard J. Ashton, *License Plate Program Recognizes Valuable Contributions*, POLICE CHIEF, Jan. 2003, at 70, 70 (same); Jeffrey W. Runge, *Role of Traffic Law Enforcement in Homeland Security*, POLICE CHIEF, Oct. 2002, at 90, 93 (same); NHTSA, *The Facts*, LOOKING BEYOND THE TICKET: TRAFFIC L. ENFT & BEYOND, <https://perma.cc/47YR-A7RN> (archived May 30, 1998) (same); Lily Rothman, *How the Son of Sam Serial Killer Was Finally Caught*, TIME (Aug. 10, 2015, 7:00 AM EDT), <https://perma.cc/T6UJ-3MKG> (discussing how a parking ticket led to the arrest of the Son of Sam serial killer); see also *infra* note 49 (discussing other examples).

46. Hailey Branson-Potts, *After Oklahoma City Bombing, McVeigh's Arrest Almost Went Unnoticed*, L.A. TIMES (Apr. 19, 2015, 3:00 AM PT), <https://perma.cc/2KKX-AMFJ>; see also *supra* note 45.

47. *Maryland v. King*, 569 U.S. 435, 450 (2013).

48. *Id.* (alteration in original) (quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 334-35 (2012)).

49. For recent examples of police officers touting arrests and seizures resulting from traffic stops, see Marcelo A. Blanco (@UplandPDChief), X (May 12, 2023, 8:53 AM), <https://perma.cc/Y5WL-43ZH>; Paul Joseph (@SJPD_AC_Joseph), X (Mar. 6, 2022, 10:20 AM), <https://perma.cc/KT7G-LKYE>; and Rafael A. Mangual (@Rafa_Mangual), X (Feb. 15, 2023, 9:04 PM), <https://perma.cc/U5XR-KF8J>. See also Casstevens, *supra* note 20, at 44-45 (leading with "just two examples of excellent police work that happens every day all across the country").

individual stories do not necessarily translate to crime reduction or deterrence at scale.⁵⁰

Opponents of pretextual traffic stops point to the litany of harms and abuses that can result. All traffic stops are an inconvenience, but when an officer's pretextual motives are clear—such as when the officer initiates the stop for innocuous driving behavior or deliberately prolongs the stop using investigatory tactics—people feel targeted.⁵¹ The stops themselves also tend to be particularly intrusive—police ask probing questions, ask for consent to search, call in drug dogs, and so on—and insinuate that the person stopped is suspected of criminal activity. At scale, feeling targeted by law enforcement can create mistrust between police and entire communities, which in turn undermines public safety.⁵²

Scholars have also noted a variety of more immediately tangible harms: fines, which can balloon into license revocations, forcing people to risk driving without a license; property seizures; arrests for low-level open warrants, such as for unpaid fines or failure to appear in court; immigration enforcement; and, of course, police uses of force.⁵³ Although we lack comprehensive data on

50. See *infra* Part II.C.2 (discussing the uncertain crime-fighting benefits of pretextual stops).

51. See EPP ET AL., *supra* note 20, at 150; Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RES. L. REV. 931, 934 (2016).

52. See, e.g., Carla J. Barrett & Megan Welsh, *Petty Crimes and Harassment: How Community Residents Understand Low-Level Enforcement in Three High-Crime Neighborhoods in New York City*, 41 QUALITATIVE SOCIO. 173, 193-94 (2018); Chris L. Gibson, Samuel Walker, Wesley G. Jennings & J. Mitchell Miller, *The Impact of Traffic Stops on Calling the Police for Help*, 21 CRIM. JUST. POL'Y REV. 139, 147 (2010) (finding that “citizens experiencing one or more than one motor vehicle traffic stop in the past 12 months were less likely to ask for assistance/information from the police than those not experiencing a traffic stop . . . or more than one stop”); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2355 (2002) (arguing that racial profiling “arguably [has] the effect of reducing [minority] groups’ social status and increasing their sense of isolation from the broader American political community”).

On the relationship between community perceptions of police and public safety, see, for example, Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 COLUM. L. REV. 1235, 1296 (2017); and Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 217 (2011).

On police legitimacy and procedural justice generally, see, for example, Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1549-54 (2017); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2268-70 (2014); and Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 234 (2008).

53. On enforcement discretion resulting from traffic stops, see generally Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV.
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deaths during traffic stops,⁵⁴ a *New York Times* investigation found over 400 during a five-year period, many of which began with a stop for a minor violation—a hallmark of pretextual stops.⁵⁵ The encounters often escalated when the driver expressed frustration, disrespect, or disobedience—“what officers sometimes call ‘contempt of cop.’”⁵⁶ This dynamic is disproportionately present in pretextual stops, in which officers tend to act more intrusively, heightening the possibility of conflict.⁵⁷

Perhaps most importantly, these harms are not distributed evenly. Study after study confirms that Black, Hispanic, Native American, and other people

672, 681-82 (2015) (discussing the limits of reforms that focus on the sanctions attaching to traffic offenses but leave police enforcement authority and discretion untouched).

On property forfeiture and traffic stops, see note 78 below.

On the impact of low-level arrests, see generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS* POLICING 53 (2018) (discussing how misdemeanor prosecutions operate as a form of social control); and ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 19-38 (2018) (exploring the wide-ranging impact of misdemeanor enforcement).

On stops and immigration enforcement, see, for example, Robert Courtney Smith et al., *Disrupting the Traffic Stop-to-Deportation Pipeline: The New York State Greenlight Law’s Intent and Implementation*, 9 J. ON MIGRATION & HUM. SEC. 94, 95 (2021); Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 495 (2015); and Angela M. Banks, *The Curious Relationship Between “Self-Deportation” Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1172 (2012).

54. There is a significant gap between the actual number of fatal police shootings and the number reported to the federal government. See Andrew Ba Tran, Marisa Iati & Claire Healy, *As Fatal Police Shootings Increase, More Go Unreported*, WASH. POST (Dec. 6, 2022, 6:30 AM), <https://perma.cc/GP35-47PX>; Fablina Sharara et al., *Fatal Police Violence by Race and State in the USA, 1980-2019: A Network Meta-Regression*, 398 LANCET 1239, 1243 (2021) (revealing a significant gap between independently gathered data on fatal shootings by police and data reported by the federal government). Private projects have stepped in to fill the gap. See, e.g., *Fatal Force*, WASH. POST, <https://perma.cc/22LG-YPXF> (last updated Oct. 23, 2023) (noting that only a fraction of fatal police shootings are reported to the federal governments for aggregation); *Why FE Exists*, FATAL ENCOUNTERS, <https://perma.cc/GGD6-A587> (archived Oct. 28, 2023) (noting the lack of national database of fatal police encounters); *About This Project*, MAPPING POLICE VIOLENCE, <https://perma.cc/52CF-QVAL> (archived Oct. 28, 2023) (describing the gap between fatal shootings by police officers and reports of those shootings to the federal government).

55. David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (updated Nov. 30, 2021), <https://perma.cc/9CUK-SEBM>.

56. *Id.*

57. See EPP ET AL., *supra* note 20, at 7-8, 14 (“[I]nquisitive intrusions, like probing questioning and searches, are not scattered across all types of stops. They are concentrated in [pretextual] stops, and officers are much more likely to pursue these intrusions of African Americans than whites.”).

belonging to already-over-policed communities are disproportionately stopped by police.⁵⁸ These disparities are at their peak in pretextual stops, when police are at the height of their discretion in selecting whom to stop.⁵⁹ Black and Latino drivers are stopped disproportionately for minor infractions, such as vehicle defects—a common precursor to a pretextual stop.⁶⁰ These disparities would warrant intervention even if not explicitly driven by race, but evidence suggests race plays a role.⁶¹ In *Pulled Over*, the authors conclude that Black drivers are disproportionately stopped for traffic violations that did not implicate traffic safety (and thus were likely pretextual) but not for true

58. See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854-59 (2011) (citing numerous studies that have demonstrated evidence of racial profiling); see also OFF. OF THE INSPECTOR GEN., L.A. POLICE COMM'N, REVIEW OF STOPS CONDUCTED BY THE LOS ANGELES POLICE DEPARTMENT IN 2019, at 2 (2020), <https://perma.cc/FKA3-VT7R>; Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 740 (2020); Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://perma.cc/CZ57-PQDT>.

In the 1990s, litigation in New Jersey and Maryland provided irrefutable statistical evidence of racial profiling in traffic stops. DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 53-62 (2002) (discussing *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. 1996), and *Wilkins v. Maryland State Police*, No. 93-cv-00468 (D. Md. May 23, 2003)).

Studies also confirm disparities in searches. See Pierson et al., *supra*, at 739; Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <https://perma.cc/8K98-QGW9>. Likewise, studies confirm disparities in police use of force. E.g., Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1213-14 (2019).

59. See Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 643 (2021); EPP ET AL., *supra* note 20, at 110; David A. Harris, Essay, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 27 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 373 & n.176 (1998). But cf. Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops*, 116 NW. U. L. REV. 1481, 1487 (2022) (“Would a Fourth Amendment right against pretextual stops reduce racial disparities in the initiation of traffic stops? Our data suggest: no.”).

60. LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ NO. 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 4 tbl.2 (rev. 2016), <https://perma.cc/KD6X-DKYN> (finding that Black drivers reported the reason for a traffic stop as “[v]ehicle defect” nearly 50% more frequently than white drivers); EPP ET AL., *supra* note 20, at 60-61; see also *infra* notes 321-22 and accompanying text (discussing racial disparities in police stops in Nashville, including an 82% disparity between Black and white drivers in 2012 for nonmoving violations).

61. See generally Katheryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999) (discussing social consequences of equating Blackness with criminality, including discussion of “Driving While Black” and congressional legislation meant to address the issue).

traffic-safety stops.⁶² As the authors explained: “In traffic-safety stops, the most important influences on who is stopped are *how people drive* and not how they look. . . . In stark contrast, in [pretextual] stops, the most important influences on who is stopped are not how people drive but *how they look*.”⁶³

In the face of these harms, one might wonder why pretextual stops remain an ingrained police practice. To date, scholars have pointed to several overlapping reasons:

First and foremost, traffic laws give police essentially unchecked discretion to stop anyone at any time. As scholars have observed, our traffic laws are “so elaborate, so detailed, and so unrealistic” that officers have essentially unchecked discretion to stop whomever they please.⁶⁴ In fact, enforcement of our traffic laws has become the “general warrant of the twentieth century.”⁶⁵ In *Whren v. United States*, the Supreme Court held that so long as the officer had a legally valid reason to initiate the stop, the officer’s pretextual motives were irrelevant under the Fourth Amendment.⁶⁶ Scholars have subjected *Whren* to withering critiques.⁶⁷

62. EPP ET AL., *supra* note 20, at 60.

63. *Id.* at 64; *see also* Frank R. Baumgartner, Leah Christiani, Derek A. Epp, Kevin Roach & Kelsey Shoub, *Racial Disparities in Traffic Stop Outcomes*, 9 DUKE F. FOR L. & SOC. CHANGE 21, 25 (2017) (concluding that racial disparities are more likely to result from pretextual stops as compared to traffic-safety stops).

64. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 670 (2002); *see also* Woods, *supra* note 12, at 1480-81; Harris, *supra* note 59, at 559.

65. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 221 (1989) (capitalization altered); *see also* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (concluding that “police officers, if they are patient, can eventually pull over almost anyone they choose”).

66. 517 U.S. 806, 813 (1996).

67. *E.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 155-56 (2017) [hereinafter Carbado, *Stopping*]; Blanks, *supra* note 51, at 933-34; Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 916-23 (2015); Kevin R. Johnson, Essay, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1065-75 (2010); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 192-96; Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032-34 (2002); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 320-21 (2001); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1413-14 (2000); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978-83 (1999); Maclin, *supra* note 59, at 340; Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2010-
footnote continued on next page

Courts have also granted police expansive authority during the course of traffic stops. Police can review a driver's license, registration, and proof of insurance; check the validity of the license and registration against computer databases; run the license plate and driver's name for open warrants; "frisk" the vehicle;⁶⁸ seek consent to search the vehicle and persons; call in a drug dog to conduct a sniff; and arrest for any offense they uncover, even if the offense itself is only punishable by a fine and could be addressed via citation.⁶⁹

The "War on Drugs" has served as a particularly potent driver of pretextual policing.⁷⁰ Because drug offenses have no clear victim, police cannot rely on victims to bring drug activity to their attention, and so they must devise more proactive methods.⁷¹ As a result, pretextual stops have become a favored tactic and a driver of drug arrests.⁷² Responding to federal enthusiasm for the War on Drugs, the Drug Enforcement Administration (DEA) created a program instructing state and local police on how to use pretextual stops to interdict

11 (1998); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 566-68 (1998); Sklansky, *supra* note 65, at 274, 278-79; Harris, *supra* note 59, at 582; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 427 (1997); Diana Roberto Donahoe, Essay, "Could Have," "Would Have:" What the Supreme Court Should Have Decided in *Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1199-200 (1997).

68. A vehicle frisk is an extension of *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968), which permitted an officer to frisk a person they reasonably suspect to be armed and presently dangerous. See *Michigan v. Long*, 463 U.S. 1032, 1051 (1983) (permitting the frisk of a person, as well as the entire passenger compartment of the vehicle, including any unlocked containers located in the passenger compartment, if an officer has reasonable suspicion to believe the driver or passenger in a vehicle is dangerous and may gain immediate control of a weapon).

69. See Carbado, *Stopping*, *supra* note 67, at 151-62 (discussing the range of actions police can take before and during a traffic stop); LaFave, *supra* note 44, at 1874-98 (same); see also SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 231-266 (2019) (discussing the profusion of automobile-related Fourth Amendment cases at the Supreme Court and the resulting impact on police behaviors while on patrols). Cf. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2015 (2017) (describing how, in the 1960s, judges began deferring to police claims of crime-control expertise).

70. Many have noted the role of the War on Drugs on our criminal system. E.g., NAT'L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 342 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 4 (2011); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 60-73 (10th anniversary ed. 2020).

71. Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 745-46 (2016).

72. See, e.g., *id.* (citing David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249); see also LaFave, *supra* note 44, at 1844-45; Gross & Barnes, *supra* note 64, at 671.

drugs.⁷³ This program, dubbed “Operation Pipeline,” reached tens of thousands of officers beginning in the 1980s,⁷⁴ and drew considerable scrutiny in the 1990s, when “Driving While Black” became part of the national discourse.⁷⁵

Moreover, traffic stops are a revenue-generating tool. Traffic fines are a common source of revenue for some jurisdictions.⁷⁶ They are used to plug budget shortfalls or generate windfalls.⁷⁷ Civil forfeiture laws, which authorize police to seize assets with minimal justification and make it difficult for individuals to reclaim the property, create additional financial incentives for police to conduct traffic stops.⁷⁸ This revenue can drive police practices and is difficult to give up once relied upon.⁷⁹ Here, again, the federal government

73. Kreit, *supra* note 71, at 748; Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761-65 (2007); Gross & Barnes, *supra* note 64, at 670-72.

74. Bascuas, *supra* note 73, at 761-62.

75. See, e.g., David Kocieniewski & Robert Hanley, *An Inside Story of Racial Bias and Denial: New Jersey Files Reveal Drama Behind Profiling*, N.Y. TIMES (Dec. 3, 2000), <https://perma.cc/7ZEP-CDPP>; David Kocieniewski, *New Jersey Argues that the U.S. Wrote the Book on Racial Profiling*, N.Y. TIMES (Nov. 29, 2000), <https://perma.cc/6YFT-DBBJ>.

76. See Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (updated Nov. 2, 2021), <https://perma.cc/6Q79-V2NB> (“While tickets and the threat of punishment deter some would-be offenders, the need for municipalities to sustain [the ticket] revenue model appears to be an incentive for many traffic stops today.”).

77. See, e.g., John Archibald, *Police in This Tiny Alabama Town Suck Drivers into Legal ‘Black Hole’*, AL.COM (updated Jan. 20, 2022, 3:00 PM), <https://perma.cc/XB93-ZY4A> (“Months of research and dozens of interviews by AL.com found that Brookside’s finances are rocket-fueled by tickets and aggressive policing. In a two-year period between 2018 and 2020 Brookside revenues from fines and forfeitures soared more than 640 percent and now make up half the city’s total income.”); Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 88 (2009) (“[W]e find evidence that law enforcement officials issue significantly more tickets in the year following a decline in local government revenue.”).

78. See LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 5, 23 (3d ed. 2020), <https://perma.cc/2WK6-ATWS>. On the relationship between forfeitures and traffic stops, see, for example, Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 77 (2017); and Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 555 (2017). See also Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://perma.cc/5NYQ-T6KZ>.

79. See Kreit, *supra* note 71, at 748-50; see also Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (finding that financial incentives created by asset seizure “change the behavior of not only police but also county governments” and that “[w]hen police are really allowed to keep the assets they seize, they increase anti-drug policing”); McIntire & Keller, *supra* note 76 (discussing examples of government policies driven by a desire for more traffic revenue); Mike Maciag, *Addicted to Fines*, GOVERNING (Aug. 19, 2019), <https://perma.cc/M7AJ-7A9S> (finding nearly 600 jurisdictions across the country where fines account for more than 10% of general fund revenues).

plays a role. The Federal Equitable Sharing Program allows police to circumvent state restrictions on forfeitures by turning the forfeiture over to federal agencies and later reclaiming the funds.⁸⁰ This program alone has yielded billions of dollars in assets for state and local police.⁸¹

Finally, policing's heavy reliance on pretextual stops reflects a general tendency of policymakers and scholars to inadequately account for the social costs of police tactics.⁸² High-volume traffic stops are akin to zero-tolerance and broken-windows-enforcement strategies, the harms of which are rarely included in assessments of efficacy.⁸³ Instead, the focus inevitably returns to the perceived value of completed arrests and prosecutions, without examining the costs.⁸⁴

And yet, despite all the attention pretextual stops have received, a staunch advocate for the practice has, to date, escaped attention—the National Highway Traffic Safety Administration. The next Part details NHTSA's quiet but essential role in encouraging pretextual traffic stops.

II. NHTSA's Path Toward Pretext

NHTSA's mission to "[s]ave lives, prevent injuries and reduce economic costs due to road traffic crashes"⁸⁵ has not always translated into an embrace of pretextual, crime-fighting traffic stops. Congress created NHTSA in the bipartisan spirit of the Great Society, empowering it to improve road safety by forcing the auto industry to invest in safety innovations that otherwise might

80. See, e.g., Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 929-30 (2015) [hereinafter Harmon, *Federal Programs*]; Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 780 (2012) [hereinafter Harmon, *Problem*].

81. KNEPPER ET AL., *supra* note 78, at 6.

82. See, e.g., Wayne A. Logan, *Geography and Reasonable Suspicion in Auto Stops*, 48 N. KY. L. REV. 309, 327-28 (2021) ("To borrow from law economics, the harms constitute negative externalities that members of the public . . . not law enforcement, are forced to suffer."); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 188-89 (2017); Harmon, *Problem*, *supra* note 80, at 792-94 (noting that the regulation of police does not focus on whether their methods are "harm-efficient"—that is, whether their benefits exceed the total costs they impose on the public).

83. "Broken-windows policing" posits that crime is prevented by maintaining the details of social order, such as picking up litter, preventing teenagers from loitering, and fixing broken windows. See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 23-27 (2001); see also Harmon, *Problem*, *supra* note 80, at 794 (discussing the harm efficiency of broken-windows policing); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 815 (1999) (same).

84. On the costs of arrests, see Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313-320 (2016).

85. *NHTSA's Core Values*, *supra* note 13.

never exist.⁸⁶ That was the agency's initial focus.⁸⁷ Over time, however, as NHTSA suffered setbacks in exercising its civil regulatory authority over the auto industry, the agency came to rely more heavily on law enforcement to change driver behavior.⁸⁸

This Part details NHTSA's turn from a regulator of the auto industry to an agency that encouraged police to conduct large numbers of crime-fighting traffic stops. Subpart A provides a high-level overview of NHTSA's evolution. The goal of this Subpart is not to be comprehensive, but to demonstrate how, over time, the agency shifted its focus from changing vehicle design to relying on police enforcement strategies. Subpart B details a subset of those police enforcement strategies: NHTSA rhetoric, funding, and training to encourage police to use traffic stops as a core crime-fighting tactic. This Subpart begins in the mid-1990s, when NHTSA's influence over law enforcement seemed precarious. It details how NHTSA's messaging turned toward crime control and pretext and includes details of particular NHTSA programs.⁸⁹ Subpart C looks at the fruits of NHTSA's efforts, finding mixed evidence of benefits and stark social harms that went ignored by the agency. Subpart D turns to the prospects for correcting NHTSA's dubious reliance on pretext stops.

A. From Vehicle Safety to Driver Behavior

1. NHTSA's origins

The emergence of the automobile transformed every aspect of daily life.⁹⁰ In 1900, there were 8,000 registered motor vehicles in the country; by 1920, over 9 million; by 1970, when NHTSA was created, nearly 110 million.⁹¹ Millions of people experienced a newfound freedom of travel. Entire industries were born.⁹² But downsides of the automobile boom quickly emerged. Cities experienced acute traffic congestion,⁹³ automobiles became both a common

86. See *infra* notes 107-13 and accompanying text.

87. See *infra* notes 117-20 and accompanying text.

88. See *infra* notes 121-33 and accompanying text (discussing adverse court decisions, delays in notice and comment proceedings, and overt political hostility to the agency's mission).

89. See *infra* notes 188-204 and accompanying text.

90. SEO, *supra* note 69, at 9-10.

91. Off. of Highway Info. Mgmt., U.S. Dep't of Transp., State Motor Vehicle Registrations, By Years, 1900-1995 (1997), <https://perma.cc/P6DR-W9RM>.

92. See Warren Brown, *America's Auto Industry Geared Up a Century Ago*, WASH. POST (July 10, 1996), <https://perma.cc/U5HK-TZ82>.

93. SEO, *supra* note 69, at 21.

target and an instrument of crime,⁹⁴ and soon, traffic crashes began to present a profound threat to public safety.⁹⁵ In 1925, the country eclipsed 20,000 automobile deaths for the first time.⁹⁶ In 1966, the country exceeded 50,000 automobile-related deaths along with millions of injuries.⁹⁷

For decades, this carnage was viewed as a problem of individual behavior and, as a result, solutions were individual-focused. The auto industry, for example, blamed “driver habits” and “the unpredictable ‘human factor’ . . . beyond industry control.”⁹⁸ Local governments responded by enacting a bevy of traffic laws and implementing education campaigns to match.⁹⁹ Traffic-safety advocates focused on driver education and traffic-law enforcement to root out the “nut behind the wheel.”¹⁰⁰ Police forces were expanded to accommodate more enforcement¹⁰¹: Some policing agencies created dedicated traffic enforcement units while others made traffic enforcement part of every officer’s duties.¹⁰²

94. *Id.* at 103.

95. For more detailed discussions of the nation’s early difficulties with traffic safety, see, for example, PETER D. NORTON, *FIGHTING TRAFFIC: THE DAWN OF THE MOTOR AGE IN THE AMERICAN CITY* 19 (2008) (“Old street uses plus new automobiles equaled disaster. This fact transformed the city street between 1910 and 1930, but in ways few participants would have predicted.”); and Conner, *supra* note 40, at 973 (“Since the beginning of the twentieth century, the man-made pandemic of traffic violence has swept across the United States, killing and injuring people of all ages on highways and city streets.”). See also Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 501-02 (2020) (discussing the costs of car crashes).

96. NHTSA, *Motor Vehicle Traffic Fatalities and Fatality Rates, 1899-2021* (2023), <https://perma.cc/9APB-GFVU>.

97. *Id.* Although we lack official injury data for that period, data from later years demonstrates that injuries are routinely multiple orders of magnitude higher than fatalities. See NHTSA, DOT HS 809 484, *TRAFFIC SAFETY FACTS 2001: A COMPILATION OF MOTOR VEHICLE CRASH DATA FROM THE FATALITY ANALYSIS REPORTING SYSTEM AND THE GENERAL ESTIMATES SYSTEM* 14 tbl.1 (2002), <https://perma.cc/3LVT-EPWT> (documenting about 2 million crash-related injuries per year from 1988 to 2001, compared with around 40,000 deaths).

98. Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REGUL. 87, 92 (1985). For a discussion on how the automobile industry lobbied to keep its control over the roads, see NORTON, *supra* note 95, at 159 (“In the face of the saturation and safety crises, the auto industry organized.”).

99. SEO, *supra* note 69, at 23, 26, 44.

100. Claybrook & Bollier, *supra* note 98, at 92 (quoting S. REP. NO. 89-1301, at 3 (1966), reprinted in 1966 U.S.C.A.N. 2709, 2711, 1966 WL 4351).

101. SEO, *supra* note 69, at 76, 78.

102. See *id.* at 70-71.

Until the 1960s, this emphasis on modifying driver behavior through education and enforcement came at the expense of improving vehicle safety.¹⁰³ Vehicle manufacturers were left to self-regulate, resulting in minimal investment in safety innovation.¹⁰⁴ For example, despite billions in profits, the entire industry spent only \$2 million in 1965 on internal research and development relating to crash-safety improvements.¹⁰⁵ Ralph Nader's 1965 book, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile*, highlighted the degree to which car companies ignored known safety defects in their vehicles, elevating profits over safety.¹⁰⁶

By 1966, traffic safety—and the failures of automakers—had risen to such public prominence that the federal government was forced into action.¹⁰⁷ In his State of the Union Address, President Lyndon B. Johnson indicated support for new legislation.¹⁰⁸ Later that year, Congress unanimously passed the National Traffic and Motor Vehicle Safety Act, the Highway Safety Act, and the Department of Transportation Act.¹⁰⁹ Together, these acts created the DOT and empowered it to address vehicle safety and driver behavior.¹¹⁰

103. See JOEL W. EASTMAN, *STYLING VS. SAFETY: THE AMERICAN AUTOMOBILE INDUSTRY AND THE DEVELOPMENT OF AUTOMOTIVE SAFETY, 1900-1966*, at 209 (1984) (“In the post World War II period, none of the American automobile manufacturers had specially designated automotive safety engineers or departments. . . . [T]he automobile manufacturers continued to support the public’s original conception of the highway safety problem as one of driver responsibility for accidents . . .”).

104. Claybrook & Bollier, *supra* note 98, at 94 (“The result for decades was an auto industry that allocated almost no resources to improving the safety of its product.”); RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* 236 (1965) (“[U]nder existing business values potential safety advances are subordinated to other investments, priorities, preferences, and themes designed to maximize profit. Industry insists on maintaining the freedom to rank safety anywhere it pleases on the list of commercial considerations. In the protection of these considerations, the industry supports and fosters the traffic safety policy focused on driver behavior . . .”).

105. Claybrook & Bollier, *supra* note 98, at 94-95.

106. See generally NADER, *supra* note 104.

107. See Claybrook & Bollier, *supra* note 98, at 96.

108. 112 CONG. REC. 141, 143 (1966) (State of the Union Address by President Johnson).

109. National Traffic and Motor Vehicle Act of 1966, Pub. L. No. 89-563, 80 Stat. 718, *repealed and reenacted by* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended in scattered sections of 49 U.S.C.); Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (codified as amended in scattered sections of 26 U.S.C.); Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) (codified as amended in scattered sections of the U.S. Code) (creating the DOT).

110. See *supra* note 109.

A few years later, with the Highway Safety Act of 1970, Congress established NHTSA within the DOT.¹¹¹ Congress designed NHTSA to be one of the “first of a ‘new breed’ of regulatory agencies” that would harness rulemaking authority to address key social problems.¹¹² Congress envisioned an agency that solved problems through “prospective, categorical rulemaking” rather than “reactive, case-by-case” techniques.¹¹³

Congress endowed NHTSA with expansive authority in two distinct domains. First, NHTSA was empowered to use rulemaking and other regulatory tools “to compel motor vehicle manufacturers to develop and install safety technologies that could, at the time, only be dimly perceived.”¹¹⁴ Second, NHTSA could assist states in designing and implementing safety programs aimed at improving driver behavior.¹¹⁵ Of these two, observers expected the former to be the agency’s focus and have the greatest impact.¹¹⁶ Over time, however, the latter has come to dominate NHTSA’s approach.

2. Declining regulation of vehicle safety

In its early years, as anticipated, NHTSA used its rulemaking authority to “set[] performance standards for new motor vehicles and motor vehicle equipment.”¹¹⁷ NHTSA’s first standards, for example, required automakers to build in a range of safety innovations, including “collapsible steering

111. Highway Safety Act of 1970, Pub. L. No. 91-605, § 202(a)-(b), 84 Stat. 1739, 1739-40, *repealed and reenacted by* Act of Jan. 12, 1983, Pub. L. No. 97-449, 96 Stat. 2413 (codified as amended in scattered sections of 49 U.S.C.).

112. Alexandra A.E. Shapiro, Book Note, 91 COLUM. L. REV. 710, 711 (1991) (reviewing MASHAW & HARFST, *supra* note 15).

113. *Id.*

114. Jerry L. Mashaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REGUL. 167, 176 (2017). *See also* Michael J. Trebilcock, *Requiem for Regulators: The Passing of a Counter-Culture?*, 8 YALE J. ON REGUL. 497, 498 (1991) (reviewing MASHAW & HARFST, *supra* note 15); Shapiro, *supra* note 112, at 711; Claybrook & Bollier, *supra* note 98, at 96-97.

115. NHTSA (and its predecessor, the National Highway Safety Agency) was authorized to provide financial assistance to the states in order to encourage the adoption of effective highway-safety plans, which initially covered topics such as driver licensing, motor vehicle registration, and driver education programs. *See* Press Release, Off. of the Sec’y, U.S. Dep’t of Com., Standards for State Highway Safety Programs Are Announced (Feb. 16, 1967), *reprinted in* *Motor Vehicle Safety Standards: Hearing on the Implementation of the National Traffic and Motor Vehicle Safety Act of 1966 Before the S. Comm. on Com.*, 90th Cong. app. A, at 334 (1967), <https://perma.cc/M73Y-Y84B>.

116. MASHAW & HARFST, *supra* note 15, at 6. There are other, less germane aspects to NHTSA’s work. For example, “NHTSA tests and rates vehicle safety performance during frontal, side, and rollover crashes.” Sara C. Bronin, Essay, *Rules of the Road: The Struggle for Safety & the Unmet Promise of Federalism*, 106 IOWA L. REV. 2153, 2168 (2021).

117. Mashaw & Harfst, *supra* note 114, at 172.

assemblies to cushion the trauma to the head, neck, and chest in a crash,” “seat anchorages to prevent seats from tumbling around,” and much more.¹¹⁸ These early rules sometimes pushed the auto industry “into uncomfortable territory” by requiring innovations that the industry did not see as benefiting its bottom line.¹¹⁹ By the early 2000s, NHTSA rules that originated before 1974 were estimated to have saved hundreds of thousands of lives.¹²⁰

But NHTSA soon encountered judicial and political pushback to its rulemaking authority.¹²¹ NHTSA’s failure to implement its original passive-restraint rule provides a good example.¹²² The rule was meant to address poor voluntary seat belt use by forcing automakers to build in protections that did not require voluntary use—namely, airbags.¹²³ The standard was delayed for fifteen years “by adverse court decisions . . . by automakers’ paper barrage . . . [during the] notice-and-comment process, and by the Reagan administration’s attempt to repeal the rule outright.”¹²⁴ Finally, in the mid-1980s, a weakened standard went into effect that was little different from pre-NHTSA strategies.¹²⁵

118. See Claybrook & Bollier, *supra* note 98, at 98-99 (documenting many NHTSA standards from this period).

119. Mashaw & Harfst, *supra* note 114, at 172.

120. *Id.* at 184 (discussing CHARLES J. KAHANE, NHTSA, DOT HS 809 833, LIVES SAVED BY THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS AND OTHER VEHICLE SAFETY TECHNOLOGIES, 1960-2002: PASSENGER CARS AND LIGHT TRUCKS (2004), <https://perma.cc/W7JH-X9BR>).

121. See MASHAW & HARFST, *supra* note 15, at 25 (“Chapters 3 through 7 describe motor vehicle safety regulation from 1966 through 1974. . . . Courts, Congress, and the executive branch all seemed in differing ways to be inhibiting rulemaking, but supporting recalls.”); *id.* at 87-88 (discussing the Sixth Circuit’s decision in *Chrysler Corp. v. Dep’t of Transp.*, 472 F.2d 659 (6th Cir. 1972), enjoining the implementation of a major safety standard).

122. *Id.* at 86. See also John D. Graham & Patricia Gorham, Comment, *NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation*, 35 ADMIN. L. REV. 193, 194-95 (1983) (detailing the passive restraint rule and its rescission).

123. MASHAW & HARFST, *supra* note 15, at 85.

124. Shapiro, *supra* note 112, at 711-12 (footnotes omitted) (citing MASHAW & HARFST, *supra* note 15, at 87-103, 208-09). Examples of judicial decisions limiting NHTSA’s rulemaking discretion include *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 645 (9th Cir. 1978) and *Chrysler*, 472 F.2d 659.

125. Rather than force manufacturers to improve vehicle design, the 1985 version of the passive-restraint rule was intended to return to a driver-behavior approach to traffic safety—namely, encouraging states to pass mandatory seat belt laws to be enforced by police. See David Roos, *When New Seat Belt Laws Drew Fire as a Violation of Personal Freedom*, HISTORY (updated Aug. 4, 2023), <https://perma.cc/GCN4-SRJF> (“[Secretary of Transportation Elizabeth Dole] issued a rule in 1985 that required automakers to install driver’s side airbags in all new cars *unless*—and this is the kicker—two-thirds of the states passed mandatory seat belt laws by April 1, 1989. Dole’s rule was so politically adroit because it looked like a regulation, but was really a gift to the auto industry. Cars already had seat belts, so all Detroit had to do was convince states to pass mandatory

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In the mid-1980s, NHTSA entered what scholars Jerry Mashaw and David Harfst have called the agency's "Ice Age of Rulemaking."¹²⁶ Faced with political branches that were hostile to its regulatory mission, the agency turned away from forward-looking rulemaking regarding safety standards and instead embraced "case-by-case, retrospective recalls" of defective products.¹²⁷ By the early 1990s, this approach was "entrenched" in the agency,¹²⁸ despite the fact that it was unlikely to yield the benefits of direct regulation of vehicle design.¹²⁹

By the 2000s, when NHTSA returned to rulemaking, its approach was fundamentally different from the early days.¹³⁰ Spurred to action by congressional mandates, NHTSA adopted eight significant rules between 2003 and 2013, but rather than push the auto industry in new directions, these rules "largely codified technology that industry had already implemented, was in the process of implementing, had voluntarily promised to implement in the near future, or could implement easily based on existing technologies."¹³¹ As a former NHTSA researcher put it: "NHTSA rarely requires industries to do

seat belt laws and it was off the hook for installing expensive air bags or automatic belts.").

126. Mashaw & Harfst, *supra* note 114, at 182.

127. *See id.* at 170; MASHAW & HARFST, *supra* note 15, at 147-71 (discussing NHTSA's embrace of recalls as a regulatory technique).

128. Rena Steinzor, (Still) "Unsafe at Any Speed": Why Not Jail for Auto Executives?, 9 HARV. L. & POL'Y REV. 443, 447 (2015); *see also* RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE 235-39 (expanded ed. 1972) (discussing Nader's disappointments with NHTSA's early efforts).

129. Vehicle-safety innovations can help reduce driver errors or mitigate the harm accidents inflict, but recalls do neither. Mashaw & Harfst, *supra* note 114, at 178. Vehicle failures account for a small percentage of crashes, with failures due to defects (as opposed to poor maintenance) accounting for less than 1%. *See Oversight of the National Highway Traffic Safety Administration: Hearing Before the Subcomm. on Com., Mfg. & Trade of the H. Comm. on Energy & Com.*, 114th Cong. 39 (2016), <https://perma.cc/BMW6-QPG2> (statement of Mitch Bainwol, President and CEO, All. of Auto. Mfrs.) (citing statistics from 2014); *see also* SANTOKH SINGH, NHTSA, DOT HS 812 506, CRITICAL REASONS FOR CRASHES INVESTIGATED IN THE NATIONAL MOTOR VEHICLE CRASH CAUSATION SURVEY 1 (2018), <https://perma.cc/C796-R7RB>; NHTSA, NATIONAL MOTOR VEHICLE CRASH CAUSATION SURVEY: REPORT TO CONGRESS 25-26 (2008), <https://perma.cc/A993-6423>. Although some argue that recalls have more potential during periods of rapid technological innovation. *See generally* Matthew T. Wansley, *Regulating Automated Driving*, 73 EMORY L.J. (forthcoming 2024), <https://perma.cc/SEW3-N7ND> (arguing that NHTSA can effectively use the threat of recalls as a tool for regulating automated driving).

130. Mashaw & Harfst, *supra* note 114, at 199.

131. *Id.* at 216.

design changes. . . . They hope they will voluntarily do the right thing.”¹³² The agency’s abdication of Congress’s original mandate was complete.¹³³

Over time, as the agency’s ability—or will—to influence vehicle design waned, NHTSA increasingly focused its efforts on trying to improve driver behavior.

3. Growing enforcement focus

NHTSA’s influence on drivers stems largely from its authority over hundreds of millions of dollars in annual highway-safety funds.¹³⁴ NHTSA allocates these funds to state highway-safety offices according to a formula based on state population and miles of road in each state.¹³⁵ Over time, these grants have ballooned in size. In 2001, grants from NHTSA to states to administer their own driver-focused programs made up over half of NHTSA’s budget.¹³⁶ By 2020, that figure had grown to nearly two-thirds.¹³⁷ In the last decade, NHTSA’s spending on driver-behavior programs has accounted for around 80% of the agency’s overall budget.¹³⁸

In order to be eligible for funding, states must implement highway-safety programs that meet criteria set by Congress and by NHTSA.¹³⁹ Originally, these criteria did not include enforcement and instead focused on safety

132. See Kimberly Kindy & Peter Whoriskey, *NHTSA’s Previous Car Pedal Safety Efforts Died, Stalled amid Industry Opposition*, WASH. POST (Feb. 11, 2011), <https://perma.cc/G4HJ-R3WZ> (quoting E. Donald Sussman).

133. Disappointment with NHTSA’s efforts continues to this day. See, e.g., Wansley, *supra* note 129 (manuscript at 35-53) (discussing NHTSA’s “passive approach” to automation safety); Steinzor, *supra* note 128, at 446-51 (describing NHTSA’s regulatory failures); Bronin, *supra* note 116, at 2168-70 (noting NHTSA’s limited regulation of vehicle height); *infra* note 333 (detailing advocates’ critiques of NHTSA).

134. *Highway Safety Grants Programs*, NHTSA, <https://perma.cc/D3AS-ZPA2> (archived Oct. 25, 2023).

135. 23 U.S.C. § 402(c)(2).

136. U.S. DEP’T OF TRANSP., BUDGET IN BRIEF: UNITED STATES DEPARTMENT OF TRANSPORTATION FISCAL YEAR 2003, at 20 tbl. (n.d.), <https://perma.cc/8MLS-3BDM>.

137. U.S. DEP’T OF TRANSP., 2022 BUDGET HIGHLIGHTS 48 tbl. (n.d.), <https://perma.cc/4HQX-DSDS>.

138. See, e.g., U.S. DEP’T OF TRANSP., BUDGET HIGHLIGHTS: FISCAL YEAR 2014, at 23 tbl., 24-25 (n.d.), <https://perma.cc/2REN-DZ83> (indicating that, in 2012, NHTSA spent \$550.3 million on traffic-safety grants, which focus on driver behavior, and \$109.5 million on driver-behavior programs, leaving just \$140.1 million for vehicle-safety programs); U.S. DEP’T OF TRANSP., *supra* note 137, at 48 tbl. (indicating that, in 2020, NHTSA spent \$194 million of its \$989.3 million budget on vehicle safety, with the rest allocated to driver-behavior programs and grants); see also Steinzor, *supra* note 128, at 450.

139. See 23 U.S.C. § 402(a)(2) (delineating certain uniform guidelines for highway-safety programs and delegating authority to the Secretary of Transportation to promulgate additional requirements for highway-safety funding).

elements such as “an effective record system of accidents,” “accident investigations to determine the probable causes of accidents,” “highway design and maintenance,” “traffic control,” and “surveillance of traffic for detection and correction of high or potentially high accident locations.”¹⁴⁰ But in 1991, Congress added a requirement for highway-safety plans: “to improve law enforcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures.”¹⁴¹ In 2005, Congress mandated that states support “national law enforcement mobilizations”—coordinated enforcement campaigns around specific traffic violations.¹⁴² Accordingly, highway-safety funds now routinely flow directly to local police departments, paying for officers to conduct traffic patrols.¹⁴³

While Congress played a clear role in NHTSA’s shift toward enforcement, NHTSA made choices in implementing those Congressional requirements that encouraged overreliance on traffic enforcement. In 2008, for example, NHTSA announced new activity metrics for all state highway-safety plans.¹⁴⁴ For any highway-safety funding used for police patrols, states now are required to report seat belt citations issued, speeding citations issued, and impaired driving arrests.¹⁴⁵ The required reporting on these metrics has led states to implement quota-like targets.¹⁴⁶

140. 23 U.S.C. § 402(a) (1966).

141. Highway Safety Act of 1991, Pub. L. No. 102-240, § 2002(a), 105 Stat. 2070, 2070 (codified as amended at 23 U.S.C. § 402(a)).

142. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 2002(b), 119 Stat. 1144, 1521 (2005) (codified as amended at 23 U.S.C. § 402(b)(1)). In 2012, those enforcement activities were expanded to include “high-visibility law enforcement mobilizations coordinated by [the DOT].” Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 31102(b)(1)(D), 126 Stat. 405, 735 (2012) (codified at 23 U.S.C. § 402(b)(1)(F)(i)).

143. McIntire & Keller, *supra* note 76 (discussing “grant-funded patrols”); *see infra* note 202 (discussing 2022 data regarding highway-safety funds provided to police departments in select states).

144. In 2008, NHTSA and the Governors Highway Safety Association (GHSA) created a set of performance metrics for states to report in their annual safety plans. JAMES HEDLUND, NHTSA, DOT HS 811 025, TRAFFIC SAFETY PERFORMANCE MEASURES FOR STATES AND FEDERAL AGENCIES, at i-iii (2008), <https://perma.cc/HLH3-ZFJ6>. These metrics were subsequently incorporated into the federal statute. 23 U.S.C. § 402(k)(5). That same statutory provision gives the DOT power to revise these measures. *Id.* (“[T]he Secretary shall coordinate with [GHSA] in making revisions to the set of required performance measures.”).

145. HEDLUND, *supra* note 144, at ii.

146. *See, e.g.,* McIntire & Keller, *supra* note 76 (“[N]umber of traffic stops is a common performance measure. In Arkansas, for instance, the goal was ‘three vehicle stops per hour’ during grant-funded patrols, while in Madison, S.D., officers were required to ‘obtain two citations per grant hour.’ Indiana officials boasted in their 2014 annual report that officers enforcing seatbelt laws averaged 3.26 stops per hour.”).

B. NHTSA Embraces Crime Fighting

The preceding Subpart described a general shift within NHTSA from focusing on vehicle design to using highway-safety funds to influence driver behavior. This Subpart focuses on NHTSA's pivot toward pretextual traffic stops, which began in the early 1990s and continues to influence the agency's programming today.

Despite NHTSA's role in administering highway-safety funds, NHTSA and traffic-enforcement advocates have long been concerned that, outside of NHTSA-funded patrols, police will de-emphasize traffic enforcement. This concern stems from a perceived divide between traffic enforcement and "real" police work.¹⁴⁷ As one of NHTSA's boosters explained, "[F]or too long, many of our officers have given 'a wink and a nod' to traffic offenses."¹⁴⁸ Instead, NHTSA sought to make traffic enforcement a central part of every officer's duties.

The early 1990s were a crucial moment. By this time, NHTSA was deep in its "Ice Age" of rulemaking and Congress had just required that state highway-safety plans include plans "to improve law enforcement services."¹⁴⁹ At the same time, three additional factors coalesced to make police traffic enforcement seem even more central to NHTSA's plans. First, traffic fatalities, which had long been on the decline, began to rebound. Fatal crashes had decreased for

147. See Woods, *supra* note 12, at 1525 ("Many officers do not view traffic enforcement as 'real police work.'" (citing David Giacompassi & David R. Forde, *Broken Windows, Crumpled Fenders, and Crime*, 28 J. CRIM. JUST. 397, 403 (2000) ("From the perspective of many officers, enforcing traffic laws is not real police work"); and P.A.J. WADDINGTON, *POLICING CITIZENS: AUTHORITY AND RIGHTS* 10 (1999) ("Yet, traffic policing is regarded by police and public alike as a marginal police responsibility, almost a distraction from 'real police work'")).

148. Earl M. Sweeney, *Combating Crashes and Crime Through Professional Traffic Stops*, POLICE CHIEF, July 1999, at 39, 42; see *infra* note 221. For example, a 1995 study examined enforcement of the minimum drinking age and found that police often did not consider it a high priority. Mark Wolfson, Alexander C. Wagenaar & Gary W. Hornseth, *Law Officers' Views on Enforcement of the Minimum Drinking Age: A Four-State Study*, 110 PUB. HEALTH REPS. 428, 428 (1995), <https://perma.cc/MTB5-PKRE> ("A number of sources suggest that [minimum drinking age] enforcement is not given high priority by many law enforcement agencies."); *id.* at 432 ("Officers in both rural and urban agencies reported that insufficient staffing often forced officers to give priority to other areas of law enforcement, resulting in relatively few citations and arrests for underage drinking.").

149. Highway Safety Act of 1991, Pub. L. No. 102-240, § 2002(a), 105 Stat. 2070, 2070 (codified as amended at 23 U.S.C. § 402(a)); see *supra* notes 126-29 and accompanying text (discussing NHTSA's Ice Age); *supra* note 141 and accompanying text (discussing the Congressional mandate to improve highway safety).

several years up to 1992 but then increased each year from 1992 to 1996.¹⁵⁰ Crashes causing injuries and total crashes also increased in this time period.¹⁵¹

Second, the agency's budget was being squeezed, making it more essential to rely on outside actors like state and local police. NHTSA's expenditures fell from \$246.5 million in 1979 to \$206 million in 1988.¹⁵² Adjusting for inflation, NHTSA's 1988 expenditures were about half of 1979's.¹⁵³ Even without adjusting for inflation, the DOT's overall budget shrank from 1992 to 1996.¹⁵⁴

Third, public attention and resources increasingly were occupied with serious crime. NHTSA and supporters of traffic stops feared that the crime spike of the late 1980s and early 1990s would divert resources away from traffic safety and toward crime fighting.¹⁵⁵ A 1996 NHTSA survey of traffic-safety officials, for example, identified "[c]ontinued public demand for the further diversion of police manpower from police traffic services to crime-fighting activity" as respondents' top concern.¹⁵⁶

It was in this moment—amid a rulemaking freeze, a stagnating budget, increasing road deaths, and a concern that law enforcement might disengage due to rising crime—that NHTSA began to promote the widespread use of traffic stops as a crime-fighting tool.

1. First steps

NHTSA saw an opportunity to take advantage of law enforcement's preference for crime-fighting traffic stops to "market . . . the benefits of police

150. NHTSA, *supra* note 97, at 14 tbl.1 (documenting vehicle crashes by severity from 1988 to 2001).

151. *Id.*

152. OFF. OF MGMT. & BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1981, at 487 (n.d.), <https://perma.cc/Z83C-P9GB>; OFF. OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1990, at 9-127 (n.d.), <https://perma.cc/TX8M-XYJD>; see also MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 43-44 (2000).

153. The buying power of \$246.5 million in December of 1979 was the same as \$387.27 million in December of 1988. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., <https://perma.cc/P7G9-8JUS> (archived Nov. 26, 2023) (to locate, select "View the live page"). NHTSA's 1988 expenditure level of \$206 million was 53.2% of \$387.27 million.

154. See Off. of Mgmt. & Budget, Table 5.2—Budget Authority by Agency: 1976-2028, <https://perma.cc/4TVP-BL5Q> (archived Oct. 25, 2023) (to locate, select "View the live page").

155. See, e.g., Alvin L. Bishop, Issue Paper, in NHTSA, POLICE TRAFFIC SERVICES IN THE 21ST CENTURY app. C, at 44 (1996), <https://perma.cc/VQU6-7BDA> ("The delivery of police traffic services nationwide . . . is faced with dwindling resources . . .").

156. NHTSA, *supra* note 155, app. B, at 40.

traffic services.”¹⁵⁷ By the mid-1990s, the Supreme Court had already endorsed pretextual stops and agencies across the country were using them for drug interdiction.¹⁵⁸ In order to take advantage of this ingrained preference, NHTSA began a campaign to teach officers that traffic stops could simultaneously improve traffic safety and fight crime.¹⁵⁹ As NHTSA put it in a January 1995 article titled *Traffic Enforcement: Saving Lives and Combating Crime*: “[A] strong traffic enforcement program will reduce the daily toll of death and injury on our nation’s highways and, at the same time, combat crime as well.”¹⁶⁰ NHTSA’s goal was to dispel the notion that officers must choose between promoting traffic safety and fighting crime.

Only a few months after the Supreme Court sanctioned pretextual traffic stops in *Whren*, NHTSA convened traffic-safety experts and law enforcement leaders from around the country to discuss its strategy going forward. The conference included representatives of state police agencies, major municipal departments, training academies, the FBI, leading police research institutions, and more.¹⁶¹ At the conference, participants endorsed the idea that stops should be used to simultaneously promote traffic safety and to fight crime.¹⁶²

The following year, NHTSA launched its Law Enforcement Liaison (LEL) program.¹⁶³ For years, the agency’s grant programs supported the work of Traffic Safety Specialists to serve as a bridge between police and state highway-

157. NHTSA, *Education*, LOOKING BEYOND THE TICKET: TRAFFIC L. ENF’T & BEYOND, <https://perma.cc/A6SB-CAAG> (archived May 30, 1998).

158. See *supra* notes 66-67 and accompanying text (discussing *Whren* and collecting scholarly critiques of the decision); *supra* notes 73-75 and accompanying text (discussing Operation Pipeline).

159. See *infra* Part II.B.2 (discussing NHTSA’s guidance and training on this topic); Part II.B.3 (discussing NHTSA’s evolving messaging).

160. *Traffic Enforcement: Saving Lives and Combating Crime*, TRAFFIC TECH (NHTSA, Washington, D.C.), Jan. 1995, <https://perma.cc/UMH2-CKK2>; see also ALEXANDER WEISS, NHTSA, DOT HS 809 689, DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY (DDACTS): AN HISTORICAL OVERVIEW 16 (2013), <https://perma.cc/2U46-H2YD> (“[L]aw enforcement executives did not fully appreciate the crime control benefits of traffic enforcement.”).

161. NHTSA, *supra* note 155, at 6-9.

162. *Id.* at 5.

163. *History of LELs*, NAT’L L. ENF’T LIAISON PROGRAM, <https://perma.cc/SL7P-XA3K> (archived Jan. 20, 2022). While this Article was in the editing process, but after efforts to lobby NHTSA to end its support for pretextual policing began, see *infra* note 358, NHTSA reevaluated its involvement in the LEL program. See LEL TRAFFIC STOP (Nat’l L. Enf’t Liaison Program, Washington, D.C.), Sept. 23, 2022, <https://perma.cc/54XA-A8KM> (“The Governors Highway Safety Association (GHSA) contract with the National Highway Traffic Safety Administration (NHTSA) to manage the National Law Enforcement Liaison Program (NLELP) ends on September 29, 2022. There will be a gap in program activities while NHTSA determines next steps.”).

safety offices.¹⁶⁴ In 1997, these specialists were renamed LELs—a title befitting their law enforcement focus.¹⁶⁵ NHTSA added LELs to its regional offices to assist “with law enforcement coordination and training.”¹⁶⁶ The LELs—typically former law enforcement officers—promoted NHTSA’s tactics among police.¹⁶⁷ The program widely disseminated NHTSA’s materials that called for more frequent traffic stops.¹⁶⁸

NHTSA also went to great lengths to develop and promote evidence to support its position that traffic stops were an important crime-fighting tool.¹⁶⁹ It supported research to encourage more “aggressive” traffic enforcement, pushing local police agencies to increase the frequency of traffic stops.¹⁷⁰ A study in Savannah, Georgia, for example, implemented a “zero tolerance” approach to traffic violations and assessed the impact on certain crimes NHTSA believed were “suppressible by aggressive traffic enforcement,” including burglary, robbery, assault, weapons possession, and more.¹⁷¹ Police initially were set to double traffic stops in the experimental areas, but research designers, “in consultation with NHTSA,” persuaded the department to quadruple traffic stops.¹⁷² The researchers concluded that the resulting drops in the rates of

164. *History of LELs, supra* note 163.

165. *Id.*

166. *Id.*

167. LAWRENCE E. DECINA & KATHY LOCOCO, NHTSA, DOT HS 813 259, CHARACTERISTICS OF STATE LAW ENFORCEMENT LIAISON PROGRAMS: SURVEY RESULTS 1 (2022), <https://perma.cc/J8SV-KLHB>.

168. See, e.g., *LEL October Webinar: Just Another Traffic Stop, Right?*, (Nat’l L. Enf’t Liaison Program, Washington, D.C.), <https://perma.cc/U34A-F9J6> (archived Oct. 28, 2023). The LEL program explicitly endorsed DDACTS as a best practice. NAT’L L. ENF’T LIAISON PROGRAM, <https://perma.cc/NC6X-XANZ> (archived Oct. 28, 2023) (listing “DDACTS” under “Best Practices”); see *infra* text accompanying notes 188–94 (discussing DDACTS).

169. In November 1995, for example, NHTSA published data from Grand Prairie, Texas, noting that up to 37% of the department’s arrests stemmed from traffic stops, and nearly half of those were for non-traffic offenses. *Traffic Enforcement Leads to Criminal Arrests: Case Study of Grand Prairie, Texas, Police Department*, TRAFFIC TECH (NHTSA, Washington, D.C.), Nov. 1995, <https://perma.cc/W3DM-7F3F>. NHTSA later cited the Grand Prairie data as evidence that “[t]raffic enforcement regularly identifies criminals and results in their apprehension.” NHTSA, *Traffic Enforcement: Myths and Facts 2* (n.d.), <https://perma.cc/2MSB-UNSX>.

170. See Don A. Josi, Michael E. Donahue & Robert Magnus, *Conducting Blue Light Specials or Drilling Holes in the Sky: Are Increased Traffic Stops Better than Routine Patrol in Taking a Bite out of Crime*, 1 POLICE PRAC. & RES. 477, 477–78, 489, 502 (2000); see also Catherine Coles, Urb. Inst., *National COPS Evaluation Organizational Change Case Study: Savannah, Georgia*, NAT’L CRIM. JUST. REFERENCE SERV., <https://perma.cc/7CJ8-UY33> (archived Oct. 28, 2023) (calling the Savannah grant unsolicited and noting that grant monies also were used to fund traffic enforcement equipment).

171. Josi et al., *supra* note 170, at 484.

172. *Id.* at 489.

certain crimes were “suggestive” of the crime-fighting benefits of traffic enforcement and called for further study of sustained increases in enforcement *in excess of* the 400% to 500% increase implemented by the researchers.¹⁷³

2. Guidance and training

NHTSA also provided direct guidance to police. In the 1990s, the agency launched *Looking Beyond the Ticket*, which advocated for “proactive traffic enforcement” and taught police to “remain[] alert for indicators of criminal activity” at every traffic stop.¹⁷⁴ The guidance listed the types of training that officers should seek out, including “aggressive patrol/interdiction, interview and interrogation, gang awareness, [and] human behavior/body language.”¹⁷⁵ NHTSA even advised relying on “gut feelings” or a “sixth sense” and suggested officers be on the lookout for “furtive movements,” “nervous behavior,” “lack of eye contact,” and “being too polite and accepting.”¹⁷⁶

The agency also authored and funded various publications for law enforcement that promoted the agency’s view of traffic stops.¹⁷⁷ In 1996, for example, NHTSA sponsored the publication of the *Highway Safety Desk Book*,¹⁷⁸ which argued that police could get “Two for the Price of One.”¹⁷⁹ The *Desk Book* wrote, “Traffic enforcement is demonstrably justifiable on its own merits. Yet today an emerging secondary benefit reinforces the value of roving patrol officers. They have become major crime fighters!”¹⁸⁰ A 2001 publication took a similar stance.¹⁸¹ Over the years, NHTSA officials wrote a variety of articles in

173. *Id.* at 505-06.

174. LOOKING BEYOND THE TICKET: TRAFFIC L. ENF’T & BEYOND, <https://perma.cc/M979-TNU8> (archived May 30, 1998).

175. NHTSA, *Elements of Success*, LOOKING BEYOND THE TICKET: TRAFFIC L. ENF’T & BEYOND, <https://perma.cc/3LHE-YZCA> (archived May 30, 1998).

176. *Id.* (quoting interviews with police officers).

177. *E.g.*, CONNIE H. WILISZOWSKI, JOHN H. LACEY, ELIZABETH CYR & RALPH K. JONES, NHTSA, DOT HS 809 269, A TREND ANALYSIS OF TRAFFIC LAW ENFORCEMENT IN THE UNITED STATES 90, 92 (2001), <https://perma.cc/5S75-XRH9> (“Traffic safety experts and official agencies must stress the importance of traffic law enforcement to those in command of law enforcement agencies . . . perhaps by pointing out other enforcement benefits emanating from traffic stops (e.g., felony arrests, reduced burglaries, etc.).”).

178. *Acknowledgements* to ADVISORY COMM. ON HIGHWAY SAFETY, INT’L ASS’N OF CHIEFS OF POLICE, THE HIGHWAY SAFETY DESK BOOK (1996), <https://perma.cc/X2FG-S6JL> (acknowledging funding provided by NHTSA).

179. ADVISORY COMM. ON HIGHWAY SAFETY, *supra* note 178, at 2-4.

180. *Id.*

181. HIGHWAY SAFETY COMM., INT’L ASS’N OF CHIEFS OF POLICE, TRAFFIC SAFETY IN THE NEW MILLENNIUM: STRATEGIES FOR LAW ENFORCEMENT 1 (n.d.), <https://perma.cc/3DU2-JCCF> (noting, in a NHTSA-sponsored publication, that “[m]any successful traffic safety

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the *Police Chief* magazine espousing their position on traffic stops.¹⁸² NHTSA's messaging about crime fighting even crept into its traffic-safety guidance. In its 2008 *Speed Enforcement Program Guidelines*, NHTSA emphasized that, when officers are encouraged to make traffic stops for speeding, they "soon realize that 'little stops result in big stops,' [and] that their traffic enforcement actions reduce crime."¹⁸³

More dramatically, NHTSA created and sponsored training programs to ingrain the use of traffic stops in police practice. For example, Conducting Complete Traffic Stops: A Crash and Crime Reduction Effort (CCTS), which launched in 2000, purported to teach police how to "detect illegal activities during traffic stops."¹⁸⁴ The course emphasized the "relationship between traffic enforcement and criminal interdiction" and encouraged police to look for "suspicious indicators."¹⁸⁵ This training program was adopted by "numerous state and local law enforcement agencies."¹⁸⁶ Although NHTSA no longer offers the training, it lives on through a variety of partners, many of which focus on criminal interdiction.¹⁸⁷

initiatives have resulted not only in reductions in collisions, but in additional positive results that benefit our communities in many areas").

182. E.g., Otis Cox, *Complete Traffic Stops*, POLICE CHIEF, Sept. 2003, at 15, 15 (Deputy Administrator of NHTSA writing "[a]t NHTSA, we have always said that traffic enforcement is law enforcement"); Runge, *supra* note 45, at 93 (Administrator of NHTSA writing "I am pleased that law enforcement officers recognize that traffic law enforcement benefits can go far beyond the traffic stop"); see also *Professionalism at the Traffic Stop: Strengthening the Citizen and Police Partnership*, TRAFFIC TECH (NHTSA, Washington, D.C.), Jan. 2001, <https://perma.cc/V7VG-PD8R>.

183. NHTSA, DOT HS 810 915, SPEED ENFORCEMENT PROGRAM GUIDELINES 15, 23 (2008), <https://perma.cc/45MM-DZHV>.

184. *EMS and Law Enforcement*, BUILDING SAFE CMTYS. (NHTSA, Washington, D.C.), June 2000, at 5, <https://perma.cc/W4QF-9ES3> (promoting CCTS training); see also TheMediaNetwork, *Sample Clips*, YOUTUBE, at 01:04-01:55 (June 29, 2010), <https://perma.cc/R94J-RP7E> (to locate, select "View the live page") (posting excerpts from NHTSA video training materials, including from CCTS, instructing that "[e]verything from drug interdiction to the identification of people who present a potential threat to the nation's security can come from a simple traffic stop").

185. Runge, *supra* note 45, at 94. Officers also were taught "[i]nterview techniques to gain more information about the immediate criminal activity but also to gather additional intelligence about other matters." *Id.*; see also Cox, *supra* note 182, at 15 (promoting CCTS training); Eli B. Silverman, *With a Hunch and a Punch*, 4 J.L. ECON. & POL'Y 133, 148 (2007) ("Among [CCTS's] objectives are to 'learn specific techniques to detect criminal activity' and to instruct officers on how to articulate objective reasons for escalating stops and searches rather than attributing their actions to mere intuition or preconceptions." (citation omitted)).

186. Silverman, *supra* note 185, at 148.

187. The Northeast Counterdrug Training Center, which receives support from the Department of Defense, offers a CCTS training that begins by instructing officers on "the relationship between increased traffic enforcement and reduction of drug

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The latest iteration of NHTSA's efforts is Data-Driven Approaches to Crime and Traffic Safety (DDACTS).¹⁸⁸ NHTSA considered DDACTS, which launched in 2008, as “the culmination of over 30 years of work.”¹⁸⁹ Unlike CCTS, DDACTS does not focus on officer techniques during the stop but instead seeks to make traffic stops a central police tactic.¹⁹⁰ DDACTS teaches police to use data and mapping techniques to identify crime and traffic-crash hot spots and then target those areas with “highly visible traffic enforcement.”¹⁹¹ A video used to promote DDACTS summed up “high-visibility enforcement” as “officers making traffic stops.”¹⁹² One DDACTS trainer described the tactics as “shock and awe.”¹⁹³

trafficking.” *Drug Interdiction and Conducting the Complete Traffic Stop*, NE. COUNTERDRUG TRAINING CTR., <https://perma.cc/CC92-QG56> (archived Oct. 29, 2023); U.S. DEP’T OF DEF., DRUG INTERDICTION AND COUNTER-DRUG ACTIVITIES: FISCAL YEAR 2024 BUDGET ESTIMATES 21 (2023), <https://perma.cc/YE97-GHLW> (referencing the Northeast Counterdrug Training Center in the current budget of the Department of Defense).

The Institute for Law Enforcement Education, a division of the Pennsylvania Department of Education, also offers a CCTS training for police officials “interested in enhancing their traffic enforcement activities or developing a traffic enforcement program to serve as an effective means to deter and detect criminal behavior.” *Conducting the “Complete” Traffic Stop*, PA. DEP’T EDUC., <https://perma.cc/7DST-LMDW> (archived Oct. 25, 2023).

Other organizations have offered similar trainings. See, e.g., *Law Enforcement Officers Assemble in Mitchell for Traffic Stop Training*, WBIW (Aug. 16, 2021), <https://perma.cc/ZK85-LLTB> (describing a CCTS training offered by the Middle Atlantic Great Lakes Organized Crime Law Enforcement Network); “*Conducting the Complete Traffic Stop*,” STOP DWI N.Y., <https://perma.cc/VDU5-VQVA> (archived Mar. 24, 2016); *Conducting Complete Traffic Stops*, CHESTER CNTY. PA., <https://perma.cc/BN7L-D4AW> (archived Oct. 25, 2023).

188. See NHTSA, DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY: OPERATIONAL GUIDELINES (2014), <https://perma.cc/69SE-FASE>.

189. WEISS, *supra* note 160, at 1.

190. See, e.g., *Data-Driven Approach to Crime & Traffic Safety*, RAYTOWN POLICE DEP’T, <https://perma.cc/P6PN-HLJ9> (archived Oct. 25, 2023) (“DDACTS is not a temporary program, it is a long-term change in policing response.”); IADLEST, *DDACTS in Idaho*, YOUTUBE, at 05:35-05:55 (July 21, 2014), <https://perma.cc/2SX7-FRG6> (to locate, select “View the live page”) (Chief Howard Hall, Roanoke County Police Department, stating that “[DDACTS] is a way of doing business, as opposed to a program that has a start and an end date”).

191. NHTSA, *supra* note 188, at ii.

192. IADLEST, *supra* note 190, at 06:45-07:03 (Chief Howard Hall, Roanoke County Police Department, speaking).

193. Christopher Bruce, *DDACTS and the Role of the Crime Analysts*, YOUTUBE, at 27:00-27:08 (Jan. 22, 2019), <https://perma.cc/4BF8-YJHL> (to locate, select “View the live page”) (Christopher W. Bruce, DDACTS Analytical Director, International Association of Directors of Law Enforcement Standards and Training, speaking).

Unsurprisingly, agencies that implement DDACTS explicitly direct their officers to make more traffic stops.¹⁹⁴

There is no simple way to quantify the impact of DDACTS, but it is undeniably widespread. In 2010, only two years after DDACTS's launch, NHTSA Administrator David Strickland described the program as "spreading like wildfire."¹⁹⁵ In the first four years, nearly 1,200 officers had been trained through workshops conducted by the International Association of Directors of Law Enforcement Standards and Training (IADLEST).¹⁹⁶ By September 2021, almost 900 agencies have received DDACTS training with IADLEST, with numerous additional training sessions planned.¹⁹⁷ Several states have implemented the program for statewide police agencies, made it mandatory for

194. ANACAPA SCIS, INC., CASE STUDY OF THE BALTIMORE COUNTY POLICE DEPARTMENT'S DDACTS PROGRAM 5 (2009), <https://perma.cc/7VGR-J8V5> (describing efforts to encourage officers "to make as many enforcement stops and other contacts with the public as possible"); ANACAPA SCIS, INC., CASE STUDY OF THE WASHOE COUNTY, NEVADA, SHERIFF'S OFFICE DDACTS PROGRAM 6 (2010), <https://perma.cc/XM23-98NK> (describing DDACTS tactics as "multiple-vehicle stops and maximum numbers of subject contacts"); *Paradise Valley Police Department DDACTS*, PARADISE VALLEY POLICE DEP'T, <https://perma.cc/Q3HX-CQ29> (archived Oct. 25, 2023) (detailing expectations that officers implementing DDACTS "conduct self-initiated activity" including "traffic stops, suspicious person stops, citizen contacts, etc."); Doug Orbin, Shawnee DDACTS Operational Plan—Current 3 (2016), <https://perma.cc/HBD5-5Q4J> (detailing traffic enforcement in Shawnee as "conducted with lower discretionary levels than what has traditionally been accepted," with each contact resulting in an arrest, citation, written warning, or field interview).

195. *Sheriff, Deputy Honored for Leading DDACTS Revolution*, HOUMA TIMES (Nov. 30, 2010), <https://perma.cc/U62K-LD3N>.

196. Christopher W. Bruce, *Towards Better Data-Driven Operations: The DDACTS Success Story*, in NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), Apr. 2012, at 7, 9, <https://perma.cc/GW6K-ZYN5>; see also Peggy M. Schaefer, *DDACTS Implementation Workshop 2016 Highlights*, in NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), Jan. 2017, at 9, <https://perma.cc/S3FM-LVDZ>.

197. Email from Peggy Schaefer, DDACTS Project Manager, Int'l Ass'n of Dirs. of L. Enf't Standards & Training, to author (Sept. 13, 2021, 11:25 PM EST) (on file with author) (noting 871 agencies trained as of September 2021); *DDACTS Workshops*, INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS & TRAINING, <https://perma.cc/9ZTM-LCJU> (archived Oct. 25, 2023) (listing fourteen additional workshops after September 2021).

local police agencies, or provided the training at no cost.¹⁹⁸ The program has even gone international.¹⁹⁹

NHTSA does not condition receipt of highway funds on adopting DDACTS,²⁰⁰ but NHTSA funds still support the program in two important ways. First, NHTSA has spent millions funding private entities to promote DDACTS and train police to operate the program.²⁰¹ Second, states can choose to allocate some of their highway-safety funds directly toward police patrol, including to agencies that use DDACTS.²⁰² Idaho, for example, has

198. See, e.g., Maryland State Police, Operations Directive: Patrol in General (2019), <https://perma.cc/JJU4-PQ8M>; Telephone Interview with Peggy Schaefer, DDACTS Project Manager, Int'l Ass'n of Dirs. of L. Enf't Standards & Training (Sept. 17, 2021) (discussing the Iowa State Patrol's use of DDACTS); IADLEST, *supra* note 190, at 00:33-00:44; *Texas DDACTS Agency Workshops*, INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS & TRAINING, <https://perma.cc/D9QG-MKDC> (archived Nov. 26, 2023).

199. See, e.g., NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), Oct. 2014, at 9, 15, <https://perma.cc/R6FL-TMS6> [hereinafter NEWSLETTER, Oct. 2014] (noting DDACTS trainings in England and Canada); Peggy Schaefer, *Munster, Germany DDACTS Presentation*, in NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), Jan. 2019, at 14, <https://perma.cc/C3P3-DN7T> [hereinafter NEWSLETTER, Jan. 2019].

200. See Uniform Procedures for State Highway Safety Grant Programs, 88 Fed. Reg. 7780, 7783 (Feb. 6, 2023) ("NHTSA also notes that DDACTS is not part of NHTSA's highway safety grant program, and not all DDACTS-related activities are eligible uses of NHTSA's grant funds.").

201. See *infra* notes 234-35 (discussing the DOT's funding of IADLEST).

202. See, e.g., Minn. Dep't of Pub. Safety, 2013 Data-Driven Approach to Crime and Traffic Safety (DDACTS): Request for Proposal 2, attach. A, <https://perma.cc/VY9E-NHF6> (archived Oct. 29, 2023) (offering grants for the implementation of local DDACTS programs, including the funding of police overtime, paid for with funds from the DOT's State and Community Highway Safety Program).

A few states publish details regarding how they allocate highway-safety grants received from NHTSA. Examining annual reports from these states can provide a rough estimate of the percentage of NHTSA grants allocated directly to policing agencies. For example, Texas appears to allocate roughly 27% of received NHTSA funds to traffic enforcement, while Florida allocates roughly 23%. TEX. DEP'T OF TRANSP., FY 2022 HIGHWAY SAFETY PLAN 204-15 (n.d.), <https://perma.cc/B5JM-RJSP>; FLA. DEP'T OF TRANSP., FY 2022 HIGHWAY SAFETY PLAN 17 (n.d.), <https://perma.cc/MVQ7-E9K5>. In Virginia, if one includes only grants with "enforcement" or "checkpoint" in the name, spending on enforcement exceeds 33%. VA. HIGHWAY SAFETY OFF., VA. DEP'T OF MOTOR VEHICLES, 2022 VIRGINIA HIGHWAY SAFETY PLAN 185-205 (n.d.), <https://perma.cc/76RS-U4VL>. Other states provide some details of their spending but in a way that does not clearly distinguish between enforcement and nonenforcement programs. See, e.g., OFF. OF HIGHWAY SAFETY, IDAHO TRANSP. DEP'T, IDAHO HIGHWAY SAFETY PLAN: FFY 2022 (n.d.), <https://perma.cc/K64M-P935>; GA. GOVERNOR'S OFF. OF HIGHWAY SAFETY, 2022 GEORGIA HIGHWAY SAFETY PLAN (n.d.), <https://perma.cc/3AVG-TXRL>; S.D. DEP'T OF PUB. SAFETY, SOUTH DAKOTA FFY2022 HIGHWAY SAFETY PLAN (n.d.), <https://perma.cc/27HW-EHM4>.

incorporated DDACTS into its statewide police training curriculum.²⁰³ Although states do not disclose precisely what proportion of their NHTSA highway-safety funds are used to fund traffic enforcement by police, the available data suggests that it is a substantial percentage.²⁰⁴

3. Tailoring the message

Since it began embracing the use of traffic stops to fight crime, NHTSA offered police a consistent, simple message: See every traffic stop as an “opportunity to not only make the roads and streets safer but possibly to discover a more serious traffic offense or a criminal activity.”²⁰⁵ As this Subpart explores, the simplicity of NHTSA’s message made it highly adaptable to the policing priority of the moment, allowing NHTSA to position the traffic stop as a one-size-fits-all policing tactic.

In the mid-1990s, while the country fixated on spiking violent crime and drug trafficking, the NHTSA-sponsored *Highway Safety Desk Book* focused its attention there: “Murderers, robbers, auto thieves, and drug traffickers all travel by motor vehicle. And when they violate traffic laws—a frequent occurrence because criminals typically are preoccupied by their crimes—that familiar police light appears in the mirror.”²⁰⁶ For much of the 1990s, the purported link between traffic enforcement, drugs, and guns remained a cornerstone of NHTSA’s pitch.²⁰⁷

In the late 1990s and early 2000s, when the national discourse became more concerned with racial profiling and Driving While Black, NHTSA offered a softer approach, suggesting that traffic stops could be used to improve community relations.²⁰⁸ Acknowledging that “[c]ommunity relations is fast emerging as one of the primary concerns of law enforcement” and noting that “[a]llegations that some officers are making decisions based on race . . . have been frequent,” NHTSA encouraged police to “build mutual

203. IADLEST, *supra* note 190, at 29:46-30:21.

204. *See supra* note 202.

205. NHTSA, *Contents*, LOOKING BEYOND THE TICKET: TRAFFIC L. ENFT & BEYOND, <https://perma.cc/K9PN-XJC2> (archived May 29, 1998).

206. ADVISORY COMM. ON HIGHWAY SAFETY, *supra* note 178, at 2-4.

207. Earl Sweeney, *Considerations for the Future*, in HIGHWAY SAFETY COMM., *supra* note 181, at 3, 13 (“[T]raffic enforcement leads to the discovery of criminals and the recovery of drugs and weapons.”); NHTSA, *supra* note 169, at 2 (“Drugs, weapons, contraband, fugitives, and illegal aliens are frequently found in vehicles during ‘routine’ traffic stops.”); Kenneth B. Marshall, *Managing Successful Criminal Patrol Interdiction Programs*, POLICE CHIEF, July 1999, at 30, 30 (“Effective traffic law enforcement directly and positively affects the reduction of overall societal crime.”).

208. *Professionalism at the Traffic Stop*, *supra* note 182.

understanding with the community” during traffic stops.²⁰⁹ NHTSA still taught police to look for “a more serious offense” but suggested doing so with “what appears to the driver to be casual observation and questioning, without causing offense.”²¹⁰

In the aftermath of 9/11, when the War on Terror became paramount, NHTSA’s messaging shifted again to assert a role of traffic stops in homeland security. In 2002, NHTSA’s Administrator wrote in the *Police Chief* magazine,

Before September 11, 2001, routine efforts by traffic law enforcement officers had already helped to identify some terrorists who were later determined to have been involved in the attacks While these stops did not prevent the terrorist acts against our country, they show that traffic law enforcement can play a crucial role in helping identify and apprehend criminals who threaten Americans’ security.²¹¹

Others at NHTSA claimed that if police committed to “[c]onducting complete traffic stops” as part of “everyday patrol,” they would be “better positioned to provide overall security protection, with the potential of stopping suspected terrorists.”²¹² The reasoning was quite simple:

Traffic policing and community policing tactics can help protect our nation against terrorism, just as they help to reduce street crime and prevent traffic crashes. Just as other criminals do, terrorists drive motor vehicles when they conduct surveillance of potential targets, when they transport weapons of mass destruction, and when they drive to and flee from their awful acts²¹³

209. *Id.*

210. *Id.*

211. Runge, *supra* note 45, at 93-94; *see also* Earl M. Sweeney, *Traffic Stops: Neglect Them at Your Peril*, POLICE CHIEF, July 2003, at 38, 42 (“And the September 11 terrorists didn’t hitchhike up and down the eastern seaboard for a year before they hijacked those airplanes on that fateful day; they drove.”).

212. Cox, *supra* note 182, at 15; *see also* NHTSA, DOT HS 810 832, CRIMINAL JUSTICE ASSOCIATIONS LEADERSHIP MEETING: FINAL REPORT 8 (2007), <https://perma.cc/98JJ-R8M4> (“Traffic enforcement is a crucial interdiction tool for counter-terrorism efforts and agencies that make traffic safety a priority tend to see an increase in a variety of criminal interdictions as a result.”).

213. Earl Sweeney, *Delving Deeper into the Looking Glass—A Second Look at the Future*, in HIGHWAY SAFETY COMM., INT’L ASS’N OF CHIEFS OF POLICE, TRAFFIC SAFETY STRATEGIES FOR LAW ENFORCEMENT: A PLANNING GUIDE FOR LAW ENFORCEMENT EXECUTIVES, ADMINISTRATORS AND MANAGERS 27 (2003), <https://perma.cc/FQU5-7RAM> [hereinafter Sweeney, *Delving*]; *see also* Earl M. Sweeney, *Highway Safety Roundup*, POLICE CHIEF, July 2002, at 21, 29 (“Terrorists, like all other criminals, travel principally by automobile, and those who attacked the World Trade Center and the Pentagon drove extensively all over the Eastern seaboard for more than a year before they joined the attack.”).

A few years later, when public sentiment shifted toward “smart,” “evidence-based,” and “data-driven” policing, NHTSA kept pace.²¹⁴ DDACTS, as discussed above,²¹⁵ was launched in 2008 and taught police to analyze and map crash and crime data in order to precisely target police resources.²¹⁶ NHTSA promoted it as offering “a stronger evidence base” and raising “fewer ethical and legal problems.”²¹⁷

In 2021, in the aftermath of George Floyd’s murder and ensuing nationwide demonstrations against police violence, NHTSA shifted messaging yet again. Perhaps appreciating the public relations risk of overtly calling for more police enforcement, “DDACTS 2.0” called for increased “engagement,” not enforcement.²¹⁸ It is hard to read this change as anything more than window dressing: DDACTS 2.0 promoted “High-Visibility Engagement” instead of “High-Visibility Enforcement,” but it offered little meaningful guidance on what “engagement” looks like without making traffic stops.²¹⁹

While clever messaging is important, NHTSA is not a criminal law enforcement agency. Its credibility and ability to influence police depended not only on the message but also on the messengers.

4. Dependable messengers

To spread its message, NHTSA cultivated a range of law enforcement emissaries. Some of these include the U.S. Department of Justice, which

214. On the emergence of data-driven policing, see generally Bureau of Just. Assistance, U.S. Dep’t of Just., OMB No. 1121-0329, *Smart Policing: Evidence-Based Law Enforcement Initiative* (2010), <https://perma.cc/DAJ2-BQ9R>; see also Jim Bueermann, *Being Smart on Crime with Evidence-Based Policing*, NAT’L INST. JUST. J., Mar. 2012, at 12, 12-13, <https://perma.cc/K7NV-BJSQ>; Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, in 42 CRIME AND JUSTICE IN AMERICA, 1975-2025, at 377, 379 (Michael Tonry ed., 2013) (“By 2012, the three Rs [random patrol, rapid response, and reactive investigations] were changing into what I describe in this essay as the ‘triple-T’ of targeting, testing, and tracking.”).

215. See *supra* notes 188-94 and accompanying text.

216. NHTSA, *supra* note 188, at ii.

217. *Id.* (quoting David Weisburd, *Place-Based Policing*, IDEAS AM. POLICING, Jan. 2008, at 2, <https://perma.cc/539C-CFDH>); see also Earl Hardy, *Data-Driven Policing: How Geographic Analysis Can Reduce Social Harm*, GEOGRAPHY & PUB. SAFETY, June 2010, at 1, 2, <https://perma.cc/L5XG-K7BK>.

218. INT’L ASS’N OF DIRS. OF LAW ENF’T STANDARDS & TRAINING, DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY (DDACTS 2.0): OPERATIONAL GUIDELINES, at x (2021), <https://perma.cc/D6TX-LZ4F> (“[H]ot spot analysis guides the realignment of workflow and operational assignments to focus high-visibility engagement efforts . . .”).

219. The closest direction might be, “Success with the DDACTS model requires the law enforcement agency to commit to connecting with, rather than speaking at, the citizens and community members to improve their quality of life.” *Id.* at 24.

sponsored and promoted DDACTS,²²⁰ and numerous current and former police officers, who endorsed its work.²²¹

NHTSA's most influential relationships, however, were with private, non-profit law enforcement associations.²²² The 1996 conference that launched much of NHTSA's efforts in this area, for example, was co-hosted by the Police Executive Research Forum, which describes itself as a "research organization that focuses on critical issues in policing."²²³ A similar conference a decade later was co-hosted by the National Criminal Justice Association.²²⁴ NHTSA also has

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220. The Department of Justice's National Institute of Justice advertises DDACTS as a "promising" crime solution. *Program Profile: Data-Driven Approaches to Crime and Traffic Safety (DDACTS) in Kansas*, CRIME SOLUTIONS (July 11, 2016), <https://perma.cc/9FGN-9TPB>. The Bureau of Justice Assistance advertises DDACTS as part of its Smart Policing Initiative. See *SPI Data-Driven Approaches to Crime and Traffic Safety*, SMART POLICING, <https://perma.cc/A33U-SV8G> (archived Oct. 29, 2023); *Smart Policing Initiative (SPI)*, BUREAU OF JUST. ASSISTANCE, <https://perma.cc/E8X3-EPL5> (last updated May 19, 2021). Some Department of Justice funding has been directed to DDACTS implementation. See, e.g., *Town of Tonawanda Patrol Initiative*, BUREAU OF JUST. ASSISTANCE (July 9, 2012), <https://perma.cc/Y42A-ATQ8> ("The grantee will use the [grant] to fund officer overtime. The project goal is to reduce crime through the utilization of additional patrols based on the implementation of Data Driven Approaches to Crime and Traffic Safety (DDACTS) information."); *Data-Driven Approaches to Crime and Traffic Safety (DDACTS) Digital Mapping Project*, BUREAU OF JUST. ASSISTANCE (Aug. 29, 2011), <https://perma.cc/C9KT-36ZE>; CITY OF DOVER POLICE DEPT, 2012 ANNUAL REPORT 28 (2012), <https://perma.cc/PBJ3-TSJL>.
221. One prominent example is Earl M. Sweeney, a former president of IADLEST. Curriculum Vitae—Earl M. Sweeney (n.d.), <https://perma.cc/P2JN-68LX> (archived Oct. 25, 2023). In the early days of NHTSA's turn toward pretextual stops, Sweeney was a vocal supporter, arguing that they could catch burglars, bank robbers, serial killers, rapists, drug traffickers, terrorists, and more. See, e.g., Sweeney, *supra* note 211, at 41-42; Sweeney, *supra* note 213, at 29; Sweeney, *supra* note 148, at 42. Sweeney was hardly alone. See, e.g., Casstevens, *supra* note 20, at 44-45. Steven Casstevens is a former President of the International Association of Chiefs of Police (IACP) and a NHTSA award recipient. *IACP Past Presidents*, INT'L ASS'N OF CHIEFS OF POLICE, <https://perma.cc/E95H-HQUR> (archived Oct. 29, 2023); Mitchell Krugel, *Vote Casstevens: Buffalo Grove Chief Making a Run at IACP Office*, ILL. COPS, May/June 2015, at 29, 29, <https://perma.cc/HNA4-ET9T>.
222. On the role of private actors in the criminal system generally, see Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696, 708-25 (2022). This reliance on private entities parallels the DOT's practices in other areas. See Bronin, *supra* note 116, at 2167 ("Though this Section has not delved into all laws affecting street design . . . this general overview points to several clear takeaways. First, most aspects of street design are established by or heavily influenced by nongovernmental bodies that are not directly accountable to the public.").
223. NHTSA, *supra* note 155, at 4; *About PERF*, POLICE EXEC. RSCH. F., <https://perma.cc/3BS7-APUF> (archived Oct. 25, 2023).
224. NHTSA, *supra* note 212, at 5 ("On November 13, 2006, the National Highway Traffic Safety Administration (NHTSA) and the National Criminal Justice Association (NCJA) convened a meeting of national criminal justice association leaders to address strategies to reprioritize traffic safety . . .").

had a longstanding relationship with the International Association of Chiefs of Police (IACP), which describes itself as “the world’s largest and most influential professional association for police leaders.”²²⁵ NHTSA’s early partnership with the IACP was more focused on traffic safety. In the 1970s, for example, NHTSA contracted with the IACP to produce model police traffic policies and procedures that encouraged traffic stops but were focused on “violations known to be accident causative,” not pretextual stops.²²⁶ But as NHTSA evolved to endorse traffic stops as a crime-fighting tool, the IACP kept pace.²²⁷ The IACP authored guides for NHTSA that endorsed traffic stops as a crime-fighting tool, including against terrorists.²²⁸

DDACTS is a powerful case study of NHTSA’s use of private law enforcement associations. DDACTS was endorsed by the National Organization of Black Law Enforcement Executives, the National District Attorneys Association, the American Probation and Parole Association, and the National Sheriffs’ Association, among others.²²⁹ The IACP endorsed DDACTS and DDACTS 2.0 to its vast membership.²³⁰ DDACTS outreach and trainings are conducted by IADLEST, another private law enforcement association.²³¹ IADLEST’s membership gives the Association reach into nearly 700 police training academies across the country, making it the ideal vehicle to promote

225. *About IACP*, INT’L ASS’N OF CHIEFS OF POLICE, <https://perma.cc/9R3T-RUE8> (archived Oct. 25, 2023).

226. Int’l Ass’n of Chiefs of Police, Position Statement on Police Traffic Management, reprinted in BUREAU OF OPERATIONS & RSCH., INT’L ASS’N OF CHIEFS OF POLICE, MODEL POLICE TRAFFIC SERVICES: PROCEDURES, at I-8 (1976), <https://perma.cc/6FM6-N9BC>; BUREAU OF OPERATIONS & RSCH., *supra*, at I-1, III-1; see also BUREAU OF OPERATIONS & RSCH., INT’L ASS’N OF CHIEFS OF POLICE, MODEL POLICE TRAFFIC SERVICES: POLICIES (1979), <https://perma.cc/F498-46S3>.

227. See, e.g., Gene Voegtlin, *IACP Opposes Traffic Stops Legislation*, POLICE CHIEF, July 1999, at 8. For years, the IACP issued the “Looking Beyond the License Plate” award to officers who go “beyond the ‘routine’ traffic stop, resulting in the apprehension of dangerous criminals.” Daniel R. Sekely, *The Routine Traffic Stop: How Officers Have Used License Plate Violations to Solve Crimes*, POLICE CHIEF, Aug. 2015, <https://perma.cc/6NV4-SD98>.

228. Sweeney, *Delving*, *supra* note 213, at 27; Sweeney, *supra* note 207, at 3, 13.

229. NHTSA, *supra* note 188, at ii-iii.

230. *Support of Data-Driven Approaches to Crime and Traffic Safety (DDACTS 2.0)*, INT’L ASS’N OF CHIEFS OF POLICE (Feb. 4, 2021), <https://perma.cc/M2BR-YXPN>; *Data-Driven Approaches to Crime and Traffic Safety (DDACTS) Augmented by Intelligence Fusion Centers*, INT’L ASS’N OF CHIEFS OF POLICE (Nov. 1, 2011), <https://perma.cc/AZ33-SFV6>.

231. Daniel A. Howard & Peggy M. Schaefer, *Texas Department of Transportation Takes the Bull by the Horns: A Data-Driven Approach to Crime and Traffic Safety*, POLICE CHIEF, Sept. 2016, at 84, reprinted in NAT’L L. ENF’T LIAISON PROGRAM, <https://perma.cc/S6NN-WSTK> (archived Apr. 13, 2022) (noting that NHTSA partnered with IADLEST to “increase awareness of [DDACTS]’s benefits to the law enforcement community”).

DDACTS.²³² IADLEST's influence might explain Idaho's statewide embrace of DDACTS training: IADLEST's CEO spent twenty-seven years at the Idaho police training agency.²³³

These private associations benefit financially from their government relationships. In just the last few years, for example, both the IACP and IADLEST have received millions from NHTSA for a variety of projects, including drug-impaired enforcement, prosecuting driving-under-the-influence cases, and implementing probation programs.²³⁴ IADLEST also secured substantial funding from a number of states to implement DDACTS.²³⁵ These grants are issued by state highway-safety entities that control hundreds of millions in federal highway-safety funds.²³⁶

Having explored *why* (Part II.A) and *how* (Part II.B) NHTSA came to embrace traffic stops as a crime-fighting tool, the essential question is: What impact did this approach have on the lives of ordinary people?

C. Impact

NHTSA has not made it easy to assess the impact of its traffic stop programs. The agency has not conducted any public evaluations, nor does it encourage police to collect the data on traffic stops that might allow a neutral observer to analyze the benefits and costs. With this limitation in mind, this

232. Int'l Ass'n of Dirs. of Law Enf't Standards & Training, IADLEST Fact Sheet (2021), <https://perma.cc/8NP2-F383>.

233. Michael N. Becar: Biography (n.d.), <https://perma.cc/E6HA-JXRM>.

234. Regarding the IACP, see, for example, Press Release, NHTSA, U.S. Department of Transportation, IACP Announce \$2.3 Million Grant Program to Combat Drug-Impaired Driving (July 15, 2019), <https://perma.cc/8PE5-8ANY>; and *Program Oversight*, INT'L ASS'N OF CHIEFS OF POLICE, <https://perma.cc/QFN7-E4WN> (archived Oct. 30, 2023) ("The Drug Evaluation and Classification (DEC) Program is managed and coordinated by the International Association of Chiefs of Police (IACP) with support from the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation."). Regarding IADLEST, see, for example, NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Van Meter, Idaho), Apr. 2008, at 5, <https://perma.cc/LWU6-KU5Y> (\$3 million umbrella agreement); NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), July 2011, at 27, <https://perma.cc/2PJ3-GPA5> (\$610,000); NEWSLETTER, Oct. 2014, *supra* note 199, at 9 (\$449,443 for DDACTS); and NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), Jan. 2015, at 12, <https://perma.cc/EGW7-7CQ8> (\$501,960 for three years for DDACTS, for a total of over \$1.5 million).

235. NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Eagle, Idaho), Apr. 2021, at 33, <https://perma.cc/X46Q-Z8XF> (\$493,735.58 from the Texas Department of Transportation for DDACTS); NEWSLETTER, Jan. 2019, *supra* note 199, at 45 (\$302,169 potential grant from Missouri); NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), July 2018, at 28, <https://perma.cc/3KVN-DV6L> (\$269,000 from South Carolina).

236. *Highway Safety Grants Programs*, *supra* note 134.

Subpart describes what is known and unknown about the impact of NHTSA's campaign.

1. Uncertain traffic-safety benefits

Traffic safety depends on a safe system—from safer road and infrastructure design, to safer vehicles, to safer drivers and other road users, to improved emergency response.²³⁷ Designing safer systems requires bringing together city planners, road designers, vehicle manufacturers, and a host of others to redesign vehicles and roads to accommodate inevitable driver mistakes.²³⁸ Improvements to traffic infrastructure—wider shoulders, median barriers, rumble strips, bike lanes, intersection left-turn lanes, roundabouts, traffic-signal timing, lighting—have demonstrated dramatic benefits.²³⁹ Although driver behavior has a role to play in a safe system, since at least the early 1990s traffic-safety experts have understood that education and enforcement are the least effective safety interventions.²⁴⁰

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237. Shill, *supra* note 95, at 518-19; Ellen Kim, Peter Muennig & Zohn Rosen, *Vision Zero: A Toolkit for Road Safety in the Modern Era*, 4 INJ. EPIDEMIOLOGY art. 1, at 1-2. Safe systems approaches have resulted in remarkable decreases in deaths. See SAFE SYS. CONSORTIUM, RECOMMENDATIONS OF THE SAFE SYSTEM CONSORTIUM 6 (2023) <https://perma.cc/E8DG-55P6> (noting reductions in traffic fatalities in countries that have adopted the “Safe System Approach”); cf. Ralph Buehler & John Pucher, *The Growing Gap in Pedestrian and Cyclist Fatality Rates Between the United States and the United Kingdom, Germany, Denmark, and the Netherlands, 1990-2018*, 41 TRANSP. REVS. 48, 50-52 (2021) (demonstrating that the U.S. far outpaces similarly wealthy nations when it comes to roadway deaths).
238. EMILY FINKEL, CULLEN MCCORMICK, MEGHAN MITMAN, SARAH ABEL & JACKIE CLARK, FED. HIGHWAY ADMIN., FHWA-SA-20-018, INTEGRATING THE SAFE SYSTEM APPROACH WITH THE HIGHWAY SAFETY IMPROVEMENT PROGRAM: AN INFORMATIONAL REPORT 5 (2020), <https://perma.cc/SER5-WUAW> (“Through collective action from all roadway system stakeholders—from system managers and vehicle manufacturers to law enforcement and everyday users—we can move to a Safe System approach that helps to anticipate human mistakes and keeps impact energy on the human body at tolerable levels, with the goal of eliminating fatalities and serious injuries for all road users.”).
239. See, e.g., DOUGLAS W. HARWOOD, JESSICA M. HUTTON, ZACHARY N. HANS, REGINALD R. SOULEYRETTE & MICHAEL A. FIELDS, AAA FOUND. FOR TRAFFIC SAFETY, SAFETY BENEFITS OF HIGHWAY INFRASTRUCTURE INVESTMENTS 11-16 (2017), <https://perma.cc/7QQA-3PKX>; N.Y.C. DEP’T OF TRANSP., DON’T CUT CORNERS: LEFT TURN PEDESTRIAN & BICYCLIST CRASH STUDY 6-7 (2016), <https://perma.cc/5LGS-N8JK>; Emma Cohen, *Segregated Bike Lanes Are Safest for Cyclists*, 186 CANADIAN MED. ASS’N J. E443, E443 (2013), <https://perma.cc/F5EK-PYG2>.
240. See, e.g., INT’L TRANSP. F., ORG. FOR ECON. COOP. & DEV., ZERO ROAD DEATHS AND SERIOUS INJURIES: LEADING A PARADIGM SHIFT TO A SAFE SYSTEM 5 (2016), <https://perma.cc/LV8C-K3JR> (“The concept of a Safe System, in the context of road safety, originated in Sweden and the Netherlands in the 1980s and 1990s. At the time, scientists and policy makers began to question the prevailing view that the safety of road users was, in the last instance, their own responsibility and that the task of road safety policy was thus primarily to influence road users’ behaviour so they would act
- footnote continued on next page*

Overall, given how deeply embedded traffic enforcement is within NHTSA, the evidence regarding its traffic-safety benefits is surprisingly thin. Several studies conclude that police presence on highways can reduce traffic crashes.²⁴¹ But others demonstrate that benefits depend on implementation, and safety gains from enforcement are not a given.²⁴² One study found no correlation between traffic stops and reductions in fatalities.²⁴³ Another found that any benefits of high-volume enforcement campaigns dissipate shortly after the campaigns end.²⁴⁴ Finally, other studies suggest that the mere presence of law enforcement—unmanned police cars and decoy cutouts—can capture many of the same benefits without the need for actual enforcement.²⁴⁵

safely at all times. As the decades-long decreases in the number of road fatalities and severe injuries were levelling out, it became clear a predominant focus on education, information, regulation and enforcement was no longer delivering progress. A rethink was needed.”); MARTIN FRIEDLAND, MICHAEL TREBILCOCK & KENT ROACH, *REGULATING TRAFFIC SAFETY* 4 (1990) (“[A]fter reviewing the traffic safety literature, our strong impression is that we have concentrated and continue to concentrate our resources too heavily on changing driver behaviour. Switching some of the resources now devoted to policing and prosecutions to improving car and road design and to curtailing activity levels of high-risk classes of drivers would, we believe, improve road safety.”).

241. E.g., Dara Lee Luca, *Do Traffic Tickets Reduce Motor Vehicle Accidents? Evidence from a Natural Experiment*, 34 J. POL’Y ANALYSIS & MGMT. 85, 85-87 (2014); Gregory DeAngelo & Benjamin Hansen, *Life and Death in the Fast Lane: Police Enforcement and Traffic Fatalities*, AM. ECON. J., May 2014, at 231, 233 (2014); Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 J.L. & ECON. 863, 866 (2011); James W. Davis et al., *Aggressive Traffic Enforcement: A Simple and Effective Injury Prevention Program*, 60 J. TRAUMA 972, 975 (2006). See generally CATHERINE L. TAYLOR ET AL., NHTSA, DOT HS 813 274-A, *SYNTHESIS OF STUDIES THAT RELATE AMOUNT OF ENFORCEMENT TO MAGNITUDE OF SAFETY OUTCOMES* (2022), <https://perma.cc/2QL7-4SN3>.
242. E.g., Daniel P. Mears & Andrea M. Lindsey, *Speeding in America: A Critique of, and Alternatives to, Officer-Initiated Enforcement*, 41 CRIM. JUST. REV. 55, 58 (2016) (“[O]fficer-initiated speed limit enforcement holds the potential to reduce speeding but . . . a wide range of factors influence whether any such effect occurs.”); Christopher J. Boudreaux, *Police, Politics, and Public Safety: Analyzing the Incentives and Efficacy of Traffic Enforcement* 69 (Dec. 3, 2013) (Ph.D. dissertation, Florida State University), <https://perma.cc/HR7Y-ZUXW> (concluding, after examining crash data over an eleven-year period, that the relationship between traffic tickets and traffic safety is “at best ambiguous”).
243. Anuja L. Sarode et al., *Traffic Stops Do Not Prevent Traffic Deaths*, 91 TRAUMA & ACUTE CARE SURG. 141, 144 (2021); see also Brad Tuttle, *Police All over the U.S. Are Issuing Fewer Traffic Tickets*, MONEY (Mar. 30, 2015), <https://perma.cc/A8DC-H5P2> (“In other words, roads today are safer, not more dangerous, and it’s hard to argue that writing more tickets is going to make anyone safer.”).
244. VISION ZERO SF, EXECUTIVE SUMMARY: SAFE SPEEDS SF HIGH VISIBILITY ENFORCEMENT CAMPAIGN FINDINGS 6 (2019), <https://perma.cc/772T-PSCS>.
245. E.g., Rylan Simpson, Mark McCutcheon & Darryl Lal, *Reducing Speed via Inanimate Police Presence: An Evaluation of a Police-Directed Field Study Regarding Motorist Behavior*, footnote continued on next page

Although there is some evidence that targeted traffic enforcement improves driver behavior, there is little rigorous evaluation of the traffic-safety impact of the NHTSA programs discussed above. Many agencies implementing NHTSA's programs (DDACTS in particular) claim traffic-safety improvements, but most claims are correlative—failing to account for other crime or traffic-safety interventions that might confound causation.²⁴⁶ One of the few rigorous traffic-safety studies—which took place in Shawnee, Kansas—found a statistically significant decrease in vehicle collisions in DDACTS zones.²⁴⁷ At the same time, however, there are indications that these programs may not improve traffic safety: Idaho had incorporated DDACTS training statewide by 2014 but saw a steady increase in total and fatal crash rates over the next three years.²⁴⁸ In Evesham, New Jersey, police touted their DDACTS successes, but according to their own statistics, accidents in the DDACTS zone increased by 15% between 2017 and 2019, and by 42% from 2018 to 2019.²⁴⁹

Although the data on traffic-safety benefits is inconclusive, logic suggests that focusing on pretextual stops will not further traffic safety and may in fact undermine it. When police view stops as a crime-fighting tool, officers do not limit themselves to stops with immediate safety implications. Instead, they make stops for violations that do not immediately implicate traffic safety—often nonmoving violations like broken taillights, expired registrations, or objects hanging from the rearview mirror.²⁵⁰ These violations do not cause most traffic crashes.²⁵¹ A study of Nashville's traffic stops, for example, found

19 CRIMINOLOGY & PUB. POL'Y 997, 1010 (2020); Jonathon L. Kaplan et al., *Use of an Unmanned Police Car to Reduce Traffic Speed*, 49 J. TRAUMA 43, 45-46 (2000).

246. See, e.g., *infra* note 249 (discussing Evesham police); *infra* note 259 (discussing Killeen police); *infra* note 276 (discussing Fargo, North Dakota, and Schenectady, New York).

247. KEVIN M. BRYANT, GREGORY M. COLLINS & MICHAEL D. WHITE, CTR. FOR NAVAL ANALYSES, SHAWNEE, KANSAS, SMART POLICING INITIATIVE: REDUCING CRIME AND AUTOMOBILE COLLISIONS THROUGH DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY (DDACTS) 13 (2015), <https://perma.cc/VSS5-7SUX>.

248. IADLEST, *supra* note 190, at 00:33-00:44; OFF. OF HIGHWAY SAFETY, IDAHO TRANSP. DEP'T, IDAHO TRAFFIC CRASHES: 2018, at 9 tbl.1 (n.d.), <https://perma.cc/52R9-8BQU> (indicating an overall increase in fatal crashes between 2014 and 2017, but a decrease between 2017 and 2018).

249. DDACTS - Data Driven Approach to Crime and Traffic Safety, EVESHAM POLICE DEP'T, <https://perma.cc/3P2F-HNA8> (archived Oct. 25, 2023) (noting increases between 2017 and 2019, in the midst of a net decrease over a five-year period).

250. See *supra* note 42 and accompanying text.

251. In 2021, 31% of fatal crashes involved alcohol, 29% involved speeding, and 8% involved distracted driving. *Fatality Facts 2021: Yearly Snapshot*, INS. INST. FOR HIGHWAY SAFETY (May 2023), <https://perma.cc/3534-MH2X> (12,330 out of 42,939 fatal crashes involved speeding; 3,349 involved driver distraction); NHTSA, DOT HS 813 450, TRAFFIC SAFETY FACTS: 2021 DATA: ALCOHOL-IMPAIRED DRIVING 10 tbl.4 (2023), <https://perma.cc/JG7V-METS> (13,384 fatalities were alcohol related).

that nonmoving violations accounted for 45% of all stops.²⁵² From 2020 to 2022, the Baltimore City Police Department reported that approximately 9% of its stops were for moving violations.²⁵³ In Philadelphia, a so-called “successful” DDACTS adopter, low-level traffic infractions commonly associated with pretextual traffic enforcement made up about 97% of stops.²⁵⁴ By focusing on this type of enforcement, officers have less time for true traffic-safety stops. In Fayetteville, North Carolina, for example, when police shifted away from pretextual and non-safety-related stops and instead focused on safety stops, there was an improvement in safety outcomes, with no significant increase in violent or property crime.²⁵⁵ In Connecticut, when agencies deprioritized low-level stops, arrests for driving under the influence increased, suggesting stops were becoming more traffic-safety focused.²⁵⁶

There also appears to be a pattern of DDACTS jurisdictions deprioritizing traffic safety and focusing on crime. In Denver, although crashes were concentrated at intersections and major traffic corridors, the agency set the DDACTS zone to include the surrounding neighborhoods in the hope of capturing crime.²⁵⁷ In Shawnee, the target DDACTS area had a high crime rate but considerably lower traffic collision rate than the control zone.²⁵⁸ A study

252. ALEX CHOHLAS-WOOD, SHARAD GOEL, AMY SHOEMAKER & RAVI SHROFF, STANFORD COMPUTATIONAL POL’Y LAB, AN ANALYSIS OF THE METROPOLITAN NASHVILLE POLICE DEPARTMENT’S TRAFFIC STOP PRACTICES 2 (2018), <https://perma.cc/JL27-GMUB>.

253. *Race-Based Traffic Stop Data Dashboard*, GOVERNOR’S OFF. OF CRIME PREVENTION, YOUTH & VICTIM SERVS., <https://perma.cc/A8CV-M4TH> (archived Oct. 31, 2023) (to locate, select “View the live page,” then select “Baltimore Police Department,” and then select the appropriate date range) (indicating that, from 2016 to 2022, only 1.67% of stops made by Baltimore police were for moving violations; for 2020 to 2022, the figure was 8.81%).

254. Walsh, *supra* note 31; IADLEST, *Data Driven Approaches to Crime and Traffic Safety (DDACTS) 20_ Overview*, VIMEO, at 41:32 (Feb. 18, 2021), <https://perma.cc/ZBV9-V7QR> (to locate, select “View the live page”) (listing Philadelphia and Nashville among “[s]uccessful DDACTS locations”).

255. Mike Dolan Fliss et al., *Re-Prioritizing Traffic Stops to Reduce Motor Vehicle Crash Outcomes and Racial Disparities*, 7 INJ. EPIDEMIOLOGY art. 3, at 6-8 (2020), <https://perma.cc/7KR4-EYAW>. The number of safety stops increased dramatically—by about 120%—though racial disparities decreased. *Id.* at 7 tbl.2.

256. Tom Condon, *After a Poor Start, CT’s Anti-Racial Profiling Effort Is Making Progress*, CT MIRROR (Jan. 30, 2022, 5:00 AM), <https://perma.cc/UN4J-DCAQ>.

257. See OFF. OF THE AUDITOR, CITY & CNTY. OF DENVER, AUDIT REPORT: DENVER POLICE DEPARTMENT: DATA DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY MODEL 16 (2017), <https://perma.cc/2FJF-965Q>.

258. KEVIN M. BRYANT WITH GREG COLLINS & JOSIE VILLA, AN EVALUATION OF DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY IN SHAWNEE, KANSAS: 2010-2013, at 79 tbl.2 (2014), <https://perma.cc/V9CY-9YCY>.

of the DDACTS program in Flint, Michigan, did not even purport to assess the program's traffic-safety benefits.²⁵⁹

But what about the crime-fighting benefits? After all, that was the carrot NHTSA used to entice police to advance its traffic-safety ends.

2. Uncertain crime-fighting benefits

On a jurisdiction-wide basis, there is little evidence that the widespread use of traffic stops is an effective primary crime-fighting strategy. A rigorous study of Nashville, which was an early adopter of DDACTS and used stops as a central policing tactic, found no relationship between serious crime and number of police stops.²⁶⁰ In other words, whether police made more stops or fewer did not impact the rate of serious crimes.²⁶¹ Data from Chicago suggests that its police department's reliance on stops has been similarly ineffective.²⁶²

259. JASON RYDBERG, EDMUND F. MCGARRELL & ALEXIS NORRIS, MICH. JUST. STAT. CTR., *FLINT DDACTS PILOT EVALUATION 4* (2014), <https://perma.cc/AK7W-X7Z3> ("The evaluation did not include an assessment of the impact on traffic safety."). Local media reporting of the Killeen Police Department's discussion of DDACTS before the city council made no mention of traffic safety. See Monique Brand, *Police Chief Breaks Down 2018 Crime Numbers to Council*, KILLEEN DAILY HERALD (Apr. 3, 2019), <https://perma.cc/2EZY-C35T>. An assessment of the DDACTS program in Lowell, Massachusetts, found essentially no impact on traffic safety but still found the program "encouraging." LOWELL POLICE DEP'T, *DOWNTOWN INITIATIVE—DATA DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY (DDACTS): PRELIMINARY RESULTS 6 & tbl.5* (2012), <https://perma.cc/3KKE-M222>.

260. CHOHLAS-WOOD ET AL., *supra* note 252, at 2.

261. *Id.* at 8-9.

262. From 2015 to 2017, stops more than tripled. See ACLU OF ILL., *RACISM IN THE REAR VIEW MIRROR: ILLINOIS TRAFFIC STOP DATA 2015-2017*, at 4 (n.d.), <https://perma.cc/9MGW-GEDH>. From 2021 to 2022 alone, the Chicago Police Department increased its traffic stops by 35%, with significant racial disparities. See IMPACT FOR EQUITY, *A NEW VEHICLE FOR "STOP AND FRISK": UPDATE 1-2, 4* (2023), <https://perma.cc/LG95-X7JV>.

These millions of stops have yielded little in terms of crime-fighting benefits. See Editorial, *Mass Traffic Stops that Don't Stop Crime Show Chicago Sorely Needs Policing Reform*, CHI. SUN TIMES (July 5, 2023, 7:06 AM PST) (citing Class Action Complaint for Declaratory and Injunctive Relief paras. 4, 16, 526-29, *Wilkins v. City of Chicago*, No. 23-cv-04072 (N.D. Ill. June 26, 2023), ECF No. 1), <https://perma.cc/3TYS-Z3SK> ("The ACLU analyzed more than 2.6 million traffic stops over six years, from 2016 through 2022, that showed Black drivers in Chicago are four to seven times more likely to be pulled over by police than whites, and Latino drivers are stopped twice as often. Shockingly, fewer than 1% of the approximately hundreds of thousands of traffic stops CPD made each of those six years led to an arrest or the discovery of illegal drugs or a gun. Illegal drugs were recovered in just 0.3% of the traffic stops, and police seized weapons even less frequently, at a rate of only 0.05%.").

It is unclear whether Chicago police follow the DDACTS model. The former Chicago transportation commissioner lobbied the Chicago Police Department to adopt DDACTS. See Greenfield, *supra* note 20 (recounting a conversation about DDACTS with a former Chicago transportation commissioner).

This tactic has limited impact across a jurisdiction in part because stops rarely uncover evidence of serious crime. A study of Nashville's stops found that less than 1% of nonmoving violation stops resulted in an arrest that might impact future serious crime.²⁶³ In North Carolina, police found contraband weapons in just 0.1% of stops.²⁶⁴ In California, police confiscated firearms in 0.03% of traffic stops.²⁶⁵ In San Diego, only 1.3% of traffic stops led to arrests of *any* kind.²⁶⁶ In Los Angeles, about 2% of searches discovered serious contraband, but stops conducted by police crime suppression units or in supposed high-crime areas—circumstances commonly associated with pretextual stops²⁶⁷—were even *less* likely to result in citation, arrest, or other enforcement action.²⁶⁸

These miniscule “success” rates underscore the dubious logic of crime-fighting pretextual stops to begin with. That logic attempts to link criminal acts with traffic violations, claiming that “[t]he aggressive sociopath is also an aggressive driver”²⁶⁹ or that “[c]riminals frequently pay little attention to other laws, such as fastening their safety belts . . . and keeping their vehicle’s equipment in shape.”²⁷⁰ But as the data above demonstrates, there is no such association. Brake lights burn out. Good people forget to renew their registrations. Some degree of speeding is accepted as routine among all drivers.²⁷¹ Policing evolved to play a prominent role in traffic enforcement because voluntary compliance was insufficient.²⁷²

263. CHOHLAS-WOOD ET AL., *supra* note 252, at 7-8.

264. FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 62 tbl.2.11 (2018).

265. MAGNUS LOFSTROM, JOSEPH HAYES, BRANDON MARTIN & DEEPAK PREMKUMAR, PUB. POL’Y INST. OF CAL., RACIAL DISPARITIES IN TRAFFIC STOPS 25 (2022), <https://perma.cc/SJ53-8AU4> (data from 2019).

266. Megan Welsh, Joshua Chanin & Stuart Henry, Opinion, *Commentary: Our Research Showed Racial Disparities in San Diego Police Stops. Our Report Was Shelved.*, SAN DIEGO UNION-TRIB. (June 17, 2020, 3:08 PM PT), <https://perma.cc/8CLF-ABXH>.

267. See Christy E. Lopez, Opinion, *Cities Should Get Rid of Their Toxic Crime-Suppression Units*, WASH. POST (Jan. 31, 2023, 8:15 AM EST), <https://perma.cc/74V4-M55C>.

268. OFF. OF THE INSPECTOR GEN., *supra* note 58, at 3-4 (discussing traffic stops as well as pedestrian and bicycle stops).

269. Earl M. Sweeney, Issue Paper, in NHTSA, *supra* note 155, app. C, at 124, 125.

270. Sweeney, *supra* note 211, at 41-42.

271. Ironically, traffic violations are so commonplace that in 1985, the Florida Department of Highway Safety and Motor Vehicles issued guidelines outlining suspicious behavior, which included “scrupulous obedience to traffic laws.” David Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (June 1999), <https://perma.cc/RQ4R-PEA5>.

272. SEO, *supra* note 69, at 12 (“But towns and cities quickly ran into an enforcement problem: everybody violated traffic laws. . . . It soon became clear that the public’s interest in street and highway safety required more policing.”).

Still, where traffic stops might have more success in deterring crime is localized areas—what some call “hot spots.” There is a relatively robust body of research documenting the short-term crime reduction benefits of focusing on localized crime “hot spots.”²⁷³ Whether such benefits exist when implemented as a crime-control strategy across a jurisdiction—or whether these benefits adhere over the long term—has not yet been established.²⁷⁴

Aligning itself with this research, NHTSA’s recent programs, including DDACTS, move away from random enforcement and instead teach police to focus on “hot spots.”²⁷⁵ Many jurisdictions that implement DDACTS claim significant drops in crime,²⁷⁶ but few of these claims are supported by robust studies. In one of the more careful evaluations, the Michigan State Police implemented a DDACTS strategy with some promising results (such as a 19% decline in violent crime in hot spots), but an independent analysis could not draw a causal connection.²⁷⁷ Shawnee studied its DDACTS implementation and found statistically significant decreases in robberies and commercial burglaries, but not in auto thefts, assaults, thefts, and other crimes.²⁷⁸ Other DDACTS jurisdictions have found mixed evidence of benefits.²⁷⁹

273. See COMM. ON PROACTIVE POLICING: EFFECTS ON CRIME, CMTYS. & C.L., NAT’L ACADS. OF SCIS., ENG’G & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 122-29 (David Weisburd & Malay K. Majmundar eds., 2018), <https://perma.cc/F5PE-UYHD> (reviewing literature on “hot spots policing”).

274. See *id.* at 6, 129.

275. NHTSA, *supra* note 188, at iii (“DDACTS is based on local data collection and analysis to identify crime, crashes, and traffic-related ‘hot spots.’”).

276. In Fargo, police reported an 8% decrease in property crime and a 9% decrease in violent crime during DDACTS implementation. Bruce, *supra* note 196, at 11. Schenectady touted a 52% reduction in certain crimes. *Data-Driven Approaches to Crime and Traffic Safety: Schenectady Police Department*, CRIM. JUST. KNOWLEDGE BANK, <https://perma.cc/ZUR9-88LW> (last updated Feb. 2019).

277. RYDBERG ET AL., *supra* note 259, at 3-4.

278. BRYANT ET AL., *supra* note 247, at 13.

279. In Denver, for example, of the twenty-seven DDACTS areas, fourteen experienced an increase in either crime or traffic accidents or both during a pilot implementation period. See Denver Police DDACTS: Year 1, at 5 tbl. (n.d.), <https://perma.cc/2MQL-VDLB>. In Lowell, Massachusetts, there was a decrease in robberies, thefts from a motor vehicle, and vandalism, but an increase in assaults and burglaries. See LOWELL POLICE DEP’T, *supra* note 259, at 4 tbl.4. St. Albans, Vermont, reported a substantial increase in crime, which analysts attributed in part to “displacement from neighboring communities where special enforcement efforts have been effective, at least locally.” ANACAPA SCIS., INC., CASE STUDY OF THE VERMONT STATE POLICE / ST. ALBANS CITY POLICE DEPARTMENT DDACTS PROGRAM 4 (2009), <https://perma.cc/GHR2-NF68>. See also ROBERT E. WORDEN & SARAH J. MCLEAN, JOHN F. FINN INST. FOR PUB. SAFETY, INC., DDACTS IN THEORY AND PRACTICE 10-12 (2009), <https://perma.cc/4NJ5-LA6M> (detailing how enforcement and other choices made when implementing DDACTS will likely impact outcomes).

Importantly, even assuming police can influence crime in hot spots, not all police activity is created equal. Studies have shown that prevention strategies such as razing abandoned buildings have strong evidentiary support,²⁸⁰ whereas more aggressive order-maintenance strategies are less effective.²⁸¹ Another study demonstrated that officers trained in procedural justice could effectively police hot spots while making fewer arrests.²⁸² But when implementing DDACTS, jurisdictions do not necessarily internalize these lessons. A review of the implementation of DDACTS in Loveland, Colorado, noted that “the [Loveland Police Department’s] implementation and focus on DDACTS as its primary patrol strategy has produced some degree of unintended consequences and at times impacts officers’ ability to develop community relationships and engage in problem solving with community members.”²⁸³

The importance of choosing the right tactic is underscored by the fact that different tactics bring with them different social costs. The remainder of this Subpart focuses on those costs.

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280. E.g., Lauren C. Porter, Alaina De Biasi, Susanne Mitchell, Andrew Curtis & Eric Jefferis, *Understanding the Criminogenic Properties of Vacant Housing: A Mixed Methods Approach*, 56 J. RSCH. CRIME & DELINQ. 378, 404 (2019), <https://perma.cc/4S4E-BXL3>; Andrew P. Wheeler, Dae-Young Kim & Scott W. Phillips, *The Effect of Housing Demolitions on Crime in Buffalo, New York*, 55 J. RSCH. CRIME & DELINQ. 390, 417 (2018); Jonathan Jay, Luke W. Miratrix, Charles C. Branas, Marc A. Zimmerman & David Hemenway, *Urban Building Demolitions, Firearm Violence and Drug Crime*, 42 J. BEHAV. MED. 626, 631 (2019).
281. E.g., Cynthia Lum et al., *Experts: Place-Based Strategies Are Effective, Central to Police Reform*, NAT’L CRIM. JUST. ASS’N (Apr. 6, 2022), <https://perma.cc/GQ2D-NDY7> (“An over-emphasis on aggressive enforcement or simply ‘flooding’ a place with cops aren’t smart hot spots approaches.”); Anthony A. Braga, Brandon C. Welsh & Cory Schnell, *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RSCH. CRIME & DELINQ. 567, 573, 581 (2015) (concluding that, although there is evidence of the crime reduction effects of community-focused and problem-solving interventions that “change social and physical disorder conditions at particular places,” there are significant crime reduction benefits of more generalized “[a]ggressive order maintenance strategies”).
282. David Weisburd et al., *Incorporating Procedural Justice into Hot Spots Policing: Lessons from a Multicity Randomized Trial*, TRANSLATIONAL CRIMINOLOGY, Fall 2022, at 6, 8, <https://perma.cc/3HYK-TQ6J>. Procedural justice refers to the public’s perception of fairness, impartiality, transparency, and respect in interactions with the police. *See id.* at 6.
283. JENSEN HUGHES, CITY OF LOVELAND, COLORADO: AN INDEPENDENT ORGANIZATIONAL ASSESSMENT OF THE LOVELAND POLICE DEPARTMENT 18 (2022), <https://perma.cc/3V2V-3FUR> (“Although the [Police Department] notes that DDACTS includes information and direction provided by citizens and problem-oriented and community-oriented policing, we saw no evidence that the Department incorporates citizen input or problem solving into its DDACTS analyses.”).

3. More stops

Although the evidence of traffic-safety and crime-fighting benefits is somewhat mixed and likely differs from jurisdiction to jurisdiction, there is a solid basis to believe that NHTSA's efforts have resulted in more traffic stops.

NHTSA's goal in coupling traffic enforcement and crime fighting was simple: to encourage police to make more stops. In a 2007 training course, NHTSA encouraged police to create "a public perception that enforcement is everywhere."²⁸⁴ NHTSA-sponsored research evaluated a 400% to 500% increase in traffic enforcement and recommended further study of even higher levels of enforcement.²⁸⁵ DDACTS advocated for police agencies to adopt "highly visible traffic enforcement as a core operational element."²⁸⁶

There is some data from DDACTS implementations suggesting that NHTSA's programs cause sharp increases in stops. The police department in Meridian, Idaho, for example, reported a 265% increase in "traffic contacts."²⁸⁷ Milwaukee reported a 136% increase in traffic stops in DDACTS areas.²⁸⁸ Flint reported a 400% increase in stops from one six-month period to the next.²⁸⁹ Weatherford, Texas, reported a 40% increase in stops.²⁹⁰ Great Falls, Montana, reported an 86% increase in traffic stops in its DDACTS zone.²⁹¹ The list goes on.²⁹²

284. Module 4: Enforcement and Action Planning, in NHTSA, *TRAFFIC OCCUPANT PROTECTION STRATEGIES: INSTRUCTOR PACKAGE 7* (2007), <https://perma.cc/N4W3-FGLK>. This training program dates back to the 1990s. See *Traffic Occupant Protection Strategies (TOPS) Training Curriculum Revised*, TRAFFIC TECH, July 1997, <https://perma.cc/3C7V-C9V9>.

285. Josi et al., *supra* note 170, at 505.

286. NHTSA, *supra* note 188, at 17.

287. NHTSA, *DDACTS: Data-Driven Approaches to Crime and Traffic Safety* 15 (n.d.), <https://perma.cc/H47Y-WW2M> (archived Dec. 26, 2016) (to locate, select "View the live page").

288. Jesse Garza, *City Crime Decreases After Surge in Traffic Enforcement Surge [sic]*, *Flynn Says*, MILWAUKEE J. SENTINEL (updated Dec. 21, 2017, 11:43 AM CT), <https://perma.cc/22H3-F87K>; see also FOX6 News Milwaukee, *Watch: Police Chief Ed Flynn Talks About the Milwaukee Police Department's Traffic Enforcement Plan Through DDACTS (Data-Driven Approaches to Crime and Traffic Safety)*, FACEBOOK (May 25, 2017), <https://perma.cc/QPP6-WUCN> (to locate, select "View the live page").

289. RYDBERG ET AL., *supra* note 259, at 21 tbl.2 (showing 1,015 stops from January to June 2012 and 4,499 stops from July to December 2012).

290. *DDACTS Works! See How This Proven System Has Improved Policing for Your Colleagues [sic]*, INT'L ASS'N OF DIRS. OF L. ENF'T STANDARDS & TRAINING, <https://perma.cc/VMN6-T8K8> (archived Oct. 25, 2023).

291. Katie Cunningham, Great Falls Police, *DDACTS Update 4* (n.d.), <https://perma.cc/829Z-MF9H>.

292. Police in Baltimore County, Maryland, increased "focused enforcement activity" by at least 14,661 stops (86.3%). ANACAPA SCIS, INC., *CASE STUDY OF THE BALTIMORE COUNTY*
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Texas state-level stop data is also informative. IADLEST began working with Texas in 2015, eventually receiving substantial funding from the Texas DOT to implement DDACTS.²⁹³ By 2017, the Texas DOT had integrated DDACTS into statewide programming.²⁹⁴ As DDACTS became further ingrained, reported stops rose steadily: 6.01 million in 2016,²⁹⁵ 6.62 million in 2017,²⁹⁶ 8.28 million in 2018,²⁹⁷ and 9.59 million in 2019.²⁹⁸ Some of this increase likely is due to improved reporting.²⁹⁹ But police in Texas make no effort to hide their affinity for pretextual stops. As the executive director of the Texas Municipal Police Association put it: “We use the traffic stop as a pretext. It’s a very valuable tool.”³⁰⁰

Nashville offers another example. In 2008, Nashville was selected as one of the original pilot sites for DDACTS.³⁰¹ It was touted by some as a “model for

POLICE DEPARTMENT’S DDACTS PROGRAM 5 (2009), <https://perma.cc/GU7B-3UUQ>. Denver reported a 17.6% increase in officer activity, with some areas increasing as much as 28.4%. Denver Police DDACTS, *supra* note 279, at 1, 2 tbl. Police in Schenectady reported a 19% increase. MATTHEW DOUGLAS, SCHENECTADY CNTY. TASK FORCE, DDACTS STUDY: DATA-DRIVEN APPROACHES TO CRIME & TRAFFIC SAFETY 3 (2018), <https://perma.cc/42HU-CE6V>.

293. Daniel A. Howard, *IADLEST Completes TXDOT-DDACTS Efforts for 2017 and Prepares for Future 2018 Activities*, in NEWSLETTER (Int’l Ass’n of Dirs. of L. Enf’t Standards & Training, Meridian, Idaho), Oct. 2017, at 4, 4-5, <https://perma.cc/C36D-D52M>.

294. *Id.*

295. Tex. Comm’n on L. Enf’t, Raw Racial Profiling Data—2016 (n.d.), <https://perma.cc/8VXW-5N3R> (to locate, select “View/Download File,” then summate data in Column I). Yearly total reported stops are available from the Texas Commission on Law Enforcement. *Racial Profiling Reports*, TEX. COMM’N ON L. ENF’T, <https://perma.cc/XJL2-J3Z2> (archived Nov. 1, 2023). Only law enforcement agencies “that employ[] peace officers who make motor vehicle stops in the routine performance of the officers’ official duties” are required to report racial profiling data. TEX. CODE CRIM. PROC. ANN. art. 2.132 (West 2023).

296. Tex. Comm’n on L. Enf’t, Raw Racial Profiling Data—2017 (n.d.), <https://perma.cc/DP25-H3XA> (to locate, select “View/Download File,” then summate data in Column J).

297. Tex. Comm’n on L. Enf’t, 2018 Racial Profiling Data (n.d.), <https://perma.cc/Q8HP-VKVC> (to locate, select “View/Download File,” then summate data in Column H).

298. Tex. Comm’n on L. Enf’t, Comprehensive Racial Profiling (2021), <https://perma.cc/2BGR-LMQX> (to locate, select “View/Download File,” then summate data in Column O).

299. See Jody Barr, *KXAN Investigation Leads to First-Ever 100% Racial Profiling Report Compliance in Texas*, KXAN (updated June 2, 2021, 11:54 AM CDT), <https://perma.cc/ZE5U-4KW4>.

300. Marsha Mercer, *Police ‘Pretext’ Traffic Stops Need to End, Some Lawmakers Say*, STATELINE (Sept. 3, 2020, 12:00 AM), <https://perma.cc/4FUV-DMY2> (Kevin Lawrence, Executive Director of the Texas Municipal Police Association).

301. Caroline Cournoyer, *Data-Driven Policing*, GOVERNING (Apr. 27, 2011), <https://perma.cc/96V3-MEZ6>.

the nation.”³⁰² A review of Nashville’s DDACTS implementation referred to Nashville’s Police Chief, Ronald Serpas, as a “superstar” in law enforcement.³⁰³ Nashville implemented DDACTS as a “method for conducting law enforcement that is integrated into all activities of the agency.”³⁰⁴ The result was an astronomical number of traffic stops. According to the Stanford Computational Policy Lab, in 2012, Nashville’s Metropolitan Police Department made over 700 traffic stops per 1,000 residents—over three times the next highest city of comparable size, about seven times the national average, and about fifteen times more than some comparable cities.³⁰⁵ These findings echoed an earlier report issued by local advocates.³⁰⁶

Given the increases in traffic stops identified above, one can expect an increase in the attendant harms identified in Part I.

4. Attendant harms

The social costs of NHTSA’s programs have gone unexamined by the agency itself, and public data again is limited, but there is some evidence from jurisdictions that have implemented DDACTS. In some places, DDACTS brings with it a spike in citations and fines. The Milwaukee Police Department, for example, reported an 885% increase in citations in its DDACTS areas.³⁰⁷ Duluth, Minnesota, reported a 92% increase.³⁰⁸ Everett, Massachusetts, reported a 72% increase.³⁰⁹ Great Falls, Montana, reported a 48% increase in citations citywide (not just in its DDACTS zones).³¹⁰

With more stops come more opportunities for uses of force. Several high-profile stops in Texas and Oklahoma—states where DDACTS is deeply ingrained³¹¹—demonstrate how low-level stops can spiral into police uses of

302. Ed Sanow, *Traffic Enforcement Equals Crime Reduction*, LAW & ORD., Mar. 2009, at 6, 6.

303. ANACAPA SCIS., INC., CASE STUDY OF THE METROPOLITAN NASHVILLE, TENNESSEE, POLICE DEPARTMENT’S DDACTS PROGRAM 1 (2009), <https://perma.cc/T7PY-9V63>.

304. *Id.* at 4.

305. CHOHLAS-WOOD ET AL., *supra* note 252, at 2 fig.1.

306. See GIDEON’S ARMY, DRIVING WHILE BLACK: A REPORT ON RACIAL PROFILING IN METRO NASHVILLE POLICE DEPARTMENT TRAFFIC STOPS 8 fig.1 (2016), <https://perma.cc/9WSQ-K4M2>.

307. Garza, *supra* note 288.

308. INT’L ASS’N OF CHIEFS OF POLICE, DULUTH POLICE DEPARTMENT: SPEED AND ALCOHOL 3 (n.d.), <https://perma.cc/B2T2-NA4U>.

309. M. TRZEPACZ, EVERETT POLICE DEPARTMENT: ANNUAL DDACTS REVIEW 4 (2013), <https://perma.cc/NFY8-SKTM>.

310. Cunningham, *supra* note 291, at 5.

311. See OKLA. HIGHWAY SAFETY OFF., FY2022 OKLAHOMA HIGHWAY SAFETY PLAN 45, 66, 82-90, 94 (n.d.), <https://perma.cc/6FQX-QS7P> (listing 26 grants to state and local policing
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force. In 2018, an officer in Arlington, Texas, shot and killed O'Shae Terry, a young Black man who had been pulled over for expired tags.³¹² In July 2015, a Texas State Trooper pulled over Sandra Bland, a twenty-eight-year-old Black woman, for allegedly failing to signal a lane change.³¹³ When Bland expressed frustration, the officer escalated the situation and forcefully arrested her.³¹⁴ Bland eventually died in custody.³¹⁵ In 2018, Harold Brown, a certified security officer, was pulled over by Valley Brook Police in Oklahoma for a malfunctioning license plate light.³¹⁶ The stop quickly spiraled into a violent arrest and eventual lawsuit.³¹⁷

There is reason to believe that NHTSA's programs operate with stark racial disparities. Pretextual stops encourage police to exercise almost unlimited discretion in deciding whom to stop, creating prime conditions for discrimination.³¹⁸ Even modern programs like DDACTS, which targets specific "high-crime" locations, are likely to produce racial disparities because crime rates reflect a variety of biases.³¹⁹ A draft of a DDACTS publication

agencies that were used, in part, to implement DDACTS); *supra* notes 293-98 and accompanying text (noting Texas's implementation of DDACTS at the state level).

312. Naomi Martin, *We're at War: Anger, Questions Mount After a Traffic Stop Ends in a Fatal Shooting by Police in Arlington*, DALL. MORNING NEWS (Nov. 4, 2018, 6:00 AM CST), <https://perma.cc/6CVG-V3ES>.

313. David Montgomery, *The Death of Sandra Bland: Is There Anything Left to Investigate?*, N.Y. TIMES (May 8, 2019), <https://perma.cc/RR4X-6JAU>.

314. Ryan Grim, *The Transcript of Sandra Bland's Arrest Is as Revealing as the Video*, HUFFPOST (updated July 23, 2015), <https://perma.cc/YPT7-SFCA>.

315. *Id.*

316. Clayton Cummins, *Lawsuit Alleges Excessive Force by Valley Brook Police Officers in 2018 Traffic Stop*, NEWS ON 6 (July 16, 2021, 9:18 PM), <https://perma.cc/8KSC-SMET>.

317. *Id.*

318. *See supra* note 64 and accompanying text.

319. There is reporting bias—disparities in who reports crime to police. *See* Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1146-47 (2017) ("Crime data is notoriously incomplete. Certain crimes like murder, burglary, and auto theft tend to be consistently reported to authorities, while other crimes like sexual assault, domestic violence, and fraud tend to be underreported. Some communities, frustrated with current policing practices, simply decline to report crimes. The Department of Justice has reported that half of crimes with victims go unreported." (footnotes omitted)); Kristian Lum & William Isaac, *To Predict and Serve?*, SIGNIFICANCE, Oct. 2016, at 14, 15 (explaining that lack of trust in police may lead to underreporting).

There is enforcement bias—disparities in where and against whom to direct police resources. *See* Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERKELEY TECH. L.J. 1051, 1073 (2021) ("[E]ven when certain types of crime occur equally across a large geographic area, police crime data may not accurately reflect that reality. Instead, crime data will reflect where police officers concentrate their time, because crimes that occur in heavily patrolled public places become more visible and thus are more likely to be recorded, and resulting crime datasets will include places and

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essentially admits as much.³²⁰ Data from Nashville substantiates this: In 2012, Black drivers were stopped at a 61% higher rate than white drivers were; in 2017, the disparity was 44%.³²¹ The disparities among nonmoving violations—broken taillights, expired registration tags, and other violations common to pretextual stops—were even more pronounced: 82% in 2012 and 68% in 2017.³²²

* * *

This Article does not purport to offer a definitive cost-benefit analysis of any particular NHTSA program, much less NHTSA's general embrace of the crime-fighting potential of traffic stops. But some conclusions are possible. First, the evidence that NHTSA's approach yields traffic-safety and crime-fighting benefits is fragmented. It stands in contrast to other contexts where the agency has been much more science-driven in its approach.³²³ Second, there has been woefully inadequate consideration of the social harms of NHTSA's policies. This gap demands attention, but the question remains where such review is most likely to originate. Subpart D begins to address that question.

people who had more contacts with law enforcement and will not reflect the actual crime occurrence rates.” (footnotes omitted)); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 508 (2021) (“[T]argeting of law enforcement resources in a specific community based on past policing patterns may lead to more arrests of individuals in that community, giving the impression that members of that community are more likely to engage in criminal behavior.”).

320. In what appears to be a draft of WEISS, *supra* note 160, posted on the IADLEST website, the author acknowledges that “[l]ike many place-based law enforcement initiatives, the adoption of the DDACTS model may result in increased law enforcement activity in minority neighborhoods.” DDACTS: A Historical Overview 21 (n.d.) (unpublished manuscript), <https://perma.cc/ZH7L-3JJ6>. Interestingly, this paragraph is deleted from the final text, although the substance of the report is otherwise largely unchanged. See WEISS, *supra* note 160, at 20-21.

321. CHOHLAS-WOOD ET AL., *supra* note 252, at 4.

322. *Id.*

323. See Andrea Roth, *The Uneasy Case for Marijuana as Chemical Impairment Under a Science-Based Jurisprudence of Dangerousness*, 103 CALIF. L. REV. 841, 844 (2015) (“Bathed in the scientific ethos [inaugural “traffic czar” William] Haddon established, researchers conducted meticulous studies with thousands of motorists that showed precise increased relative crash risks at precise BACs. For example, these studies revealed a precipitous rise in crash risk at .10 and .15 percent BAC, and a lesser but still troubling increased relative crash risk at .08 percent. At the prodding of federal officials, states would eventually adopt these BACs as presumptive proof of impairment, and later—after DUI enforcement took a punitive, law-and-order turn in the 1980s—would redefine the very crime of DUI in terms of BAC.” (footnote omitted)).

D. Legal and Political Accountability

This Subpart explores how one might go about reversing NHTSA's promotion of pretextual traffic stops. As discussed below, neither constitutional law nor administrative law offers much of an avenue to challenge NHTSA's approach directly. This likely means that change will need to come from the DOT's and NHTSA's political leadership. But assuming the will exists, implementation faces its own challenges.

Traditional constitutional protections around policing are unlikely to offer a viable avenue of relief.³²⁴ As a general matter, constitutional criminal procedure—primarily the Fourth Amendment's protection against unreasonable searches and seizures³²⁵—sets the general bounds of police authority in individual encounters, but it gives police discretion to determine how to exercise that authority in any particular encounter.³²⁶ After the Supreme Court's decision in *Whren v. United States*, federal law requires only that the officer have reasonable suspicion of a traffic violation to be able to stop a vehicle, regardless of their ulterior motives.³²⁷ A driver can still challenge their selection on equal protection grounds, but again, current law sets a high bar.³²⁸

Moreover, successfully litigating a particular stop does little to address agency-level policies. Scholars have long urged changes to constitutional doctrine that would take into account agency rules and the extent to which officers follow them.³²⁹ That has not happened. As Daphna Renan puts it:

324. Cf. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (explaining, in the context of administrative agencies' pursuit of criminal matters, that neither administrative law nor individual rights provisions of the Constitution offer much protection against structural inequities).

325. U.S. CONST. amend. IV.

326. Many have questioned the extent to which these rights adequately protect against police overreach. E.g., Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 525 (2021) (analyzing limits of Fourth Amendment and constitutional jurisprudence for regulating police officers' use of force); Andrew Guthrie Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 551 (2017) (discussing the applicability of the Fourth Amendment to "data trails" emitted by smart devices); Harmon, *Problem*, *supra* note 80, at 768-81 (describing the limits of the conventional paradigm of police regulation, which focuses on court enforcement of constitutional rights and remedies).

327. 517 U.S. 806, 810 (1996); see *supra* note 67 (collecting scholarship critiquing *Whren*).

328. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274, 279 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

329. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974) ("The rule of constitutional law that I urge is simple . . . [u]nless a search or seizure is conducted pursuant to and in conformity with either legislation or police

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“Fourth Amendment law has developed few tools to put those pieces together, to see a whole greater than the sum of its parts.”³³⁰ As a result, scholars have urged turning to administrative law to regulate the decision-making of policing agencies.³³¹ But, at least in this context, administrative law offers little to hold NHTSA accountable for its policy choices.

As an initial matter, administrative law will not push NHTSA toward revitalizing its efforts to regulate vehicle safety. Agency inaction is afforded substantial deference by the courts, with little opportunity for public involvement.³³² NHTSA’s idleness on the regulatory front—its limited rulemaking around automobile safety—has been a frequent source of complaints from advocates.³³³ In the years following its rulemaking

departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment.”).

330. Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1056 (2016) (discussing how Fourth Amendment law’s focus on discrete police actions fails to capture the aggregate impact of programmatic surveillance, much like how a focus on the lawfulness of an individual traffic stop misses the cumulative effect of using traffic stops as a crime-fighting tactic).

331. *E.g.*, Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 51-56 (2019) (calling for regulation of police by permanent administrative bodies called “regulatory intermediaries”); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 117-18 (2017) (proposing a regulatory solution to problems created by predictive policing); Renan, *supra* note 330, at 1046 (suggesting ways to integrate administrative law and the Fourth Amendment to address and redress programmatic surveillance); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 120-21, 139 (2016) (arguing that police agencies should be subject to administrative law principles, such as notice-and-comment rulemaking); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1889-92 (2015) (arguing that police practices should be subject to democratic review and explaining how courts can motivate change within existing administrative and constitutional law frameworks); Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1758-75 (2014) (proposing administrative law principles as an alternative to Fourth Amendment jurisprudence for purposes of regulating “panvasive” surveillance—large-scale monitoring of the population with no individualized suspicion). For a partial critique of this approach, see Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2057-59 (2016) (arguing that criminal courts should expand their participation in systemic criminal justice regulation rather than make way for other forms of regulation).

332. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658-61 (2004) (critiquing the current deferential standard of review of agency inaction); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 654, 665 (1985) (discussing *Heckler v. Chaney*, 470 U.S. 821 (1985), and its deferential approach to agency inaction).

333. *See, e.g.*, Eli Wolfe, *Safety Advocates Assail Lack of Federal Action on Weak Vehicle Seats*, SALON (Sept. 9, 2020, 7:29 AM EDT), <https://perma.cc/J2K7-SWEA>; Clarence Ditlow & Ralph Nader, Opinion, *Weak Oversight, Deadly Cars*, N.Y. TIMES (Oct. 28, 2014),
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slowdown, however, whenever NHTSA was taken to court in an attempt to force it to exercise its regulatory authority, it prevailed.³³⁴

Nor does administrative law offer a way to prompt change in NHTSA's pretextual stops programs. Even under recent case law limiting the statutory authority of administrative agencies,³³⁵ it is hard to imagine a court finding these NHTSA programs are outside the agency's traffic-safety authority. After all, encouraging traffic enforcement is now solidly written into NHTSA's enabling legislation.³³⁶ Nor is there any evidence of bad faith or ill intent behind NHTSA's actions that might cause a court to ignore the presumption of regularity in NHTSA's efforts.³³⁷ These are the sorts of tactical decisions generally committed to agency discretion.

The informality of these programs further insulates them from judicial review. DDACTS, for example, was promoted via guidance.³³⁸ Guidance documents are issued without public notice or an opportunity for comment.³³⁹ In the typical case, when guidance documents subject a regulated entity to an administrative enforcement proceeding, the guidance may eventually be

<https://perma.cc/P8UV-ZBUU>; *supra* note 133 (noting scholarly critiques of NHTSA's passivity).

334. Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, 66 LAW & CONTEMP. PROBS. 135, 147 (2003).

335. The Supreme Court has deployed its novel "major questions doctrine" in an expansive deregulatory manner. *See, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2610-14 (2022) (applying the doctrine to restrict the EPA's ability to regulate greenhouse gas emissions). *See generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (critically analyzing "significant recent developments in the major questions doctrine"). Although one might be tempted to rely on deregulatory principles to rein in NHTSA in this case, I am skeptical the Court's doctrine would go that far. When it offers guidance to police, NHTSA is not directly regulating anyone, at least not in ways that cause immediate economic consequences, which is what has previously triggered the doctrine. *See, e.g., Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). Nor is embracing law enforcement's longstanding use of pretextual traffic stops a particularly novel use of regulatory authority. *Cf. West Virginia*, 142 S. Ct. at 2605 (rejecting a "novel reading" of the EPA's statutory authority).

336. *See supra* notes 141-42 and accompanying text.

337. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2582-83 (2019) ("Where there are equally plausible views of the evidence, one of which involves attributing bad faith to an officer of a coordinate branch of Government, the presumption compels giving the benefit of the doubt to that office.").

338. *Guidance Documents*, NHTSA, <https://perma.cc/B6RE-NN79> (archived Oct. 25, 2023); NHTSA, *supra* note 188.

339. *See* U.S. Dep't of Just., Just. Manual § 1-19.000 (2022), <https://perma.cc/GU5D-VLF3> ("Unlike rules promulgated through the notice and comment process . . . guidance documents do not bind the public and are not treated as binding by the courts.").

subject to judicial review.³⁴⁰ But that will never happen with DDACTS. DDACTS is mere guidance directed at state and local police, entities over which NHTSA has no direct regulatory authority.³⁴¹ DDACTS likewise has avoided internal executive branch “good guidance” practices.³⁴²

Beyond DDACTS, much of the guidance at the heart of NHTSA’s efforts is even less formal. NHTSA took a wide range of actions to push its view of traffic stops: organizing conferences, trainings, sponsoring research, funding private law enforcement associations, making statements of support in magazines and in front of Congress, and so on.³⁴³ This murky “sub-guidance” is even less transparent or accountable than typical guidance, yet exerts significant influence on the policing gestalt.³⁴⁴

Absent direct legal recourse, the longevity of these NHTSA programs at the federal level will be a function of political will. It hardly is a given that the

340. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 411-12 (2007); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004); Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466-71 (1992); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1316-17 (1992).

341. See Uniform Procedures for State Highway Safety Grant Programs, 88 Fed. Reg. 7780, 7782-83 (Feb. 6, 2023) (“As NHTSA explained in the [Notice of Proposed Rulemaking], DDACTS is a law enforcement operational model that integrates location-based traffic-crash and crime data to determine the most effective methods for deploying law enforcement and other resources. . . . NHTSA also notes that DDACTS is not part of NHTSA’s highway safety grant program, and not all DDACTS-related activities are eligible uses of NHTSA’s grant funds.”).

342. “Good guidance” procedures centralize the review of “significant” agency guidance documents, including those that are reasonably anticipated to cause at least \$100 million in annual economic impact or raise “novel legal or policy issues arising out of legal mandates.” Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007); see also Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1287 (2017) (discussing these good guidance practices). Although widespread use of crime-fighting traffic stops surely raises significant policy questions and has a substantial economic impact, there is no indication that any of NHTSA programs, including DDACTS, went through this centralized review process.

343. See *supra* Part II.B.

344. This exacerbates policing’s already-acute transparency problem. On the problem of transparency in policing, see, for example, Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 919-20, 929-30 (2021); Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 504 (2018); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 187-96 (2008); and Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1108-14 (2000).

executive branch will find the resolve to tackle pretextual traffic stops.³⁴⁵ And even if it decides to do so, NHTSA's political leadership will need to reverse an approach that has become entrenched within parts of the agency after decades of support from career officials with their own views on policing.³⁴⁶

Like any agency, NHTSA has several divisions with differing expertise, missions, and orientations.³⁴⁷ Among NHTSA's divisions focused on driver behavior, one in particular played an outsized role in the programs discussed in Part II. Known as the "Traffic Law Enforcement Division" in the mid-1990s³⁴⁸ and now known as the "Enforcement and Justice Services Division," this division funded and promoted many of the publications and programs discussed above, including CCTS and DDACTS.³⁴⁹ Unlike the engineers, economists, and attorneys that staff NHTSA's other divisions, many of the career staff within the Enforcement and Justice Services Division are former law enforcement officers.³⁵⁰ The manager of NHTSA's LEL program, for example, was a former police officer in Tempe, Arizona.³⁵¹ NHTSA's DDACTS

345. See, e.g., David Nakamura, Mark Berman & Annie Linskey, *Why Biden's Executive Order on Policing Is Still Up in the Air*, WASH. POST (Apr. 7, 2022, 5:00 AM EDT), <https://perma.cc/Z275-2MTK>.

346. See generally Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 529 (2020) (exploring "the relationship between democracy and the criminal enforcement bureaucracy" in the modern political context).

347. NHTSA, Organization Chart (2023), <https://perma.cc/247S-QJHG>; see also Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036-37 (2011). For example, in their seminal examination of NHTSA, Mashaw and Harfst explored internal tensions, highlighting the influence of attorneys and economists. MASHAW & HARFST, *supra* note 15, at 17. There is also the separation between NHTSA's vehicle-safety divisions and its driver-behavior ones—the latter controlling the vast majority of NHTSA's budget. See *supra* notes 136-38 and accompanying text (discussing NHTSA's budget).

348. See *Traffic Occupant Protection Strategies (TOPS) Training Curriculum Revised*, *supra* note 284, at 1 ("The Traffic Law Enforcement Division at [NHTSA] has developed the *Traffic Occupant Protection Strategies (TOPS)* training curriculum."); NHTSA, *supra* note 155, app. A, at 35 ("Brian G. Traynor is currently chief of the Traffic Law Enforcement Division. Previously, he served in the Police Traffic Services Division of NHTSA Before 1980, Mr. Traynor was a member of the Metropolitan Police Department in Washington, D.C. . . .").

349. DAVID MCCLURE & JEREMY LEVY WITH NANCY LA VIGNE & DAVID HAYESLIP, URBAN INST., DDACTS EVALUABILITY ASSESSMENT: FINAL REPORT ON INDIVIDUAL AND CROSS-SITE FINDINGS 36 (2013), <https://perma.cc/79PC-3DUH> ("In July 2008, the NHTSA Enforcement and Justice Services Division hosted an initial meeting to discuss its new DDACTS initiative.").

350. See MASHAW & HARFST, *supra* note 15, at 17 (discussing professional NHTSA staff other than law enforcement).

351. Nat'l L. Enf't Mem'l & Museum, *Roadside Crashes—A Constant Danger* (n.d.), <https://perma.cc/RJA5-EKNX>.

National Coordinator was a former employee of the IACP and a former police officer with two decades of experience.³⁵² They are hardly alone.³⁵³

One cannot altogether rule out that NHTSA's political leadership was fully aware of and approved the activities of this Division, but I am skeptical that was the case. Racial profiling, Driving While Black, and the harms of pretextual traffic stops have been controversial for the duration of NHTSA's embrace of traffic stops as a crime-fighting tactic.³⁵⁴ Both the Obama and Biden administrations recognized that pretextual stops could lead to unlawful and discriminatory policing.³⁵⁵ And yet, DDACTS expanded significantly during the Obama administration; DDACTS 2.0 launched in 2021, during the Biden administration.³⁵⁶ Perhaps NHTSA's political leadership, lacking policing expertise, simply missed the implications of these programs.³⁵⁷ Or perhaps the

352. *NASID Conference Speaker Biographies*, NAT'L ALL. TO STOP IMPAIRED DRIVING, <https://perma.cc/PMG4-XLSK> (archived Nov. 6, 2023) (Christine Frank); Int'l Ass'n of Dirs. of L. Enf't Standards & Training, DDACTS: National Agency Strategic Planning Session 1 (n.d.) (on file with author).

353. *Moderators & Panelists: AV Test Initiative Tracking Tool Launch and Panel Discussions*, NHSTA, <https://perma.cc/W46F-YPAW> (archived Nov. 6, 2023) ("John W. Marshall serves as the Director of the Office of Safety Programs with [NHSTA]. . . . Marshall began his career in public safety in 1980 as a Virginia State Trooper."); *A National Forum to Develop a Model Speed Management Pilot Program*, INS. INST. HIGHWAY SAFETY, <https://perma.cc/YB7F-JFFG> (archived Oct. 25, 2023) ("Keith D. Williams is the chief of the Enforcement and Justice Services division at [NHTSA]. . . . Prior to federal service, Mr. Williams spent 25 years in law enforcement . . ."); see also NEWSLETTER (Int'l Ass'n of Dirs. of L. Enf't Standards & Training, Meridian, Idaho), Apr. 2017, at 41, <https://perma.cc/356J-39HT> ("Keith Williams, Chief of Enforcement Division at NHTSA, spoke on behalf of John Marshall. Mr. Williams started by saying that NHTSA appreciates the relationship they have with IADLEST.").

354. See LaFraniere & Lehren, *supra* note 58; see also Kirkpatrick et al., *supra* note 31 (detailing controversies over racial profiling and pretextual traffic stops).

355. See Consent Decree paras. 2, 76(c), 80, *United States v. City of Ferguson*, No. 16-cv-000180 (E.D. Mo. Mar. 17, 2016), ECF No. 12 (agreement between President Obama's Department of Justice and the City of Ferguson addressing a pattern of unconstitutional policing by, among other things, limiting the Ferguson Police Department's use of pretextual stops); *supra* note 30 and accompanying text (discussing President Biden's executive order).

356. See *supra* notes 195-96 and accompanying text (discussing the expansion of DDACTS during the first Obama administration); INT'L ASS'N OF DIRS. OF LAW ENF'T STANDARDS & TRAINING, *supra* note 218, at 1.

357. NHTSA administrators came from a variety of backgrounds. Raymond Peck, who was the administrator from 1981 to 1983, was a coal lobbyist. Mashaw & Harfst, *supra* note 114, at 190. Diane Steed, Peck's successor, was a regulatory analyst at the Office of Management and Budget. *Id.* at 191. David Strickland served as legislative counsel. Press Release, U.S. Senate Comm. on Com., Sci. & Transp., Rockefeller Statement on David Strickland Named as NHTSA Nominee (Dec. 7, 2009), <https://perma.cc/PV6M-4KZN>. Mark Rosekind is an expert on human fatigue. Mark Rosekind, U.S. DEP'T OF TRANSP. VOLPE CTR., <https://perma.cc/RS99-AYBW> (archived Nov. 4, 2023).

Division's low visibility (and lack of public attention) made these implications inconsequential to leadership. Consistent with both of these possibilities, in 2022, when advocates raised concerns about these programs in meetings with the DOT's leadership, Secretary Buttigieg's office indicated that these programs had received little scrutiny to date but that auditing programs like these was a priority for the administration.³⁵⁸ This was particularly so given the direction in President Biden's executive order that federal agencies review their grants to policing agencies.³⁵⁹

Even if the political leaders of NHTSA and the DOT did not approve of or fully appreciate the implications of these programs, it is too simple to place full blame on the Enforcement and Justice Services Division. The longevity of these programs must be understood in the context of an agency that, over time, embraced driver behavioral change as its central method of ensuring traffic safety.³⁶⁰ This culture encouraged career officials to develop novel (and in this case, controversial) programs. At the same time, data collection, evaluation, and consciousness of social harm seem not to have kept up. In fact, the DOT's Inspector General, who oversees NHTSA, has never audited any aspect of these programs.³⁶¹

While the DOT considers whether to right its ship, change might come more quickly at the local level. Indeed, there are some indications of recent attention to pretextual stops.³⁶² However, as Rachel Harmon has observed in other contexts, federal programs can operate in ways that disrupt local accountability.³⁶³ NHTSA continues to use highway-safety funding to finance

358. See Letter from Policing Project & Transp. Equity Caucus to Sec'y Pete Buttigieg, U.S. Dep't of Transp., & Att'y Gen. Merrick Garland, U.S. Dep't of Just. (Feb. 14, 2022), <https://perma.cc/JG5G-S9A9>. The author was present at subsequent meetings with leaders of NHTSA and the DOT, including one on May 27, 2022, led by DOT Deputy Secretary Polly Trottenberg and Ann Carlson, then-Chief Counsel of NHTSA and future Acting Administrator, as well as subsequent meetings with the DOT's Office of the Secretary and Departmental Office of Civil Rights.

359. Exec. Order No. 14074, § 20(b)(i), 3 C.F.R. 371, 391 (2023) ("[T]he head of every . . . Federal agency that provides grants to State, local, and territorial [law enforcement agencies] shall commence a . . . review of its law enforcement-related grantmaking operations and the activities of its grant recipients.").

360. See *supra* Part II.A; Mashaw & Harfst, *supra* note 114, at 191 n.78 ("NHTSA policy [in the late 1980s] focused on behavioral modification strategies to the virtual exclusion of motor vehicle safety standards.").

361. See *National Highway Traffic Safety Administration*, U.S. DEP'T OF TRANSP., OFF. OF THE INSPECTOR GEN., <https://perma.cc/WLC6-EG8L> (archived Oct. 25, 2023) (listing activities of the DOT Inspector General dating back to 2001).

362. See *supra* note 31 (collecting examples of jurisdictions that have limited pretextual stops).

363. Harmon, *Federal Programs*, *supra* note 80, at 947; see also ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN
footnote continued on next page

police patrols.³⁶⁴ NHTSA expects officers to make stops and issue citations during these patrols, creating opportunities for pretextual enforcement.³⁶⁵ Moreover, these patrols generate their own revenue—via fines and property seizures, the latter of which is facilitated by the federal Equitable Sharing program.³⁶⁶ Once relied upon, these funds can be difficult for localities to turn away.³⁶⁷

* * *

NHTSA was neither the first nor the last entity to advocate for the widespread use of traffic stops as a crime-fighting tactic. In fact, the practice of pretextual stops can be traced to the early decades of the automobile.³⁶⁸ There is little doubt that police would continue to use the practice today even without NHTSA's encouragement.

NHTSA, however, made an important contribution. Its programs explicitly coupled traffic safety and crime control, teaching police they could

AMERICA 3 (2016); Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 564 (2019).

For a detailed historical analysis of the relationship between the federal government and state and local police, see Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 5 (2019).

On policing policy coming at the local level, see, for example, Harmon, *Federal Programs*, *supra* note 80, at 947. See also Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 370 (2018) ("American policing, like American politics, is a decidedly local affair."); Harmon, *Problem*, *supra* note 80, at 815 ("Even limited federal intervention into policing—which has always been a local concern—has been politically controversial."); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1980 (2008) ("Of course, America's justice system already is bureaucratized, but the most important bureaucracies—police forces and district attorneys' offices—are governed by local politics and politicians.").

Some scholars focus on the inverse—the impact of state and local policing on the federal government. E.g., Daniel Richman & Sarah A. Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. C.R. & C.L. 421, 424 (2022); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, in 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 377, 379 (Michael Tonry ed., 2006).

364. See McIntire & Keller, *supra* note 76 (discussing federal funding of traffic stops).

365. See *supra* notes 144-46 and accompanying text (discussing NHTSA's 2008 activity metrics); *supra* notes 174, 183 and accompanying text (discussing NHTSA materials that encouraged officers to see every traffic stop as a crime-fighting opportunity).

366. See *supra* notes 76-81 and accompanying text.

367. See Harmon, *Federal Programs*, *supra* note 80, at 948.

368. See SEO, *supra* note 69, at 183 ("Beginning in the late 1930s and with increasing frequency each decade, [Black motorists] wrote to the NAACP about traffic stops for minor or fabricated charges that left them terrified"); Chris Lamb, *America's First Post-World War II Race Riot Led to the Near-Lynching of Thurgood Marshall*, WASH. POST (Feb. 25, 2021), <https://perma.cc/G2G4-R98D> (discussing a pretextual stop of Thurgood Marshall in the 1940s).

achieve both goals with a single tactic. This subtle shift has diverted resources away from the nation's traffic-safety efforts toward ordinary crime fighting. Lack of data and rigorous study make it difficult to quantify NHTSA's precise impact, but what is known suggests NHTSA's efforts yield mixed benefits using tactics that are known to cause significant harm. Understanding these programs and their impact could not come at a more critical policymaking moment, with traffic deaths spiking, the DOT flush with federal funds, and renewed public attention on the harms of pretextual stops.³⁶⁹

III. Crime Control and the Administrative State

In failing to exercise its regulatory authority to improve vehicle design and in embracing pretextual policing, NHTSA presents a cautionary tale about the role of the administrative state in driving criminal law enforcement.³⁷⁰ This Part grapples with the broader implications of this dynamic, and in doing so, points to the role that administrative agencies play in driving our overreliance on policing—an overreliance that fuels deregulation and leaves the underlying social problems unaddressed.³⁷¹

Subpart A details examples from the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and the Bureau of Alcohol Tobacco, Firearms and Explosives (ATF) that parallel NHTSA's shift from regulation to policing-oriented solutions. Although each example is unique, collectively they demonstrate a symbiotic relationship between the failure of administrative regulation and the increased reliance on criminal law. This Subpart views

369. See *supra* notes 22-31 and accompanying text.

370. This Part contributes to an already-deep literature on criminal law as a mode of governance. E.g., Alexandra Natapoff, Response, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 152 (2020); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 410 (2018); Sarah A. Seo, Essay, *The New Public*, 125 YALE L.J. 1616, 1627-29 (2016); see also SEO, *supra* note 69, at 267; JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 5 (2007); MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 66 (2005) (describing the embrace of police as a “mode of governance”); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 114-15 (paperback ed. 2002).

There is also scholarship conceptualizing the criminal system as a regulatory system. E.g., Malcolm M. Feeley, *Criminal Justice as Regulation*, 23 NEW CRIM. L. REV. 113, 114 (2020); Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 316 (2014).

371. There is irony, of course, in small-government, antiregulatory opposition to agency action resulting in more policing. Some scholars see antiregulatory forces as stemming from “an ideological commitment to reducing the federal government’s presence.” MASHAW & HARFST, *supra* note 15, at 203. But this commitment seems reserved for government restriction of private industry. Concerns about government overreach largely disappear when agencies turn to policing.

classic regulatory failures—an agency’s inability or unwillingness to exercise its systemic regulatory authority with respect to private industry—as an antecedent to the agency’s embrace of policing strategies.

Subpart B uses these examples to make three broader points about the relationship between policing and the administrative state. First, federal administrative agencies not traditionally associated with crime control play an important role in driving local criminal law enforcement. Second, this dynamic often plays out via agency inaction—that is, deregulation and an agency’s inability to exercise its systemic regulatory authority create conditions ripe for reliance on policing and incarceration. Third, this reliance often proves ineffective because it shifts resources and attention away from root causes of social problems and toward individual behavior.

A. A Broader Dynamic

The story of NHTSA’s regulatory pullback and embrace of policing is hardly unique within the administrative state. This Subpart draws on examples from the FDA, FTC, and ATF that parallel NHTSA’s tale.³⁷² The brief descriptions below are not meant to provide a comprehensive account of the dynamics at play within these agencies. Instead, the narratives focus on a shared core: At critical moments, each agency shied away from exercising its systemic regulatory authority against private industry and instead reframed the social problem under its purview as one best addressed via individual criminal law enforcement.³⁷³

372. The examples above were selected to provide a cross section—of types of agencies, of their use of criminal sanctions, and of relationships to law enforcement. But other agencies also have followed similar patterns, eschewing civil regulatory solutions in favor of criminal law enforcement ones. The Securities and Exchange Commission, for example, has moved away from its original mandate of market regulation in favor of an enforcement-based approach. See Steven Pearlstein, *GameStop Mania Exposes SEC’s Failure as Regulator*, WASH. POST (Jan. 30, 2021, 6:57 PM EST), <https://perma.cc/MB3A-6H3Z>. The Department of Housing and Urban Development’s “One Strike Policy” encouraged local housing authorities to evict entire families if a single family member is arrested for criminal activity. See, e.g., Robert Hornstein, *Litigating Around the Long Shadow of Department of Housing and Urban Development v. Rucker: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 1 (2011); Jason Dzubow, *Fear-Free Public Housing?: An Evaluation of HUD’s “One Strike and You’re Out” Housing Policy*, 6 TEMP. POL. & C.R. L. REV. 55, 55-57 (1996).

373. Of course, this dynamic is not universal. Agencies can, for example, play important roles in promoting civil rights norms. See, e.g., Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW. & CONTEMP. PROBS. 115, 141 (2016); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1343-44 (2012).

1. The FDA and opioids

The FDA has significant authority to ensure the safety of prescription medication. In 1962, the world was reeling from revelations that thalidomide, a medication marketed to treat morning sickness in pregnant women, caused deaths and horrific birth defects.³⁷⁴ Although the United States had not approved the drug, its manufacturer had distributed it to 1,200 U.S. physicians.³⁷⁵ In response, Congress empowered the FDA to evaluate the efficacy of drugs before they go to market and gave the FDA oversight over prescription-drug advertising.³⁷⁶

In the late 1990s, under the FDA's watch, the nation entered a more wide-ranging crisis. In 1996, with the FDA's approval, Purdue Pharma released OxyContin, a new time-release opioid painkiller.³⁷⁷ From 1997 to 2002, OxyContin prescriptions for non-cancer-related pain increased about tenfold to 6.2 million.³⁷⁸ During this same period, OxyContin also became one of the nation's most abused prescription drugs.³⁷⁹

The FDA had regulatory authority to prevent and address this crisis but, like NHTSA, misdirected its efforts.³⁸⁰

374. See Leila McNeill, *The Woman Who Stood Between America and a Generation of 'Thalidomide Babies'*, SMITHSONIAN MAG. (May 8, 2017), <https://perma.cc/QK2A-AQB9>.

375. *Id.* The fallout would have been far worse if not for the efforts of Dr. Frances Oldham Kelsey. See Karen Geraghty, *Commemorative Issue: Protecting the Public: Dr. Frances Oldham Kelsey*, 3 VIRTUAL MENTOR 418, 418 (2001), <https://perma.cc/837J-HL6U>.

376. *Kefauver-Harris Amendments Revolutionized Drug Development*, FDA CONSUMER HEALTH INFO. (FDA, Silver Spring, Md.), Oct. 2012, at 2, <https://perma.cc/42QT-38LY>.

377. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221, 224 (2009), <https://perma.cc/98J8-2S94>.

378. *Id.* at 223.

379. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., NO. 19-05, REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S REGULATORY AND ENFORCEMENT EFFORTS TO CONTROL THE DIVERSION OF OPIOIDS 3 (2019), <https://perma.cc/YJ8K-K4TP>.

380. See generally PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021) (chronicling the history of the Sackler family, including the FDA's failure to adequately police OxyContin, in part due to extensive lobbying efforts by the Sacklers and Purdue Pharma); BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA 50-51, 64-67 (2018) (discussing the FDA's failures in regulating OxyContin and other painkillers despite opposition from advocates and community groups); Andrew Kolodny, *How FDA Failures Contributed to the Opioid Crisis*, 22 AMA J. ETHICS 743, 744-46 (2020), <https://perma.cc/ZGU7-GHAL> (exploring the FDA's failures to (1) regulate opioid marketing, (2) require adequate clinical trials for opioids, and (3) resolve conflicts of interest between the FDA and the pharmaceutical industry); Lars Noah, *Federal Regulatory Responses to the Prescription Opioid Crisis: Too Little, Too Late?*, 2019 UTAH L. REV. 757, 764-84 (discussing tools the FDA could have used to prevent and mitigate the opioid crisis). But see Letter from Janet Woodcock, Dir., Ctr. for Drug Evaluation & Rsch., FDA, to Sen. Maggie Hassan (n.d.), <https://perma.cc/8P5H-JWGE> (defending the FDA's actions).

The FDA approved the drug's use for "moderate" pain and for lengthy periods of time, opening the door for OxyContin to be prescribed for a wide range of ailments.³⁸¹ Even more remarkably, the agency approved a label for OxyContin stating that the drug's formulation was "believed to reduce the abuse liability of a drug," although that claim was not supported by clinical studies.³⁸² This allowed Purdue to launch an aggressive marketing campaign claiming that OxyContin was both as effective as and far less addictive than its competitors were.³⁸³

When public pressure drew attention to the FDA's paltry review and Purdue's misleading labeling, the FDA failed again. In 2001, the FDA included new warnings on OxyContin's label relating to its potential for misuse and abuse, but at the same time allowed Purdue to market the drug for "management of moderate to severe pain when a continuous, around-the-clock opioid analgesic is needed for an extended period of time."³⁸⁴ This label change allowed Purdue to sell more pills at higher doses.³⁸⁵ Again, this approval was given with "no studies on the safety or efficacy of opioids for long-term use."³⁸⁶ The FDA's "ever obliging" treatment of Purdue continued for years.³⁸⁷

While shirking its regulatory duties, the FDA was quick to highlight the problem of drug abuse and the need for a criminal law enforcement response. At a 2002 congressional hearing, for example, the head of the FDA's Office of New Drugs explained the agency's response to the opioid crisis in part by referring to the agency's work with law enforcement to address the "problem

381. Kolodny, *supra* note 380, at 745-46; KEEFE, *supra* note 380, at 244.

382. Caitlin Esch, *How One Sentence Helped Set off the Opioid Crisis*, MARKETPLACE (Dec. 13, 2017), <https://perma.cc/TE8T-HAVY>.

383. *See id.*; Van Zee, *supra* note 377, at 223; U.S. GEN. ACCT. OFF., GAO-04-110, PRESCRIPTION DRUGS: OXYCONTIN ABUSE AND DIVERSION AND EFFORTS TO ADDRESS THE PROBLEM 43-44 (2003), <https://perma.cc/L383-LCE3>.

384. *Timeline of Selected FDA Activities and Significant Events Addressing Substance Use and Overdose Prevention*, FDA, <https://perma.cc/B4XR-9W4M> (last updated Sept. 27, 2023).

385. Bill Whitaker, *Did the FDA Ignite the Opioid Epidemic?*, CBS NEWS (Feb. 24, 2019, 7:01 PM), <https://perma.cc/BQ4G-TUFL>.

386. *Id.* (quoting David Kessler, former FDA commissioner).

387. Patrick Radden Keefe, *The Family that Built an Empire of Pain*, NEW YORKER (Oct. 23, 2017), <https://perma.cc/2CNT-H6PZ> (discussing Purdue's efforts to protect its market share by preventing the sale of generic OxyContin and the FDA's acquiescence).

In May 2007, three Purdue executives pled guilty to misdemeanor false marketing but avoided jail time. Ameet Sarpatwari, Michael S. Sinha & Aaron S. Kesselheim, *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 463, 473 (2017) ("As part of the plea bargain, Purdue agreed to pay the federal government \$600 million and 27 states \$20 million. The three executives agreed to \$34.5 million in fines but avoided jail-time. By contrast, Purdue has earned an estimated \$31 billion in total revenues from extended-release oxycodone since its launch." (footnotes omitted)).

of abuse, misuse and illegal diversion” of OxyContin.³⁸⁸ At a 2005 congressional hearing, another FDA official highlighted the “FDA’s efforts to address the diversion and illegal sales of approved controlled substances.”³⁸⁹ In particular, the official highlighted how the FDA “work[ed] closely with [the] DEA on criminal investigations involving the illegal sale, use and diversion of controlled substances.”³⁹⁰

Although the FDA did not directly fund or train law enforcement like NHTSA does, its messaging shifted the enforcement focus from the pharmaceutical industry to the individual abuser. When evidence of OxyContin abuse and overdoses mounted, Richard Sackler, then-president of Purdue Pharma, deflected blame, writing: “Abusers aren’t victims They are the victimizers.”³⁹¹ He instructed his company to “hammer on the abusers in every way possible. . . . They are the culprits and the problem. They are reckless

388. *OxyContin: Balancing Risks and Benefits: Hearing Before the S. Comm. on Health, Educ., Lab. & Pensions*, 107th Cong. 13 (2002), <https://perma.cc/EV6M-MF6L> (statement of John K. Jenkins, Director, Off. of New Drugs, Ctr. for Drug Evaluation & Rsch., FDA).

389. *OxyContin and Beyond: Examining the Role of FDA and DEA in Regulating Prescription Painkillers: Hearing Before the Subcomm. on Regul. Affs. of the H. Comm. on Gov’t Reform*, 109th Cong. 23 (2005), <https://perma.cc/8H22-3X86> (statement of Robert Meyer, Dir., Off. of Drug Evaluation II, Ctr. for Drug Evaluation & Rsch., FDA).

390. *Id.* (statement of Robert Meyer). The DEA’s actions mirrored the FDA’s. Once a drug is approved by the FDA for prescription use, the DEA’s Quota Section sets Aggregate Production Quotas (APQs)—the upper limit for a drug’s domestic production. *See, e.g.*, Established Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2023, 87 Fed. Reg. 74168 (Dec. 2, 2022). As the rate of opioid abuse and overdoses skyrocketed across the country, the DEA could have stemmed the sheer volume of opioids by decreasing or at least holding steady the oxycodone APQ. *See* OFF. OF THE INSPECTOR GEN., *supra* note 379, at i. Instead, while the opioid overdose rate was climbing 8% annually, the agency continued authorizing substantially greater quantities. *Id.* By 2013, the oxycodone APQ was over 400% of the 2002 level. *Id.* The DEA would not significantly reduce this level until 2017. *Id.*

The DEA was eager to tout its criminal prosecutions. In 2001, in response to the growing OxyContin crisis, the DEA created a National OxyContin Action Plan—its first such plan targeting a brand-specific drug because of abuse. *Action Plan to Prevent the Diversion and Abuse of OxyContin*, DIVERSION CONTROL PROGRAM, <https://perma.cc/5VWE-8QQF> (archived Dec. 10, 2001); Off. of Diversion Control, DEA, *OxyContin: Diversion & Abuse* 6 (2003), <https://perma.cc/7HU6-3C9N>; U.S. GEN. ACCT. OFF., *supra* note 383, at 36. The first pillar of the DEA’s plan was “Enforcement & Intelligence”—seeking to “target individuals and organizations involved in the diversion . . . and abuse of OxyContin.” *Action Plan to Prevent the Diversion and Abuse of OxyContin*, *supra*. In subsequent years, when describing the results of its plan before Congress, DEA representatives summarized its impact in terms of investigations and arrests. *See, e.g.*, *OxyContin and Beyond*, *supra* note 389, at 44 (prepared statement of Joseph T. Rannazzisi, Acting Deputy Assistant Adm’r, Off. of Diversion Control).

391. KEEFE, *supra* note 380, at 230 (quoting Richard Sackler, President of Purdue Pharma).

criminals.”³⁹² The FDA’s approval of OxyContin and its public statements reinforced Purdue’s position.³⁹³

This criminal law enforcement approach did little to stem the tide of the opioid crisis created by the FDA’s lax treatment of OxyContin and Purdue Pharma. Consistent with the FDA’s approach to drug abuse, drug arrests rose substantially during these early years of the crisis.³⁹⁴ Ten years after OxyContin was approved by the FDA, arrests for possession of synthetic narcotics (including OxyContin) were up 167% while overall drug possession arrests rose 25%.³⁹⁵ And yet, overdose deaths remained on a steady upward trajectory.³⁹⁶ Between 1999 and 2021, for example, opioid overdose deaths increased ten-fold to over 80,000, and overdose deaths from prescription opioids (such as OxyContin) increased five-fold.³⁹⁷

2. The FTC and identity theft

Identity theft—wrongfully obtaining and using another person’s personal data, typically for economic gain³⁹⁸—garnered national attention in the late 1990s.³⁹⁹ Physical and legal infrastructure built for the pre-internet era put too much personal data in the hands of too many and stored it in insecure ways, thereby creating the ideal circumstances for identity thieves.⁴⁰⁰ A 1998 General

392. Jan Hoffman, *Richard Sackler Says Family and Purdue Bear No Responsibility for Opioid Crisis*, N.Y. TIMES (updated Sept. 17, 2021), <https://perma.cc/L8BY-C85E> (quoting Richard Sackler).

393. In 2002 testimony to Congress, a Purdue Pharma executive touted the company’s engagements with the FDA as evidence that the company was committed to fighting “abuse and diversion” of its drug. See *OxyContin: Balancing Risks and Benefits*, *supra* note 388, at 71-73 (prepared statement of Paul D. Goldenheim, Vice President for Rsch., Purdue Pharma).

394. See FBI, *Arrest Data—Reported Number of Drug Arrests*, <https://perma.cc/H7UA-HUCP> (last updated Jan. 1, 2017) (to locate, select “View the live page,” then select “Arrest Data—Reported Number of Drug Arrests,” and then select “Download”).

395. See *id.* (showing 17,575 arrests for possession of synthetic narcotics and 879,631 total possession arrests in 1995, compared to 46,930 and 1,097,376 in 2005).

396. *Drug Overdose Death Rates*, NAT’L INST. ON DRUG ABUSE, <https://perma.cc/Z64N-3F9K> (last updated June 30, 2023); Noah Weiland, *U.S. Recorded Nearly 110,000 Overdose Deaths in 2022*, N.Y. TIMES (May 17, 2023), <https://perma.cc/5BZF-DGDN>.

397. Nat’l Inst. on Drug Abuse, *National Drug Overdose (OD) Deaths, 1999-2021* (Jan. 19, 2023), <https://perma.cc/CQ5U-FDV4> (to locate, select “View the live page”).

398. *Identity Theft*, U.S. DEP’T OF JUST., <https://perma.cc/JC3H-UZKQ> (last updated Aug. 11, 2023).

399. U.S. GEN. ACCT. OFF., GAO/GGD-98-100BR, *IDENTITY FRAUD: INFORMATION ON PREVALENCE, COSTS, AND INTERNET IMPACT IS LIMITED* 4-5 (1998), <https://perma.cc/3372-4PDQ>.

400. Social security numbers, for example, routinely are used to open new accounts although they never were intended to be used as secure identifiers. DANIEL J. SOLOVE, *footnote continued on next page*

Accounting Office report highlighted the scale of the problem—impacting thousands of Americans and costing billions of dollars—and that no single federal agency was responsible for addressing the issue.⁴⁰¹ On the heels of the report, Congress passed the Identity Theft Assumption and Deterrence Act, creating new federal identity theft crimes and thrusting the FTC into a central role addressing identity theft.⁴⁰²

Congress's choice of the FTC made sense. The FTC is empowered with broad civil enforcement authority to protect consumers against unfair and deceptive business practices.⁴⁰³ Over time, it emerged as the nation's de facto privacy regulator.

But like NHTSA and the FDA, the FTC did not use its regulatory authority to address the core issues that drove identity theft. At first, the FTC took the position that it lacked the regulatory authority to require companies to adopt certain information practices.⁴⁰⁴ Even after reversing this position in 2001,⁴⁰⁵

THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 115-16 (2004) [hereinafter SOLOVE, DIGITAL PERSON]; see also Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1255 (2003) [hereinafter Solove, *Identity Theft*] (“The problem stems not only from the government’s creation of a de facto identifier and lax protection of it, but also from the private sector’s inadequate security measures in handling personal information.”).

Credit card payment systems that were developed for the physical world, but are too insecure for the digital one, remain in place because of convenience and path dependence. CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION: PRIVACY LAW AND POLICY 221 (2016).

401. U.S. GEN. ACCT. OFF., *supra* note 399, at 4, 16 (“No one federal agency has primary jurisdiction regarding identity fraud.”).

402. Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (codified as amended in scattered sections of the U.S. Code); Solove, *Identity Theft*, *supra* note 400, at 1246; *Identity Theft: Hearings Before the Subcomm. on Tech., Terrorism & Gov’t Info. of the S. Comm. on the Judiciary*, 107th Cong. 8 (2002), <https://perma.cc/6MTK-VXYJ> (prepared statement of Howard Beales, Dir., Bureau of Consumer Prot., FTC) (“The 1998 legislation positioned the FTC to play a key role in the national dialogue on identity theft.”); 144 CONG. REC. 26270 (1998) (statement of Sen. Patrick Leahy) (discussing the establishment of a “‘clearinghouse’ at the Federal Trade Commission to keep track of consumer complaints of identity theft and provide information to victims of this crime on how to deal with its aftermath”).

403. See 15 U.S.C. § 45 (authorizing the FTC to prevent the use of unfair or deceptive acts or practices affecting commerce); see also Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 95 (2008) (“While consumer protection is generally of secondary importance to banking agencies, one of the central missions of the FTC is consumer protection.”); HOOFNAGLE, *supra* note 400, at 343 (“The FTC was a radical creation. Never before had Congress created a body with such broad, inquisitorial powers of investigation along with some ability to police the market.”).

404. David J. Bender, Essay, *Tipping the Scales: Judicial Encouragement of a Legislative Answer to FTC Authority over Corporate Data-Security Practices*, 81 GEO. WASH. L. REV. 1665, 1672 (2013).

405. *Id.* at 1674.

the FTC took very limited action. Its approach to protecting consumer data adhered to a limited conception of notice-and-choice: Notice, in most cases, meant “little more than burying data practices in the fine print of a dense privacy policy,” while choice meant “choosing to use a service with its non-negotiable data practices as a take-it-or-leave-it option.”⁴⁰⁶ As the FTC itself has acknowledged to some extent, this approach was a failure—resulting in reams of unread privacy policies with little benefit to consumers.⁴⁰⁷ After a decade of doing little else on this matter, the FTC eventually began pursuing enforcement actions to require companies to improve their data-security practices.⁴⁰⁸ But as numerous scholars have pointed out, even these actions only scratch the surface of how the agency could use its authority to address identity theft.⁴⁰⁹

Instead, beginning in the late 1990s and early 2000s, the FTC embraced a law enforcement approach to identity theft.⁴¹⁰ Commission representatives repeatedly told Congress that “[m]ost identity theft cases are best addressed

406. Woodrow Hartzog & Neil Richards, *Privacy’s Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1704 (2020); see also Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 444 (2016) (“In most cases that matter, the assumption that users have actual notice or meaningful choice is an illusion. Privacy self-management is increasingly recognized to be unworkable and possibly even a farce.”).

407. Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 975 & n.103 (2017) (citing statements by leaders of the FTC).

408. Bender, *supra* note 404, at 1674. Although these enforcement actions have made some important contributions, they were limited in scope and number. See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 585-86 (2014); Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 256-61 (2007) (“Of the hundreds of documented data-security breaches from February 2005 through September 2006, the FTC could apparently pursue only six.” (footnotes omitted)); see also Jan M. Rybníček & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1288 (2014) (“Although originally intended to be an integral part of the FTC’s administrative powers and an important tool for shaping competition policy in the United States, the Commission’s unfair-methods-of-competition enforcement record has been uninspiring, if not bleak, by any measure of performance.”).

409. E.g., Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2234 (2015); HOOFNAGLE, *supra* note 400, at 224; see also Justin (Gus) Hurwitz, *Data Security and the FTC’s UnCommon Law*, 101 IOWA L. REV. 955, 998-99 (2016) (“The Commission has long viewed itself primarily as a law enforcement agency. In such a role it is responsible for enforcing legal norms, not setting them.” (footnote omitted)).

410. Like NHTSA, the FTC also emphasized education campaigns. It encouraged individuals, military personnel, businesses, and federal agencies to implement procedures to safeguard data. See, e.g., PRESIDENT’S IDENTITY THEFT TASK FORCE, REPORT 10, 14 (2008), <https://perma.cc/NYW6-TWFX>.

through criminal prosecution.”⁴¹¹ In 2003, a report published by the FTC on identity theft emphasized training law enforcement and building partnerships to encourage investigations and prosecutions.⁴¹² To that end, the Commission operated an “Identity Theft Clearinghouse” to “encourage[] greater coordination and data sharing among [law enforcement].”⁴¹³ With the Clearinghouse, the agency took on the role of “coordinator” or “central point of contact” in “support of law enforcement.”⁴¹⁴ The agency prepared and sent materials “to over 40,000 law enforcement departments across the country to instruct officers on identity theft, investigative resources, and victim assistance.”⁴¹⁵

On a practical level, the criminalization of identity theft did little to stem the tide.⁴¹⁶ Criminal prosecutions of hackers and identity thieves are challenging—they require significant expertise and resources to investigate and often involve individuals from outside the agency’s jurisdictions.⁴¹⁷ In the decade following the Identity Theft Assumption and Deterrence Act of 1998, a

411. *E.g., Identity Theft: Is There Another You?: Joint Hearing Before the Subcomm. on Telecomms., Trade & Consumer Prot. and the Subcomm. on Fin. & Hazardous Materials of the H. Comm. on Com.*, 106th Cong. 21 n.23 (1999), <https://perma.cc/CR2Z-8GMN> (prepared statement of Joan Z. Bernstein, Dir., Bureau of Consumer Prot., FTC); *Identity Theft*, *supra* note 402, at 8 n.5 (prepared statement of Howard Beales, Dir., Bureau of Consumer Prot., FTC); *Identity Theft: The Nation’s Fastest Growing Crime Wave Hits Seniors: Hearing Before the Special S. Comm. on Aging*, 107th Cong. 40 n.7 (2002), <https://perma.cc/8CKV-54UB> (prepared statement of Howard Beales, Dir., Bureau of Consumer Prot., FTC).

412. FTC, REPORT: FEDERAL TRADE COMMISSION OVERVIEW OF THE IDENTITY THEFT PROGRAM: OCTOBER 1998-SEPTEMBER 2003, at 6 (2003), <https://perma.cc/VEV4-CFGJ>.

413. *Fact Sheet: The Work of the President’s Identity Theft Task Force*, U.S. DEP’T OF JUST. (Sept. 19, 2006), <https://perma.cc/PA7T-NW8G>; *see also* FTC, *supra* note 412, at 3-5 (discussing the Clearinghouse).

414. *Identity Theft: Is There Another You?*, *supra* note 411, at 16 (statement of Joan Z. Bernstein).

415. FTC, *supra* note 412, at 2. The Commission also partnered with the IACP to create a standardized police report to encourage reporting. GRAEME R. NEWMAN & MEGAN M. McNALLY, NO. 210459, IDENTITY THEFT LITERATURE REVIEW 55-56 (2005), <https://perma.cc/7YS4-QF2V>.

416. *See* SOLOVE, DIGITAL PERSON, *supra* note 400, at 114-15 (“[T]he prevailing approach to dealing with identity theft—by relying on criminal penalties and by depending upon individuals to take great lengths to try to protect themselves—has the wrong focus.”).

417. OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., A NATIONAL STRATEGY TO COMBAT IDENTITY THEFT 2 (2006), <https://perma.cc/5Q5D-PHNX>; Bender, *supra* note 404, at 1682 (“[F]rom a policy standpoint, focusing agency resources against inadequate corporate data-security policies is strongly preferable to enforcement actions against individual hackers, who are difficult to locate and likely judgment-proof.”); *see also* SOLOVE, DIGITAL PERSON, *supra* note 400, at 115 (“Of course, identity thieves should be prosecuted and people should avoid being careless with their data. The law has significant room to improve in prosecuting identity theft. But these solutions fail to address the foundations of the problem.”).

significant investment of resources led to a steady rise in federal identity theft prosecutions, peaking at around 2,000 cases.⁴¹⁸ And yet, identity theft continued to rise.⁴¹⁹ By 2008, about 10 million Americans were victims of identity theft—a 22% increase from the previous year—resulting in over \$50 billion in costs to consumers.⁴²⁰

3. The ATF and illegal gun sales

Firearms and gun violence are a staple of American life. We far outpace every other country in the world in gun ownership.⁴²¹ Tens of thousands of Americans die every year in gun suicides and homicides.⁴²² Although mass shootings at schools and public venues dominate the headlines,⁴²³ the true toll of gun violence falls disproportionately on urban, predominantly Black

418. KRISTIN FINKLEA, CONG. RSCH. SERV., R40599, IDENTITY THEFT: TRENDS AND ISSUES 16 fig.3 (2014), <https://perma.cc/JM7L-WX9T>.

419. *Id.* at 12 fig.2 (documenting a rise in FTC identify-theft complaints from under 50,000 in 2000 to over 350,000 in 2012); *see also infra* note 420.

420. KRISTIN M. FINKLEA, CONG. RSCH. SERV., R40599, IDENTITY THEFT: TRENDS AND ISSUES 1 (2009), <https://perma.cc/GLB3-PKE7>. The estimated number of identity-theft victims in 2012 was 12.6 million Americans, up from 11.6 million from a year earlier. FINKLEA, *supra* note 418, at 9-10.

For a broader discussion of the harms of identity theft, see Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 745 (2018) (“In this Article, we focus on data-breach harms. We explore why courts have struggled with the issue, and we offer an approach to address data-breach harms that has roots in existing law. In what follows, we explore the nature of data-breach harms and demonstrate how the law is far from closed off to recognizing them.”).

There are similar trends in the lack of regulation around cryptocurrency today. *Cf.* Jeremy B. Merrill & Steven Zeitchik, *An Ex-Cop Fell for Alice. Then He Fell for Her \$66 Million Crypto Scam.*, WASH. POST (Apr. 4, 2022, 4:13 PM ET), <https://perma.cc/Q7S5-3P8A> (documenting the rise in cryptocurrency scams and noting an absence of regulation).

421. AARON KARP, SMALL ARMS SURV., ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 fig.1 & tbls.1-2 (2018), <https://perma.cc/E8FU-DGYQ> (estimating that there are 120.5 civilian-owned firearms in the U.S. for every 100 residents).

422. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (updated Apr. 26, 2023), <https://perma.cc/8Y7M-ATTB>.

423. *See, e.g.*, Shaila Dewan, Nicholas Bogel-Burroughs & Chelsia Rose Marcus, *The Signs Were All There. Why Did No One Stop the Maine Shooter?*, N.Y. TIMES (Nov. 2, 2023), <https://perma.cc/PF6H-4BPU>; *A Partial List of U.S. Mass Shootings in 2023*, N.Y. TIMES (July 3, 2023), <https://perma.cc/4KDU-N8RE>; Edgar Sandoval, *Two Children, a Burst of Gunfire and the Year that Came After*, N.Y. TIMES (Apr. 17, 2023), <https://perma.cc/37XC-Z9NV>; Jaclyn Diaz & Vanessa Romo, *At Least 18 Dead in 3 Days After Mass Shootings in California Devastate 2 Communities*, NPR (Jan. 24, 2023, 11:04 PM ET), <https://perma.cc/7J43-8NV6>.

communities, where young men of color are killed by firearms at astonishing rates.⁴²⁴

This reality sets the stakes for appropriately regulating the sale of firearms—a task which falls to the Bureau of Alcohol, Firearms, Tobacco and Explosives. The ATF has authority to issue the licenses necessary to sell firearms and ammunition.⁴²⁵ To maintain a federal license, sellers are required to document the details of all purchases (e.g., information about the firearm and the buyer), to conduct background checks on buyers, to not sell to straw purchasers or other prohibited individuals, to verify age and residency requirements, and to report any lost or stolen firearms.⁴²⁶ To demonstrate compliance with these requirements, sellers must keep records for every firearm in their inventory and be prepared to make these records available to the ATF for inspection.⁴²⁷ The agency has civil regulatory authority to penalize sellers that fail to comply, including by revoking a seller’s license for certain willful violations.⁴²⁸

But the ATF historically has failed to exercise its civil enforcement authority and instead adopted a “largely toothless and conciliatory” attitude toward firearms retailers.⁴²⁹ When ATF inspectors uncover misconduct—sales to individuals barred from owning weapons, failures to conduct background checks, failures to account for hundreds of guns missing from their inventory, lying to investigators, and falsifying records—they issue warnings but rarely take strict enforcement action.⁴³⁰ In 2011, for example, one Indiana gun shop

424. Aliza Aufrichtig, Lois Beckett, Jan Diehm & Jamiles Lartey, *Want to Fix Gun Violence in America? Go Local*, GUARDIAN, <https://perma.cc/YM8S-8MEE> (archived Nov. 27, 2023); see also Robert Klemko, *With Little Outcry Chicago’s Bloody Weekend Eclipses Highland Park Toll*, WASH. POST (updated July 7, 2022, 11:26 AM ET), <https://perma.cc/TH57-ZJ9Y>.

425. 18 U.S.C. § 923(c) (authorizing the Attorney General to issue licenses); see Elimination of Firearms Transaction Record, ATF Form 4473 (Low Volume) (2008R-21P), 79 Fed. Reg. 45091, 45091 (Aug. 4, 2014) (codified at 27 C.F.R. pt. 478) (explaining that the Attorney General has delegated licensing authority to the ATF).

426. On background check and documentation requirements, see 18 U.S.C. §§ 922(t), 923(g)(1); and 27 C.F.R §§ 478.101-102, 478.124, 478.131, 478.134 (2022). On preventing prohibited sales, including to straw purchasers and individuals with criminal convictions, see 18 U.S.C. § 922(d); and 27 C.F.R § 478.99 (2022). On age requirements, see 18 U.S.C. § 922(b)(1); and 27 C.F.R § 478.99(b) (2022). On residency requirements and the requirement to report lost or stolen firearms, see 18 U.S.C. §§ 922(b)(2), 923(g)(6).

427. 18 U.S.C. § 923(g)(1)(A); 27 C.F.R §§ 478.23, 479.22 (2022).

428. See *Firearms Compliance Inspections*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://perma.cc/966U-3WST> (last updated Oct. 2, 2023).

429. Brian Freskos, Daniel Nass, Alain Stephens & Nick Penzenstadler, *After Repeated ATF Warnings, Gun Dealers Can Count on the Agency to Back Off; Sometimes Firearms Flow to Criminals*, USA TODAY (May 27, 2021, 8:52 AM PDT), <https://perma.cc/T8EU-6G87>.

430. See *id.*

was permitted to keep its license despite years of repeated violations for “selling to underage customers,” selling “to someone who identified themselves as a convicted felon,” “aid[ing] the making of false statements,” facilitating “straw purchasing,” and “failing to properly record firearm transfers.”⁴³¹ In 2022, the ATF conducted inspections on around 5% of federal firearms licensees, and only 1.3% of those inspections resulted in a license revocation.⁴³²

The result has been a direct pipeline from select firearms dealers to violent criminals. An investigation after the notorious “Beltway Sniper” shootings in Washington, D.C., uncovered the ATF’s failure to shut down a noncompliant gun store from which the shooter stole his rifle.⁴³³ That store had sold weapons used in more than fifty violent crimes, and although the ATF found various problems in its inspection, it did not revoke the store’s license.⁴³⁴ In Chicago, an analysis of thousands of “crime guns” recovered by the Chicago Police Department between 2013 and 2016 revealed that almost one quarter were purchased from just ten retailers.⁴³⁵ The top three stores alone accounted for more than 2,000 guns.⁴³⁶ In the years after the Indiana gun shop mentioned above was permitted to keep its license, Chicago police traced more than 130 crime guns to that seller.⁴³⁷

Although the ATF rarely exercises its authority over firearms dealers, it maintains a “disproportionate focus on individual acts of gun violence.”⁴³⁸ Over the last decade, more than 80% of the ATF’s budget has been dedicated to law enforcement operations.⁴³⁹ The result has been thousands of arrests but

431. Champe Barton, *Their Guns Fueled Chicago Crime. When They Broke the Law, the ATF Went Easy*, TRACE (Apr. 11, 2022), <https://perma.cc/69P2-QRTD>.

432. See *Fact Sheet—Facts and Figures for Fiscal Year 2022*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Jan. 2023), <https://perma.cc/EZ7P-PLG5>.

433. Mike Carter, Steve Miletich & Justin Mayo, *Errant Gun Dealer, Wary Agents Paved Way for Beltway Sniper Tragedy*, SEATTLE TIMES (Apr. 29, 2003), <https://perma.cc/86PE-9VJS>.

434. *Id.* (“This shop has all of the obvious indicators that something’s wrong. When the bureau looked at it and found the problems were true, nothing was done.” (quoting Jerry Nunziato, former director of the ATF’s National Tracing Center)).

435. CITY OF CHICAGO, GUN TRACE REPORT 1, 4 (2017), <https://perma.cc/YJ5C-HN56>.

436. *Id.* app. D, at 24 tbl.

437. Barton, *supra* note 431.

438. CHELSEA PARSONS, EUGENIO WEIGEND VARGAS & RUKMANI BHATIA, CTR. FOR AM. PROGRESS, RETHINKING ATF’S BUDGET TO PRIORITIZE EFFECTIVE GUN VIOLENCE PREVENTION 4 (2020), <https://perma.cc/NU4K-LCMZ> [hereinafter PARSONS ET AL., RETHINKING].

439. *Id.*; see also CHELSEA PARSONS & ARKADI GERNEY WITH MARK D. JONES & ELAINE KAMARCK, CTR. FOR AM. PROGRESS, THE BUREAU AND THE BUREAU: A REVIEW OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES AND A PROPOSAL TO MERGE IT WITH THE FEDERAL BUREAU OF INVESTIGATION 4 (2015), <https://perma.cc/ZM9T-FYHX> [hereinafter PARSONS ET AL., BUREAU] (“[The ATF] has often channeled scarce
footnote continued on next page”).

largely for individual firearms possession offenses—primarily of individuals with prior felonies who are not permitted to possess a weapon, many of whom were not alleged to have committed any additional acts of violence or engaged in drug trafficking.⁴⁴⁰ Given the long mandatory minimums that come with federal gun charges,⁴⁴¹ these prosecutions are relatively straightforward,⁴⁴² but they are no substitute for enforcement of the ATF's regulations regarding firearms sales. There are many other law enforcement agencies that can prosecute individual weapons possession charges, but the ATF is unique in its authority to oversee the gun industry. By focusing its resources on inspecting and punishing firearms sellers that facilitate violent crime, the agency might stem the flow of firearms at its source rather than waiting for them to fall into the wrong hands.⁴⁴³

B. Policing the Administrative State

The examples above suggest a deeper relationship between policing and the administrative state—and the potential for trade-offs between civil regulation and criminal enforcement—that warrants further examination. This Subpart begins that task.

resources away from the regulatory side of the house and has marginalized the regulatory personnel within the agency.”).

440. PARSONS ET AL., *RETHINKING*, *supra* note 438, at 5; *see also National Profile and Enforcement Trends over Time*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: ATF (May 19, 2003), <https://perma.cc/4ADU-33WZ> (“A large proportion of all ATF federal prosecutions are directed at individual gun users rather than illegal gun dealers. In FY 2002, for example, the lead charge in two out of three ATF weapons [prosecutions] was a section of the law making it a crime for a felon to possess a gun. Only a small fraction of the ATF cases appeared to have been aimed at dealers who failed to live up to various restrictions imposed by law on the nation’s gun dealers.” (emphasis omitted)); *Federal Weapons Prosecutions Continue to Climb in 2019*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: REPORTS (June 5, 2019), <https://perma.cc/78RC-4369> (showing similar data for October 2018 through April 2019).

441. *See* U.S. SENT’G COMM’N, *MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 8-11 (2018), <https://perma.cc/TSM5-4SJL>.

442. *See* Rachel E. Barkow, *Case Comment, Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 200 (2019) (“The Comprehensive Crime Control Act of 1984 (CCCA) cabined the discretion of judges, eliminated parole, and gave greater power to prosecutors (through the use of mandatory minimum sentences, higher maximum sentences, and increased pretrial detention, all of which increased prosecutorial leverage to extract pleas).” (footnotes omitted)).

443. *See* PARSONS ET AL., *RETHINKING*, *supra* note 438, at 3-7 (criticizing the ATF’s focus on duplicative enforcement efforts and calling for the agency to refocus on gun trafficking and oversight of gun dealers).

1. Crime-control agencies

How is it, given all the scholarly and public attention on traffic stops and pretextual policing, that NHTSA's efforts flew under the radar? The answer, at bottom, is that NHTSA is not understood as a crime-control agency, certainly not one that influences crime-control tactics of state and local police officers. NHTSA's invisibility in this world reveals a myopia in how we view the relationship between the administrative state and crime control. This Article endeavors to show that any distinction between "ordinary" and "crime-control" agencies is artificial; that, in fact, many "ordinary" agencies make critical decisions that drive state and local law enforcement.

Given the size and impact of the criminal system in the United States, it is no surprise that scholars have filled volumes exploring the social, political, and legal drivers of overpolicing and overincarceration. Some explore a range of social, cultural, and institutional factors, from institutional racism to market forces.⁴⁴⁴ Political process explanations—the political popularity of tough-on-crime policies—are salient.⁴⁴⁵ Particular attention has been paid to political incentives that drive legislators to implement punitive policies and sentencing regimes.⁴⁴⁶

444. E.g., ALEXANDER, *supra* note 70, at 5 (describing mass incarceration as primarily the product of institutional racism); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 34 (2012) (arguing that the "New Jim Crow" analogy provides an "incomplete account"); GARLAND, *supra* note 370, at ix (arguing that various social factors shaped harsh attitudes toward crime and contributed to mass incarceration); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF THE NATURAL ORDER* 196-220 (2011) (analyzing the relationship between neoliberal government policies, capitalism, and incarceration); see also Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 262 (2021) (reviewing historical literature on the criminalization of Black Americans and highlighting "key national and municipal developments in crime-control practices and punitive policymaking that most affected black communities").

445. E.g., RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 5-6 (2019) [hereinafter BARKOW, *PRISONERS*] (explaining how populist punitive policies have driven mass incarceration and exploring ways to insulate criminal justice policymaking from political whims); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 37, 39, 143 (2017) (exploring the political choices that caused Black leaders in urban centers to support the war on crime that ultimately proved so devastating to these same communities); see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748-50 (2005) (explaining the role of interest groups, media, and voters).

446. E.g., STUNTZ, *supra* note 70, at 6-7 (2011) (describing social and geopolitical changes that eroded local democratic control over crime policy and shifted greater power to state legislators, Congress, and federal judges); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856 (2018) (reviewing JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017)) (casting doubt on the notion that prosecutors are primarily to blame for mass incarceration, and pointing instead to judges and legislators); Donald A. Dripps, Essay, *Criminal Procedure, Footnote Four, and the Theory of*
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Administrative actors, however, receive far less attention from scholars of the criminal system.⁴⁴⁷ For the most part, when scholars discuss the role of agencies, they focus on agencies whose primary mission is criminal law enforcement: police, prosecutors, and prisons.⁴⁴⁸ Some scholars look to

Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 SYRACUSE L. REV. 1079, 1089-92 (1993) (discussing the relationship between voters, legislators, and criminal procedure decisions).

Lawmakers also lack information that might cause them to act, particularly around the social costs of policing. Barry Friedman & Elizabeth G. Jánosky, *Policing's Information Problem*, 99 TEX. L. REV. 1, 33 (2020).

447. One recent exception is Ellen Podgor's work, which explores how agency inaction can result in high-profile incidents that demand prosecutorial responses. See Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1066-68 (2021).

When scholars of criminal law discuss non-law-enforcement administrative agencies, they do so primarily in two contexts: *First*, administrative agencies appear in discussions of collateral consequences—for example, denying housing or government benefits to a person with a criminal record. E.g., James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 395 (2006); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 566-69 (2005); George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1775 (2012). Although this role can drive involvement with the criminal system—when, for example, individuals are deprived of stable housing—the agencies in this case are not driving criminal enforcement or criminal policy. *Second*, administrative agencies are featured in the "overcriminalization" literature discussing the expansion of our criminal laws over the last few decades. Scholars have taken umbrage with the role of administrative agencies in defining these new crimes. E.g., F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 285-86 (2021); Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855, 857-58 (2020); Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 746 (2014).

448. Scholarship on these topics is far too vast to capture. On prosecutors, see, for example, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 76-81 (2019); PFAFF, *supra* note 446, at 6 ("The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people . . ."); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); and David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474 (2016).

On police, see, for example, STUNTZ, *supra* note 70, at 6 (2011).

On prisons, see generally HEATHER SCHOENFELD, BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION (2018); PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (Tara Herivel & Paul Wright eds., 2007); and ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

There is substantial scholarship regarding the intersection of criminal and administrative law, but it is often focused on criminal-system actors and sentencing. E.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895-97 (2009); Daniel Richman, *Prosecutors and*
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administrative law as a source of governance, but again, with a focus on governing police, prosecutors, and other traditional crime-control agencies.⁴⁴⁹

While focusing on police and prosecutors as drivers of criminal outcomes is essential, to ignore the influence of “ordinary” regulatory agencies is to miss an important piece of the puzzle. In a society where policing and the criminal law play such a significant role in the lives of so many, even an agency whose mission seems far removed from crime fighting is not truly insulated.

The growing scholarship on “cimmigration” is a laudable example of a field that has closely examined the relationship between a nominally civil agency and crime control.⁴⁵⁰ Cimmigration scholars have identified an “intertwinement of crime control and migration control.”⁴⁵¹ This intertwining is characterized, among many aspects, by immigration law’s shift “away from regulation and toward enforcement, punishment, and deterrence”⁴⁵² and immigration enforcement’s “devol[ution] down to local criminal justice actors.”⁴⁵³

NHTSA’s embrace of crime control, although not to the degree of cimmigration, bears many of these same hallmarks. The agency’s steady move away from civil regulation of the auto industry was accompanied by a concomitant embrace of traffic enforcement, which now comes to account for

Their Agents, Agents and Their Prosecutors, 103 COLUM. L. REV. 749, 752 (2003); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789-805 (1999) [hereinafter Richman, *Federal Criminal Law*]; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996).

449. See *supra* notes 330-31 and accompanying text; see also John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 211 (2015); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 524 (2000).

450. E.g., Rachel E. Rosenbloom, Essay, *Policing Sex, Policing Immigrants: What Cimmigration’s Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 153 (2016); César Cuauhtémoc García Hernández, *The Life of Cimmigration Law*, 92 DENV. U. L. REV. 697, 697 (2015); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

451. César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1467 (quoting Joanne van der Leun & Maartje van der Woude, *A Reflection on Cimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing*, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 41, 43 (Maria João Guia, Maartje van der Woude & Joanne van der Leun eds., 2013)).

452. Allison S. Hartry, Commentary, *Gendering Cimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 5 (2012) (quoting Tom Barry, *A Death in Texas: Profits, Poverty, and Immigration Converge*, BOS. REV. (Nov. 1, 2009), <https://perma.cc/CSQ5-62Y6>).

453. Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High-Volume US Court*, 57 BRIT. J. CRIMINOLOGY 112, 115 (2017).

around 80% of the agency's budget.⁴⁵⁴ The agency traded regulation of vehicle design for "regulation" of driver behavior—an approach starkly at odds with Congress's original vision.⁴⁵⁵ The result has been the transfer of federal resources away from traffic-safety innovation and toward more enforcement by local police.⁴⁵⁶ And NHTSA's embrace of traffic enforcement evolved over time—first focusing on traffic safety and then pushing traffic stops as a core crime-control tactic.⁴⁵⁷ This evolution put the agency in the position of proselytizing a crime-fighting approach that has been deeply controversial for decades.

The other agencies discussed above also embraced crime-control approaches, though to differing degrees. Take the FTC: Rather than exercise its authority to strengthen data-collection limits or data-security requirements among private businesses—a tactic that might have addressed the root causes of identity theft—the agency found itself facilitating a prosecution-focused approach.⁴⁵⁸ The ATF embraced individual prosecutions at the expense of enforcing its rules for firearms retailers.⁴⁵⁹ Even the FDA, when initially confronted with its regulatory failures regarding OxyContin, endorsed criminal enforcement as the solution to rising rates of addiction.⁴⁶⁰

This failure to appreciate the depths to which crime-control approaches have penetrated the administrative state is of great consequence. In particular, understanding the relationship between agencies and crime control informs growing concerns with our reliance on criminal law as a mode of governance.⁴⁶¹ To date, many scholars have framed this concern as police amassing too large a role in addressing social problems.⁴⁶² There is truth to

454. See *supra* notes 136-38 and accompanying text.

455. See *supra* Part II.A.

456. See *supra* notes 134-38 and accompanying text; see also *supra* Part II (charting NHTSA's evolution from regulation of the auto industry to enforcement).

457. See *supra* Parts II.B.1-2.

458. See *supra* notes 404-20 and accompanying text.

459. See *supra* notes 429-43 and accompanying text.

460. See *supra* notes 384-90 and accompanying text. One could add many agencies to this list. See *supra* note 372 (discussing the Securities and Exchange Commission and the Department of Housing and Urban Development); Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1079 (2017) (discussing the DEA).

461. See *supra* note 370.

462. E.g., BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 183 (2018) ("[A] reimagined criminal justice will concede some jurisdiction over the policy task of public safety to other agencies—departments of housing, child services, public health, education, and labor."); Vincent M. Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2, 10 (2023) ("Policing and caging people is the knee jerk
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this. But police are only part of the equation. One must also consider how other government agencies drive policing. Understanding the crime-control contributions of agencies like NHTSA is key to understanding how criminal policy is set, where regulatory policy falls short, and where interventions are likely to be most effective.

2. Deregulate / Incarcerate

Appreciating that any administrative agency can play a role in setting crime-control policy is a necessary start, but it is essential to understand *why* some agencies come to rely on individual criminal enforcement in lieu of exercising their systemic regulatory authority. This Subpart outlines some preliminary intuitions for why some agencies fall into this trap.

There are clear differences among the examples discussed in this Article. For example, NHTSA's engagements with state and local police are far more direct and extensive than the FDA's or the FTC's. And the ATF—unlike NHTSA, the FDA, and the FTC—is (in substantial part) a criminal law enforcement agency. Some might reasonably consider efforts to prosecute identity theft as more morally defensible than prosecuting drug possession offenses.

Despite these differences, these examples exhibit a common relationship between industry deregulation and increased reliance on criminal law enforcement. NHTSA, the FDA, the FTC, and the ATF all responded to their inability (or unwillingness) to exercise their civil regulatory authority over private interests by reframing the solution in terms of criminal law enforcement. The agencies did so in response to a set of similar incentives. In the face of private-industry pressure and political opposition, the agencies sought a path of less resistance to achieve their regulatory mission. Police proved a receptive audience. Relying on police not only brought with it a wealth of potential resources for understaffed agencies but also had the political benefit of making the agency seem “tough on crime.”

It is well understood that political opposition to the administrative state—often the result of interest-group pressure and antiregulatory ideology—can

response to all manner of social problems” (citing Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1817 (2020)); Friedman, *supra* note 37, at 986 (“The police themselves realize all too well that they are at best a band-aid on the chronic social problems they encounter. . . . [P]olice officials are not going to provide the long-term attention needed to address a complicated situation. The very nature of the policing function is that the police come, they do their thing, and they leave.”); Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2147 (2017) (“[R]outing rehabilitation and social services through the police could perversely widen the carceral net and reify the ‘culture of control.’” (quoting GARLAND, *supra* note 370)).

create difficult regulatory environments.⁴⁶³ For NHTSA, political appointees hostile to rulemaking abandoned or revoked rules before they could take effect.⁴⁶⁴ The Reagan Administration's stated goal for doing so was to protect the auto industry.⁴⁶⁵ Over time, Congress subjected the ATF to a variety of debilitating restrictions at the gun lobby's behest.⁴⁶⁶ These restrictions ran the gamut from limiting the agency's inspection authority and data collection to blocking political appointees and severely restricting the agency's budget.⁴⁶⁷ In response to the FTC's restrictions on certain marketing practices, Congress imposed a series of procedural requirements that made rulemaking particularly difficult and costly.⁴⁶⁸ The FDA also has experienced political pressures on its budget and legal authority.⁴⁶⁹

In contrast, agencies meet less resistance when they focus on individual, low-level "criminals." People with substance-use problems, traffic scofflaws, and violent criminals have no lobbyists. In fact, the political incentives are precisely reversed—elected officials traditionally have every incentive to appear tough on crime.⁴⁷⁰ Few platforms have more bipartisan support—

463. See, e.g., Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1534-35 (2018) (discussing the relationship between politics and the civil service during the Trump administration, with a focus on Joel Clement's resignation from his role as the head of the Department of the Interior's Office of Policy Analysis); Daniel A. Farber, *The Thirty Years War over Federal Regulation*, 92 TEX. L. REV. 413, 413-14 (2013) (reviewing THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013)) (examining U.S. regulatory history since Ronald Reagan became president).

464. MASHAW & HARFST, *supra* note 15, at 199.

465. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 59 (2009); see also GOLDEN, *supra* note 152, at 43.

466. Glenn Thrush, Danny Hakim & Mike McIntire, *How the A.T.F., Key to Biden's Gun Plan, Became an N.R.A. 'Whipping Boy'*, N.Y. TIMES (updated Sept. 29, 2021), <https://perma.cc/4FPV-B8DW>.

467. PARSONS ET AL., BUREAU, *supra* note 439, at 7-9, 20.

468. Jeffrey S. Lubbers, Essay, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982-85 (2015); David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 2 (1983) ("The 1980 [Federal Trade Commission Improvements Act] foreclosed the Commission from basing any action in its much-criticized rulemaking proceeding on children's television advertising on a determination that such advertising constituted an unfair act or practice.").

469. Rebecca S. Eisenberg, *The Role of FDA in Innovation Policy*, 13 MICH. TELECOMMS. & TECH. L. REV. 345, 345-46 & nn.1-2 (2007).

470. BARKOW, PRISONERS, *supra* note 445, at 5-6; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

particularly at the federal level—than crime fighting.⁴⁷¹ NHTSA's efforts spanned three decades of alternating Democratic and Republican administrations.⁴⁷² The early decades of the War on Drugs saw similar bipartisan support.⁴⁷³ Federal identity theft legislation was enacted by a Republican Congress and a Democratic President.⁴⁷⁴

Turning to this path of less resistance is no doubt enticing for agencies facing regulatory headwinds. After all, these agencies are staffed by career civil servants who no doubt are seeking a tangible solution to the social problems they see. Embracing policing yields easily measurable outputs (e.g., tickets, arrests, prosecutions), which in turn allow the agency to create at least the superficial appearance that it is not simply sitting on its hands.

Moreover, for resource-strapped administrative agencies, relatively well-to-do policing agencies may seem like ideal partners—offering an immediate pool of resources and personnel to pursue their mission.⁴⁷⁵

It is a common refrain that agencies lack adequate resources, particularly when compared to the multibillion-dollar industries they are asked to regulate.⁴⁷⁶ The pharmaceutical industry, for example, spends billions on

471. See, e.g., David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1013 (2020); Friedman & Jánosky, *supra* note 446, at 25.

472. NHTSA has advocated for the widespread use of traffic stops as a crime-fighting tactic since at least the mid-1990s and continues to do so today. See *supra* notes 159-68, 218-19, 356-58 and accompanying text.

473. See HINTON, *supra* note 363, at 310 (“Democratic members of the pro-crime consensus worked alongside the Reagan administration to bring about a new level of militaristic policing in segregated urban neighborhoods and at the nation’s borders, treating the War on Drugs as any other war.”).

474. Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (codified as amended in scattered sections of the U.S. Code); MILDRED L. AMER, CONG. RSCH. SERV., NO. 97-37 GOV, MEMBERSHIP OF THE 105TH CONGRESS: A PROFILE 1 (1998), <https://perma.cc/E22R-GKSP>; Statement on Signing the Identity Theft and Assumption Deterrence Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2203 (Oct. 30, 1998), <https://perma.cc/CQA8-LT39> (statement of President Clinton).

475. Recent police reform efforts have not impacted this situation. Even after the “Defund the Police” movement, most police budgets are at or near their peaks. See Fola Akinnibi, Sarah Holder & Christopher Cannon, *Cities Say They Want to Defund the Police. Their Budgets Say Otherwise.*, BLOOMBERG (Jan. 12, 2021), <https://perma.cc/N8V7-H2P5>. In fact, a growing portion of the population wants to see more police funding. Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), <https://perma.cc/KUB9-UM6A>.

476. See, e.g., *infra* notes 477-81; Aurelia Glass, *The NLRB Protects Workers’ Right to Organize, Yet Remains Underfunded*, CTR. FOR AM. PROGRESS (Dec. 5, 2022), <https://perma.cc/Y4N3-RCCC> (explaining how a lack of funding prevents the National Labor Relations Board from fully executing its mission); Charles S. Clark, *The Trump Administration’s War on Regulations*, GOV’T EXEC., <https://perma.cc/WJL8-5YPR> (archived Nov. 4, 2023) (discussing the restrictions imposed on agencies by the Trump administration).

direct-to-consumer advertisements alone.⁴⁷⁷ But the FDA has only a few dozen staff members responsible for reviewing tens of thousands of drug promotional materials each year.⁴⁷⁸ In 2019, with a budget limited at the gun lobby's behest, the ATF had 770 investigators tasked with overseeing 53,000 gun retailers;⁴⁷⁹ that same year, retailers sold nearly 14 million firearms.⁴⁸⁰ NHTSA, since the Reagan administration's assault on its budget, is often cast as understaffed as compared to the auto industry.⁴⁸¹ Similar claims have been made about the FTC.⁴⁸²

Police offer administrative agencies an enticing way to bridge this resource gap. In the early 1990s, there were about 800,000 police officers across the

477. C. Lee Ventola, *Direct-to-Consumer Pharmaceutical Advertising: Therapeutic or Toxic?*, 36 PHARMACY & THERAPEUTICS 669, 670 fig.1 (2011), <https://perma.cc/ST5U-EVXF>.

478. Reuven Blau, *FDA Sends Record Low Number of Warnings to Drugmakers Found Lying in Ads*, N.Y. DAILY NEWS (updated Apr. 7, 2018, 10:26 AM), <https://perma.cc/CB3H-MKTG> ("There are approximately 60 FDA staffers responsible for keeping track of at least 75,000 ads and other promotional material published each year. 'It's a very, very small unit,' a former high-ranking FDA official said. 'It's historically been underfunded.'"); U.S. GEN. ACCT. OFF., *supra* note 383, at 12 ("In fiscal year 2002, FDA had 39 staff positions dedicated to oversight of drug advertising and promotion of all pharmaceuticals distributed in the United States."); *see also* Press Release, Consumer Fed'n of Am., Under Funded FDA Jeopardizes Food Safety (Dec. 6, 2007), <https://perma.cc/5HEU-HSR2>; Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J.L. REFORM 461, 476 (1997) ("The FDA is woefully underfunded for its mandate . . .").

479. Thrush et al., *supra* note 466; PARSONS ET AL., *RETHINKING*, *supra* note 439, at 6-7.

480. Press Release, Small Arms Analytics, U.S. Firearms Sales: December 2019 Up over Last Year (Jan. 6, 2020), <https://perma.cc/9FMP-QF3D>.

481. *See, e.g.*, Mashaw, *supra* note 334, at 148-49; *NHTSA Oversight: The Road Ahead: Hearing Before the Subcomm. on Com., Trade & Consumer Prot. of the H. Comm. on Energy & Com.*, 111th Cong. 37, 37-38 (2010), <https://perma.cc/PS5T-TS2N> (prepared statement of Joan Claybrook, Former Adm'r, NHTSA) ("NHTSA has been viewed by the motor vehicle industry for years as a lapdog, not a watch dog."); Christopher Jensen & Matthew L. Wald, *Carmakers' Close Ties to Regulator Scrutinized*, N.Y. TIMES (Mar. 30, 2014), <https://perma.cc/U59H-ZYDU>; Myron Levin & Eli Wolfe, *In Battle Against 'the Highway Disease,' NHTSA Attacked as Being Asleep at the Wheel*, MD. MATTERS, (Dec. 31, 2020), <https://perma.cc/SSLJ-MSXP>.

482. *See, e.g.*, David Shepardson & Diane Bartz, *U.S. Lawmakers Seek \$1 Bln to Fund FTC Privacy Probes*, REUTERS (updated Sept. 10, 2021, 3:46 AM PDT), <https://perma.cc/B5M8-GG25> ("[I]t is long past time that the FTC have the tools it needs to keep pace with the online marketplace and those who would undermine it." (quoting Senator Maria Cantwell)); Peter Maass, *Your FTC Privacy Watchdogs: Low-Tech, Defensive, Toothless*, WIRED (June 28, 2012, 6:30 AM), <https://perma.cc/FK33-A34D> ("[T]he agency's ambitions are clipped by a lack of both funding and legal authority."); Jennifer L. Pomeranz, *Federal Trade Commission's Authority to Regulate Marketing to Children: Deceptive vs. Unfair Rulemaking*, 21 HEALTH MATRIX 521, 525 (2011) ("Congress withdrew the FTC's authority to regulate advertising to children as 'unfair' . . .").

country; by 2001, that number was over 1 million.⁴⁸³ In 2020, state and local police budgets totaled well over \$100 billion.⁴⁸⁴ For an administrative agency that is strapped for resources and tasked with tackling problems on a national scale, tapping into these funds is an easy way to extend its reach.

In light of these dynamics, agencies may view a turn to policing as an opportunity to reclaim a sense of autonomy from the political constraints placed on their pursuit of their mission.⁴⁸⁵

Police prove themselves willing partners because the relationship fosters their own interests. As first responders, police are on the front lines of the consequences of administrative agencies' failures. They see the visceral harms inflicted upon communities—death and injuries from traffic accidents and gun violence, families and lives ruined by drug abuse, even the pervasiveness of identity theft. But they are in no position to address these problems via administrative regulation. They are trained to view these problems through the lens of criminal law and are limited by the tools at their disposal.⁴⁸⁶ But there may be more selfish motives as well. For example, police often stand to benefit financially when administrative agencies come knocking. Sometimes this benefit arrives in the form of federal funding (e.g., highway-safety funds) and, in other cases, from in-kind federal resources.⁴⁸⁷ And all this policing generates additional forfeiture opportunities.⁴⁸⁸

483. DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, BUREAU OF JUST. STAT., NCJ 249681, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 2 tbl.1 (2016), <https://perma.cc/99N5-CJUK>.

484. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., <https://perma.cc/MMG5-H42V> (archived Nov. 4, 2023).

485. See generally DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 3-4 (2001) (discussing how administrative agencies develop bureaucratic autonomy); Ouziel, *supra* note 460 (discussing how organizational dynamics in federal drug enforcement create a disconnect between the aims and outcomes of a particular law).

486. See Friedman, *supra* note 37, at 930 ("Policing in the United States tends to be a one-size-fits-all endeavor that puts primacy on what is unique about the police—using force and law—to achieve 'public safety.' Force and law, though, are an odd match, at best, for the actual problems the police are called out daily to address.").

487. See Richman, *Federal Criminal Law*, *supra* note 448, at 784. ATF task forces, for example, bring investigative resources to assist in local gun investigations. See, e.g., Robert Arnold, *Houston ATF Task Force Nets Hundreds of Arrests in Gun-Related Crimes*, CLICK2HOUSTON (Nov. 5, 2020, 7:19 PM), <https://perma.cc/7XD5-XHAT>; Amanda Milkovits, *26 Indicted on Federal Firearms and Drug Charges*, PROVIDENCE J. (updated Oct. 1, 2018, 9:22 PM ET), <https://perma.cc/73S4-XJFD>.

488. Regarding forfeitures, see *supra* note 78 and accompanying text. Regarding drugs and forfeitures, see, for example, John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 183 (2001); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 106-08 (1998).

In short, antiregulatory pressures make criminal law enforcement an attractive option for agencies, and police often are willing to oblige. These incentives align to create conditions under which administrative agencies drive policing and incarceration.

3. Efficacy and harm

Embracing a policing mentality may be the path of least resistance for agencies facing regulatory headwinds, but this approach has real costs, both for the agency and for the public at large.

Within an agency, a shift toward policing and incarceration can warp the agency's regulatory approach. Agencies have finite resources. Resources spent pursuing criminal enforcement come at the expense of regulatory efforts. There are times when criminal enforcement and civil regulation complement one another, such as criminal investigations into regulatory violations. Criminal enforcement of environmental regulations, for example, might deter other violators and promote the underlying regulatory goal. In the examples identified above, however, the policing solution detracts from the agency's regulatory mission. The resources NHTSA poured into driver-behavior modification were not available to invest in improving vehicle safety. The ATF's criminal prosecutions commanded far greater resources than its civil enforcement efforts with respect to firearms retailers. Focusing resources on criminal enforcement causes critical regulatory muscles to atrophy. Path dependence makes it difficult for the agency to switch tactics.

More importantly, an agency's reliance on policing typically results in ineffective policy. Part II.C outlined the mixed evidence regarding the benefits of crime-fighting traffic stops. One could say the same regarding the other criminal tactics described above: Drug prosecutions do little to deter future crime and may actually lead to more overdose deaths⁴⁸⁹ and the lengthy sentences meted out for federal gun charges do little to promote public

489. Alice Zhang et al., *The Relationship Between Police Contacts for Drug Use-Related Crime and Future Arrests, Incarceration, and Overdoses: A Retrospective Observational Study Highlighting the Need to Break the Vicious Cycle*, 19 HARM REDUCTION J. art. 67, at 6 (2022), <https://perma.cc/5QUX-TZBS>; PEW CHARITABLE TRS., MORE IMPRISONMENT DOES NOT REDUCE STATE DRUG PROBLEMS: DATA SHOW NO RELATIONSHIP BETWEEN PRISON TERMS AND DRUG MISUSE 5 (2018), <https://perma.cc/Q45M-V8GV>; SHANNON MACE, ANNE SIEGLER, KC WU, AMANDA LATIMORE & HEATHER FLYNN, NAT'L COUNCIL FOR BEHAV. HEALTH & VITAL STRATEGIES, MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER IN JAILS AND PRISONS: A PLANNING & IMPLEMENTATION TOOLKIT 72 (2020), <https://perma.cc/VV23-ESMZ>; Lia N. Pizzicato, Rebecca Drake, Reed Domer-Shank, Caroline C. Johnson & Kendra M. Viner, *Beyond the Walls: Risk Factors for Overdose Mortality Following Release from the Philadelphia Department of Prisons*, 189 DRUG & ALCOHOL DEPENDENCE 108, 108 (2018).

safety.⁴⁹⁰ More fundamentally, approaches that rely on policing to alter individual behavior are bound to leave unaddressed the underlying social problems that drive criminality. That is why, for example, drug users cycle in and out of the carceral system.⁴⁹¹

Ineffective policies would be unfortunate enough, but policing solutions frequently bring with them a variety of social harms. It almost goes without saying that policing brings with it the certainty of social harm—to the individuals that become entangled in the criminal system, to their families, and to broader communities.⁴⁹² The criminal enforcement efforts these agencies embrace likely will reflect the racial disparities of the system generally.

In the examples discussed above, these social costs appear not to play any role in the agency's considerations. This failure reflects a common shortcoming of policing policies generally,⁴⁹³ but it also reflects the fact that these agencies are not experts in policing. Lacking expertise or public input, policing solutions became a default without regard to their attendant harms.⁴⁹⁴

Conclusion

This Article accomplishes two goals. First, it draws attention to NHTSA's history of and continued embrace of widespread traffic stops as a method of crime control. In so doing, one hopes the agency might study the impact of its approach. This Article comes at a critical moment for our nation as we struggle

490. See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 118-19 (2018) ("There is . . . strong criminological evidence that lengthy prison terms are counterproductive for public safety as they result in incarceration of individuals long past the time that they have 'aged out' of the high crime years, thereby diverting resources from more promising crime reduction initiatives."); AVINASH BHATI, COUNCIL ON CRIM. JUST., THE PUBLIC SAFETY IMPACT OF SHORTENING LENGTHY PRISON TERMS 5 (2023), <https://perma.cc/G8AH-NT4H> ("The relatively small number of additional predicted arrests indicates that the vast majority of the people serving long prison terms have 'aged out' of criminal behavior near the end of their stays, and that reducing long prison terms for them has little to no public safety impact.").

491. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 20 (2010), <https://perma.cc/RW6P-GXBH>.

492. See Friedman, *supra* note 37, at 938.

493. See *supra* notes 82-84 and accompanying text.

494. This shortcoming suggests at least a general direction forward, one that I hope to explore in future work. There are a variety of institutional design options that can help ensure agencies are better able to assess the impact of their policies on the criminal system. An agency might self-impose requirements to solicit formal public comments on the impact of proposed actions, or it might obtain informal feedback by engaging with outside experts and advocacy organizations. The executive might impose such requirements or centralize review within a policing czar.

with both a sharp rise in traffic fatalities and deep discontent with the state of policing.

Second, it highlights how regulatory action (and inaction) can drive policing and criminal law enforcement. Rather than limiting our attention to the role of crime-control agencies (e.g., police and prosecutors), we must understand that any agency can make decisions that prove critically influential to the criminal system. Drawing on NHTSA's story and others, this Article identifies a pattern of administrative agencies shying away from exercising their civil regulatory authority against private industry and instead reframing the social problems under their purview as best tackled via criminal law enforcement. In highlighting the connection between regulatory failure and policing, this Article stakes out ground that is ripe for further exploration—exploration that is vital if we are to understand the systemic drivers of our society's overreliance on policing and criminalization.

5-2025

The Sheriff's Constitution

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The Sheriff's Constitution

FARHANG HEYDARI*

The county sheriff is unique among our nation's law enforcers, with an ancient pedigree, elected status, and special protections as a state constitutional officer. But these factors combine to cause a recurrent problem—elected sheriffs often assert for themselves the power to refuse to enforce criminal laws of their choosing. Today's constitutional sheriffs—a group of sheriffs who view themselves as the highest authority in their county, answerable only to their electorate—are the latest manifestation of this ethos, declaring opposition to gun control measures, pandemic restrictions, environmental protections, and more. Lest one think these nonenforcement decisions are entirely one-sided, other sheriffs have declared opposition to immigration and abortion restrictions.

This challenge to the rule of law has flourished in part because our modern criminal system embraces enforcement discretion, offering only the thinnest of constitutional backstops. In lieu of legal limits, even blanket nonenforcement of certain crimes is managed primarily through political checks, such as elections or intervention by other levels of government. But these constraints have serious shortcomings.

This Article proposes reviving judicially-enforceable limits on nonenforcement discretion modeled on a now-forgotten understanding of the sheriff's duties to investigate and enforce. For much of our history, state courts played an important role in supervising nonenforcement discretion. Routinely called upon to determine when a sheriff's failure to enforce the law amounted to neglect of duty, courts across the country developed a relatively nuanced understanding regarding the permissibility of nonenforcement. This precedent rebuked sheriff nullification but did not naively demand perfect enforcement, thus limiting lawlessness while preserving some flexibility. Over time, however, this approach largely fell by the wayside, replaced with broad pronouncements of enforcement discretion.

Rediscovering the authority of courts to check enforcement discretion presents an opportunity to rethink much of our modern canon—such as the false choice between full enforcement of all criminal laws and unfettered discretion, and the unassailability of law enforcement's case-by-case discretion. To be sure, this approach imposes costs, but there are

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legislative strategies to mitigate these consequences, including limiting arrestable offenses and the use of pretrial detention. And without limits on nonenforcement discretion, we risk an unchecked arbitrariness that poses the greatest risk to the most vulnerable in our society.

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INTRODUCTION

On the surface, the office of the sheriff of Klickitat County, Washington—a rural county along the Oregon border¹—operates like many others across the country. The state constitution mandates an election for the office.² The sheriff’s department is the largest policing agency in the county.³ Most of the department’s budget is dedicated to its patrol division.⁴ The office’s arrests primarily are for low-level offenses.⁵ While other county departments have seen their budgets stagnate over the last few years, the sheriff’s budget has had a number of increases.⁶

Although much of this is humdrum, the man occupying the office is anything but, at least when it comes to his view of a sheriff’s enforcement authority. Three-term sheriff of Klickitat County, Bob Songer, is an open adherent to the “constitutional sheriffs” ideology⁷—one that views the sheriff as the highest law enforcement authority in the county and answerable only to their electorate.⁸ As a consequence, Sheriff Songer has opposed both federal and state authorities operating in his county and has declared he will not enforce various state laws—including gun laws,⁹ social-distancing mandates,¹⁰ and protections for gray wolves.¹¹

1. Charles Bethea, *A Coronavirus Turf War in Klickitat County*, *New Yorker* (May 17, 2020), <https://www.newyorker.com/news/us-journal/a-coronavirus-turf-war-in-klickitat-county>.

2. WASH. CONST. art. XI, § 5.

3. Compare *Klickitat County Sheriff’s Department*, POLICE SCORECARD [hereinafter *Klickitat Police Scorecard*], <https://policescorecard.org/wa/sheriff/klickitat-county> [<https://perma.cc/2DNT-NV64>] (last visited Mar. 25, 2025), with *Goldendale Police Department*, POLICE SCORECARD, <https://policescorecard.org/wa/police-department/goldendale> [<https://perma.cc/7V7H-BEW3>] (last visited Mar. 25, 2025).

4. JENNIFER NEIL, CORRECTIONS | JAIL REPORT 8 (2024), <https://www.klickitatcounty.org/1543/Corrections-Jail-Report>. The department also has K-9, Marine, and Posse units. *Id.* at 7–8.

5. *Klickitat Police Scorecard*, *supra* note 3.

6. See NEIL, *supra* note 4, at 6–7.

7. Paul Kiefer, ‘Constitutional Sheriff’ Raises Controversial Posses in Klickitat County, *SPOKESMAN-REV.* (Oct. 11, 2024, 10:11 PM), <https://www.spokesman.com/stories/2024/oct/11/constitutional-sheriff-raises-controversial-posses> [<https://perma.cc/9ZBK-4REZ>].

8. Maurice Chammah, Opinion, *The Law Enforcement Officers with Surprising Power*, *N.Y. TIMES* (Oct. 15, 2024), <https://www.nytimes.com/2024/10/15/opinion/sheriff-power-trump.html> (“The group argues that sheriffs have more authority within their counties than the state or federal government.”); Kiefer, *supra* note 7.

9. Kiefer, *supra* note 7.

10. Jacob Bertram, *Songer Calls COVID-19 Restrictions ‘Illegal,’* *COLUM. GORGE NEWS* (Nov. 25, 2020), www.columbiagorenews.com/free_news/songer-calls-covid-19-restrictions-illegal/article_99ce1f662e8d-11eb-a012-9f52a9a23f3e.html [<https://perma.cc/KWA7-FFRQ>].

The notion that the county sheriff can nullify criminal statutes—that is, refuse to enforce applicable criminal law “because of moral or ideological opposition to that law”¹²—has reared its head in a variety of contexts. In recent years, a substantial number of sheriffs have purported to exercise their authority along the lines of Sheriff Songer—opposing firearms laws and public health regulations.¹³ Others oppose immigration-related laws, abortion restrictions, or camping bans targeting homeless individuals.¹⁴ Some fail to protect victims of domestic violence or decline to pursue confirmed voter-fraud plots.¹⁵ And the movement has spread beyond sheriffs, fueling broader assertions about the authority of “constitutional counties” to oppose state and federal policies.¹⁶

In some ways, this embrace of the sheriff’s nonenforcement authority parallels prosecutorial practices. Prosecutors long have claimed the authority to choose which cases to pursue.¹⁷ More controversially, modern reform prosecutors openly decline to enforce certain low-level offenses in order to serve broader justice-oriented goals, including decarceration.¹⁸ Their policies have generated a range of acclaim and criticism.¹⁹

11. Cole Goodwin, *Klickitat County Sheriff Bob Songer Says He Will Not Enforce Protections for Gray Wolves*, COLUM. CMTY. CONNECTION NEWS (Nov. 3, 2023), [columbiacommunityconnection.com/the-dalles/klickitat-county-sheriff-bob-songer-will-not-enforce-endangered-species-ac](https://perma.cc/H8ST-XT4V) [https://perma.cc/H8ST-XT4V].

12. I borrow this definition from W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 181 (2021). Accord Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011).

13. See *infra* notes 88–94 and accompanying text.

14. See *infra* notes 83, 96–97, and accompanying text.

15. See, e.g., sources cited *infra* note 124; Molly Beck & Corrinne Hess, *After Residents Commit Voter Fraud to Make a Point, Racine Sheriff Seeks to End Online Ballot Requests Instead of an Investigation*, MILWAUKEE J. SENTINEL (July 29, 2022, 2:07 PM), www.jsonline.com/story/news/politics/elections/2022/07/28/racine-sheriff-blames-elections-website-after-absentee-ballot-plot-donald-trump-robin-vos/10178217002 [https://perma.cc/V2NG-XH6V].

Regarding the sheriff’s impact on voting generally, see Khaya Himmelman, *Constitutional Sheriffs Group Plans to Insert Itself into More Aspects of the Voting Process in 2024*, TALKING POINTS MEMO (Apr. 18, 2024, 2:28 PM), talkingpointsmemo.com/news/constitutional-sheriffs-group-plans-to-insert-itself-into-more-aspects-of-the-voting-process-in-2024 [https://perma.cc/2DUC-ZR7Q], and Kira Lerner, *Sheriffs Have a Lot of Power over Whether Hundreds of Thousands of People Can Vote*, APPEAL (Aug. 10, 2020), <https://theappeal.org/politicalreport/sheriffs-and-voting-rights-in-jail> [https://perma.cc/9B59-98NH].

16. TJ L’Heureux, Albert Serna Jr., Anisa Shabir, Adrienne Washington, Isaac Stone Simonelli & Brendon Derr, *In the Sheriff We Trust*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Aug. 21, 2023), <https://azcir.org/csp02> [https://perma.cc/PSKA-NQL3] (“[A]t least a dozen U.S. counties influenced by the sheriffs’ group have considered ‘constitutional county’ resolutions over the past two years.”).

17. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (discussing the general principle that the prosecutor “must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints”).

18. See Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1444–45 (2021). The term “progressive prosecutor” glosses over important distinctions among such prosecutors. See *id.* at 1417–18 (offering a typology of progressive prosecutors).

This literature on reform-oriented prosecutors is impossible to summarize here, but for important defenses of their practice, see generally, for example, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973 (2023); Murray, *supra* note 12;

Yet, in sharp contrast to that of reform prosecutors, sheriff nonenforcement has been relatively ignored by the legal academy.²⁰ A few scholars have begun to examine the politicized nature of the sheriff's office,²¹ while others focus on the white supremacist ideologies underlying the constitutional sheriffs movement.²² But legal scholars have not yet engaged deeply with the fundamental tenet of the movement²³—whether sheriffs have the authority, on moral or ideological

Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020); Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL'Y REV. 218 (2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019); and David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC DAVIS L. REV. ONLINE 25 (2017).

19. For positive takes, see sources cited *supra* note 18. For more critical assessments, see generally, for example, Paul H. Robinson & Jeffrey Seaman, *Decriminalizing Condemnable Conduct: A Miscalculation of Societal Costs and Benefits* (U. Pa. Carey L. Sch., Research Paper No. 24-10, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=473286.

Some scholars question the extent to which prosecutors can achieve mass decarceration. See, e.g., Seema Tahir Saifce, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 56 (2022); Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1984 (2022); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 168–69, 171 (2022).

20. Although not specific to this issue of nonenforcement discretion, legal academics have done more of late to include sheriffs in their analysis of U.S. law enforcement. See, e.g., Anthony O'Rourke, Rick Su & Guyora Binder, Essay, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1371 (2021) (“This section outlines the legal structure and historical development of sheriffs’ offices. While police and sheriffs serve similar law enforcement roles today, and are both equally resistant to structural reforms, the sheriff and the police arrived at this point from dramatically different directions.”).

21. See generally, e.g., EMILY M. FARRIS & MIRYA R. HOLMAN, THE POWER OF THE BADGE: SHERIFFS AND INEQUALITY IN THE UNITED STATES (2024); James Tomberlin, Note, “Don’t Elect Me”: Sheriffs and the Need for Reform in County Law Enforcement, 104 VA. L. REV. 113 (2018). Professors Farris and Holman, along with Jessica Pishko, see *infra* note 22, have led the modern scholarly examination of key political aspects of the office of the sheriff.

22. The authoritative treatment of this issue is in JESSICA PISHKO, THE HIGHEST LAW IN THE LAND: HOW THE UNCHECKED POWERS OF SHERIFFS THREATENS DEMOCRACY (2024). See also Chuck Tanner & Devin Burghart, *CSPOA Leader Divulges White Nationalist Ties*, INST. FOR RSCH. & EDUC. ON HUM. RTS. (Oct. 19, 2023), <https://irehr.org/2023/10/19/cspoa-leader-divulges-white-nationalist-ties> [<https://perma.cc/LE34-758U>]. “The ‘constitutional sheriffs’ movement contends that ‘[t]he law enforcement powers held by the sheriff supersede those of any agent, officer, elected official or employee from any level of government when in the jurisdiction of the county.’” STATES UNITED DEMOCRACY CTR. & INST. FOR CONST. ADVOC. (ICAP) AT GEO. UNIV. L. CTR., FACT SHEET: “CONSTITUTIONAL SHERIFFS” AND ELECTIONS (2024) [hereinafter FACT SHEET] (alteration in original) (quoting *About, CSPOA*, <https://cspoa.org/about> [<https://perma.cc/76A3-YFLQ>] (last visited Mar. 26, 2025)), <https://statesunited.org/wp-content/uploads/2022/10/Fact-Sheet-22Constitutional-Sheriffs22-and-Elections-31-Oct-2024-1.pdf> [<https://perma.cc/P7PU-MPSH>].

23. Much of the commentary that exists is fairly perfunctory and largely focused on other aspects of the constitutional sheriffs movement. See, e.g., Tim Dickinson, *He Parties with Neo-Confederates, Trashes MLK, and Leads the ‘Constitutional Sheriffs,’* ROLLING STONE (Oct. 17, 2023), www.rollingstone.com/politics/politics-features/constitutional-sheriffs-ceo-sam-bushman-ties-white-supremacists [<https://perma.cc/1234855624>] (“The theory is legal hokum, but difficult to rein in because sheriffs have broad latitude in enforcement and are generally answerable only to voters who elect them.”); *Confronting Violent White Supremacy (Part V): Examining the Rise of Militia Extremism: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 117th Cong. 29 (2021) (statement of Mary McCord, Executive Director, Institute for Constitutional Advocacy and Protection (ICAP), Georgetown Law) (“[T]he constitutional sheriffs movement is a dangerous movement. It has no really [sic] authority under law. It’s a

grounds, to decline to enforce otherwise applicable criminal laws.²⁴

One reason for this lack of attention might be that these sheriffs seem to have a point. Sheriff nullification is a natural extension of expansive modern conceptions of law enforcement discretion.²⁵ Broad statements of enforcement discretion are widespread.²⁶ The Supreme Court embraces such discretion, even when faced with seemingly mandatory statutes.²⁷ Scholars of the presidency and of prosecutorial authority differ on whether enforcement discretion permits categorical nonenforcement²⁸—that is, declining to enforce entire classes of

made-up thing, but it has a real impact.”); cf. Va. Op. Att’y Gen. No. 19-059 at 3 (2019), www.oag.state.va.us/files/Opinions/2019/19-059-Jones-issued.pdf (<https://perma.cc/PPU3-WNZQ>) (“[A]ll localities, local constitutional officers, and other local officials are obligated to follow duly enacted state laws.”).

24. See Robert L. Tsai, *The Troubling Sheriffs’ Movement That Joe Arpaio Supports*, POLITICO MAG. (Sept. 1, 2017), www.politico.com/magazine/story/2017/09/01/joe-arpaio-pardon-sheriffs-movement-215566 (<https://perma.cc/KSSY-CPM1>).

25. See Laura McFarland, *Constitutional Officers Address Logistics of Second Amendment Sanctuary Designation*, RICHMOND TIMES-DISPATCH (Jan. 6, 2020), www.richmond.com/news/local/central-virginia/powhatan-todaytoday/constitutional-officers-address-logistics-of-second-amendment-sanctuary-designation/article_bfdeb2a-30a7-11ea-bfde-3b66878ad625.html (interviewing Sheriff Brad Nunnally, who said, “If the attorney (general’s) office or the governor’s office thinks they are going to remove discretion from my job, it is a mistake. This is how the system works”); Joshua Hersch, *This Washington Sheriff Is Refusing to Enforce His State’s New Gun Control Law*, VICE (Mar. 22, 2019, 10:18 AM), www.vice.com/en/article/gyaew4/this-washington-sheriff-is-refusing-to-enforce-his-states-new-gun-control-law (<https://perma.cc/J6X8-AC5Z>) (“‘Even if it was a legal law, you have discretionary power,’ [Sheriff Bob] Songer told VICE News. ‘There is no other law enforcement official in the entire United States except a sheriff that’s elected to office by the people.’”).

26. See, e.g., Peter Margulies, *Immigration Law’s Boundary Problem: Determining the Scope of Executive Discretion*, 74 HASTINGS L.J. 679, 726 (2023) (“In criminal law, the discretion of law enforcement is part of settled practice.”); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 11 (2019) (reciting the saying that law enforcement is “shot through with discretion” (quoting David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 245 (2001))).

27. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761, 764–65, 767 n.13 (2005); see also *United States v. Texas*, 599 U.S. 670, 682 & n.4 (2023) (citing *Castle Rock*, 545 U.S. 748, and explaining that “by infringing on the Executive’s enforcement discretion, [statutes mandating arrest] could also raise Article II issues”); *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (interpreting the term “shall” in enforcement provision to preserve discretion because such language is “commonly found in the criminal provisions of Title 18 of the United States Code”).

28. Debates regarding presidential nonenforcement authority have been particularly robust over the last decades, sparked in part by immigration-enforcement debates. ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 3 (2020). For some commentators taking a robust view of presidential nonenforcement authority, see, for example, *id.* at 192–93 and Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 516 (2017). For a dimmer view of presidential nonenforcement, see, for example, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85 (2013). For a middle position that focuses on when categorical nonenforcement becomes inappropriate, see, for example, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1757 (2016), and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014).

Also generating controversy is federal nonenforcement in the context of marijuana laws. See generally Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011).

On the prosecutor front, the notion of discretion in the individual case is well-established. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978). The debate today focuses on categorical

offenses²⁹—but none challenge enforcement discretion on a case-by-case basis. This Article, however, challenges this embrace of enforcement discretion.

To find the legal limits of sheriff nonenforcement discretion, this Article examines the long history of sheriff nullification.³⁰ This approach yields two insights:

First, sheriff nullification has a long pedigree, suggesting it may be a consequence of the structure of the sheriff's office—an elected law enforcement official with weak political constraints.³¹ In recent times, there has been widespread nonenforcement of public health mandates related to masking and social distancing.³² A century ago, it was alcohol prohibition laws.³³ Modern nonenforcement of regulatory mandates often involves gun control laws.³⁴ A century earlier, it was gambling and prostitution.³⁵ This pattern suggests it is a mistake to think that today's constitutional sheriffs solely are a byproduct of our current political climate.³⁶

nonenforcement. For the view that prosecutors generally do not have this authority, see, for example, CHARLES D. STIMSON & ZACK SMITH, HERITAGE FOUND., "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 29 (2020); Fairfax, *supra* note 12, at 1274–75; Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1684–85, 1685 n.137 (2010); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 875 (2004). For a contrary view, see, for example, Milan Markovic, *Charging Abortion*, 92 FORDHAM L. REV. 1519, 1525–26, 1542–43 (2024); Murray, *supra* note 12, at 200, 255; Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 608–10 (2020); and Ronald Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 828, 857 (2020).

29. See Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 667 (2023).

30. See *infra* Section I.B. Justin Murray makes the point, in the context of prosecutors, that even absent direct enforcement, criminal laws can still have a residual impact, either through enforcement by other actors or by otherwise structuring social relationships. See generally Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391 (2022).

31. See *infra* Part II.

32. See *infra* notes 93–94 and accompanying text.

33. See *infra* notes 99–100 and accompanying text.

34. See *infra* notes 88–92 and accompanying text.

35. See *infra* notes 102–03 and accompanying text; *Freas v. State ex rel. Freeling*, 235 P. 227, 228 (Okla. 1925) (although not requiring a jury instruction on the matter, noting that the sheriff was permitted to present evidence regarding “palliation or extenuation of his alleged failure to enforce the gambling and prohibitory laws”); *State v. Lombardi*, 99 N.W.2d 829, 840 (1959) (“The evidence of the prostitutes shows that although when [Sheriff] Lombardi knew indisputably the nature and activities of Club 166 he found no reason to interfere with its operations but on the contrary protected it against interference by others. Other evidence . . . is competent to show that the sheriff intended not to disturb the Club's operations though his knowledge of them was complete, that is, he wilfully refused or neglected to perform the duties of his office.”); *Ferguson v. Superior Ct.*, 147 P. 603, 605–06 (Cal. Dist. Ct. App. 1915) (“The accusation at length is as follows: . . . ‘That the defendant [constable] . . . has seen women and girls living and residing in houses of prostitution, . . . but he has at all times failed, refused, and neglected, and still fails, refuses and neglects, to cause the prosecution or the arrest of any of the persons letting said cribs for the purpose of prostitution, or any of the persons residing therein.’”).

36. This conflict has flavors of the “new preemption,” by which a state government preempts local government actions. See Maria Ponomarenko, *Some Realism About Criminal Justice Localism*, 173 U. PA. L. REV. (forthcoming 2025) (manuscript at 13–16) (on file with author). See generally Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018). Whereas municipalities generally are unprotected against state preemption, see *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (describing municipalities as “convenient agencies for exercising such of the governmental

Second, examining past instances of sheriff nonenforcement reveals a forgotten history of the role state courts played in curbing arbitrary nonenforcement. As the office of the sheriff evolved in early America, courts were called upon to flesh out when a sheriff's failure to arrest amounted to neglect of duty—a removable offense.³⁷ In doing so, courts developed a robust understanding regarding the permissibility of nonenforcement. Their decisions rebuked sheriff nullification but also preserved an important degree of flexibility and leniency in the law.³⁸ This Article is the first to excavate this history and to delineate this jurisprudence.

Based on these insights, this Article critiques the way in which our system eschews legal checks on nonenforcement and instead relegates abuse of nonenforcement authority to the world of politics. Drawing on the long-forgotten ways in which state courts enforced the sheriff's obligations to investigate allegations of crime and enforce criminal statutes, this Article suggests we revisit the possibility that nonenforcement would be subject to judicial review. By reviewing nonenforcement through a neglect-of-duty framework, one can begin to create a legal regime that provides some meaningful check on the sheriff's nonenforcement discretion, even when that discretion is exercised on a case-by-case basis.

This Article proceeds in four parts. Part I outlines the stakes of neglecting sheriff nonenforcement. It begins by describing a sheriff's authority and impact, making clear that where they operate, sheriffs tend to be the primary law enforcement official.³⁹ This Part then details current and historical instances of sheriff nullification, including modern constitutional sheriffs. Part I concludes by making the case for why we should be wary of unfettered nonenforcement discretion.

Given the authority of the sheriff and the potential harms of nonenforcement, Part II turns to existing checks on a sheriff's authority. Those checks, primarily political in nature, ultimately fail to meaningfully curb nonenforcement discretion, thus permitting movements like the constitutional sheriffs' to propagate.

Part III asks whether the law can do more to constrain nonenforcement. It does so by looking to earlier eras to understand the legal controls on the sheriff. This Part provides an original account of a body of state law that, over the course of decades, defined what was required of a sheriff when it comes to investigating and enforcing criminal statutes—and when a sheriff's inaction amounted to neglect of duty. Collectively, this body of law offers a framework for legal

powers of the State as may be entrusted to them in its *absolute discretion*" (emphasis added) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991))), the office of the county sheriff is established by most state constitutions, thus imbuing the office with certain responsibilities and authorities that are guaranteed against state infringement absent constitutional amendment. *See infra* note 267.

This Article does not explore the permissible boundaries of state preemption in this arena, but rather focuses on the sheriff's enforcement (and nonenforcement) obligations as a matter of historical practice and common law. These obligations serve as the authority for judicial action constraining the sheriff.

37. *See infra* Part III.

38. *See infra* Section III.C; *see also infra* Part IV (discussing reforms that would mitigate the harms of arrest—such as those imposed by pretrial detention—as well as alternative actors whose decisions could avoid unduly harsh convictions and sentences).

39. *See infra* Section I.A (detailing sheriffs' law enforcement impact).

controls over nonenforcement, including in individual cases—a path that appears long abandoned, but that this Article contends we should reconsider.

Part IV considers potential counterarguments and negative consequences of reviving legal controls on nonenforcement. This Part challenges the modern assumption that courts are incapable of reviewing nonenforcement decisions in particular cases. This Part also rejects the notion that curbing nonenforcement discretion mandates “full enforcement” of criminal laws.⁴⁰ Yet, wary of the human toll that accompanies every arrest, this Part also proposes a series of legislative reforms to reduce our reliance on pretrial detention and restore leniency elsewhere in the system.⁴¹

Before proceeding, one caveat is in order. Although from time to time this Article notes variations among the states, in general it discusses “sheriffs” as one broad category. But in reality, a sheriff’s powers and duties vary from state to state.⁴² Rather than provide an authoritative treatment of any one state or catalogue all the possible variations, this Article focuses on the most powerful (and the most common) version of the U.S. sheriff—one established by the state constitution with full enforcement authority. Doing so addresses the sheriff’s strongest claims, which can be adapted to particular states to draw more specific conclusions.⁴³

I. SHERIFFS AS KINGS

This Part provides the context needed to evaluate the political and legal checks on the sheriff’s nonenforcement authority. Section I.A explains the role of the sheriff as a law enforcer and criminal policymaker. Section I.B outlines the rise of the constitutional sheriffs movement while also drawing parallels to earlier

40. See *infra* Section IV.A.

41. See *infra* Sections IV.D–E.

42. See *McMillian v. Monroe County*, 520 U.S. 781, 795 (1997) (“[I]t is entirely natural that both the role of sheriffs and the importance of counties vary from State to State”); James A. Conser, Rebecca Paynich & Terry E. Gingerich, *LAW ENFORCEMENT IN THE UNITED STATES* 82–84 (3d ed. 2013) (explaining that the duties of sheriffs vary from county to county).

For example, although most sheriffs are established as elected officials in their state constitution, see *infra* note 182, Alaska and Connecticut do not have sheriffs at all. Daniel M. Thompson, *How Partisan Is Local Law Enforcement? Evidence from Sheriff Cooperation with Immigration Authorities*, 114 AM. POL. SCI. REV. 222, 224 n.5 (2020). In Alabama, sheriffs are statutorily obligated to “ferret out crime.” ALA. CODE § 36-22-3(a)(4). In Tennessee, they are obligated “to patrol the roads of the county.” TENN. CODE ANN. § 38-3-102(b).

Sheriffs’ enforcement authority also varies. In Delaware, for example, where the state constitution defines sheriffs as “conservators of the peace,” the legislature was permitted, without constitutional amendment, to strip the sheriff of arrest powers. *Christopher v. Sussex County*, 77 A.3d 951, 952, 962 (Del. 2013). But in Pennsylvania, the state supreme court found implied authority for sheriffs to make arrests for breaches of the peace committed in their presence. *Commonwealth v. Leet*, 641 A.2d 299, 303 (Pa. 1994).

43. See Price, *supra* note 29, at 694–736 (examining prosecutorial power based on each state’s specific constitutional structure); Wright, *supra* note 28, at 840 (“A uniform theory of declinations . . . does not work well for all the varied state and local prosecutor offices in the United States.”).

examples of sheriff nullification. Section I.C then focuses specifically on the risks posed by unchecked nonenforcement discretion.

A. THE LONG ARM OF THE SHERIFF

Although largely an afterthought to policing scholars, sheriffs are key cogs in the U.S. criminal apparatus.⁴⁴ There are nearly 3,000 sheriffs' offices across the country,⁴⁵ with a combined budget of about \$44 billion.⁴⁶ Although more than half of sheriffs' offices employ fewer than twenty-five full-time officers,⁴⁷ in the aggregate, sheriffs (and their deputies) constitute 25% of the full-time sworn law enforcement officers employed in the country.⁴⁸ Both elected sheriffs and their deputies are overwhelmingly white and male.⁴⁹ Sheriffs' offices also employ 55% of full-time nonsworn law enforcement personnel.⁵⁰ Approximately 130 million Americans live in a jurisdiction for which the sheriff is the sole local law enforcement entity.⁵¹ Even in larger cities with their own municipal police departments, sheriffs retain jurisdiction to enforce the law within the city limits.⁵²

Sheriffs' wide jurisdiction and substantial personnel numbers translate into a significant enforcement footprint. Based on 2016 data, for example, Aaron Littman has calculated that sheriffs' offices made about 20% of the reported arrests for possession of marijuana nationwide; that figure rises to more than 33%

44. Although this Article focuses on criminal enforcement, the sheriff's role as a process server involves sheriffs in a variety of civil proceedings. Examples include writs of possession (evictions), writs of execution (to satisfy court judgments), and orders of protection. *See* TENN. CODE ANN. § 29-15-114 (writ of possession); MINN. STAT. § 550.135 (writ of execution); NEB. REV. STAT. ANN. § 28-311.09 (9)(a) (order of protection); *see also* Linehan v. Rockingham Cnty. Comm'rs, 855 A.2d 1271, 1275 (N.H. 2004) ("Generally, the sheriff's common law powers included conserving public peace, preserving public order, preventing and detecting crime, enforcing criminal laws by, among other things, raising a posse and arresting persons who commit crimes in their presence, providing security for courts, serving criminal warrants and other writs and summonses, and transporting prisoners.").

45. CONNOR BROOKS, OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 305200, SHERIFFS' OFFICES PERSONNEL, 2020, at 2 tbl.2 (2022), <https://www.ojp.gov/sites/g/files/xyckuh236/files/media/document/sop20.pdf> [<https://perma.cc/7SG7-QBAR>].

46. *Id.* at 13 tbl.14.

47. *Id.* at 3 tbl.3.

48. *Id.* at 1.

49. *See id.* at 4 ("The percentage of full-time sworn officers who were female decreased from 1997 (16%) to 2020 (14%)." (citation omitted)); George Bulman, *Law Enforcement Leaders and the Racial Composition of Arrests*, 57 ECON. INQUIRY 1842, 1843 (2019) ("[O]nly 4% of counties had a Black sheriff . . . between 1991 and 2015.").

50. BROOKS, *supra* note 45, at 1. The number of nonsworn personnel more than doubled from 1997 to 2020, while the number of sworn officers held steady. *See id.* at 2 tbl.1.

51. *See* O'Rourke et al., *supra* note 20, at 1371.

52. *See, e.g.,* Sheriff's Duty to Patrol Within City Limits, Tenn. Op. Att'y Gen. No. 08-134 at 1 (2008), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2008/op08-134.pdf> [<https://perma.cc/KX/D-PRVB>] ("[I]f the sheriff has reason to believe that [a municipal] police force is neglecting its duty, his or her duty to prevent and suppress offenses in that community is the same as it is in unincorporated parts of the county."); Sheriff's Authority in Municipalities, Miss. Op. Att'y Gen. No. 2008-00596 at 1 (2008) ("[T]he sheriff's authority extends to all portions of the county including all municipalities situated therein, [while] the municipal police department is limited to the confines of the corporate limits of the municipality"); Wash. Op. Att'y Gen., AGO 61-62 No. 25 (1961), <https://www.atg.wa.gov/ago-opinions/offices-and-officers-county-sheriff-authority-investigate-le-lony-cases-third-and-fourth> [<https://perma.cc/E72A-4N3H>] ("[T]he sheriff, [is] the chief law enforcement officer in the county, with jurisdiction coextensive with the county, including municipalities and townships").

in Louisiana and South Carolina.⁵³ Pretrial incarceration rates in rural areas (where sheriffs dominate)⁵⁴ have accelerated over the last few decades and now outpace urban areas with substantially higher crime rates.⁵⁵ Sheriffs deploy a wide range of force techniques⁵⁶ and kill a disproportionate number of Americans each year.⁵⁷ Sheriffs' offices deploy aerial drones, license plate readers, predictive policing, and other controversial data and surveillance techniques⁵⁸ often associated with large urban police forces. Almost all sheriffs' offices have K-9 units, handling more than 5,500 police dogs, primarily for drug detection purposes.⁵⁹ Sheriffs' deputies routinely check the immigration status of people in their custody.⁶⁰

Sheriffs also play a key role in operating and filling jails.⁶¹ The vast majority of jails are operated at the county level, administered by an elected sheriff.⁶² Through a variety of policy choices—proposing and securing support for new jail construction, using jail space for non-criminal detention (e.g., immigration detention), and determining when a jail will cite rather than incarcerate—the sheriff plays a key role in determining the volume of jail incarceration.⁶³

Jail incarceration has boomed of late. Even after a 25% decline during the pandemic, at midyear 2022, local jails (not prisons) still held 663,100 people in

53. Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 904 & n.186, app. 1 (2021).

54. Jessica Pishko, *How Sheriffs' Power and Autonomy Make Them Central Players for Policing Reform*, BOLTS (Sept. 26, 2019), <https://boltsmag.org/sheriffs-and-policing-practices-the-badg> [<https://perma.cc/UMG7-95AS>] (“Sheriffs are typically the only policing force in rural and unincorporated areas. Law enforcement in cities and towns tends to be the province of police departments formed by municipal authorities . . .”); Michele Bisaccia Meitl, Ashley Wellman & Patrick Kinkaid, *Texas Sheriffs' Perceptions on Firearm Regulations and Mass Shootings*, 23 INT'L J. POLICE SCI. & MGMT. 222, 222 (2021) (“There are nearly 3,000 sheriffs' offices around the United States and they often serve as the only law enforcement body in rural areas.”).

55. JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 7 (2017), <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf> [<https://perma.cc/2UBA-2RPJ>].

56. CONNOR BROOKS, OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 307234, SHERIFFS' OFFICES, PROCEDURES, POLICIES, AND TECHNOLOGY, 2020 – STATISTICAL TABLES 7 tbl.2 (2023), bjs.ojp.gov/document/soppt20st.pdf [<https://perma.cc/EW8T-L4H9>].

57. E.D. Cauchi & Scott Pham, *County Sheriffs Wield Lethal Power, Face Little Accountability: “A Failure of Democracy,”* CBS NEWS (May 20, 2024, 6:00 AM), www.cbsnews.com/news/county-sheriffs-deaths-accountability [<https://perma.cc/KM7Y-CS6H>] (“County sheriff's officers are three times more lethal than city police . . .”).

58. BROOKS, *supra* note 56, at 9 tbl.4, 21 tbl.13, 23 tbl.14. About one in eight offices, covering about 38% of officers, deploy predictive policing. *Id.* at 21 tbl.13. About one in five offices, covering about 60% of officers, regularly use license plate readers. *Id.* at 23 tbl.14.

59. *Id.* at 11 tbl.5.

60. *Id.* at 15 (“Sixty percent of sheriffs' offices had deputies regularly check immigration status during selected circumstances, such as traffic stops or arrests, in 2020.” (citation omitted)).

61. See Littman, *supra* note 53, at 869, 876, 920.

62. *Id.* at 870 & n.28, 876 & n.55 (explaining that sheriffs operate almost all county jails, which house 88% of jail detainees across 2,750 jail systems).

63. See *id.* at 902–03, 908–09, 913–14.

custody.⁶⁴ Only 30% of these individuals were serving a sentence or awaiting sentencing post-conviction—most were being held pretrial.⁶⁵ Between July 2021 and June 2022, approximately 7.3 million people were processed through jails, with an average stay of about one month.⁶⁶ That time period is sufficient to impose the well-documented harms of the arrest process and often to induce a guilty plea.⁶⁷ The massive growth of the jail population over the last few decades has occurred almost entirely in county jails.⁶⁸ That growth continues today, even as the country closes more jails and prisons than it opens.⁶⁹

In short, the sheriff plays a key role in our law enforcement landscape. As both chief law enforcement officers and jail administrators, sheriffs exercise their discretion in ways that have a profound impact on who is incarcerated. And unlike municipal police, who are subject to removal by the mayor, the sheriff is a constitutional officer—an elected official whose office is mandated by their state constitution and thus largely insulated from other county officials.⁷⁰ For broad swaths of the country, the sheriff *is* the law. This authority extends to which crimes to prioritize, and which not to pursue.

B. THE RECURRENCE OF SHERIFF NONENFORCEMENT

This Section provides a brief overview of the nation's recurring experience with sheriff nonenforcement, making the point that although the laws sheriffs ignore have shifted over time, nonenforcement has remained a common thread.

Many analyses of the U.S. sheriff begin by noting the office's English history.⁷¹ Although there is no disputing that the office of the sheriff has an ancient

64. ZHEN ZENG, OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 307086, JAIL INMATES IN 2022 – STATISTICAL TABLES 1 (2023), <https://bjs.ojp.gov/document/ji22st.pdf> [<https://perma.cc/FUP8-PYJ7>].

65. *Id.* at 3.

66. *Id.* at 1.

67. Regarding arrest costs, see Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016) (discussing the range of harms associated with an arrest). Regarding guilty pleas for low-level offenses, see Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 663, 669–70 (2014) (quoting a public defender who says that for clients going through the plea process, “[t]he main thing is to get out of jail”), and Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1347 (2012) (“For those with children, jobs, or other obligations, the deprivations inflicted by a month in jail can be worse punishment than they would face if they were convicted at trial.”).

68. Littman, *supra* note 53, at 871.

69. KANG-BROWN & SUBRAMANIAN, *supra* note 55, at 6; Elizabeth Allen, *How to Redevelop Former Jails and Prisons for the Collective Good*, VERA INST. JUST. (Apr. 30, 2024), <https://www.vera.org/news/how-to-redevelop-former-jails-and-prisons-for-the-collective-good> [<https://perma.cc/H9ZH-D84B>].

70. See *infra* Section II.B (describing limits on the ability of county commissioners to control the county sheriff).

71. For examples of legal scholars grounding their analyses of the sheriff in the office's history, see O'Rourke et al., *supra* note 20, at 1371, 1376–80; Tomberlin, *supra* note 21, at 116–22; and David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 765–87 (2015).

For a particularly thorough treatment of sheriff history, see Soraya K. Kawucha, *Sheriffs – The Other Police* (Dec. 2014) (Ph.D. dissertation, Sam Houston State University) (ProQuest). For an in-depth treatment of the sheriff's history as it relates to the modern sheriff and the constitutional sheriffs movement, see PISHKO, *supra* note 22, at 44–72.

pedigree, one must be careful not to overrely on a history that long predates the rise of our modern criminal enforcement system.⁷² Still, to understand the claims of some sheriffs today, one must start with the fact that the sheriff originally served as the representative of the English Crown's enforcement authority in the county.⁷³ As American colonies and states imported the office, empowering their own sheriffs, some English traditions found their way into U.S. law. In particular, leading treatises and various courts described the sheriff as a law enforcement officer with "no superior in his county."⁷⁴

Today's constitutional sheriffs take this understanding of a sheriff's authority to an extreme.⁷⁵ In their view, "[t]he sheriff's constitutional authority means that they can choose which state and federal laws to enforce."⁷⁶ This is nullification by another name. The constitutional sheriffs movement found its footing in the

72. The sheriff's *posse comitatus*, for example, long predates the rise of modern professional police forces. PISHKO, *supra* note 22, at 45.

73. See 1 WILLIAM BLACKSTONE, COMMENTARIES *343 ("As keeper of the king's peace, both by common law and special commission, [the sheriff] is the first man in the county, and superior in rank to any nobleman therein, during his office."); see also Wis. Pro. Police Ass'n v. County of Dane, 316 N.W.2d 656, 658 (Wis. 1982) ("The office of sheriff is one of the most ancient and important in Anglo-American Jurisprudence."); Annala v. McLeod, 206 P.2d 811, 812 (Mont. 1949) ("The office of sheriff is one of great antiquity. As 'reeve of the shire' or 'shire reeve,' he was, during his term of office, supreme in rank to any nobleman within the limits of his county. He was a representative of the king, 'the first man in the county.'" (quoting BLACKSTONE, *supra*, at *339, *343)).

74. 1 WALTER H. ANDERSON, CLYDE BOWEN & GUS CARR ANDERSON, A TREATISE ON THE LAW OF SHERIFFS, CORONERS, AND CONSTABLES WITH FORMS § 6, at 5 (1941) ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and he has no superior in his county.").

State courts have echoed this sentiment. See, e.g., Dunn County v. Wis. Emp. Rels. Comm'n, 718 N.W.2d 138, 144 (Wis. Ct. App. 2006); State v. McCarty, 179 P. 309, 311 (Kan. 1919); see also Sheriffs, Prosecuting Attorneys—Duties and Powers, Wash. Op. Att'y Gen., AGO 51-53 No. 322 (1952), <https://www.atg.wa.gov/ago-opinions/sheriffs-prosecuting-attorneys-duties-and-powers> [<https://perma.cc/Y766-6WLF>].

75. Tsai, *supra* note 24 ("[The constitutional sheriff movement's] animating idea is that a sheriff holds ultimate law-enforcement authority in his county—outranking even the federal government within its borders.").

The constitutional sheriffs movement manifests in other ways as well, including opposition to attempts to impose term limits for the sheriff's position, civilian oversight, and budget cuts. See Jack Leonard, *Baca Wins His Battle Against Term Limits*, L.A. TIMES (Nov. 11, 2004, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2004-nov-11-me-limits11-story.html> [<https://perma.cc/K8NB-SN9N>]; Andrew Graham & Marisa Endicott, *Sonoma County Sheriff Sees Whistleblower Investigation Subpoenas as Threat to Constitutional Autonomy*, PRESS DEMOCRAT (July 19, 2024), <https://www.pressdemocrat.com/article/news/sonoma-county-sheriff-oversight-whistleblower-subpoena-light> [<https://perma.cc/376B-JAXY>]. Although this Article focuses primarily on nonenforcement discretion, I touch on these issues in the budgetary context in Section II.B.

76. Josh Numainville, *Q&A: Why Are 'Constitutional Sheriffs' Refusing to Enforce Gun Control Laws?*, WESTLAW TODAY (Feb. 22, 2023), [https://today.westlaw.com/Document/Ib150302fb3881ed8636e1a02dc72f16/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&hrstPage=true](https://today.westlaw.com/Document/Ib150302fb3881ed8636e1a02dc72f16/View/FullText.html?transitionType=Default&contextData=(sc.Default)&hrstPage=true) [<https://perma.cc/B4VC-77MM>] (quoting researchers Emily Farris (TCU) and Mirya Holman (Tulane)).

aftermath of the 2012 Sandy Hook school shooting.⁷⁷ In response to the shooting, the Obama Administration announced a detailed plan involving numerous executive and congressional actions to reduce gun violence.⁷⁸ Sheriffs across the country responded in strong opposition—vowing not to enforce any new gun laws and even to prevent federal officials from doing so.⁷⁹ In the years since, the movement has continued to show strength—for example, over a five-year period, a leading constitutional sheriff association hosted events in at least thirty states and conducted formal trainings for law enforcement officers in at least thirteen states.⁸⁰ Overall, a recent survey found nearly 45% of sheriffs agree that their authority in their county supersedes that of federal or state governments.⁸¹

Sheriff opposition to federal law and priorities is not an isolated or novel phenomenon. Today's constitutional sheriffs focus on opposition to federal gun legislation.⁸² But other sheriffs have announced publicly their intent not to cooperate with federal immigration enforcement efforts.⁸³ Although there are differences between immigration sanctuary policies and “Second Amendment sanctuaries,”⁸⁴ these sheriffs are united in their opposition to certain federal laws

77. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), <https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>.

78. See THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 2 (2013), <https://perma.cc/Y82H-YBV4>.

79. Jonathan Thompson, *The Rise of the Sagebrush Sheriffs: How Rural “Constitutional” Peace Officers Are Joining the War Against the Feds*, HIGH COUNTRY NEWS (Feb. 2, 2016), www.hcn.org/issues/48-2/the-rise-of-the-sagebrush-sheriffs; Letter from Utah Sheriffs' Ass'n to President Barack Obama (Jan. 17, 2013) [hereinafter Letter from Utah Sheriffs' Ass'n], www.scribd.com/doc/121298169/Utah-Sheriffs-Association-s-letter-to-President-Barack-Obama (<https://perma.cc/M5DZ-26G9>) (“No federal official will be permitted to descend upon our constituents and take from them what the Bill of Rights—in particular Amendment II—has given them.”).

80. See L'Heureux et al., *supra* note 16 (discussing actions of the Constitutional Sheriffs and Peace Officers Association up to August 2023).

81. Numainville, *supra* note 76.

82. In 2013, Maricopa County Sheriff Joe Arpaio and nearly 500 other sheriffs “vowed not to obey any federal law that required them to confiscate guns.” Tsai, *supra* note 24. That same year, in Utah, twenty-eight sheriffs warned: “No federal official will be permitted to descend upon our constituents and take from them what the Bill of Rights—in particular Amendment II—has given them.” Letter from Utah Sheriffs' Ass'n, *supra* note 79.

83. See, e.g., Nick Ochsner, *After Calls for Collaboration, Sheriff McFadden Ignores Calls, Emails from ICE*, WBTV (Oct. 25, 2019, 9:43 AM), www.wbtv.com/2019/10/25/after-calls-collaboration-sheriff-mcfadden-ignores-calls-emails-ice (<https://perma.cc/5YCY-15K4>) (reporting on a Mecklenburg County, North Carolina, sheriff refusing to honor ICE detainers or notify ICE officials when undocumented persons are being released); Hayley Fixler, *Durham County Sheriff Speaks Out Against Bill that Forces Offices to Work with ICE*, CBS17.COM (Mar. 29, 2023, 5:46 PM), www.cbs17.com/news/local-news/durham-county-sheriff-speaks-out-against-bill-that-forces-offices-to-work-with-ice (“‘As the sheriff in Durham County, I should not be enforcing federal immigration law. I will not enforce federal immigration law,’ [Sheriff Clarence] Birkhead said.”).

84. Immigration laws are not directly enforced by local law enforcement; they are federal laws that benefit from local cooperation. See *Arizona v. United States*, 567 U.S. 387, 395–97 (2012) (discussing federal law enforcement of immigration laws); *id.* at 411 (“Consultation between federal and state officials is an important feature of the immigration system.”). But firearms regulations often are state laws, which apply to sheriffs directly. See Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 463, 466 (2020).

or practices. And the further back one goes, more examples abound. In 2014, several sheriffs in Utah defied Bureau of Land Management efforts to protect cultural resources by forcibly opening closed roads.⁸⁵ Sheriffs played a role in the “Sagebrush Rebellion” and its opposition to federal ownership of land in Western states.⁸⁶ Southern sheriffs long opposed federal civil rights efforts, from the aftermath of Reconstruction through Jim Crow.⁸⁷

Like sheriff opposition to federal laws, sheriffs also oppose a range of state criminal statutes. Today’s constitutional sheriffs again focus their opposition on gun-control efforts. In 2023, about 80% of Illinois’s sheriffs announced they would refuse to enforce a provision of a new gun-control law that required owners of assault weapons to register them with the state.⁸⁸ In 2019, sheriffs in at least thirteen counties in Washington announced they would not enforce a gun-control law that involved raising the age of purchase for assault weapons to twenty-one, a mandatory waiting period, and more thorough background checks.⁸⁹ That same year, in Colorado, Weld County Sheriff Steve Reams announced he would not enforce the state’s pending red flag law—a law that permitted a court to temporarily remove firearms from a person in crisis.⁹⁰ Sheriffs raised similar opposition in Oregon

85. See Thompson, *supra* note 79.

86. See *id.*; Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 118–19 (2001) (“A tenuous relationship has always existed between the local representatives of federal agencies and local landowners, but recent incidences such as the Sagebrush Rebellion and the more recent County Supremacy movement have made federal land management personnel scared for their lives and safety.”). See generally R. MCGREGG CRAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* (1993) (discussing the “Sagebrush Rebellion” of the 1980s and opposition to federal control over public lands).

87. On post-Reconstruction violence and lynching, see *infra* note 175 and accompanying text. On Jim Crow-era opposition to integration efforts, see, for example, Louis Menand, *The Color of Law*, NEW YORKER (July 1, 2013), <https://www.newyorker.com/magazine/2013/07/08/the-color-of-law>; Margalit Fox, *Jim Clark, Sheriff Who Enforced Segregation, Dies at 84*, N.Y. TIMES (June 7, 2007), <https://www.nytimes.com/2007/06/07/us/07clark.html>.

88. See Mirya Holman & Emily Farris, *Constitutional Sheriffs Refuse to Follow or Enforce Illinois’ New Assault Weapons Ban*, TALKING POINTS MEMO (Feb. 3, 2023, 9:00 AM), talkingpointsmemo.com/cafe/constitutional-sheriffs-refuse-to-follow-or-enforce-illinois-new-assault-weapons-ban [<https://perma.cc/RVP7-KEL9>]; Cesar Sanchez & Hannah Meisel, *Sheriff’s Offices in Illinois Defy New Assault Weapons Ban: ‘We Are the Keeper of Our Jails,’* WQAD8 (Jan. 12, 2023, 5:35 PM), www.wqad.com/article/news/politics/illinois-politics/illinois-sheriffs-against-assault-weapons-ban/526-368230a6-34b7-45ec-916a-935d95181cfc [<https://perma.cc/E6S7-BJKQ>]; see also Eunice Alpasan, *Sheriffs Across Illinois Say They Won’t Enforce New Assault Weapons Ban*, WTTW (Jan. 17, 2023, 8:58 PM), news.wttw.com/2023/01/17/sheriffs-across-illinois-say-they-won-t-enforce-new-assault-weapons-ban [<https://perma.cc/BW4W-6SR8>] (In the context of new state firearms restrictions, Jefferson County Sheriff Jeff Bullard said, “[i]t’s my duty to stop civil rights violations from happening in my county, so it goes way beyond just not enforcing.”).

89. Owen Daugherty, *At Least 13 County Sheriffs in Washington Refuse to Enforce New Gun Law*, THE HILL (Feb. 11, 2019, 3:08 PM), thehill.com/homenews/state-watch/429460-at-least-13-county-sheriffs-in-washington-refusing-to-enforce-states-new/; see also Hersch, *supra* note 25.

90. Scott McLean & Sara Weisfeldt, *This Colorado Sheriff Is Willing to Go to Jail Rather Than Enforce a Proposed Gun Law*, CNN (Mar. 31, 2019, 2:11 AM), <https://www.cnn.com/2019/03/31/us/colorado-red-flag-gun-law/index.html> [<https://perma.cc/M7EK-4NB1>].

in 2022⁹¹ and in California in 2024.⁹²

Sheriff opposition to state laws is hardly limited to gun mandates. Sheriffs have opposed pandemic-era stay-at-home mandates,⁹³ masking requirements,⁹⁴ and wildlife-protection laws.⁹⁵ Lest one think that sheriff opposition always comes from the political right, a Washington state sheriff recently declared his opposition to enforcing a ban on sleeping on public lands (which is often used to

For additional examples, see Tim Skubick, *Nessel, Sheriff, Clash over Enforcement of Red Flag Law*, WLNS (Apr. 21, 2023, 8:19 PM), www.wlns.com/news/local-news/nessel-sheriff-clash-over-enforcement-of-red-flag-law (Livingston County, Michigan); Leah Anaya, *NM Sheriffs Force Lawmakers to Abandon Red Flag Bill: We Refuse to Enforce Unconstitutional Laws*, LAW ENF'T TODAY (Jan. 19, 2020), <https://www.lawenforcementtoday.com/nm-sheriffs-force-lawmakers-to-abandon-red-flag-bill-we-refuse-to-enforce-unconstitutional-laws> [<https://perma.cc/E99R-EA31>] (Lincoln County, New Mexico); Sara Knuth, *Weld County Votes to Become Second Amendment Sanctuary County*, GREELEY TRIB. (May 13, 2020, 2:45 AM), <https://www.greeleytribune.com/2019/03/06/weld-county-votes-to-become-second-amendment-sanctuary-county> (Weld County, Colorado); and Jesse Paul, *Colorado's Attorney General Says Sheriffs Who Won't Carry Out a Red Flag Bill Court Order "Should Resign,"* COLO. SUN (Mar. 20, 2019, 5:07 AM), [coloradosun.com/2019/03/20/colorado-second-amendment-sanctuary-counties-court](https://www.coloradosun.com/2019/03/20/colorado-second-amendment-sanctuary-counties-court) [<https://perma.cc/8J48-JX17>] ("County commissions that have made their counties 'sanctuaries' say they don't want their elected sheriffs enforcing a law they don't think is legally sound. But what's not totally clear is if that means refusing to use the tools provided under the measure, or defying a court order to seize weapons.").

91. Jonathan Levinson, *Some Oregon Sheriffs Refuse to Enforce Gun Laws*, JEFFERSON PUB. RADIO (Nov. 21, 2022, 4:55 PM), <https://www.jpjr.org/politics-government/2022-11-21/some-oregon-sheriffs-refuse-to-enforce-gun-laws> [<https://perma.cc/FKG8-5X29>].

92. AWR Hawkins, *California Sheriff Not Enforcing New State Bans on Concealed Carry*, RIGHT EDITION, <https://rightedition.com/2024/01/04/california-sheriff-not-enforcing-new-state-bans-on-concealed-carry> [<https://perma.cc/C5HS-DP49>] (last visited Mar. 26, 2025); Cam Edwards, *Growing Number of California Law Enforcement Say They Won't Enforce New Carry Restrictions*, BEARING ARMS (Jan. 5, 2024, 1:01 PM), bearingarms.com/camedwards/2024/01/05/growing-number-of-california-law-enforcement-say-they-wont-enforce-new-carry-restrictions-n79059 [<https://perma.cc/V652-6KJM>].

93. See, e.g., Joseph Choi, *At Least Four New York Sheriffs Say They Won't Enforce Cuomo's Limits on Thanksgiving Gatherings*, THE HILL (Nov. 17, 2020, 2:52 PM), thehill.com/homenews/state-watch/526367-at-least-four-new-york-sheriffs-say-they-wont-enforce-cuomos-limits-on (New York); 2 *Arizona Sheriffs Refuse to Enforce a Stay-at-Home Order*, ASSOCIATED PRESS (May 3, 2020, 12:21 PM), apnews.com/general-news-a7c04cfd3b0e243b8beb28140cadccfb [<https://perma.cc/R7DH-GAA1>] (Arizona); Jim Owczarski & Sophie Carson, *Racine County Sheriff Will Not Enforce Stay-at-Home Order, Says It Will Have 'Dire Lifetime Consequences,'* MILWAUKEE J. SENTINEL (Apr. 17, 2020, 8:58 PM), <https://www.jsonline.com/story/news/local/2020/04/17/coronavirus-wisconsin-racine-county-sheriff-schmaling-says-evers-order-overreaching-lire-consequence/5157229002> [<https://perma.cc/G58R-58K7>] (Wisconsin).

94. See, e.g., Minyvonne Burke, *'Not Backed by Science': L.A. County Sheriff Will Not Enforce Mask Mandate*, NBC NEWS (July 17, 2021, 11:53 AM), <https://www.nbcnews.com/news/us-news/not-backed-science-l-county-sheriff-will-not-enforce-mask-n1274274> [<https://perma.cc/4WGS-4HNN>]; Austin Jenkins, *'Don't Be a Sheep': A SW Washington Sheriff's Response to Governor's Mask Order*, OPB (June 25, 2020, 9:30 AM), www.opb.org/news/article/washington-state-mask-order-county-sheriff-response [<https://perma.cc/EAS5-KXPC>] (discussing Sheriff Robert Snaza of Lewis County, Washington, who encouraged listeners not to be "sheep" and not to abide by the governor's mask mandate); *Law Enforcement Agencies Across the State Clarify Their Stance on the Statewide Mask Mandate*, KX NEWS (Nov. 16, 2020, 4:59 PM), www.kxnet.com/news/local-news/law-enforcement-agencies-across-the-state-clarify-their-stance-on-the-statewide-mask-mandate (discussing McKenzie County, North Dakota, Sheriff Matthew Johansen's announcement that he would not enforce the governor's mask mandate).

95. See, e.g., Goodwin, *supra* note 11 (discussing intent of the sheriff of Klickitat County, Washington, not to enforce protections for gray wolves under Washington law or the federal Endangered Species Act).

target homeless individuals).⁹⁶ Another in Louisiana declared she would not enforce a state ban on abortions.⁹⁷ A Texas sheriff refused to make arrests for certain instances of low-level drug possession.⁹⁸

Again, like sheriff opposition to federal laws, sheriff nullification of state laws has a long history. A century ago, sheriffs widely refused to enforce alcohol prohibitions.⁹⁹ One particularly transparent example was Sheriff Charles Barbee of Prince William County, Virginia, who freely admitted he was “exceedingly inactive” in enforcing alcohol prohibitions.¹⁰⁰ Neglect of Sunday Blue Laws¹⁰¹ and anti-gambling laws¹⁰² was commonplace as well.

It is not difficult to explain this breadth and history of sheriff nullification. As elected officials, sheriffs appeal to the preferences of their constituencies—

96. Lauren Girgis, *Burien Seeks New Police Chief After Sheriff Refuses to Enforce Camping Ban*, SEATTLE TIMES (Apr. 11, 2024, 7:48 PM), www.seattletimes.com/seattle-news/homeless/burien-seeks-new-police-chief-after-sheriff-refuses-to-enforce-camping-ban/.

For an additional example, see Alex Zielinski, *Multnomah County Sheriff Says She Won't Use Jails to Criminalize Homelessness Under Portland Camping Policy*, OPB (July 30, 2024, 8:11 PM), <https://www.opb.org/article/2024/07/30/multnomah-county-sheriff-nicole-morrisey-odonnell-says-wont-jail-homelessness/> [<https://perma.cc/Q4RR-7UJ7>].

97. Victor Skinner, *Louisiana Sheriff Says She'll Defy State Abortion Law*, CTR. SQUARE (July 8, 2022), <https://www.thecentersquare.com/louisiana/louisiana-sheriff-says-shell-defy-state-abortion-law/article/184a04f6-1ef1-11ec-ab63-a32e17c568a9.htm> [<https://perma.cc/99FU-8UR3>].

98. Tomas Hoppough, *Texas Sheriff Refuses to Arrest Drug Carriers at Border Patrol Checkpoint*, KFOX14 (Oct. 1, 2015, 7:07 PM), <https://kfoxtv.com/archive/gallery/texas-sheriff-refuses-to-arrest-drug-carriers-at-border-patrol-checkpoint-01-20-2014> [<https://perma.cc/W2YG-MN7R>].

99. See, e.g., *Guard of State Closed the Bars*, MANKATO FREE PRESS, July 5, 1918, at 2, <https://chroniclingamerica.loc.gov/lccn/sn83016589/1918-07-05/ed-1/seq-3> [<https://perma.cc/344C-PNMI>] (reporting how sheriff of Steele County, Minnesota, refused to close saloons during prohibition); *Freas v. State ex rel. Freeling*, 235 P. 227, 227 (Okla. 1925) (action to remove sheriff for failure to enforce violations of the prohibitory liquor law and violations of the gambling laws); *State v. Teeters*, 209 P. 818, 818 (Kan. 1922) (petition alleging sheriff failed to enforce liquor laws); *State ex rel. McDonald v. Dyson*, 183 N.W. 298, 299–300 (Neb. 1921) (removing sheriff for failing to enforce the laws involving the transfer of intoxicating liquors).

100. *Barbee v. Murphy*, 141 S.E. 237, 240 (Va. 1928).

101. See, e.g., *Marion Party Disappointed*, MARION DAILY MIRROR, June 27, 1907, at 8 (discussing refusal of Sheriff E. Drown of Marion County, Ohio, to enforce “state law against Sunday saloons and baseball in the territory outside the city of Marion”).

102. See, e.g., *In re Sulzmann*, 29 Ohio N.P. (n.s.) 92, 103 (Ohio Ct. C.P. 1931) (“The respondent [sheriff], knowing that betting and gambling was going on, constituted himself in effect the self-appointed race-gambling commissioner of Cuyahoga county, issuing and refusing permits as he saw fit, knowingly permitted open gambling and wagering at the meetings he graciously allowed to operate, and when appeals were made to step in and stop the gambling he wholly neglected not only to stop it but never made a move to investigate the matter.”), *aff'd*, 183 N.E. 531 (Ohio 1932); *Mays v. Robertson*, 288 S.W. 382, 383 (Ark. 1926) (alleging sheriff “knowing that certain persons (naming them) were guilty of the crime of exhibiting certain gambling devices . . . did unlawfully, knowingly, and willfully, fail, neglect, and refuse to arrest said persons and take them before some magistrate or court”); *Freas*, 235 P. at 227 (alleging sheriff’s failure to enforce violations of the prohibitory liquor law and violations of the gambling laws); *Coffey v. Superior Court*, 82 P. 75, 75 (Cal. 1905) (alleging police chief permitted gambling); *Sheriff Defies Governor*, OMAHA SUNDAY BEE, June 25, 1905, at 1 (Sheriff John Herpel of St. Louis County, Missouri, defying governor’s orders to enforce anti-betting law); *Sheriff Defies Folk*, CITIZEN-REPUBLICAN, June 29, 1905, <https://chroniclingamerica.loc.gov/lccn/sn99062010/1905-06-29/ed-1/seq-3> [<https://perma.cc/2SJQ-12W4>] (sheriff threatening to arrest state officials sent to enforce gambling laws that sheriff refused to enforce).

preferences for alcohol during Prohibition or preferences for their firearms in the face of gun-control laws. As the sheriff of Broward County, Florida, put it about seventy-five years ago: He “decided to keep his hands off gambling because he was ‘elected on the liberal ticket and the people want it.’”¹⁰³ Direct elections of sheriffs inject political considerations (and community preferences) into law enforcement decisions, including decisions not to enforce criminal statutes. Given the obvious democratic impulse, the question becomes whether nullification is a problem worth addressing.

C. THE RISKS OF SHERIFF NULLIFICATION

Constitutional sheriffs defend their nonenforcement decisions along two normative dimensions: democracy and liberty. With respect to the former, these sheriffs emphasize their status as the nation’s only elected law enforcement officials and argue that they have an obligation to enforce the law according to the values and priorities of their constituents. This was Sheriff Bob Songer’s basis for objecting to protections for gray wolves—that his community valued protecting their livestock more than the ecological and biodiversity benefits that might accrue from protecting the wolves.¹⁰⁴ With respect to liberty, these sheriffs emphasize that nonenforcement is necessary to protect the public from unjust application of criminal laws. A leader of the constitutional sheriffs movement argues, for example, that a constitutional sheriff would not have arrested Rosa Parks.¹⁰⁵

This Section begins by examining each of these justifications—democracy and liberty—finding both are contestable and that serious threats arise when nonenforcement authority is left unchecked. This Section concludes with a broader concern about unchecked nonenforcement discretion: the risk of arbitrariness and discrimination. That is, without adequate checks on nonenforcement, criminal enforcement will amount to government by men, not by laws.¹⁰⁶

103. *Permitted Gambling, Florida Sheriff Says*, N.Y. TIMES, July 23, 1950, at 34, <https://timesmachine.nytimes.com/timesmachine/1950/07/23/113167276.html?pageNumber=34>. For an in-depth examination of Broward County Sheriff Walter Clark and the role of the sheriff in local government, see generally Cindy Hahamovitch, *The “Profane Margins” of the State: Florida Sheriff Walter R. Clark and the Local History of Crime, Policing, and Incarceration*, 110 J. AM. HIST. 643 (2024).

104. See Goodwin, *supra* note 11.

105. PISHKO, *supra* note 22, at 23–25 (recounting a story told by Richard Mack, founder of the Constitutional Sheriffs and Peace Officers Association (CSPOA), who “recites a made-up tale about Rosa Parks, who, in his imagined version, would have been helped by a sheriff who refused to arrest her when she did not move to the back of the bus”).

106. Cf. Richard Samuelson, *A Government of Laws, Not of Men*, 17 CLAREMONT REV. BOOKS 45, 46 (2017) (reviewing RICHARD ALAN RYERSON, *JOHN ADAMS’S REPUBLIC: THE ONE, THE FEW, AND THE MANY* (2016), and LUKE MAYVILLE, *JOHN ADAMS AND THE FEAR OF AMERICAN OLIGARCHY* (2016)) (“And what, according to [John] Adams, were to be the principles at the heart of the American regime? . . . Adams famously called a republic ‘a government of laws, not of men.’”).

1. Democracy Concerns

Consider, first, the democracy justification. As described in more detail below, there is substantial reason to doubt that sheriff elections are accurate measures of democratic sentiment in these communities.¹⁰⁷ But even assuming sheriff elections provide an accurate barometer of community sentiment on particular enforcement practices, there are democracy-based reasons to contest a sheriff's authority to nullify.

It is not clear that sheriffs' elected status makes legitimate their unilateral decision to effectively repeal (through nonenforcement) a democratically enacted criminal statute. After all, the sheriff's oath of office obligates them to uphold all relevant laws, including both federal and state mandates.¹⁰⁸ And as the Supreme Court has explained: "Foremost among the prerogatives of [state] sovereignty is the power to create and enforce a criminal code."¹⁰⁹ Why should a sheriff be permitted to violate this sovereignty? A sheriff's decision to follow local popular will merely preferences voters at a county level over those at the state level.¹¹⁰ The legitimacy of this preference is subject to ongoing debate in the scholarly literature about the value of localism in criminal law and is plainly up for debate.¹¹¹

Sheriff nullification also creates another democracy problem—it sidelines the democratically elected county prosecutor. With modest exceptions discussed below,¹¹² a sheriff's enforcement decision is binary: to enforce or not to enforce. The former has the virtue of bringing the county prosecutor (and often, the courts) into the process, while nonenforcement cuts out the prosecutor's office. Yet the county prosecutor typically also is a constitutional officer elected by the same constituency as the sheriff.¹¹³ In fact, the prosecutor seems better situated to reflect the community's preferences because they have at their disposal a far greater range of tools to approximate the community's sense of justice—in particular: declining to prosecute the case, conditioning dismissal on a period of good behavior, offering a plea with a non-carceral sentence,

107. See *infra* Section II.A.

108. See, e.g., TENN. CODE ANN. § 8-8-104; ALA. CONST. art. XVI, § 279; N.J. STAT. ANN. § 40A:9-96; TEX. CONST. art. XVI, § 1(a); GA. CODE ANN. § 15-16-4.

109. *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

110. Following preferences at the county level can be critiqued, for example, as not accounting for the spillover effects of criminal enforcement. See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 976–77 (2019).

111. See generally JOSHUA KLEINFELD, STEPHANOS BIBAS & RICHARD BIRSCHBACH, BY THE PEOPLE: RESTORING DEMOCRACY IN CRIMINAL JUSTICE (forthcoming 2025); Ponomarenko, *supra* note 36; John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017). My goal is not to enter the ongoing debate about the virtues of criminal law localism but instead to focus specifically on nonenforcement.

112. See *infra* notes 385, 418, and accompanying text (discussing statutory authority to issue citations and "station adjustments" in lieu of arrest).

113. See, e.g., MICH. CONST. art. VII, § 4; N.J. CONST. art. VII, § 2, ¶¶ 1–2; N.C. CONST. art. IV, §§ 2, 18; OKLA. CONST. art. XVII, § 2; VT. CONST. ch. II, § 50; VA. CONST. art. VII, § 4; WASH. CONST. art. XI, § 5; W. VA. CONST. art. IX, § 1; WIS. CONST. art. VI, § 4(b)–(c).

and much more.¹¹⁴ The sheriff's options are far more limited. Thus, nonenforcement's stronger democratic claimant probably is the prosecutor.¹¹⁵

2. Liberty Concerns

Putting the democratic legitimacy of nullification to one side, it is worth interrogating the sheriff's claim that nonenforcement is liberty enhancing. There is obvious appeal to this assertion. We live in an era of racially disparate criminal enforcement,¹¹⁶ mass incarceration,¹¹⁷ and overreliance on criminal penalties to address social ills.¹¹⁸ In light of these practices, one can easily imagine a range of nonenforcement decisions that are defensible as liberty enhancing.¹¹⁹ Rosa Parks would be just the tip of the iceberg.¹²⁰ In fact, appeals to mercy and justice are a common defense of jury nullification, prosecutorial nullification, and other avenues of relief from criminal prosecution.¹²¹

114. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTOR FUNCTION, Standards No. 3-4.4, No. 3-5.6, No. 3-5.7 (AM. BAR ASS'N, 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function [<https://perma.cc/3HXY-JPSQ>]; see also Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 941–42 (2024) (discussing the unique power of prosecutorial declinations).

115. See generally Murray, *supra* note 12 (developing a theory of democratically justified prosecutorial nullification).

116. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 130–37 (2020).

117. The literature on mass incarceration is too expansive to recount here, but scholars have explored a variety of causes and drivers. See, e.g., *id.* at 5 (describing mass incarceration as the product of institutional racism); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 5–6 (2019) (explaining how populist punitive policies have driven mass incarceration).

118. Regarding our overreliance on policing to address social problems, see Farhang Heydari, *The Invisible Driver of Policing*, 76 STAN. L. REV. 1, 5 (2024) (“[T]his Article identifies a pattern of agencies shying away from exercising their civil regulatory authority over private industry and instead addressing the social problems under their respective purviews through criminal law enforcement.”); Vincent M. Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2, 10 (2023) (“Policing and caging people is the knee jerk response to all manner of social problems . . .”); Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 986 (2021) (“The police themselves realize all too well that they are at best a band-aid on the chronic social problems they encounter.”).

119. Many scholars view liberty concerns as the primary driver of separation of powers. See, e.g., F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 306–07 (2021); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–14 (2006). And police scholars find police discretion desirable. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 589 (1997) (“Police scholars recognize that ‘it is especially desirable’ in the community policing context ‘that officers have the option, except when a serious offense is committed, to choose not to enforce the law if another alternative appears more effective.’” (quoting Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 CRIME & DELINQ. 6, 23 (1987))).

120. See *supra* note 105 and accompanying text.

121. See Bowers, *supra* note 28, at 1670–71 (“Law and equity can and do coexist harmoniously within justice systems. . . . [I]t is no sign of the deficiency of law that the system permits—and indeed requires—some amount of equitable exception (particularly in petty cases). It is, instead, a sign only of the complexity of existence.” (footnote omitted)); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679, 700–01 (1995); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1336 (2008)

At the same time, however, there are many circumstances in which nonenforcement creates real threats to liberty. The most obvious historical examples of this are the Reconstruction- and Jim Crow-era sheriffs who ignored racialized violence.¹²² Additional examples are easy to find: a sheriff who chooses not to pursue charges against individuals who injure civil demonstrators;¹²³ sheriffs who decline to charge crimes of domestic violence;¹²⁴ sheriffs who ignore potential hate crimes.¹²⁵

In these circumstances, nonenforcement can leave victims feeling vulnerable, unprotected, and without recourse. This itself is a threat to liberty and personal autonomy. Crime victimization has a range of negative impacts on a person's quality of life, including "substantial and lasting physical (and mental) health impacts."¹²⁶ There is also evidence that victimization causes tangible changes in people's lives: they are more likely to move, they take more sick time, and they experience an overall decrease in earnings.¹²⁷

Nonenforcement can also create cycles of victimization. It can embolden lawbreakers and invite repeated violations.¹²⁸ Evidence from college campuses, for example, finds that the vast majority of sexual assaults are committed by a small

(arguing that "unreviewable decisions to grant mercy should still have a place in the criminal justice system").

122. See Fox, *supra* note 87; *infra* note 175 and accompanying text.

123. See Dusty Lane, *5 Sheriff's Deputies Disciplined for Not Arresting Man for Assault at Trump Rally*, FOX 13 SEATTLE (Mar. 16, 2016, 6:24 PM), <https://www.fox13seattle.com/news/5-sheriffs-deputies-disciplined-for-not-arresting-man-for-assault-at-trump-rally> [<https://perma.cc/4S2H-CLTB>].

124. See Max Marin, *Philadelphia Sheriff's Office Seizes Firearms in Just 13% of Domestic-Abuse Cases. Victims Say It's Unacceptable*, PHILA. INQUIRER (July 23, 2023, 5:08 AM), <https://www.inquirer.com/news/philadelphia/domestic-violence-philadelphia-protective-order-act-79-sheriffs-office-20230723.html>; Emily M. Farris & Mirya R. Holman, *Public Officials and a "Private" Matter: Attitudes and Policies in the County Sheriff Office Regarding Violence Against Women*, 96 SOC. SCI. Q. 1117, 1130 (2015) ("[W]e provide clear evidence that . . . there remains a portion of sheriffs who continue to believe in domestic violence and rape myths, including that some women invite sexual assault on themselves, and that domestic violence may be a result of income, education, and alcohol and drug use.").

125. See *Minami Tamaki LLP and Szeto-Wong Law File Civil Rights Lawsuit Alleging Sutter County Delayed Hate Crime Investigation*, MINAMI TAMAKI LLP (May 19, 2022), <https://www.minamitamaki.com/2022/05/minami-tamaki-llp-and-szeto-wong-law-file-civil-rights-lawsuit-alleging-sutter-county-delayed-hate-crime-investigation> [<https://perma.cc/J65F-L5B3>]. There are also examples of prosecutors refusing to charge cases as hate crimes. See Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 863, 881 (2014).

126. Anna Bindler, Nadine Ketel & Randi Hjalmarsson, *Costs of Victimization*, in HANDBOOK OF LABOR, HUMAN RESOURCES AND POPULATION ECONOMICS 15 (2020); see also Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle & Grace S. Hubel, *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 194 (2010) (concluding "studies indicate that crime victimization is associated with changes and impairments in functioning that adversely impact quality of life" and advocating for further research); Dean G. Kilpatrick, Benjamin E. Saunders, Lois J. Veronen, Connie L. Best & Judith M. Von, *Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact*, 33 CRIME & DELINQ. 479, 479 (1987) ("Of all crime victims [sampled], 27.8% subsequently developed posttraumatic stress disorder (PTSD)." (emphasis omitted)).

127. Bindler et al., *supra* note 126, at 20.

128. See PAUL H. ROBINSON, JEFFREY SEAMAN & MUHAMMAD SARAHNE, *CONFRONTING FAILURES OF JUSTICE: GETTING AWAY WITH MURDER AND RAPE* 70 (2024). Although I would not overstate the deterrent effect of enforcement, for a discussion of some of the relevant empirical studies, see *id.* at 67–

number of offenders.¹²⁹ Nonenforcement also can create a misleading picture about the impact and frequency of crime.¹³⁰ Imagine a policing agency that frequently fails to take reports of sexual assaults, either convincing victims not to make reports or misclassifying the offense. In that jurisdiction, sexual assault crime rates appear low, which in turn may encourage authorities to devote fewer resources or discourage victims from reporting.

At scale, nonenforcement risks creating “entrenched patterns of victimization.”¹³¹ Nonenforcement can send an official message of disregard and create an impression that certain types of victimization are unworthy of government intervention.¹³² Domestic violence was (and perhaps still is) a prime example of this.¹³³ When communities (or subpopulations) see nonenforcement, they are also less likely to cooperate with law enforcement efforts,¹³⁴ again creating a cycle of crime and victimization. Sexual assaults are woefully underreported in part because of the “predictability of a non-response” by authorities.¹³⁵

Moving beyond particular victims or particular categories of crimes, granting law enforcement authority to choose their enforcement targets will not necessarily result in less enforcement overall. One might hope that discretion would translate to less attention on low-level offenses in favor of more serious investigations, but experience teaches differently. The New York Police Department’s use of “stop, question and frisk” is one example.¹³⁶ The practice was justified as a tactic deployed at an officer’s discretion in order to fight violent crime, but in practice, officers ended up conducting huge numbers of stops for low-level offenses.¹³⁷ Similarly, when jurisdictions implement programs that rely on traffic stops to

72 and Shaun Ossei-Owusu, *Gimme Some More: Centering Gender and Inequality in Criminal Justice and Discretion Discourse*, 18 AM. U. J. GENDER SOC. POL’Y & L. 607, 617–18 (2010).

129. See John D. Foubert et al., *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study*, 26 VIOLENCE AGAINST WOMEN 296, 304 (2020).

130. See Ossei-Owusu, *supra* note 128, at 617–18 (“Over-policing and profiling dominate the discussion on race, class, gender, and crime, but underenforcement of the law is an equally, if not more egregious, phenomenon. Specifically, underenforcement is not subject to review; formal statistics of underenforcement are not kept; underenforcement decreases the amount of crime that is officially recognized; and it increases real crime by giving some offenders solace in knowing that certain crimes won’t be investigated rigorously.” (footnotes omitted)).

131. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1748 (2006).

132. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29–30 (1997).

133. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 239–41 (2005).

134. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 265 (2008) (discussing how law enforcement’s loss of legitimacy can lead to less cooperation).

135. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–93 (2016).

136. *Stop, Question and Frisk*, NYC CIVILIAN COMPLAINT REV. BD., <https://www.nyc.gov/site/ccrb/investigations/stop-question-and-frisk.page> [<https://perma.cc/BLH4-4F9F>] (last visited Mar. 28, 2025).

137. See The New York Times, *N.Y. Region: Stop and Frisk in Brownsville, Brooklyn* | *The New York Times*, YOUTUBE, at 2:52 (July 12, 2010), <https://www.youtube.com/watch?v=iW8ZXrps9v4> (interviewing officers who conducted stops for “throwing a cigarette on the sidewalk or spitting”).

fight crime, officers tend to make increasing numbers of stops for non-public-safety violations.¹³⁸

Sheriffs, in particular, are a poor bet to exercise enforcement discretion in a decarceral manner. As discussed above, rural incarceration rates are spiking,¹³⁹ even in the face of downward trends in urban areas.¹⁴⁰ Because a sheriff's budget is tied substantially to the jails they operate, sheriffs have a financial incentive to keep their jails full and even to build new ones.¹⁴¹ And, as discussed below, sheriff candidates tend to favor greater enforcement more than their communities do.¹⁴²

In sum, the liberty-enhancing effects of nonenforcement are highly case-specific. Given the sheriff's institutional role as enforcer and jailer, nonenforcement authority seems unlikely to result in substantial decarceration.

3. Arbitrariness Concerns

Although the democracy and liberty calculus of sheriff nullification is contestable, what is less contestable is the risk created by leaving enforcement decisions to the sole discretion of the sheriff. Vesting such broad authority in a single elected official raises concerns that the sheriff's decisionmaking could be influenced by political considerations or personal biases rather than impartial application of the law. In the criminal context, our system of checks and balances exists in large part to mitigate the chance that law enforcement will exercise its authority in arbitrary and discriminatory ways¹⁴³—that is, without adequate and legitimate justification. Without robust checks and balances, nonenforcement authority could be abused or applied inconsistently, undermining equal protection and due process principles that are fundamental to the rule of law.

Concerns about arbitrariness often arise in the context of government *action*, such as the imposition of criminal sanctions.¹⁴⁴ This is certainly true of the Fourth Amendment's protections, which the Supreme Court has stated repeatedly are

138. See Heydari, *supra* note 118, at 6–8 (discussing pretextual stop programs underwritten by the U.S. Department of Transportation); see also Farhang Heydari, *Rethinking Federal Inducement of Pretext Stops*, 2024 WIS. L. REV. 181, 204–35 (2024) (examining the federal government's broader role in promoting the use of pretextual stops).

139. See *supra* text accompanying note 55.

140. KANG-BROWN & SUBRAMANIAN, *supra* note 55, at 6–7.

141. See Littman, *supra* note 53, at 920, 925–27.

142. See Thompson, *supra* note 42, at 223, 233.

143. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 468 (2003) (“The concern for arbitrariness can be seen as one of the primary evils at which our traditional checks and balances are aimed.”). See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (Illini Books 1971) (1969) (discussing the need to control discretionary applications of the law in various contexts, including arrest and criminal prosecutions).

144. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676 (1975) (discussing the need to protect individuals from arbitrary agency actions, noting “individual autonomy is vulnerable to the imposition of sanctions at the unruly will of executive officials”); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1374–75 (1972).

meant to protect individuals against the arbitrary exercise of police investigative and arrest authority.¹⁴⁵ It is a mistake, however, to think that concerns for arbitrariness subside in the context of nonenforcement.¹⁴⁶

When government is not required to justify its choices, there is the risk that it will act in ways that favor groups in power and disadvantage marginalized ones.¹⁴⁷ Historically, in the law enforcement context, this dynamic manifested in law enforcement's failure to prevent or prosecute (and sometimes facilitate) lynchings and other forms of racialized violence by white Americans against Black Americans.¹⁴⁸ Today, enforcement decisions continue to drive disparate outcomes—evidence suggests that law enforcement more often exercises its discretion not to charge, or to charge more leniently, in favor of white individuals.¹⁴⁹ Racially disparate nonenforcement also manifests in disparities between traffic citations and warnings, again favoring whites.¹⁵⁰ And race is not the only point of arbitrary nonenforcement. In Nashville, for example, during the height of the COVID-19 pandemic, police used nonenforcement discretion widely in the face

145. See, e.g., *Carpenter v. United States*, 585 U.S. 296, 303 (2018); *Camara v. Mun. Ct. of the City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

146. See Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1503 (2007) (“[E]nforcement discretion can be understood as a function of both affirmative and negative choices. By ‘affirmative choice,’ I mean the authority of police affirmatively to subject people to enforcement procedures. By ‘negative choice,’ I mean the authority of police to decline to subject people to enforcement procedures even when police are legally authorized to enforce the laws against them.”).

147. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 4 (2011) (“Discretion and discrimination travel together.”).

148. See *Holliday v. Fields*, 275 S.W. 642, 647 (Ky. 1925) (“[T]here was serious criticism of the laxness of law enforcement, and of the prevalence of the crime of lynching, and the amendment was enacted and adopted in obedience to a popular demand for the correction of these abuses.”); HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 425 (1982) (discussing nonenforcement when whites perpetrated offenses against Blacks); see also *infra* note 175.

149. See EMILY OWENS ET AL., QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., U. PA. L. SCH., *EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO* 45 (2017), www.law.upenn.edu/live/files/6793-examining-racial-disparities-may-2017-full [<https://perma.cc/BLZ5-B2B4>] (“[C]omparing the seriousness of cases booked against Black and White defendants accused of the same broad crime in the same neighborhood reveals that, in certain police districts, particularly the Bayview and Southern districts, black residents are booked for more, and more serious charges than white residents.”); NAZGOL GHANDNOOSH & CELESTE BARRY, SENT’G PROJECT, *ONE IN FIVE: DISPARITIES IN CRIME AND POLICING* 3 (2023), www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing [<https://perma.cc/6AJW-MR3A>] (“Black and white Americans use illicit drugs at roughly similar rates, but about one in four people arrested for drug law violations are Black, although Black people make up 14% of the U.S. population.”); Emmanuel Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 CAL. L. REV. 755, 778–79 (2024) (“[T]o the extent that criminality attaches to one’s identity, not when one breaks the law, but rather when one is pursued for law enforcement, discretionary nonenforcement withholds the production of White criminality.”).

150. See Rudi Keller, *Report Shows Black Drivers in Missouri More Likely to Be Ticketed, Arrested*, MO. INDEP. (June 3, 2023, 5:55 AM), <https://www.missouriindependent.com/2023/06/03/report-shows-black-drivers-in-missouri-ticketed-arrested-at-much-higher-numbers-than-whites> [<https://perma.cc/FB32-SP2C>] (“White motorists were released with a warning or no action after more than half of those stops, with just under 40% receiving a citation and arrests in 3.65% of cases. Black drivers received a citation after almost 58% of stops, with 5.26% arrested.”).

of violations of the city's public health orders; the only two arrests made for violations of COVID restrictions were of homeless individuals.¹⁵¹ In short, leaving nonenforcement unchecked raises the risk that government will make arbitrary and illegitimate decisions.

The lack of protection and risks to personal liberty that arise from nonenforcement do not fall equally across society. Rather, they disproportionately impact already marginalized groups.¹⁵² Often, the groups that suffer are non-white, less affluent, and less powerful.¹⁵³ In 2021, for example, Black women and girls were killed at a 51% higher rate than 2019, while the number of unsolved homicides in this demographic rose by 89% between 2018 and 2021, "a far bigger increase than any other demographic group."¹⁵⁴ The crisis in unsolved murdered and missing Native American women and girls bears similar hallmarks of disparate impact from nonenforcement.¹⁵⁵

Arbitrary nonenforcement of criminal laws causes harm beyond immediate victims. It perpetuates the impression (perhaps accurately) that criminal enforcement operates as a mere reflection of subjective preferences, rather than more objective considerations of utility or desert. This sense of lawlessness undermines the criminal law's legitimacy,¹⁵⁶ which is a key reason why people obey the law to begin with.¹⁵⁷

151. Mariah Timms, *Nashville's Public Health Orders Have Sent Two Homeless Men to Jail—and So Far No One Else*, TENNESSEAN (Aug. 6, 2020, 4:54 PM), www.tennessean.com/story/news/crime/2020/08/06/nashville-mask-mandate-arrest-homeless-man-highlights-enforcement-disparity-sparks-outcry/309150001 (<https://perma.cc/N89Q-8EW6>).

152. See Natapoff, *supra* note 131, at 1719 ("Over- and underenforcement are twin symptoms of a deeper democratic weakness of the criminal system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable. Because of this weakness, justice and lawlessness are distributed unevenly and unequally across racial and class lines, crime remains rampant in some communities but not others, and some people can trust and rely on law enforcement while others cannot.").

153. See KENNEDY, *supra* note 132, at 19 ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.").

154. Zusha Elinson & Dan Frosch, *Murders of Black Women Rose During the Pandemic. The Solving of Their Cases Fell*, WALL ST. J. (Dec. 31, 2022, 9:00 AM), <https://www.wsj.com/articles/black-women-homicides-clearance-rates-murders-11672431377>; see also Gian Maria Campedelli, *Homicides Involving Black Victims Are Less Likely to Be Cleared in the United States*, 62 CRIMINOLOGY 90, 116 (2024).

155. See Morgan B. Hawes et al., *Understanding the Missing and Murdered Indigenous Women Crisis: An Analysis of the NamUs Database*, 34 CRIM. JUST. POL'Y REV. 184, 184 (2023) ("American Indian/Alaska Native women are 135% more likely to be listed within the 'unidentified remains' cases than women of other races. The results also showed that in states with relatively high urban population densities, women of all races were 250% more likely to be found dead and remain unidentified than women in places with a low urban population.").

156. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 138–39 (1997) ("A consistent strain of our constitutional politics asserts that legitimacy flows from 'the rule of law.' By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority. By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.").

157. See generally Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277 (2022).

In short, a sheriff's choices about when not to enforce the law impose serious consequences—on democratic governance, on personal liberty, and on the most vulnerable groups in our society. The question becomes whether there exist adequate checks on the sheriff's exercise of discretion to mitigate these risks. Part II explores political checks and ultimately finds them lacking. Part III, in turn, examines the need for legal checks—judicially enforceable rules to govern the sheriff's nonenforcement decisions.

II. THE LIMITS OF POLITICAL ACCOUNTABILITY

As a general matter, one can consider two types of checks on a sheriff's nonenforcement authority: legal rules enforceable via judicial review, and political checks dependent on non-judicial actors.¹⁵⁸ Although Part III addresses legal checks in detail, the traditional view is that enforcement discretion primarily is checked via political processes.¹⁵⁹ This Part evaluates three of those political checks in the context of the sheriff and details their shortcomings. Section II.A explores sheriff elections and democratic accountability. Section II.B considers the power of other county officials to check the sheriff, primarily through budget authority. Section II.C considers the possibility of other law enforcement agencies stepping in for the sheriff. Having found these checks wanting, Part III turns to legal checks that existed historically but appear long forgotten.

A. ELECTIONS AND DEMOCRATIC ACCOUNTABILITY

Many sheriffs argue that their elected status provides democratic legitimacy—proof of popular support—for their enforcement (and nonenforcement)

Belief in the law's legitimacy is a key part of why people obey the criminal law. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (2006); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 401 (2012).

158. One could also imagine internal bureaucratic checks, but given the sheriff's near absolute authority over deputies, this route offers little meaningful resistance to a sheriff's nonenforcement decisions. *See* Jonathan Drew, *Court Upholds Sheriff's Firing of Deputies Who Didn't Donate*, BLUERIDGE NOW (Jan. 29, 2016, 2:03 PM), <https://www.blueridgenow.com/story/news/2016/01/29/court-upholds-sheriffs-firing-of-deputies-who-didnt-donate/28336451007/> [<https://perma.cc/2LXL-CUJH>] (“The state Supreme Court on Friday upheld the firings of sheriff's deputies who declined to donate to their boss's political campaign, ruling that they aren't covered by a state law protecting county workers from political coercion.”); Emily M. Farris & Mirya R. Holman, *The Political Power of Sheriffs Is Rarely Seriously Challenged*, GOVERNING MAG., Summer 2024, at 38, 39, <https://online.flippingbook.com/view/103/261407/38> [<https://perma.cc/EX2Y-W5NH>] (“The need to suppress potential opponents from within their own subordinate ranks leads to a wide set of bad behaviors by sheriffs. Deputies who've run against their own bosses have faced demotion and sometimes been fired. Deputies do not even need to actually run for office to face these actions from a sheriff; many suffer consequences for simply supporting a sheriff's opponent. When a sheriff gets sued for retaliation, it's the county that pays the settlement, not the sheriff himself.”).

159. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 846 (2018) (“Decisions not to arrest or charge are virtually immune from judicial review or other nonpolitical oversight.”); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 551–52 (2000) (“Today's practice of law enforcement is atheoretical The general motivation behind the shape of enforcement is practical and political, the allocation of limited resources coupled with the desire of elected officials to remain in office.”).

policies.¹⁶⁰ These sheriffs contend that if their constituents did not approve of their nonenforcement practices, they would vote the sheriffs out.¹⁶¹ This suggestion is not entirely spurious: In recent years, a few sheriff elections have turned on the nature of the sheriff's enforcement policies,¹⁶² suggesting that elections might provide some check, at least in cases of extreme public disapproval.

But, in truth, as scholars have documented, sheriff elections give more of a veneer of political accountability than any real constraint.¹⁶³ As a general matter, rural elections are "low turn-out affairs, with local politics controlled by business interests."¹⁶⁴ Sheriffs in particular often run unopposed and enjoy an incumbency advantage that "far exceeds that of other local offices" and even members of Congress.¹⁶⁵ This advantage is at its apex in smaller jurisdictions, where sheriffs often operate.¹⁶⁶ As a result, sheriffs enjoy incredible job security, with average tenures that far exceed those of municipal police executives.¹⁶⁷

Furthermore, there is evidence that voter preferences have limited influence on sheriff policy. One detailed examination of sheriff policies on immigration detention found that sheriffs took similar positions, regardless of their party affiliation.¹⁶⁸ These choices could not be explained by voter preferences—voters exhibited a range

160. See NAT'L SHERIFFS' ASS'N, PRESERVE THE OFFICE OF SHERIFF BY CONTINUING THE ELECTION OF OUR NATION'S SHERIFFS 1–2, [https://sheriffs.org/sites/default/files/tb/Preserving the Office of Sheriff Through Election.pdf](https://sheriffs.org/sites/default/files/tb/Preserving%20the%20Office%20of%20Sheriff%20Through%20Election.pdf) [<https://perma.cc/DAH9-EZ9Q>] (last visited Mar. 28, 2025) ("The elected Office of Sheriff is 'directly' accountable and responsible to eligible voters and an 'elected' Office of Sheriff is not directly controlled by local county board/commissioners, supervisors, mayor, etc."); Farris & Holman, *supra* note 158, at 39 ("Sheriffs argue that elections keep the office independent of other influences and make them directly accountable to voters."); cf. WXIA Staff, *Who Holds the Sheriff Accountable?*, 11ALIVE (May 7, 2015, 10:45 PM), <https://www.11alive.com/article/news/local/riverdale-jonesboro/who-holds-the-sheriff-accountable/85-13033185/> [<https://perma.cc/99TA-RE7M>] ("Because he is an elected official, Sheriff Victor Hill does not face the same scrutiny as other heads of law enforcement agencies in the state. Only voters can hold him accountable.").

161. NAT'L SHERIFFS' ASS'N, *supra* note 160, at 2–3; see also PISHKO, *supra* note 22, at 21 ("The [constitutional sheriffs] ideology echoes the same themes that sheriffs of both political parties use to resist reform and preserve their political power: the carefully built myth that sheriffs are uniquely accountable to voters and, as a result, do not require additional oversight."); *id.* at 135 ("The job of sheriff, I have been told many times over, is unique because of the closeness between the sheriff and the voters.").

162. Littman, *supra* note 53, at 940–41 (discussing recent efforts around sheriff elections).

163. In their recent book, political scientists Emily M. Farris and Mirya R. Holman forcefully make this point. See FARRIS & HOLMAN, *supra* note 21, at 36–63.

Similar concerns have been raised about prosecutor elections. See Jennifer E. Laurin, *Progressive Prosecutorial Accountability*, 50 FORDHAM URB. L.J. 1067, 1077 (2023); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1543 (2020).

164. Littman, *supra* note 53, at 938 (citing Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 856–58, 886 (2020)).

165. See Michael Zoorob, *There's (Rarely) a New Sheriff in Town: The Incumbency Advantage for Local Law Enforcement*, ELECTORAL STUD., Nov. 2022, at 1, 2–3, 7.

166. See Maria Ponomarenko, *The Small Agency Problem in American Policing*, 99 N.Y.U. L. REV. 202, 243 (2024) (citing J. ERIC OLIVER, SHANG E. HA & ZACHARY CALLEN, LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 125 (2012)).

167. Tomberlin, *supra* note 21, at 129, 132, 143; see also Thompson, *supra* note 42, at 224, 235 (describing practical difficulties in ousting elected sheriffs from office).

168. Thompson, *supra* note 42, at 233–34.

of preferences and other elected officials followed suit, but not sheriffs.¹⁶⁹ The results suggest that the policy views of sheriff candidates are ideologically homogenous—far more than their electorate.¹⁷⁰ This constraint limits the electorate’s ability to influence sheriff policies.¹⁷¹ Perhaps unsurprisingly, therefore, sheriffs report low levels of solicited community engagement on important matters of policy.¹⁷²

But even if sheriff elections were robust, they are unlikely to protect the politically powerless.¹⁷³ The majority of a community may well approve of the sheriff nullifying certain laws.¹⁷⁴ Think here of the Reconstruction-era sheriffs who entrenched white power and permitted violence against Black members of their community.¹⁷⁵ These sheriffs were acutely aware that standing in the way of these practices meant risking their careers.¹⁷⁶ Or consider the sheriff who takes a hands-off approach to domestic

169. *See id.* at 223.

170. *See id.*

171. “[C]andidates for sheriff need law enforcement credentials to run,” and this requirement produces candidates that fall within a “narrow band of the ideological spectrum.” *Id.* at 224.

172. *See* BROOKS, *supra* note 56, at 19 (according to the Bureau of Justice Statistics, in 2020 “[m]ore than a third of all sheriffs’ offices solicited community feedback on prioritizing crime or disorder problems (41%), evaluating deputy or agency performance (39%), assessing community trust (38%), informing agency policies and procedures (35%), and allocating resources to neighborhoods (34%) in 2020” (citation omitted)).

173. *See* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 10–11 (1960) (criticizing vagrancy laws on the ground that their enforcement tends to fall on minorities that lack political power). Some have called for the elimination of sheriff elections entirely. *See* Janet C. Hoefel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 327 (2015).

174. *Cf.* Ponomarenko, *supra* note 166, at 235 (“The problem is that the people who bear the burdens of policing are not always the same people who have the ear of city officials or with whom officers are likely to interact with in their day-to-day lives. The more that local communities are stratified . . . and the more that the specific harms of policing fall on those who are most marginalized, the less likely these street-level checks are likely to work.”).

175. Scholars and historians have collected extensive records of sheriffs who not only declined to pursue racial violence but also facilitated it. *See, e.g.,* MANFRED BERG, *POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA* 155 (2011) (noting sheriffs were “almost immune from federal or state interference and could count on the refusal of all-white local juries in the South to convict officers for aiding a lynch mob”); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 585–86 (2003) (collecting examples of sheriff complicity with lynchings and nonenforcement from Mississippi, Louisiana, Missouri, South Carolina, and other places); Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 L. & INEQ. 263, 300 (2003) (“Local law enforcement routinely failed to participate in efforts to identify and try lynchers for their crimes.”); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 40–41 (1996) (“[T]he paucity of law enforcement resources, while perhaps contributing to the states’ failure to prevent lynchings, does not tell the whole story. Local sheriffs harbored indifference, or outright hostility, toward their duties to prevent mobs from killing blacks and to apprehend lynchers.”).

176. Holden-Smith, *supra* note 175, at 40–41 (“Politics certainly contributed to the Southern states’ failure to protect blacks from lynching and prosecute white mob members. Whites voted; blacks could not. The local sheriffs, prosecutors, and judges were usually elected officials. They were aware that any vigorous protection of blacks from white violence would pave their way out of office. Lynching, after all, enjoyed widespread support among Southern whites.”).

violence¹⁷⁷ or violence against civil demonstrators;¹⁷⁸ or sheriffs who ignored prohibitions on alcohol, gambling, or prostitution.¹⁷⁹ Each of these examples may well find popular support among the sheriff's electorate. And yet, in each case, nonenforcement has its victims. Some of those victims suffer violence or injustice,¹⁸⁰ others simply find their policy preferences ignored.¹⁸¹ In short, local democracy is unlikely to provide a consistent cure to the ills of nonenforcement.

B. SEPARATION OF POWERS AT THE COUNTY LEVEL

Like elections, other county-level officials provide little constraint on the sheriff. In many states, the office of the sheriff is established by the state constitution¹⁸²—typically alongside other local officials, such as the county commissioners and county attorney.¹⁸³ This constitutional structure, as interpreted by state courts, puts the office of the sheriff beyond the reach of other officials that might serve as a moderating influence.¹⁸⁴ For example, sheriffs generally cannot be removed by fellow county officials.¹⁸⁵ The sheriff is considered to have “exclusive power [vis-à-vis other elected county officials] to determine law enforcement priorities.”¹⁸⁶ Meaningful civilian oversight over sheriffs is rare.¹⁸⁷ Add to this the decline in rural

177. See *supra* note 124 and accompanying text.

178. See *supra* note 123 and accompanying text.

179. See *supra* notes 35, 99–100, 102–03, and accompanying text.

180. See *supra* note 175.

181. See *supra* note 169 and accompanying text.

182. Many states establish the elected office of the sheriff in their state constitution. See, e.g., ARIZ. CONST. art. XII, § 3; CAL. CONST. art. XI, §§ 1(b), 4(c); COLO. CONST. art. XIV, § 8; FLA. CONST. art. VIII, § 1(d); GA. CONST. art. IX, § 1, ¶ III(a); ILL. CONST. art. VII, § 4(c); MD. CONST. art. IV, pt. VII, § 44; ME. CONST. art. IX, § 10; MICH. CONST. art. VII, § 4; MISS. CONST. art. V, § 135; N.H. CONST. art. LXXI; N.J. CONST. art. VII, § 2, ¶ 2; N.C. CONST. art. VII, § 2; N.D. CONST. art. VII, § 8; OKLA. CONST. art. XVII, § 2; OR. CONST. art. VI, § 6; VT. CONST. ch. II, § 50; VA. CONST. art. VII, § 4; WASH. CONST. art. XI, § 5; W. VA. CONST. art. IX, § 1; WIS. CONST. art. VI, § 4(b).

183. See, e.g., *State ex rel. Johnston v. Melton*, 73 P.2d 1334, 1336–37 (Wash. 1937) (“The people are the source of all governmental power, and, in setting up a constitutional government, they provided that certain of their powers should be exercised through county governments, governments close to the people, and they further provided, in section 5 of article 11 of the Constitution, that the powers to be thus exercised through county governments should be exercised only through officials elected by themselves. In section 5 of article 11, they named the officers whom they then thought needful, county commissioners, sheriffs, . . . prosecuting attorneys . . .”).

184. See Tomberlin, *supra* note 21, at 129–30, 130 n.109.

185. *Id.* at 129–30.

186. Gregory Howard Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 128 (1984) (“In each county, the sheriff had exclusive power to determine law enforcement priorities, and any controls on the sheriff’s power were indirect. No state or local official had the power specifically to direct the sheriff in the performance of his day-to-day duties.”); see also *Wolfe v. Huff*, 205 S.E.2d 254, 255 (Ga. 1974) (enjoining county commissioners, who could properly establish a new police force, from directly interfering with the sheriff or his deputies).

187. See Sharon R. Fairley, *Survey Says: Powerful Sheriffs Successfully Limit the Rise of Civilian Oversight*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 803, 817 (2021); see also BROOKS, *supra* note 56, at 2 (“In 2020, about 10% of all sheriffs’ offices had a civilian complaint review board or agency.”); *id.* (“About 30% of sheriffs’ offices required investigations by an external agency for use of force resulting in death, and 37% of all deputies worked in such offices.”).

journalism,¹⁸⁸ limiting yet another potential source of information and accountability for the sheriff.

Because direct interference with enforcement policy is impermissible, the sheriff's budget is the county's primary form of leverage.¹⁸⁹ Unsurprisingly, county commissioners and sheriffs frequently disagree on the appropriate level of funding that the county must provide.¹⁹⁰ As a general principle, county governments are not obligated to fund sheriffs at their desired level and have some discretion in setting funding levels.¹⁹¹ States have developed a variety of standards to assess, in particular cases, the adequacy of a sheriff's budget. Many appear quite permissive. Some courts will disturb a county budget only if "clearly inadequate" for performance of the sheriff's statutory duties.¹⁹² In other states, courts require funding that permits sheriffs to perform their duties at a "minimally serviceable" level.¹⁹³ In other states, funding decisions are subject to "arbitrary and capricious"

Attempts to establish an oversight entity with authority to conduct independent investigations into the conduct of the sheriff's office have been successfully challenged as inconsistent with the office's status under the state constitution. *See, e.g.,* *Demings v. Orange Cnty. Citizens Rev. Bd.*, 15 So. 3d 604, 605–06 (Fla. Dist. Ct. App. 2009).

188. *See* MARNIE WERNER, CTR. FOR RURAL POL'Y & DEV., *THE DISAPPEARING RURAL NEWSPAPER* 2 (2023), <https://www.ruralmn.org/the-disappearing-rural-newspaper> [<https://perma.cc/Q4AK-625H>].

189. *See* Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1219–20 (2022); *State v. Winne*, 96 A.2d 63, 71 (N.J. 1953) ("In contrast, the sheriff, although he possesses by the common law broad powers of law enforcement in his county, is not given the right to incur expenses in the prosecution of criminals that has been granted to the county prosecutor. The inevitable result of this is that his work as a law enforcement officer has been rendered less effective than that of the county prosecutor, without, however, any diminution of his powers or responsibilities.").

190. *See, e.g.,* Alyse Jones, *Sheriff's Office Budget Battle Continues in Cleveland County*, KOCO NEWS 5 (Sept. 25, 2024, 10:06 PM), <https://www.koco.com/article/sheriffs-office-budget-battle-continues-in-cleveland-county/6237685> [<https://perma.cc/2PQN-13ZQ>]; Jeff Hager, *Harford County Sheriff Disagrees with Budget Cuts Proposed by County Executive*, WMAR 2 NEWS (Apr. 26, 2023, 7:25 PM), <https://www.wmar2news.com/local/harford-county-sheriff-disagrees-with-budget-cuts-proposed-by-county-executive/> [<https://perma.cc/8HP2-RGSW>]; Chandler Watkins, *Clackamas Co. Sheriff Says County Cut Her Office out of Budgeting Process*, FOX 12 OR. (May 20, 2023, 1:34 AM), <https://www.kptv.com/2023/05/20/clackamas-co-sheriff-says-county-cut-her-office-out-budgeting-process/> [<https://perma.cc/7EQL-Q7NH>]; Catalina Gaitán, *Oregon Funding for Supervising, Jailing Felons Locally Is Inadequate, Sheriff Says*, OREGONLIVE (Mar. 26, 2024, 11:58 AM), <https://www.oregonlive.com/news/2023/08/oregon-funding-for-supervising-jailing-felons-locally-is-inadequate-sheriff-says.htm>.

191. *See, e.g.,* *Chaffin v. Calhoun*, 415 S.E.2d 906, 908 (Ga. 1992) ("This does not mean, however, that county commissioners must approve the budget that a sheriff proposes.").

192. *See, e.g.,* *Cnty. Comm'n v. Cummings*, 720 S.E.2d 587, 595 (W. Va. 2011) ("In this case, the record is devoid of any evidentiary basis for the trial court's conclusion that the Sheriff's statutory duties will be affected by the reduction. Moreover, absent evidence that a county commission has budgeted a clearly inadequate sum for the performance of the statutory duties of a county officer, a trial court lacks the authority to direct a county commission to meet for the purpose of preparing a revised budget.").

193. *See, e.g.,* *Lucas v. Wayne Cnty. Bd. of Comm'rs*, 385 N.W.2d 267, 270 (Mich. Ct. App. 1983) ("The issue is whether the elimination of the division in question renders plaintiff unable to provide statutorily mandated services at a 'minimally serviceable' level . . . [A] 'serviceable' level of funding need not be an optimal level; in order for a level of funding to be deemed less than 'serviceable', there must be some showing of an 'emergency immediately threatening the existence of the function.'" (quoting *Cahalan v. Wayne Cnty. Bd. of Comm'rs*, 286 N.W.2d 62, 67 (Mich. Ct. App. 1979))).

review.¹⁹⁴ Others combine these standards.¹⁹⁵

The problem with relying on budgetary control, however, is that it is unlikely to provide a sufficiently granular constraint to curb nonenforcement discretion. Some sheriff tactics—particularly those that rely on significant personnel power,¹⁹⁶ incarceration,¹⁹⁷ or new deployments of technology¹⁹⁸—are likely to be somewhat cost sensitive. But constraining the purchase of new equipment is not the same as using a budget to control nonenforcement. Even assuming a sheriff's funding could be withheld in response to nonenforcement that county officials disagree with—perhaps on the theory that the sheriff had failed to fulfill their duties—courts generally resist attempts to use the budget to exercise policy control.¹⁹⁹ In Georgia, for example, courts are explicit that a county's authority to set a budget does not grant it powers to determine how that budget will be spent.²⁰⁰ Other states follow a similar pattern.²⁰¹ There is some precedent for a county reducing a sheriff's budget in order to contract for law enforcement services with another policing agency.²⁰² In Georgia, for example, its supreme court upheld a

194. See, e.g., *Rogers v. Excise Bd.*, 701 P.2d 754, 758 (Okla. 1984) (“The Sheriff acknowledges that under *Summey* the Board has discretionary authority to examine and to adjust items contained in an estimate of needs. However, the Sheriff argues that the Board violated the *Summey* doctrine because it acted arbitrarily and capriciously.”); *Tihonovich v. Williams*, 582 P.2d 1051, 1056 (Colo. 1978) (“Further, though he established that his requests were reasonably necessary for the sheriff's department and jail, he failed to demonstrate that the board had acted unreasonably or arbitrarily in denying his request in light of all the circumstances.”); MINN. STAT. ANN. § 387.20(7) (authorizing a court, on appeal by the sheriff, to overturn a budget allocation “[i]f the court shall find that the board acted in an arbitrary, capricious, oppressive or unreasonable manner or without sufficiently taking into account the extent of the responsibilities and duties of the office of the sheriff, the sheriff's experience, qualifications, and performance”).

195. See, e.g., *Daniels v. Hanson*, 342 A.2d 644, 649 (N.H. 1975) (“Unless the appropriation for the operation of the sheriff's department is arbitrary and capricious or in such an amount as will, for all practical purposes, prevent the sheriff from performing a legally mandated function of his office it cannot be declared illegal or invalid.”).

196. For example, using K-9s for detection and enforcement. See BROOKS, *supra* note 56, at 11 tbl.5.

197. See Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. L.J. 841, 903, 907 (2024); HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 107 (2015).

198. For example, license plate readers. See BROOKS, *supra* note 56, at 23 tbl.14. On the limited regulation of police use of surveillance technologies, see generally Barry Friedman, Farhang Heydari, Max Isaacs & Katie Kinsey, *Policing Police Tech: A Soft Law Solution*, 37 BERKELEY TECH. L.J. 701, 713–22 (2022).

199. See, e.g., *Wolfe v. Huff*, 210 S.E.2d 699, 701 (Ga. 1974) (holding commissioners may not “do indirectly, by the exercise of their fiscal authority and their control of the county property, that which they could not do directly”).

200. Su et al., *supra* note 189, at 1220.

201. Cal. Op. Att’y Gen., No. 93-903 at 1 (1994), <https://oag.ca.gov/system/files/opinions/pdfs/93-903.pdf>, <https://perma.cc/9FJ7-4KKA> (“A county board of supervisors is not authorized to govern the actions of a sheriff or district attorney concerning the manner in which their respective budget allotments are expended or the manner in which personnel are assigned.”).

202. See *Lucas v. Wayne Cnty. Bd. of Comm’rs*, 385 N.W.2d 267, 268, 271 (Mich. Ct. App. 1983) (“We find no occasion to overrule the trial court’s factual finding that most of the functions performed by the division in question continued to be performed at ‘serviceable’ levels, because they were (1) duplicated by other divisions or departments, including the State Police” (footnote omitted)); *Daniels v. Hanson*, 342 A.2d 644, 648 (N.H. 1975) (“In budgeting funds for the operation of the office of

47% reduction in a sheriff's budget where the trial court found the budget "sufficient" to perform the sheriff's core functions.²⁰³ This might serve as a precedent to address a sheriff who engaged in widespread nonenforcement, but it is a dramatic step and might require the county to create or fund an alternative enforcement agency. There is also the political reality that county commissioners may be hesitant to take on a sheriff put into authority by the commissioners' constituents. In short, budgetary control seems ill-suited to the task of controlling nonenforcement.

C. FEDERALISM AND DECENTRALIZATION

A somewhat more realistic check on nonenforcement derives from our overlapping national system of law enforcement. There are nearly 18,000 federal, state, county, and municipal policing agencies across the country.²⁰⁴ These agencies often operate with concurrent jurisdiction: a sheriff will sometimes share jurisdiction with municipal police.²⁰⁵ State police often have plenary jurisdiction over violations anywhere in the state.²⁰⁶ And with the expansion of federal criminal law to cover much of the conduct prohibited by state codes, even federal law enforcement can prosecute seemingly local crime.²⁰⁷

It is possible, therefore, that other law enforcement agencies will step in when sheriffs fail to enforce the law. Federal law enforcement is one option.²⁰⁸ History

sheriff, the convention could properly consider and decide that the county's interest would be better served by decreasing the law enforcement support previously given by the sheriff's department to the towns in the county. This would require these towns to provide more personnel, training and equipment for their own protection.").

203. *Chaffin v. Calhoun*, 415 S.E.2d 906, 908 (Ga. 1992) ("Here, the commissioners have removed about 47% of the sheriff's budget. Although this is a substantial portion of the Sheriff's budget and will reduce the Sheriff's law enforcement capability, the trial court found that the budget is sufficient to allow the Sheriff to perform his duties. On the record before the court, we cannot say that the trial court's finding is clearly erroneous.").

204. DUREN BANKS ET AL., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/GE5W-SARU>]. Largely ignored among these 18,000 are the police officers employed by administrative or regulatory agencies—a subset of law enforcement I hope to explore in future work.

205. See *supra* note 52 and accompanying text.

206. See David Gutman, *Inslee, Ferguson Warn Gun Dealers to Comply with New Firearms Law or Face 'Legal Jeopardy'*, CHRONICLE (Mar. 7, 2019, 4:04 PM), <https://www.chronline.com/stories/inslee-ferguson-warn-gun-dealers-to-comply-with-new-firearms-law-or-face-legal-jeopardy.10/69> [<https://perma.cc/J38Y-MYQW>]. As a legal matter, the existence of alternative, redundant enforcement authorities does not absolve the sheriff of his enforcement duties. See, e.g., *Freas v. State ex rel. Freeling*, 235 P. 227, 229 (Okla. 1925) ("No degree of remissness in other officers could excuse the sheriff for remissness in the discharge of his duties, and it was the conduct of the sheriff alone which was under investigation in this case.").

207. Brown, *supra* note 159, at 884. The federal government has also used state and local police for its law enforcement ends. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 311–12 (2016).

208. Some commentators have noted the relevance of federal enforcement redundancy as a check on sub-federal enforcement decisions. See, e.g., Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1039–40 (2023) ("So the federal system has evolved to doing something different: 'backstop' state enforcement errors and breakdowns, which inevitably occur given how much states have to do. Together, those very different roles keep the states entrenched on the front lines of

is replete with examples of federal interventions into local non-prosecution, with varying degrees of justification—from federal prosecutions for lynchings in the Jim Crow South²⁰⁹ to federal gun prosecutions in District Attorney Larry Krasner's Philadelphia.²¹⁰ State police are another option. In fact, a number of state officials have threatened constitutional sheriffs with this type of intervention.²¹¹ For example, when sheriffs in Washington began to ignore the state's new gun-control mandates, the state Attorney General threatened to call in state police and even considered federal involvement.²¹²

But like other political checks, relying on outside enforcement agencies to fill the sheriff-nullification gap has serious limits. As an initial matter, given their lack of familiarity with local communities, federal and state police start at a disadvantage when investigating local crime. This is precisely why federal law enforcement often relies on task forces when operating locally.²¹³ More importantly, these would-be intervenors do not have the resources to intercede on a regular basis. Primary state law enforcement agencies, for example, employ only about one-third the number of officers and one-quarter the total personnel as sheriffs' offices;²¹⁴ federal law enforcement is also fewer in number than sheriff personnel and has the added burden of enforcing federal statutes.²¹⁵ Thus, while threatened interventions are good political theatre and

criminal justice and the federal system small, supplemental, and dependent.”); Brown, *supra* note 159, at 850 (“Redundant enforcement through overlapping federalism has had considerable success addressing some underenforcement problems, such as corruption by state and local officials, certain kinds of civil rights violations, or crimes against disfavored minority groups.”); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 666 (2002) (discussing federal enforcement as a “backstop”).

209. See, e.g., *United States v. Guest*, 383 U.S. 745, 746–48, 747 n.1, 760 (1966).

210. See Julie Shaw, *U.S. Attorney Says Philly DA Larry Krasner's 'Radical Experiment Has Failed' in Announcing Federal Charges in 2 Cases*, PHILA. INQUIRER (Sept. 14, 2020, 6:05 PM), <https://www.inquirer.com/news/us-attorney-william-mcswain-philadelphia-district-attorney-larry-krasner-violent-crime-cases-20200914.html> (discussing U.S. Attorney prosecutions and claims that District Attorney Krasner's policies were too lenient).

It should go without saying that I draw no equivalency between these two examples—the former is abhorrent and the latter a policy choice. Rather, I simply seek to demonstrate a range of possibilities.

211. See, e.g., Greg Bishop, *Attorney General Says If Sheriffs Won't Enforce Gun Ban 'There Are Other People There to Do the Job,'* CTR. SQUARE (Jan. 13, 2023), www.thecentersquare.com/illinois/article/8b6d435c-938f-11ed-bf51-3b891f7f861d3.htm [<https://perma.cc/HV9A-E3PQ>] (“Attorney General Kwame Raoul said Friday if local law enforcement won't act, someone will. ‘As law enforcement agencies, there's overlapping jurisdiction as well, so if they don't do their jobs, there are other people there to do the job,’ Raoul said.”).

212. Gutman, *supra* note 206.

213. See Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527, 1556–57, 1622–23, 1626 (2023).

214. BROOKS, *supra* note 45, at 2 tbl.2.

215. See *id.* (reporting about 174,000 full-time sworn officers employed in sheriffs' offices in 2020); CONNOR BROOKS, OFF. OF JUST. PROGRAMS, U.S. DOJ, *FEDERAL LAW ENFORCEMENT OFFICERS, 2020 – STATISTICAL TABLES 1* (2023), <https://bjs.ojp.gov/document/fleo20st.pdf> [<https://perma.cc/Q3ZQ-1MD3>] (reporting nearly 137,000 full-time federal law enforcement officers employed in fiscal year 2020).

surely carry some weight,²¹⁶ they likely are not a sustainable constraint on nonenforcement discretion.²¹⁷

Ultimately, the political checks discussed in this Part play an important but limited role in checking nonenforcement discretion. Elections are unlikely to protect those few most directly injured by nonenforcement. County budgetary moves are too blunt, and threats of involvement by federal and state law enforcement too episodic. Given the limits of these political interventions, the next question to ask is whether there are any stricter legal bounds on the sheriff's exercise of nonenforcement discretion.

III. LAW FOR THE LAWMAN

Today, commentators widely recognize that there are few legal limits on nonenforcement decisions.²¹⁸

Federal constitutional law, for example, imposes modest requirements. This is not because the county sheriff is above federal law, as some constitutional sheriffs assert.²¹⁹ Federal law remains the supreme law of the land.²²⁰ Although anti-commandeering principles limit the ways in which the federal government can encourage participation in national regulatory efforts,²²¹ leaving local law enforcement free

216. Cf. Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion, and Race*, 50 PEPP. L. REV. 1, 5 (2023) (explaining that even if legally suspect, firearm sanctuary policies will still carry practical weight); Murray, *supra* note 30, at 395.

217. There also may be political costs of state politicians interfering in local law enforcement matters. See PISHKO, *supra* note 22, at 192–93 (“The best most governors can do is use other law enforcement, like state police, to enforce the laws sheriffs will not. Because this solution is so politically distasteful, many politicians seek to avoid the issue altogether.”).

218. See, e.g., Natapoff, *supra* note 131, at 1756 (“Even when nonenforcement decisions reach systemic proportions, law enforcement decision makers are well shielded from judicial scrutiny.”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989) (explaining that “random underenforcement is not constitutionally objectionable”).

219. See *supra* notes 76–87 and accompanying text (discussing history of sheriff nullification of federal laws); JJ MacNab, *Context Matters: The Cliven Bundy Standoff – Part 3*, FORBES (June 25, 2014, 9:09 PM), www.forbes.com/sites/jjmacnab/2014/05/06/context-matters-the-cliven-bundy-standoff-part-3/?sh=50b84e6c6599 (“Like most Sovereigns, [resident of the county Cliven] Bundy believes that the County Sheriff is the most powerful law enforcement officer in the entire country, with unlimited authority that trumps that of any federal agent, elected official, local police officer, or perceived enemy.”). The purported authority to nullify federal law is prevalent among groups that embrace “county supremacy.” See, e.g., *Explainer: The Influence of County Supremacy Doctrine in the Oregon Standoff*, CTR. FOR W. PRIORITIES (Jan. 8, 2016), <https://westernpriorities.org/2016/01/explainer-the-influence-of-county-supremacy-doctrine-in-the-oregon-standoff/>; <https://perma.cc/C6NF-SXDW> (discussing adherents to the ideology of “county supremacy”); Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 654 (1997) (discussing the “County Supremacy Movement”).

The legal arguments here echo nullification theories espoused in the southern states prior to the civil war. See Jessica Pishko, *Sheriffs Undermine Democracy Through Nullification*, DEMOCRACY DOCKET (July 26, 2023), www.democracydocket.com/opinion/sheriffs-undermine-democracy-through-nullification (<https://perma.cc/Y45R-TJHC>); Jamelle Bouie, *America Holds onto an Undemocratic Assumption from Its Founding: That Some People Deserve More Power than Others*, N.Y. TIMES MAG. (Aug. 14, 2019), www.nytimes.com/interactive/2019/08/14/magazine/republicans-racism-african-americans.html (discussing multiple iterations of nullification history and its focus on limiting the power of Black Americans).

220. U.S. CONST. art. VI, cl. 2 (making federal law “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).

221. See Friedman et al., *supra* note 213, at 1588 (citing *Printz v. United States*, 521 U.S. 898 (1997)).

to withhold support in implementing federal criminal statutes,²²² sheriffs may not actively nullify federal law.²²³ However, most criminal enforcement is state-law driven.²²⁴ On that front, the federal Constitution sets a meager floor. It requires that nonenforcement comport with the Equal Protection Clause,²²⁵ but demonstrating an equal protection violation in this context is exceedingly difficult.²²⁶ This difficulty is compounded for sheriffs, whose operations often are insulated from external oversight.²²⁷

To fill the gap left by constitutional law, scholars have proposed various ways to create rules and policies that constrain enforcement discretion.²²⁸ Some scholars suggest turning to administrative law, such as requiring police to operate via rulemaking.²²⁹ At present, however, it is doubtful that Administrative Procedure

222. Sheriffs can even do so on their view that a federal law is unconstitutional. See Response in Opposition to Application of the Injunction Issued by the U.S. Dist. Ct. for the W. Dist. of Mo. at 23, *Missouri v. United States*, 144 S.Ct. 7 (2023) (No. 23A296), 2023 WL 6627387, at *23 (“The government has not argued, and the district court did not hold, that Missouri is required to assist in the enforcement of federal law. . . . The State is free to withhold that assistance – including based on the State’s view that certain federal laws are unconstitutional.”).

223. See *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 501 (1960) (“[I]nterposition . . . is illegal defiance of constitutional authority.” (quoting *Bush v. Orleans Parish Sch. Bd.*, 188 F. Supp. 916, 926 (E.D. La. 1960))); *United States v. Reynolds*, 235 U.S. 133, 149 (1914) (noting “state statutes” that “nullify” federal statutes “must fail”); *Anderson v. Carkins*, 135 U.S. 483, 490 (1890) (“The law of Congress is paramount; it cannot be nullified by direct act of any State, nor the scope and effect of its provisions set at naught indirectly.”); *United States v. Peters*, 9 U.S. 115, 136 (1809) (“If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.”).

224. See *State Policy Drives Mass Incarceration*, PRISON POL’Y INITIATIVE (2022), https://www.prisonpolicy.org/graphs/state_driver_numbers_1925-2020.html [<https://perma.cc/ED6X-SZGA>]; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL’Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/2CKN-D9QB>] (indicating only about 11% of currently incarcerated people are in the federal system).

225. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

226. See Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 991–92 (2021) (discussing selective enforcement claims and difficulties obtaining discovery to prove such claims); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1238 (2016) (calling *Armstrong*’s requirements “insuperably difficult to meet”).

227. See *supra* notes 187–88 and accompanying text (discussing lack of civilian oversight and paucity of rural press).

228. See, e.g., Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543, 580 (1960) (suggesting creation of an oversight entity to review police decisions not to invoke the criminal process).

229. Many scholars see administrative law (rulemaking in particular) as a key potential constraint on police discretion. See, e.g., DAVIS, *supra* note 143, at 96; Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1907 (2015); Livingston, *supra* note 119, at 658–63; Luna, *supra* note 159, at 594–608; Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 449–51 (1990); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 382–91 (1986); Williams, *supra* note 186, at 124.

For some contrary perspectives on the propriety of administrative law processes in this context, see, for example, Ponomarenko, *supra* note 26, at 15–20, and Ronald J. Allen, *The Police and Substantive*

Act (APA) requirements apply to many sheriffs.²³⁰ And, even assuming its applicability, administrative law does little to constrain nonenforcement (failures to act).²³¹

Other suggestions rely on legislative action, but public choice theory suggests legislatures will have little incentive to eschew tough-on-crime politics in favor of limits on police discretion.²³² In fact, outside of specific contexts (such as domestic violence enforcement),²³³ much of the legislative intervention to constrain nonenforcement discretion has been targeted at reform prosecutors,²³⁴ not sheriffs or police. These interventions vary, but for the most part, they target categorical nonenforcement, while leaving case-by-case nonenforcement untouched.²³⁵ As discussed in more detail below, this approach seems oddly backwards, at least when trying to limit arbitrariness.²³⁶

Missing from this discussion is an understanding of the sheriff's traditional duty to enforce the law. Throughout the nation's history, the sheriff was not understood to be a constitutional officer with "no superior in his county"²³⁷ but one whose authority was bound by state law. Most obviously, the state legislature defined prohibited criminal behavior.²³⁸ As the state's representative in the

Rulemaking: Reconciling Principle and Expediency, 125 U. PA. L. REV. 62, 67, 70 (1976) (noting various doctrinal objections to substantive rulemaking by law enforcement agencies).

230. See Stephen C. Emmanuel & Alexandra E. Akre, *Judicial Review*, in FLORIDA ADMINISTRATIVE PRACTICE § 12.2 (2023) ("Unlike the situation with state agencies in which *F.S.* 120.68 provides for judicial review of final agency action, there may be no comparable statute authorizing an appeal from a decision by a local governmental entity. For example, county commissions, sheriffs' offices, and municipalities are not considered agencies, within the meaning of *F.S.* 120.52(1) unless expressly made subject to the APA by general law, special law, or existing judicial decision."); *Kondylis v. Strain*, 117 So. 3d 1255, 1257 (La. 2013) ("The APA requires an a [sic] 'agency' to file its rules with the Department of State Register, and the definition of 'agency' articulated therein, excludes 'political subdivisions,' such as sheriffs." (citations omitted)).

Some have argued that although local officers are not governed directly by the APA, they are nonetheless bound by the federal APA and state APAs because the federal and state governments that enacted the underlying substantive criminal prohibitions are bound by the APA. See Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 126, 135 (2016).

231. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

232. See BARKOW, *supra* note 117, at 5–6 (explaining how populist punitive policies have driven mass incarceration); Friedman & Ponomarenko, *supra* note 229, at 1862–65; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

233. See *infra* note 259 and accompanying text.

234. See JORGE CAMACHO ET AL., LOC. SOLS. SUPPORT CTR., PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 3, A1–A6 (2023), <https://static1.squarespace.com/static/6ce4377caeb1ce00013a02fd/t/63cf18da2a130036/cfec952/16/4516/05430/ProsecutorialDiscretion2023.pdf>, [\[https://perma.cc/371W-KK5M\]](https://perma.cc/371W-KK5M).

235. See Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1699 (2023) ("At first glance, sanctions—in particular sanctions that are triggered by nonenforcement or underenforcement policies—appear to attack the very foundation of prosecutorial discretion. But in practice they may instead require prosecutorial discretion to take a certain form—namely, the ad hoc and opaque decisionmaking that has dominated prosecutorial decisionmaking for many decades.").

236. This preference encourages law enforcement to keep its nonenforcement policies a secret, while leaving most day-to-day nonenforcement decisions untouched. See *infra* Section IV.B.

237. ANDERSON ET AL., *supra* note 74, at 5.

238. Though interest groups, including law enforcement, play a role in this process as well. See generally Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561 (2024).

county, the sheriff's enforcement decisions shaped the legislature's choices.²³⁹ Left unchecked, however, enforcement discretion could swallow the legislature's role.²⁴⁰ To mediate this potential conflict, state courts, over the course of decades, developed a robust body of case law defining when a sheriff's failure to act (non-enforcement) amounted to a neglect of the sheriff's official duties—an offense for which the sheriff could be removed from office.²⁴¹ This provided a legal check on the sheriff's enforcement discretion, while still demonstrating a nuanced understanding of the sheriff's responsibilities and the proper role of courts.

The remainder of this Part details this law: Section III.A begins the analysis by explaining why historical understanding is important and why existing statutes that define the sheriff's enforcement obligations often are ambiguous as to the sheriff's nonenforcement discretion. Section III.B details the general understanding that the sheriff had a mandatory duty to arrest in most cases. Section III.C explains how courts refined and enforced this duty, with a particular focus on when a sheriff's failure to investigate allegations of criminal activity, to enforce judicial orders, or to make arrests amounted to "neglect of duty."

This Part largely is descriptive—detailing a seemingly forgotten history of how the law bound sheriff discretion. Part IV, in turn, explores the import of reviving these principles.

A. AMBIGUITY OF THE SHERIFF'S STATUTORY ENFORCEMENT OBLIGATIONS

Before turning to historical practice, one ought to examine existing statutory schemes and the extent to which they permit nonenforcement. For the most part, criminal statutes say nothing about enforcement discretion. Statutes generally proscribe conduct by the public without reference to law enforcement's obligations.²⁴² The sheriff's obligations with respect to those statutes are set out in other sections of that state's code that define the office's powers and duties.²⁴³

When it comes to a sheriff's arrest authority, these general statutes fall into two seemingly distinct categories: On the one hand, some states provide that the sheriff

239. Subordinate officials may not overrule state law. *See* Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119, 1139 (2022). However, enforcement choices set the practical terms of the law on the ground. *See* *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy, . . . are often tougher and truer law than the dead words of the written text.").

240. That result would be contrary to our democracy's founding principles. *See* *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("It is the proud boast of our democracy that we have 'a government of laws and not of men.'").

241. *See infra* Section III.C.

242. *See, e.g.*, TENN. CODE ANN. § 39-17-418(a) ("It is an offense for a person to knowingly possess or casually exchange a controlled substance, unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice.").

243. *See, e.g.*, TENN CODE ANN. § 38-3-102.

may enforce criminal laws,²⁴⁴ suggesting a degree of discretion. Iowa law, for example, provides that “[a] peace officer *may* make an arrest under any of the following circumstances.”²⁴⁵ On the other hand, in many other states, the statutory language appears more mandatory. Arizona law provides that “[t]he sheriff *shall*: . . . Arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense.”²⁴⁶ Texas law provides that “[e]ach sheriff . . . *shall* arrest all offenders against the laws of the State, in his view or hearing, and take them before the proper court for examination or trial.”²⁴⁷ Nebraska law states: “It *shall* be the duty of the sheriff by himself or deputy to preserve the peace in his county, to ferret out crime, to apprehend and arrest *all* criminals . . . [and] to file [charges] against *all* persons who he knows, or has reason to believe, have violated the laws of the state”²⁴⁸

One might be tempted to think that these general enforcement mandates, on their own, determine the extent of sheriff nonenforcement discretion. In other words, in states that provide a sheriff *may* arrest, discretion exists; in states that provide a sheriff *shall* arrest, discretion does not. Although attractively simple, this view is an oversimplification.

First, a purely textualist approach would mean that legislatures intended dramatically different enforcement regimes based on a single word difference. This is possible,²⁴⁹ but so is imprecise legislative drafting. Look at Section 26601 of the California Government Code, which provides that “[t]he sheriff *shall* arrest and take before the nearest magistrate for examination *all* persons who attempt to commit or who have committed a public offense.”²⁵⁰ And yet, Section 836 of the California Penal Code provides that an officer “*may* arrest a person . . . [if] [t]he officer has probable cause to believe that the person to be arrested has committed a public offense in the officer’s presence.”²⁵¹

244. See, e.g., GA. CODE ANN. § 17-4-20(a)(1) (defining circumstances under which “[a]n arrest for a crime may be made by a law enforcement officer”); IND. CODE ANN. § 35-33-1-1(a) (same); see also *People v. Hammond*, 959 N.E.2d 29, 48 (Ill. 2001) (“Section 107–2(1)(c) of the Code of Criminal Procedure of 1963 provides that a ‘peace officer *may* arrest a person when’ the officer ‘has reasonable grounds to believe that the person is committing or has committed an offense.’ This statute has been construed to mean that an officer has discretion to arrest a person ‘immediately, later, or perhaps never.’” (citation omitted) (quoting *People v. Geier*, 944 N.E.2d 793, 799–800 (Ill. App. Ct. 2011))).

245. IOWA CODE ANN. § 804.7(1) (emphasis added).

246. ARIZ. REV. STAT. ANN. § 11-441(A) (emphasis added). A number of states use similar language. See, e.g., CAL. GOV’T CODE § 26601; N.D. CENT. CODE ANN. § 11-15-03(1)(b); MONT. CODE ANN. § 7-32-2121(2); IDAHO CODE ANN. § 31-2202(2); WASH. REV. CODE ANN. § 36.28.010(1).

247. TEX. CODE CRIM. PROC. ANN. art. 2.17 (emphasis added). The law also provides that the sheriff “*shall* quell and suppress *all* assaults and batteries, affrays, insurrections and unlawful assemblies.” *Id.* (emphasis added).

248. NEB. REV. STAT. ANN. § 23-1710 (emphasis added).

249. A detailed legislative history of some of these statutes might be helpful (though perhaps unlikely). See William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1462 (2020) (noting the Progressive Era origins of some of these full-enforcement statutes).

250. CAL. GOV’T CODE § 26601 (emphasis added).

251. CAL. PENAL CODE § 836(a) (emphasis added); see also *Tomlinson v. Pierce*, 2 Cal. Rptr. 700, 702–03 (Dist. Ct. App. 1960) (“The power of a police officer to arrest or not to arrest is a power in which discretion is vested in the officer. Section 836, . . . describing the circumstances permitting an arrest,

Second, a textual reading using today's common vernacular may not track what these historic statutes intended. Although "may" and "shall" have accepted meanings in our modern parlance—the former implying discretion, the latter not²⁵²—these meanings are not invariable.²⁵³ And when reading statutes of some vintage, we should be particularly careful.²⁵⁴ Context is essential.²⁵⁵ As Justice Scalia explained when confronted with the seemingly mandatory language of a domestic violence statute, enforcement discretion cannot be understood outside of the "well established tradition of police discretion."²⁵⁶ Perhaps unsurprisingly then, scholars disagree on whether "shall" statutes are in fact mandatory.²⁵⁷

Third, even permissively written statutes (e.g., "may arrest") do not explain what sort of discretion the legislature intended. For example, one might reasonably understand a statute that provides officers "may" arrest as affording officers the authority and the discretion to determine whether probable cause exists, but not necessarily affording them the authority to decline to arrest once probable cause has been established. Determinations of probable cause are fact-bound and often made in time-sensitive circumstances.²⁵⁸ But an enforcement decision after

provides that a peace officer 'may' arrest under such circumstances. If he 'may' arrest, he may 'not' arrest.").

252. See *Yoo v. United States*, 43 F.4th 64, 72 (2d Cir. 2022).

253. See, e.g., *id.* at 73 ("Of course, the use of the word 'may' is not 'necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.' We have also acknowledged that 'in some limited scenarios, the word "may" can impose a mandatory directive,' because '[a]lthough the word "may," when used in a statute, usually implies some degree of discretion, this common-sense principle of statutory construction is by no means invariable and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.'" (alteration in original) (citations omitted) (first quoting *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000); and then quoting *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 66 (2d Cir. 2021))).

254. See *Bd. of Supervisors v. United States ex rel. State Bank*, 71 U.S. 435, 438 (1866) ("If the statute had simply said, '*may levy a tax*,' it might then well be argued, that in cases where the interests of a third party were concerned the court would construe may to mean *shall*, and would enforce the levy."); *Minor v. Mechanics Bank of Alexandria*, 26 U.S. 46, 64 (1828) ("The argument of the defendants is, that 'may,' in this section, means 'must,' and reliance is placed upon a well known rule in the construction of public statutes, where, the word 'may,' is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power.").

255. See *Fischer v. United States*, 603 U.S. 480, 491–92 (2024) (interpreting federal criminal statute "in light of the history of the provision").

256. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005); see also *Diaz v. Comm'r of Corr.*, 279 A.3d 147, 160–61 (Conn. 2022) ("To start, treating the statute as mandatory would deprive police officers of the necessary discretion as to whether and when to arrest a suspected felon."); *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935) ("Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect.").

257. Compare Goldstein, *supra* note 228, at 557 (explaining "shall" means "shall"), with KENNETH CULP DAVIS, *POLICE DISCRETION* 79–80 (1975) (explaining "shall" practically means "may").

258. See *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003) ("[T]he probable-cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" (second alteration in original) (citations omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 231–32 (1983))).

probable cause has been established is more of a policy judgment than a factual one. Perhaps more importantly, any subsequent prosecution and punishment are filtered through multiple actors (e.g., prosecutors, juries, judges).

In short, rather than assume these general pronouncements (“shall” or “may”) decide the extent and nature of a sheriff’s enforcement discretion, one must further explore the relevant context, including the history and tradition of the sheriff’s duty to arrest.

Before turning to that context, one final point about existing statutes. There are a few criminal statutes today that are more specific when it comes to the sheriff’s (or any law enforcement officer’s) obligations. For example, a significant number of states have laws that purport to require law enforcement to arrest whenever there is probable cause of a domestic violence incident.²⁵⁹ Putting aside whether these statutes are sound policy,²⁶⁰ it is possible to read these statutes as indicating that, in the absence of such specificity, sheriffs (and law enforcement generally) have discretion to choose not to enforce other criminal prohibitions.

But there are at least two reasons to doubt such an interpretation: First, domestic violence laws can be understood as limiting a particular *type* of law enforcement discretion that might otherwise be permissible even under the duty-to-arrest and neglect-of-duty framework described below.²⁶¹ A common scenario officers face is when the victim of an offense declines to cooperate with an investigation.²⁶² Imagine, for example, a theft offense where the perpetrator returns the stolen goods and the victim seeks not to “press charges.” Even assuming the officer has probable cause to arrest without the victim’s testimony, it is plausible to imagine that courts would find the officer has fulfilled their enforcement duties by facilitating a resolution short of arrest. Some domestic violence statutes, however, are the legislative expression that such extra-legal resolutions are impermissible. And rather than debate the merits of such an approach in every instance, the statutes create a blanket prohibition on non-arrest resolutions.

Second, mandatory arrest laws can coexist with a general duty-to-arrest because they serve an important signaling function. Legislatures sometimes enact specific criminal statutes even when not strictly necessary. Take, for example,

259. See COMM’N ON DOMESTIC & SEXUAL VIOLENCE, AM. BAR ASS’N, DOMESTIC VIOLENCE ARREST POLICIES (2014), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence/Resources/charts/migrated_charts/2014-domestic-violence-arrest-policy-chart.pdf [<https://perma.cc/PCS9-49N7>]; see, e.g., CONN. GEN. STAT. ANN. § 46b-38b(a).

260. For data potentially relevant to the debate on this point, see Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting Vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXP. CRIMINOLOGY 1, 2, 6 (2015) (finding, contrary to earlier results, that fatalities among victims of domestic abuse were more likely after an arrest). See also AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION 68 (2020).

261. See *infra* Section III.C.

262. See Rachel Louise Snyder, Opinion, *We Prosecute Murder Without the Victim’s Help. Why Not Domestic Violence?*, N.Y. TIMES (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html>.

laws that criminalized law enforcement facilitation of lynching.²⁶³ It is hard to imagine that such conduct was lawful prior to the enactment of the statute. But the legislature likely sought to send a message—to make a political point, to call attention to an issue, and to encourage others to adopt similar policy positions. Mandatory arrest statutes in the domestic violence context might serve a similar expressive function.

Importantly, these mandatory-arrest laws are of relatively modern vintage, enacted after modern conceptions of law enforcement discretion had taken hold.²⁶⁴ The history recounted below suggests, in fact, that such discretion is ahistorical and the presumption of enforcement was reversed.

B. THE HISTORIC DUTY TO ARREST

To understand the meaning of these general statutes defining the sheriff's enforcement obligations, historical practice is a useful place to start, for two reasons.

First, as discussed above, historical practices provide context for statutory language.²⁶⁵ If sheriffs historically were understood to exercise broad nonenforcement discretion, then even seemingly mandatory statutes (e.g., “shall arrest”) might not in fact be mandatory absent some obvious evidence of legislative intent to reverse this practice. Conversely, if sheriffs historically were understood to have an obligation to arrest, then even seemingly permissible statutes (e.g., “may arrest”) might not be ushering in a radical change but rather simply providing sheriffs the statutory authority to make arrests.

Second, under many states' laws, the sheriff's common law authority helps define the powers of the modern sheriff. Many state courts have held that by creating an office of the sheriff—either in the constitution or by statute—the legislature intended to imbue the office with the powers and duties of that office at common law.²⁶⁶ If the sheriff had a particular power at common law, unwinding

263. For example, the constitutional amendment at issue in *Holliday v. Fields*, 275 S.W. 642, 647 (Ky. 1925). See also, e.g., *People ex rel. Davis v. Nellis*, 94 N.E. 165, 167–68 (Ill. 1911).

264. The 1994 Violence Against Women Act (VAWA) marked a turning point in efforts relating to mandatory arrest, sparking significant change across the country. See Monica N. Modi, Sheallah Palmer & Alicia Armstrong, *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 J. WOMEN'S HEALTH 253, 254 (2014).

265. See *supra* notes 252–56 and accompanying text.

266. See, e.g., *State ex rel. Johnston v. Melton*, 73 P.2d 1334, 1338 (Wash. 1937) (“The office of sheriff is a constitutional office. In naming the county officers in section 5, article 11 of the Constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold.”); *McCoy v. Key*, 123 So. 873, 875 (Miss. 1929) (looking to the “general powers under the common law as sheriff of the county”); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (Wis. 1870) (“Now, it is quite true that the [C]onstitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the [C]onstitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted.”); see also *People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 834 (Ill. 1928) (“Where the Legislature has created an office which was known to the common law, and by virtue of the common law was vested with certain powers and duties, those common-law powers and duties, attached to the office by reason of its adoption by the Constitution. It was so held in regard to the office of sheriff in the case of *Dahnke v. People*, [48 N. E. 137 (Ill. 1897)] . . .”).

that power could be complicated.²⁶⁷ Conversely, if the sheriff did not have such a power at common law, explicit statutory language would be required to provide that authority.

Thus, understanding the sheriff's traditional authority (or lack thereof) to decline to enforce criminal statutes is essential. This Section now discusses that authority.

An extensive array of historic authorities describes the sheriff's duty to arrest in mandatory terms.²⁶⁸ In 1898, for example, the Supreme Court of Ohio, while quoting Lord Coke, defined the sheriff's duty as to "apprehend and commit to prison all persons who break or attempt to break the peace."²⁶⁹ A few decades later, the Supreme Court of Mississippi, reviewing English common law authorities, explained that "[w]henver a charge of felony was brought to [the sheriff's] notice, supported by reasonable grounds of suspicion, they were required to apprehend the offenders, or at least to raise hue and cry."²⁷⁰ These authorities

267. Many states are clear that a sheriff's common law authority is defeasible by statute. *See, e.g.*, *Linehan v. Rockingham Cnty. Comm'rs.*, 855 A.2d 1271, 1274–75 (N.H. 2004); *Williams v. Matthews*, 448 S.E.2d 625, 628 (Va. 1994); *Soper v. Montgomery County*, 449 A.2d 1158, 1161 (Md. 1982); *Merrill v. Phelps*, 84 P.2d 74, 76 (Ariz. 1938); *State ex rel. Thompson v. Reichman*, 188 S.W. 225, 227 (Tenn. 1916).

But others take a different view. *See, e.g.*, *Fortney v. Sch. Dist.*, 321 N.W.2d 225, 234 (Wis. 1982) ("[T]he sheriff, under common law, had certain powers and duties in his relationship to the courts which were incorporated into the constitution. The sheriff cannot be divested of those powers and duties by statute."); *People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 834 (Ill. 1928) ("[I]t was further held that the officer could not be deprived of the common-law functions pertaining to his office by the Legislature, but new duties might be imposed."); *Ex parte Corliss*, 114 N.W. 962, 965 (N.D. 1907) (noting that permitting constitutional officers to have their powers stripped by an act of the legislature, "carried to its logical and inevitable result, would lead to the monstrous doctrine that the Constitution means nothing, and, notwithstanding its plain provisions, the legislative assembly may provide that the duties pertaining to all these offices shall be discharged by officers appointed in some manner prescribed by them").

As a result, state courts reach disparate conclusions on similar questions: Wisconsin courts have struck down any attempt to transfer operations of a jail from the sheriff, *see State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 412–15 (1870), while other states with similar constitutional provisions have reached the opposite conclusion. *See, e.g.*, *Beck v. Cnty. of Santa Clara*, 251 Cal. Rptr. 444, 446, 450 (Ct. App. 1988); *Beasley v. Ridout*, 52 A. 61, 62, 66 (Md. 1902).

268. *See, e.g.*, JOHN IMPEY, *THE PRACTICE OF THE OFFICE OF SHERIFF AND UNDER SHERIFF* 31 (3d ed. 1812); *see also* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 688 & n.62 (1994) (discussing common law duty of private individuals to assist in keeping the peace, citing historical sources indicating that public officials have a duty to arrest); *Goodman v. Condo*, 12 Pa. Super. 456, 461–62 (1899) (citing English common law on the sheriff's arrest duty); *State ex rel. Att'y Gen. v. McLain*, 50 N.E. 907, 907–08 (Ohio 1898) (same).

269. *McLain*, 50 N.E. at 908.

270. *Orick v. State*, 105 So. 465, 469–70 (Miss. 1925) (quoting "2 R. C. L., p. 446," a common law authority); *accord Powe v. State*, 235 So. 2d 920, 921–22 (Miss. 1970).

The "hue and cry" was a common law duty to respond to a crime by loudly calling for help. *See* T. Jarrett Bouchette, *Citizen's Arrest in South Carolina: Shield or Sword?*, S.C. LAW, Jan. 2021, at 20, 22, 24 n.5. Members of the public had an obligation to heed the call and to assist with apprehending the alleged offender. *See id.* at 22 ("In 1285, the Statute of Winchester not only gave citizens the right to arrest those who had committed crimes, but required it whenever the 'hue and cry' was raised. Failure to participate was itself a punishable offense." (emphasis omitted) (endnote omitted) (citing *THE STATUTE OF WINCHESTER* (1285), reprinted in *SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY* 76–79 (George Burton Adams & H. Morse Stephens eds., 1901))); Laura K. Donohue, *The Original Fourth*

focused on felonies and breaches of the peace because, as a historical matter, sheriffs did not always have authority to arrest for minor offenses not committed in their presence.²⁷¹ Yet, when they had authority, the common law rejected discretionary arrest authority. As one scholar explained:

[P]eace officers [a term that includes sheriffs] had no such choice at common law: if they had authority to arrest for the offense, they were obligated to do so; if not, they were obligated to present their information regarding the offense to a justice of the peace, who could then bring the offender to court using either a summons or a warrant.²⁷²

This historic understanding was carried into U.S. law, which in the late nineteenth century and early twentieth century continued to describe the sheriff's arrest duty in mandatory terms. The Idaho Supreme Court, for example, described itself as "apply[ing] the common law rule" that if an officer

had reasonable cause to believe [a suspect] was committing, or was about to commit, a crime, it was his duty, without a warrant, to endeavor to prevent him from committing it, and to arrest him, even though he had completed the offense before he could be prevented from so doing.²⁷³

In Nebraska, the state supreme court, interpreting a statute similar to the one that exists today,²⁷⁴ declared in the context of a chief of police: "It was then his duty to arrest at once any one he personally found violating the law."²⁷⁵ The Court of Criminal Appeals of Texas explained that upon a credible report of a person carrying a pistol, the sheriff's duty was "to arrest [that] person without warrant . . . [and] to carry such person before the nearest justice of the peace for trial."²⁷⁶ Similar statements abound,²⁷⁷ making clear that U.S. courts at the turn of

Amendment, 83 U. CHI. L. REV. 1181, 1231, 1233–34 (2016) (explaining that a constable's decision to raise a hue and cry to apprehend a felon was not discretionary, but depended on the existence of two conditions: "first that a felony has been really committed, and the second, that the person [arrested] is properly suspected." (alteration in original) (quoting SAUNDERS WELCH, OBSERVATIONS ON THE OFFICE OF CONSTABLE WITH CAUTIONS FOR THE MORE FAIR EXECUTION OF THAT DUTY 17 (1754))).

271. *Orick*, 105 So. at 469–70 (explaining that traditional arrest authority extended to felonies as well as breaches of the peace committed in the officer's presence).

272. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 399–400 (2002).

273. *State v. Clarke*, 446 P.3d 451, 457 (Idaho 2019) (quoting *State v. Mox Mox*, 152 P. 802, 804 (Idaho 1915)).

274. *Compare State v. Donahue*, 135 N.W. 1030, 1036 (Neb. 1912) ("Our statute provides that 'every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained.'"), with NEB. REV. STAT. ANN. § 23-1710 ("It shall be the duty of the sheriff by himself or deputy . . . to apprehend and arrest all criminals . . .").

275. *Donahue*, 135 N.W. at 1036–37.

276. *Garner v. State*, 97 S.W. 98, 100 (Tex. Crim. App. 1906).

the twentieth century carried forward the English common law understanding that the sheriff's duties to arrest and enforce were mandatory.

C. NONENFORCEMENT AS NEGLIGENCE OF DUTY

Section III.B outlined the basic understanding that the sheriff's arrest authority was mandatory. This Section explains how state courts refined and enforced that duty in various contexts.

Sheriffs, like other government officials, hold their office subject to the faithful performance of their duties. Failure to perform these duties—often termed “neglect of duty” or “nonfeasance”—has long been a removable offense.²⁷⁸ At common law, neglect of duty also was punishable by criminal prosecution and

277. See, e.g., *Bassinger v. U.S. Fid. & Guar. Co.*, 58 F.2d 573, 574 (8th Cir. 1932) (“In so far as arrests by the sheriff are concerned, the law of Nebraska makes it the duty of a sheriff to arrest for a felony upon a warrant or upon view of the commission of the felony or in an honest belief, based upon reasonable grounds, that the person arrested has been guilty of a felony.”); *State v. Driscoll*, 144 P. 153, 155 (Mont. 1914) (“A riot existing to the knowledge of the sheriff, it becomes his duty to suppress it; he must command the rioters to disperse; he must arrest them if they do not disperse; and for that purpose he may command the aid of all persons present or within the county. The duty thus imposed is absolute” (citations omitted)); *Scougale v. Sweet*, 82 N.W. 1061, 1064 (Mich. 1900) (“What was the duty of the sheriff? Upon this point we need say but little. The law is not disputed. It was his duty to prevent the game, and, if the players persisted in proceeding with it, it was his duty to promptly arrest them all.”); *People ex rel. McEwen v. Keeler*, 64 How. Pr. 478, 482 (N.Y. Gen. Term 1883) (“He is bound to take all misdoers and commit them to jail for safe custody This general statement is substantially correct now, and need not be enforced by citations. It has been the duty of the sheriff to arrest and confine all persons charged with crime”), cited with approval in *Ex parte Corliss*, 114 N.W. 962, 973–74 (N.D. 1907); *Darlington v. Mayor of New York*, 31 N.Y. 164, 187, 206 (1865) (upholding statute indemnifying property owners for damage caused by riot that public officials failed to prevent because officials had a duty to prevent such damage); *Roberts v. State*, 14 Mo. 138, 146 (1851) (“Where persons are found loitering about and lodging in groceries, tippling-shops, [etc.], or begging from door to door, or with burglarious instruments upon them, the officer so finding them, is required to arrest them and take them before the recorder.”); *Coyles v. Hurtin*, 10 Johns. 85, 87 (N.Y. Sup. Ct. 1813) (“The sheriff is, *ex officio*, a conservator of the peace; and it is not only his right, but his duty to arrest all persons, with their abettors, who oppose the execution of process.”).

278. See *Gay v. Dist. Ct.*, 171 P. 156, 157 (Nev. 1918) (“From time immemorial society has found it necessary to make some provision for the removal of venal, corrupt, faithless, and negligent public officers. The importance of this was realized when the Constitution of the United States was drafted, and this policy has been carried into the Constitution of every state in the Union.”); *State ex rel. Att’y Gen. v. McLain*, 50 N.E. 907, 907 (Ohio 1898) (“By the rule of the common law, the faithful performance of the duties of an office was the tacit condition upon which the continued right to hold the office depended, and any breach of that condition constituted cause for the forfeiture of the office.”); *Governor v. Dodd*, 81 Ill. 162, 165 (1876) (“Numerous authorities might be cited from the courts of other States to show that the law imposes the liability, if they were needed to sustain so plain a proposition. All understand that sheriffs, constables, and other ministerial officers, are held liable for mere *nonfeasance* of duty. Sheriffs and constables are not unfrequently held liable for failing to levy an execution, failing to return it, for permitting property seized on execution to be re-taken by the defendant, and in a number of other cases, where loss is occasioned to the plaintiff by mere non-action, unintentional, and caused by mere negligence or omission to perform a duty.”); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 28 (2021) (“Neglect of duty and malfeasance in office, it shows, are terms that have been used for hundreds of years to address the problem of an officer’s failure to faithfully execute the laws. Courts have used them to define and analyze the obligations of officeholding, while legislatures have employed them to motivate an office’s ‘faithful execution.’”).

finer.²⁷⁹ Today, states have codified their removal procedures and penalties.²⁸⁰

State courts in the early twentieth century had frequent occasion to determine when the sheriff's failure to enforce the law constituted a dereliction of the sheriff's duties.²⁸¹

Over decades, across various states, courts developed a body of case law detailing the sheriff's obligations. This law was structured around several key principles:

1. Given sufficient notice of criminal activity, a sheriff's failure to enforce the law constituted a removable offense.
2. The sheriff was obligated to follow judicial orders, including arrest warrants.
3. The sheriff could not fulfill their statutory duties merely by enforcing warrants.
4. The sheriff had an affirmative obligation to investigate alleged criminal violations.
5. Courts provided some flexibility for a sheriff's unwitting failures and generally would not sanction removal without some evidence of recklessness or deliberate neglect.

The remainder of this Section details each of these principles.

1. A Duty to Enforce

First and foremost, courts repeatedly held that sheriffs had an affirmative obligation to enforce criminal statutes by arresting offenders and that failure to do so constituted an offense for which the sheriff could be removed from office.²⁸²

279. 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE CLASH BETWEEN PRIVATE INITIATIVE AND PUBLIC INTEREST IN THE ENFORCEMENT OF THE LAW 161 (1956) ("Conversely, there were many provisions which appointed fines to be imposed upon constables who neglected or refused to execute their duties. The courts were empowered to inflict these, the amount being left to the discretion of the bench."); *id.* at 162 ("This code of fines covered a great variety of cases in which a constable might have failed to preserve morality, public safety or peace in general."); *South v. Maryland*, 59 U.S. 396, 402–03 (1855) (indicating that neglect of public duty to preserve the public peace was punishable by indictment at common law).

280. Each state provides some method of removing county officials during the course of their elected term. Meighan R. Parsh, *Dueling Discretion: The Imperfect Mechanisms for removing Elected Prosecutors*, 102 N.C. L. REV. 573, 577 (2024); *see, e.g.*, MINN. STAT. ANN. § 351.15. Although the mechanics of these removals differ (e.g., who may remove, timing of judicial review), FACT SHEET, *supra* note 22, my focus here is the substance of the removal standards—often termed neglect of duty or nonfeasance. *See, e.g.*, ALA. CODE §§ 36-11-1(a), 36-11-1(b)(1), 36-11-4; ARK. CODE ANN. § 16-90-112 (a). For more information on the considerable variation among removal procedures and standards, see generally Charles M. Kneier, *Some Legal Aspects of the Governor's Power to Remove Local Officers*, 17 VA. L. REV. 355 (1931) (exploring variations among removal laws).

281. *See, e.g.*, *Goodell v. Woodbury*, 52 A. 855, 856 (N.H. 1902).

282. *See, e.g.*, *State ex rel. McDonald v. Dyson*, 183 N.W. 298, 300 (Neb. 1921) ("The section of the law under which this proceeding was instituted is broad in its scope and purpose. It provides that, if a sheriff fails to do his duty, neglects to do his duty, or refuses to do his duty in the enforcement of this law, he may be removed from office. Evidently the Legislature intended that, if the law was being violated and the sheriff was failing habitually to do his duty because of incompetency, inefficiency, or unwillingness to aid in its enforcement, there should be a direct method provided by law for his summary removal.").

Although not a removal case, *Scougale v. Sweet* drives home the clarity with which courts of this era viewed the sheriff's duty to enforce the laws as written.²⁸³ In *Scougale*, the Michigan Supreme Court heard an appeal of a sheriff's libel action against a local clergyman.²⁸⁴ The claim of libel stemmed from a scathing open letter written by the clergyman calling for the sheriff's resignation for having "allowed two gangs of criminals to commit crime after due notification had been given you of such intention, first by the criminals themselves, and subsequently by more than one law-abiding citizen."²⁸⁵ The offense in question: playing a game of baseball on the Sabbath, in violation of Michigan law.²⁸⁶ The Michigan Supreme Court reversed the sheriff's victory below, and in the process, spoke to the sheriff's duties: "What was the duty of the sheriff? Upon this point we need say but little. The law is not disputed. It was his duty to prevent the game, and, if the players persisted in proceeding with it, it was his duty to promptly arrest them all."²⁸⁷

Consistent with this admonition, courts of this era repeatedly held that even a single instance of nonenforcement could support a sheriff's removal. In 1914, the Montana Supreme Court affirmed the removal of a sheriff for failure to take steps to suppress a riot.²⁸⁸ A few years later, the Supreme Court of Nebraska upheld a sheriff's removal for having "willfully failed, neglected and refused to do his duty in the enforcement of the liquor laws" based on the testimony of a single witness who witnessed a single incident of the sheriff providing liquor, contrary to law.²⁸⁹ A single failure to arrest for bribery was deemed sufficient to support a charge of nonfeasance.²⁹⁰ So too was a single failure to arrest the perpetrator of an assault.²⁹¹ In a case in which those seeking to remove the sheriff had not met their burden of proof, the Kentucky Supreme Court listed a number of examples of actions that qualify as "neglect of duty," including "carelessly or intentionally

283. 82 N.W. 1061 (Mich. 1900).

284. *Id.* at 1061–62.

285. *Id.* at 1062.

286. *Id.*

287. *Id.* at 1064, 1066.

288. *State ex rel. Rowe v. Driscoll*, 144 P. 153, 153–56 (Mont. 1914) ("A riot existing to the knowledge of the sheriff, it becomes his duty to suppress it; he must command the rioters to disperse; he must arrest them if they do not disperse The duty thus imposed is absolute, and to charge that the riotous assembly occurred with the knowledge of the sheriff; that it continued for eight hours; that it was accompanied by disorder and destruction of property; that it was not dispersed; that participants therein were not arrested; and that no physical resistance was offered to its acts—is to charge official delinquency upon the part of that officer" (citations omitted)).

289. *State ex rel. McDonald v. Dyson*, 183 N.W. 298, 299–300 (Neb. 1921).

290. *State ex rel. Beazley v. Dist. Ct.*, 241 P. 1075, 1076 (Mont. 1925).

291. *Gay v. Dist. Ct.*, 171 P. 156, 156–57 (Nev. 1918) ("A complaint was filed in the district court of said county, wherein it was alleged that the defendant, Sam Gay, as sheriff, was guilty of nonfeasance in office, in that he neglected and refused to arrest one Joe Keate, his deputy, while the latter was making an assault with a pistol upon W. H. Harkins, a justice of the peace, in the presence of the defendant. . . . [T]he court had jurisdiction to hear and determine the matter presented in the complaint filed in the district court charging the petitioner with nonfeasance in office.").

to suffer a criminal to escape or a prisoner to be lynched, or to fail to arrest a person who committed a public offense in his presence.”²⁹²

2. A Duty to Execute Judicial Orders

A sheriff's duty to enforce most often applied when the sheriff personally observed (or could have observed) a criminal violation.²⁹³ But there was a parallel obligation on sheriffs to arrest for offenses committed outside of their presence—namely, a duty to execute judicial orders.

Although the sheriff began as an extension of the King in the countryside,²⁹⁴ English reforms stripped the office of its quasi-judicial authority, removing discretion from the sheriff's role in enforcing judicial orders.²⁹⁵ In fact, the sheriff's failure to execute judicial orders was an indictable offense.²⁹⁶ And if damages resulted from a sheriff's failure to promptly execute, liability would follow.²⁹⁷

U.S. law followed suit. U.S. courts embraced the sheriff's duty to execute judicial orders, routinely describing the sheriff's role in enforcing judicial orders as ministerial and obligatory.²⁹⁸ This historical understanding gives context to modern statutes,

292. *Holliday v. Fields*, 275 S.W. 642, 647–48 (Ky. 1925). Ultimately, the court dismissed the charges against the sheriff on the grounds that they were supported by only one witness affidavit (the statute required two), occurred before the statute's effective date, or were personal misconduct. *Id.* at 648.

293. *See id.* at 647.

294. *See Magna Carta* 1297, 25 Edw. c. 9 (Eng.); *THE STATUTE OF WINCHESTER*, *supra* note 270, at 77–78.

295. *See Justices of the Peace Act* 1968, c. 69 (UK).

296. *See South v. Maryland*, 59 U.S. 396, 403 (1855) (“Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports.”); *Forrist v. Leavitt*, 52 N.H. 481, 482 (1872) (“A justice of the peace is a judicial officer, and the sheriff, being a ministerial officer, is subordinate to and under control of the former. Such is the doctrine of the common law. ‘In all cases where a justice has power to make an order and direct it to an inferior ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable.’” (quoting 1 WM. OLDNALL RUSSELL, *A TREATISE ON CRIMES & MISDEMEANORS* *525)).

297. *See, e.g., Johnson v. Price*, 36 So. 1031, 1032 (Fla. 1904) (“At common law it seems that a sheriff was liable to be ruled and held in contempt and amerced for failure to execute a writ or for not making a return. This was a summary remedy. The plaintiff also had his remedy against the sheriff in an action on the case for damages.”); *Bank of Hartford Cnty. v. Waterman*, 26 Conn. 324, 339 (1857) (“The opinion of Lord Denman in the case of *Randell v. Wheble*, 10 A. & E. 719, contains this passage: ‘We agree with the case of *Brown v. Jarvis*, that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the court in that case, that some actual damage must be shown in order to make the negligence of the sheriff in that respect a cause of action.’”).

298. *See, e.g., Kendall v. Aleshire*, 45 N.W. 167, 168 (Neb. 1890) (“Meeker, as sheriff of the county, had a warrant in his possession, directed to him, issued by a justice of the peace of the county, for the arrest of the plaintiff upon a criminal charge. This warrant was, for aught that appears, fair on its face. It was the duty of the sheriff to arrest said Aleshire, defendant in said warrant, if found within this state.”); *People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173, 192 (1850) (“There is clearly a duty resting upon the sheriff, not only to return the writ but to return it truly. If he should fail to do so, it would most clearly be a violation of official duty.”); *State v. Hood*, 12 N.C. 506, 507 (1828) (“[I]f the criminal is at large, without taking the oath of insolvency, it should be the duty of the Clerk to issue his writ of *capias ad satisfaciendum*, and the duty of the Sheriff to arrest the body of the said criminal, if to be found, and him confine until he either pays off the costs of prosecution, or discharges himself by taking the oath of insolvency.”); *see also IMPEY*, *supra* note 268, at 32 (“The sheriff being obliged to execute every writ and process issuing and directed to him by lawful authority, he is likewise obliged by the duty of his

which define the sheriff's obligation to enforce warrants and court orders. Some state it is "the duty" of the sheriff to diligently execute such orders.²⁹⁹ Other statutes use more explicitly mandatory language (e.g., the sheriff "shall" or "must").³⁰⁰

3. Beyond Warrant Enforcement

Although enforcement of warrants and judicial orders is an inexorable part of a sheriff's duties, it does not fulfill a sheriff's duty to enforce the law. From time to time, sheriffs attempted to justify their inaction (nonenforcement) by arguing that their enforcement obligations were limited to warrants and other court orders.³⁰¹ Courts roundly rejected this limit. The Michigan Supreme Court explained: "We cannot shut our eyes to the fact that this [that no warrants had been issued] has been a common excuse of sheriffs and other police officers for not enforcing this and other laws."³⁰² The Tennessee Supreme Court put it simply: "We cannot agree that [the sheriff] is a mere process server, or that he may, if he would discharge the duties of his office, be passive until some one swears out a warrant for him to serve."³⁰³ A few decades later, the Virginia Supreme Court reiterated that a sheriff's enforcement duties are "not discharged by simply executing warrants which are placed in his hands."³⁰⁴

4. A Duty to Investigate

A corollary of the fact that sheriffs could not rely solely on warrants (or lack thereof) is that their enforcement duties included an affirmative obligation to investigate alleged criminal violations brought to their attention.³⁰⁵ The Virginia

office to execute such process *without favour*, with the utmost expedition and secrecy; and as soon after he receives it as the nature of the thing will admit of . . .").

299. See, e.g., GA. CODE ANN. § 15-16-10(a) ("It is the duty of the sheriff: (1) To execute and return the processes and orders of the courts and of officers of competent authority, if not void, with due diligence, when delivered to him for that purpose . . ."); see also *In re Smith*, 424 S.E.2d 45, 46 (Ga. Ct. App. 1992) ("In light of the foregoing statutes, it is clear that a sheriff can be found in contempt of court by 'neglecting' to perform his duties. . . . [T]he Supreme Court of Georgia held that whether a sheriff neglected his duty 'would depend on the good faith of his conduct, in view of the circumstances under which he acted, of which the court is to judge.'" (quoting *Heard v. Callaway*, 51 Ga. 314, 317 (1874))).

300. See, e.g., WASH. REV. CODE ANN. § 36.28.010 ("The sheriff . . . [s]hall execute the process and orders of the courts . . ."); 55 ILL. COMP. STAT. ANN. § 5/3-6019 ("Sheriffs shall serve and execute, within their respective counties, and return all warrants, process, orders and judgments . . ."); IND. CODE ANN. § 35-33-8.5-12 ("The sheriff must return every process issued to the sheriff with the sheriff's doings fully endorsed thereon, and every process, judgment and commitment of the circuit and criminal courts must be executed by the sheriff."); WYO. STAT. ANN. § 18-3-604 ("The county sheriff or his deputy shall serve and execute according to law all processes, writs, precepts and orders issued by any court of record in his county . . .").

301. See, e.g., *State ex rel. Thompson v. Reichman*, 188 S.W. 225, 227 (Tenn. 1916); *Scougale v. Sweet*, 82 N.W. 1061, 1062 (Mich. 1900).

302. *Scougale*, 82 N.W. at 1065.

303. *Reichman*, 188 S.W. at 228.

304. *Barbee v. Murphy*, 141 S.E. 237, 240 (Va. 1928).

305. See, e.g., *Maxwell v. Andrew County*, 146 S.W.2d 621, 625 (Mo. 1940) ("[T]he sheriff is under a legal duty to investigate alleged crimes and to suppress crime and arrest felons."); *Farmers' Mut. Fire Ass'n of Shelby Cnty. v. Hunolt*, 81 S.W.2d 977, 981 (Mo. Ct. App. 1935) ("It has been held that the duty of a sheriff in the enforcement of the law implies initiative on his part, and that he must be reasonably alert with respect to possible violations of the law, and is not entitled to wait until they come to his personal knowledge, but must follow up information received from any source."); *Reichman*, 188

Supreme Court explained that a sheriff's duties not only prohibited willful blindness but also required the sheriff to "be active and vigilant, and pursue those who he has cause to believe are violating the law."³⁰⁶ By 1941, the Supreme Court of Minnesota explained more specifically that the sheriff was not permitted "to wait until [violations] come to his personal knowledge, but must follow up information received from any source."³⁰⁷ The sheriff's duties required "initiative."³⁰⁸

At the same time, however, courts were careful not to extend this investigative responsibility so far as to micromanage a sheriff's affairs. For example, courts drew a distinction between a duty to investigate allegations of criminal activity and a duty to patrol and proactively ferret out crime.³⁰⁹ The former was required as a natural extension of the sheriff's duty to enforce the laws.³¹⁰ But a duty to patrol did not exist, in part because patrol was not considered a part of the sheriff's traditional responsibilities.³¹¹

S.W. at 228 ("It is idle to say that all this [legal authority] does not imply initiative on the part of the sheriff in the enforcement of the law against public offenses. The duties imposed cannot be performed without some degree of activity and diligence to inform himself of conditions in his county. Certainly they preclude the idea that he may, without dereliction, shut his eyes to what is common knowledge in the community, or purposely avoid information, easily acquired, which will make it his duty to act."); *cf. In re Sulzmann*, 29 Ohio N.P. (n.s.) 92, 98 (Ct. C.P. 1931) ("[I]t is urged that the sheriff need act only when there is an uprising or disquietude of a general nature in his county, perhaps a riot, or lynching, or other public violence. . . . As the chief law enforcement officer of the county [the sheriff] is the only officer in the county who directly represents the sovereignty of the state To hold that he shall be only a 'process server' and shall be active only in enforcing the laws of the state when great physical outbursts are threatened, would be robbing the executive of the state of 88 assistants in the enforcement of law and would leave our citizens still more helpless under the assaults of organized crime.").

306. *Barbee*, 141 S.E. at 240; *accord* Ohio Op. Att'y Gen. No. 94-081 at 2-403 (1994). <https://www.ohioattorneygeneral.gov/getattachment/c/bfcb03-a117-4041-a0dd-a835bfc6d131/1994-081.aspx> [<https://perma.cc/Z64G-ENWY>] ("Moreover, the exercise of law enforcement powers by the county sheriff necessarily requires the sheriff to investigate crimes that occur within his jurisdiction.").

307. *In re Olson*, 300 N.W. 398, 400 (Minn. 1941) (quoting *Hunolt*, 81 S.W.2d at 981).

308. *Id.*

309. *See, e.g., In re Sulzmann*, 183 N.E. 531, 532 (Ohio 1932) ("While the sheriff is not required to patrol his county as a policeman, nor to ferret out crime as a detective, under the conceded facts of this case he committed malfeasance in office"); *Reichman*, 188 S.W. at 228 ("We do not mean that it is his duty to patrol the county as the streets of the city are patrolled by the police, or to maintain a detective force to ferret out crimes. All we now decide is that it is the duty of the sheriff and his deputies to keep their eyes open for evidence of public offenses, and that it is a distinct neglect of duty for them to ignore common knowledge of law violations or to intentionally avoid being where they have reason to believe that such offenses are being committed.").

310. *See Reichman*, 188 S.W. at 228.

311. *See id.*; MARK R. ELLIS, LAW AND ORDER IN BUFFALO BILL'S COUNTRY: LEGAL CULTURE AND COMMUNITY ON THE GREAT PLAINS, 1867-1910, at 64 (2007) ("The sheriff's primary role in law enforcement involved investigating felony crimes such as murders, horse and cattle thefts, serious assaults, burglaries, and various larcenies. Lincoln County sheriffs did not do much in the way of crime prevention. They did not monitor the outlying ranches for stock rustlers, walk through the rail yards looking for thieves, or patrol the Front Street saloons for drunk and disorderly patrons. These responsibilities fell upon North Platte police officers and Union Pacific detectives. As the chief lawman of the county, however, the sheriff had to do everything in his power to apprehend suspected felons."); *Lorain Cnty. Deputies Ass'n v. Vasi*, No. 92CA005337, 1992 WL 380604, at *1 (Ohio Ct. App. Dec. 16, 1992) ("The Ohio Supreme Court has held that the mandate to 'preserve the public peace' does not require that a sheriff patrol his county as a policeman or ferret out crime as a detective." (quoting *Sulzmann*, 183 N.E. at 532)); *Jones v. Wittenberg*, 357 F. Supp. 696, 700 (N.D. Ohio 1973) ("The weight

5. Limits and Potential Defenses

This nuanced understanding of the sheriff's duty to investigate parallels other ways in which state courts preserved some flexibility for law enforcement while still serving as a check against arbitrary nonenforcement. First, as a practical matter, the only cases that came to the attention of these courts were ones in which the violations sufficiently irked or injured someone to justify bringing a removal action³¹²—a natural filtering mechanism. Second, and more importantly, in determining whether a sheriff had neglected their enforcement duties, courts made accommodations for the sheriff's state of mind and often required those challenging the sheriff to present a detailed record of the sheriff's enforcement decisions (and their failures).³¹³ Courts would not necessarily countenance removal merely because of the widespread existence of unenforced criminal activity.³¹⁴ Rather, courts required clear knowledge (or at least reckless disregard) of the violations

of what little authority there is indicates that the Sheriff is only required to respond to calls. He does not have to serve as a patrolman for the County.”).

312. Language in some opinions suggests that some sort of injury to the public welfare is required. *See, e.g., State ex rel. Hardie v. Coleman*, 155 So. 129, 132 (Fla. 1934) (“Neglect of duty has reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law. It is not material whether the neglect be willful, through malice, ignorance, or oversight. When such neglect is grave and the frequency of it is such as to endanger or threaten the public welfare it is gross.”). But I have found no general support for that proposition as it appears to be in tension with the case law recounted above that one-off failures will support removal for neglect of duty. *See supra* notes 282–92 and accompanying text.

313. *See, e.g., State v. Lombardi*, 99 N.W.2d 829, 840 (1959) (“The evidence of the prostitutes shows that although when [Sheriff] Lombardi knew indisputably the nature and activities of Club 166 he found no reason to interfere with its operations but on the contrary protected it against interference by others. Other evidence . . . is competent to show that the sheriff intended not to disturb the Club's operations though his knowledge of them was complete, that is, he wilfully refused or neglected to perform the duties of his office.”); *Freas v. State ex rel. Freeling*, 235 P. 227, 228 (Okla. 1925) (although not requiring a jury instruction on the matter, noting that the sheriff was permitted to present evidence regarding “palliation or extenuation of his alleged failure to enforce the gambling and prohibitory laws”); *Ferguson v. Superior Ct.*, 147 P. 603, 605–06 (Cal. Dist. Ct. App. 1915) (“Such offenses as vagrancy, prostitution and (usually) the letting of houses for prostitution, depend for their criminal character, not upon a single act, but upon a series of acts extending over a considerable period of time, and are criminal offenses because of their continuance and repetition. From the very nature of the offense of letting a house for prostitution and the conducting of prostitution therein, such offenses are rarely, if ever, committed in the presence of the officer; and while he may have had, as a result of information obtained from various sources an acquaintance with the fact, and hence in a limited sense, knowledge, of the commission of such offenses, nevertheless the act which would require, as a positive official duty, the making of an arrest without a warrant was not committed in his presence.”).

314. *See, e.g., State ex rel. Riddle v. Jeansonne*, 18 So. 2d 306, 307–08 (La. 1944) (“The other charges brought against the sheriff were for the most part neglect of duty in the matter of suppressing gambling, particularly with slot machines. The evidence shows and the judge found that the sheriff was not neglectful of his duty in that respect. The only vicinities in which the playing of slot machines or other forms of gambling flourished were the vicinities where public sentiment tolerated it and the majority of the citizens winked at it, and hence no one would inform against the offenders. One of the witnesses who had firsthand—not hearsay—information assured the judge that the sheriff suppressed gambling and enforced all of the so-called blue laws in every locality in which he had enough information and the necessary cooperation.”).

and a subsequent failure to act.³¹⁵ Poor judgement as to what qualified as a violation of state law generally was insufficient to constitute neglect of duty.³¹⁶ As the Tennessee Supreme Court explained when reversing a sheriff's ouster from office:

Shreds of human imperfections gathered together to mold charges of official dereliction should be carefully scanned before a reputable officer is removed from office. These derelictions should amount to knowing misconduct or failure on the part of the officer if his office is to be forfeited; mere mistakes in judgment will not suffice.³¹⁷

Although they afforded sheriffs some flexibility, courts rejected the notion sheriffs could shirk their enforcement duties based on policy objections—either their own or their community's.³¹⁸ The Tennessee Supreme Court explained:

315. See, e.g., *In re Olson*, 300 N.W. 398, 400 (Minn. 1941) (“Where, as here, the operation of slot machines was open and notorious within the corporate limits of the cities and villages of Scott county, including the county seat, where relator resides and has his office, his claim of ignorance of what everyone else knew about this situation cannot excuse him. His statutory duties and his obligations to the public cannot be discharged by willful failure to see the obvious. He may not shut his eyes or close his ears to what others see and hear.”); *Freas*, 235 P. at 228 (“Mere thoughtless acts with no bad or evil purpose, in which there is no inexcusable carelessness or recklessness on the part of the officer, will not constitute such a willful failure or neglect of duty as is contemplated by the law of the state relating to the removal of officers, or by these instructions.”); see also *State ex inf. Fuchs v. Foote*, 903 S.W.2d 535, 538 (Mo. 1995) (“‘Willful neglect,’ on the other hand, is a hybrid between conduct that is wholly willful and conduct that is wholly neglectful. It is something more than mere mistake or the thoughtless failure to act. Neglect pertains to nonfeasance, the failure to act, whereas willfulness refers to intentional or self-determined conduct. Implicit in the idea of willfulness is the actor’s knowledge of the duty neglected; one cannot intentionally neglect a duty without knowing that the duty exists.”), *abrogated by State v. Olvera*, 969 S.W.2d 715 (Mo. 1998).

Some states appeared to impose a slightly higher intent standard, at least formally. See, e.g., *State ex rel. Thompson v. Donahue*, 135 N.W. 1030, 1034 (Neb. 1912) (“[W]illful neglect to perform an official duty is considered to be something more than oversight or carelessness or a merely voluntary neglect. It must be prompted by some evil intent or legal malice, or without sufficient ground for believing himself justified in the course pursued. . . . ‘[W]here such act results from a mere error of judgment or omission of duty without the element of fraud, or where the alleged negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state.” (quoting *State v. Hastings*, 55 N.W. 774, 774 (Neb. 1893))).

316. See, e.g., *Phillips v. State*, 181 P. 713, 714 (Okla. 1919) (“Betting on the result of an election is wrong, and is to be condemned. We believe, from the record in the instant case, that the act of the sheriff in betting on an election, and his failure to arrest the one against whom he bet, was a thoughtless act, and that there is total lack of evidence showing beyond a reasonable doubt that in so doing he was guilty of ‘willful neglect of official duty.’”); *Donahue*, 135 N.W. at 1035 (“It may be that the chief of police and every member of the police force was mistaken in supposing that they ought to be controlled by [the mayor and police commission’s] policy of enforcing the law, but we cannot believe that they were guilty of a willful refusal to do their duty because of this mistaken notion that they should be governed by the policy of their superiors.”).

317. *Vandergriff v. State ex rel. Davis*, 206 S.W.2d 395, 395, 397 (Tenn. 1937).

318. See, e.g., *State ex rel. Timothy v. Howse*, 183 S.W. 510, 516 (Tenn. 1916); see also *Price*, *supra* note 28, at 749 (“[E]ven in areas like criminal law, where substantial nonenforcement of statutes is inevitable, executive officials should understand their task as a matter of priority setting within the parameters of statutory policy, not one of crafting policy-based exceptions to statutory coverage.”).

The attempted justification . . . on the ground that the local public sentiment was opposed to law enforcement is no sort of justification An official is elected and sworn to enforce the law, not public sentiment; and any suggestion that a municipality, a creature of the state, or its officers may set at naught or defy the laws of a sovereign state cannot be too severely rebuked. That way leads to anarchy. The officer who treads it brands himself as unworthy.³¹⁹

The concern was not that the sheriff misunderstood their community's desires but a firm conviction that the sheriff's duties ran to the state and the public as a whole, not merely to local constituents.³²⁰ And, as a practical matter, courts must have recognized that permitting nonenforcement based on community preferences would effectively gut courts' abilities to constrain nonenforcement.

The case law discussed above should dispel the notion, reinvigorated by the constitutional sheriffs, that a sheriff has discretion to nullify criminalization decisions of the state legislature. Failure to adequately investigate allegations of illegality and failure to take enforcement actions were removable offenses, regardless of policy disagreements with the law.³²¹ Likewise for ignoring court orders.³²²

The history of sheriffs in the United States indicates courts were willing to review the sheriff's decisions in specific cases and to impose on the sheriff a duty to make arrests and to investigate allegations of criminal activity. Policy or political opposition to criminal statutes was particularly disfavored, and nonenforcement on those grounds a removable offense. In short, at least as a historical matter, the sheriff's opinion is not the highest law in their county.

One reasonably might ask whether this law, some of it from over a century ago, applies today. The answer is complicated: On the one hand, these cases have not been overruled. The fundamental structure of the office of the sheriff, its statutory powers, and its obligations have not evolved much. In fact, one can find

319. *Howse*, 183 S.W. at 516; accord *State ex rel. Jackson v. Wilcox*, 97 P. 372, 372 (Kan. 1908) (upholding removal of mayor although "[t]he mayor appears to have proceeded on the theory that he was justified in following this course so long as the wide open policy was in vogue in the county").

320. See, e.g., *Frederick v. Combs*, 354 S.W.2d 506, 508 (Ky. 1962) ("The people of the whole state have an interest in the peace and good order of every individual community within it. . . . In fact, it is hardly possible for vice and corruption to flourish very long without the indulgence of the local community, and a remedy resting exclusively with the legislative body of that community could not be adequate protection to the rights of the public as a whole.").

321. Basic principles of judicial supremacy also undermine any suggestion that sheriffs can decline to enforce laws based on their own theory of constitutionality. Presidents and chief executives in the states have a duty to "take care" and see that laws are "faithfully" executed. U.S. CONST. art. II, § 3; see *Manners & Menand*, *supra* note 278, at 28. Sheriffs, however, have no such authority to intrude on the role of the courts. See *In re Fortney*, 478 P.3d 1061, 1068 (Wash. 2021) ("Fortney does not have the authority as Snohomish County sheriff to determine the constitutionality of laws. That is the role of the courts.").

322. This would apply to red flag laws, which some sheriffs rail against. See *supra* note 90 and accompanying text.

aspects of these legal controls—the duty to enforce the law and observe judicial mandates—in modern decisions.³²³

On the other hand, there is no question that the tenor of modern discussions around enforcement discretion has shifted.³²⁴ References to discretion, not duty, fill volumes. Why this shift? This Article does not offer a definitive answer, but one can speculate: the massive expansion in criminal codes;³²⁵ the rise of criminal procedure as the primary avenue of governing law enforcement discretion;³²⁶ the acceptance of plea bargaining and the judiciary's reluctance to police the practice.³²⁷ Perhaps the shift to discretion is due to some combination of these changes.

Given this evolution, the question becomes: What are the objections to or negative implications of reviving the sheriff's duties to investigate and enforce? Part IV turns to these questions.

IV. OBJECTIONS & IMPLICATIONS

Sixty years ago, Kenneth Culp Davis, studying police enforcement in Chicago, revealed a troubling state of affairs: Police would pay lip service to the notion that they were required to enforce the criminal laws as written, but, in reality, they engaged in selective enforcement based on principles and values entirely of their own design.³²⁸ Davis suggested that police eschew the outward notion that they were bound to enforce the laws and that society should develop clear rules to constrain police discretion.³²⁹

The state of affairs today is, in some ways, worse than what Davis observed. The first half of Davis's wishes have been realized. Today, police discretion is common parlance, both in the legal academy and among law enforcement.³³⁰ The constitutional sheriffs, for example, pay no lip service to the notion of mandatory enforcement; they cloak themselves in discretion.³³¹ We should be grateful that police are transparent in their embrace of discretion. After all, as Davis said, “[p]olice] work for the public. In a democratic system, the members of the public—the electorate—are their bosses. And the bosses have a right to know what is going

323. See, e.g., *Fortney*, 478 P.3d at 1066–67 (“Though Sheriff Fortney is entitled to a great deal of discretion in his enforcement decisions, he is still subject to recall if he uses his discretion in a ‘manifestly unreasonable manner.’ If Fortney leveraged his discretionary power to refuse to enforce the governor’s proclamation with the objective of inciting noncompliance in the midst of a pandemic, the voters may determine that this was a manifestly unreasonable use of discretion. (citation omitted)); *Sarasino v. State*, 215 So.3d 923, 930 (La. Ct. App. 2017) (noting that sheriffs retain some discretion in the timing and manner of executing arrest warrants but not questioning they are obligated to serve them).

324. See *supra* notes 25–29 and accompanying text.

325. See Brown, *supra* note 159, at 884; Luna, *supra* note 159, at 522, 527.

326. See generally William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

327. See Ortman, *supra* note 249, at 1440, 1496–97.

328. See DAVIS, *supra* note 257, at III.

329. See *id.* at IV–V.

330. See, e.g., McFarland, *supra* note 25. See generally, e.g., DAVIS, *supra* note 257.

331. See McFarland, *supra* note 25.

on.”³³² Today there is improved transparency, but the meaningful constraints on discretion that Davis hoped for remain elusive.³³³

The result is a system of law enforcement that is increasingly forthright about selectively enforcing certain laws while ignoring others based on policy choices about the relative importance of various laws. These enforcement preferences inevitably come to reflect the sheriff’s politics—with some sheriffs ignoring gun restrictions and others ignoring drug or abortion laws.³³⁴ The risks of this approach are significant, particularly for those under the sheriff’s jurisdiction who lack meaningful political clout.³³⁵

Rather than having courts rubber-stamp police enforcement decisions and cede nonenforcement discretion to the world of politics, historical practice suggests a different path is possible. As detailed in Part III, state courts often evaluated nonenforcement decisions under a neglect-of-duty framework. Reviving the possibility of judicial review of nonenforcement could help avoid the lawlessness that appears to characterize modern nonenforcement.

Having already discussed the potential benefits of reviving this approach, this Part examines several possible objections. Section IV.A explores what this Article calls the “myth of full enforcement”—the false dichotomy between full enforcement of the criminal laws (which is impractical) and unfettered enforcement discretion. Section IV.B challenges the view that courts cannot review nonenforcement decisions in particular cases. Section IV.C examines strategies for mitigating the harms that might result from limiting nonenforcement discretion. Section IV.D explains why legal constraints and judicial review need not result in crippling monetary liability. Finally, Section IV.E argues that this Article’s suggestion to restore limits on nonenforcement reinforces legislative supremacy over the criminal law.

A. THE MYTH OF FULL ENFORCEMENT

Although the neglect-of-duty case law discussed in Part III has not been explicitly overruled, it has fallen out of favor. A key argument in favor of expansive nonenforcement discretion is that the alternative is a regime of “full enforcement” of the criminal laws.³³⁶ Full enforcement, in turn, is thoroughly dismissed as a “false pretense,”³³⁷ unrealistic,³³⁸ “thoroughly impractical,”³³⁹ a myth,³⁴⁰

332. DAVIS, *supra* note 257, at 71–72.

333. See *supra* notes 228–29 (collecting scholarly suggestions on constraining police discretion).

334. See *supra* notes 88–92, 97–98, and accompanying text.

335. See *supra* Section I.C.

336. See Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 141, 148 (1963).

337. DAVIS, *supra* note 257, at 52–54.

338. Goldstein, *supra* note 228, at 560–62.

339. Luna, *supra* note 159, at 604.

340. Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915 (1962); Williams, *supra* note 186, at 128.

intolerable,³⁴¹ and extreme.³⁴² The Connecticut Supreme Court, for example, construed a statute containing mandatory enforcement language as preserving police discretion because to construe the statute as meaning what it says would be “unworkable on many levels and would lead to absurd results.”³⁴³

But “full enforcement” has always been a straw man. As a practical matter, no one believes law enforcement can enforce every criminal law to the fullest.³⁴⁴ That would be impossible in today’s era of expansive and overlapping criminal codes.³⁴⁵ And it would have been impossible in earlier eras as well, with alcohol bans, gambling bans, and bans on playing baseball on Sundays all to be enforced before the development of massive modern policing agencies. But the impracticability of full enforcement does not imply that officers must have unfettered discretion to decline to enforce the law.³⁴⁶

The neglect-of-duty case law discussed in Part III demonstrates a commitment, not to full enforcement in the abstract but to reasoned decisionmaking in particular cases. Courts assessing whether nonenforcement amounted to neglect of duty did so not based on generalized allegations of underenforcement but instead on specific examples and evidence.³⁴⁷ The Louisiana Supreme Court, for example, saw evidence of widespread gambling as relevant but nonetheless asked what the sheriff did in response.³⁴⁸ Discretion has a role to play: Absent a court order, sheriffs must make judgments about the existence of probable cause.³⁴⁹ Ambiguous laws require interpretation.³⁵⁰ Witnesses must be credible.³⁵¹ Conduct must meet *mens rea* requirements.³⁵² Undercover officers are permitted to protect their identity.³⁵³ But these reasons can be presented and tested in court. What was beyond

341. See WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION* § 13.2(d), at 454 (2d ed. 2009) (explaining how enforcing ambiguous plea agreements fully and literally can lead to unfair results for defendants).

342. Markowitz, *supra* note 28, at 515.

343. *Diaz v. Comm’r of Corr.*, 279 A.3d 147, 160–61 (Conn. 2022).

344. See, e.g., Luna, *supra* note 159, at 562.

345. *Id.* (“[T]he current state of criminal law enactment and adjudication makes full enforcement prohibitive and police discretion inevitable; legislatures overcriminalize and courts defer, more or less.”).

346. See Allen, *supra* note 229, at 75 (“[E]ven if the police are unable to enforce ‘all the criminal laws,’ that alone does not necessarily justify the deliberate nonenforcement of any particular statute . . .”).

347. See *supra* notes 313–16 and accompanying text.

348. See *State ex rel. Riddle v. Jeansonne*, 18 So. 2d 306, 307–08 (La. 1944).

349. See, e.g., CAL. PENAL CODE § 836(a).

350. See Delahunty & Yoo, *supra* note 28, at 799 n.104 (“Enforcement also implies interpretation. In order to carry out the laws, an Executive must determine their meaning. Sometimes those laws will be clear, as when the Constitution sets the minimum age for a President, but more often than not, the laws are ambiguous or delegate decision making to the Executive.”).

351. See *Mustafa v. City of Chicago*, 442 F.3d 544, 548 (7th Cir. 2006); *United States v. Wyche*, 307 F. Supp. 2d 453, 463 (E.D.N.Y. 2004); *Wilson v. Russo*, 212 F.3d 781, 794 (3d Cir. 2000).

352. See *District of Columbia v. Wesby*, 583 U.S. 48, 59 (2018); *Dollard v. Whisenand*, 946 F.3d 342, 362 (7th Cir. 2019); *Williams v. City of Alexander*, 772 F.3d 1307, 1312 (8th Cir. 2014).

353. See *Diaz v. Comm’r of Corr.*, 279 A.3d 147, 160–61 (Conn. 2022).

the pale was nonenforcement based on policy preferences or local indulgence.³⁵⁴ As the Tennessee Supreme Court explained, “[t]hat way leads to anarchy.”³⁵⁵

Clinging to the false dichotomy between discretion and full enforcement makes it impossible for state courts to ensure a sheriff’s faithful execution of their duties. Rubber-stamping police enforcement decisions makes it impossible to judge whether law enforcement exercised its discretion appropriately.³⁵⁶ By contrast, the case law discussed in Part III charted a middle course between full enforcement and unfettered discretion, attempting to control unnecessary or inappropriate discretion under the neglect-of-duty framework, much like the calls from Kenneth Culp Davis and others decades later.³⁵⁷

Rather than a precursor to full enforcement or a wholesale rejection of discretion, a sheriff’s duties to investigate and enforce were seen as a necessary back-stop.³⁵⁸ Without these duties, a sheriff’s inaction would go unchallenged. Naked policy choices would be unreviewable. The real choice, therefore, is not between full enforcement and discretion but between unfettered discretion and reviewable discretion. Neglect-of-duty case law supplies a framework to implement the latter.

B. THE UNASSAILABILITY OF CASE-BY-CASE DISCRETION

Reviving judicial review of sheriff nonenforcement under a neglect-of-duty framework will encounter a second challenge from modern conceptions of enforcement discretion—that so long as law enforcement exercises its discretion on a case-by-case (not categorical) basis, those choices are unreviewable.³⁵⁹

At present, much of today’s discussion of enforcement discretion focuses on “categorical” nonenforcement policies—that a particular type of crime will not be enforced.³⁶⁰ Sparked by Obama-era immigration policies and a raft of declination policies from reform prosecutors, scholars have explored the propriety of categorical nonenforcement in great detail.³⁶¹ Some claim that categorical nonenforcement is

354. See *supra* notes 318–20 and accompanying text.

355. *State ex rel. Timothy v. Howse*, 183 S.W. 510, 516 (Tenn. 1916).

356. Cf. Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 193 (“[The] notion that police are ministerial officers—an idea that police have sometimes encouraged—still pervades much of the public discourse about law enforcement in ways detrimental to the reasonable restraint of arbitrary and capricious police behavior.”).

357. See DAVIS, *supra* note 257, at 112–20 (discussing fourteen reasons in favor of police rulemaking to govern police-enforcement discretion); Kadish, *supra* note 340, at 915 (“Certainly the challenge of making accountable the policeman’s exercise of power not to arrest is formidable. Neither the perpetuation of the myth of full enforcement nor of the myth of the benignity and inevitability of unfettered discretion will move us towards an acceptable accommodation.”).

358. See *supra* Section III.C.1, 4.

359. See sources cited *supra* note 28; see also *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (“The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.”); *Moses v. Kennedy*, 219 F. Supp. 762, 764–65 (D.D.C. 1963) (holding that “the inherent limitations upon the judicial power” prevented the court from granting mandamus ordering a criminal prosecution).

360. Although this Article contrasts only categorical and case-by-case nonenforcement, there are in fact a variety of ways that law enforcement can deploy its enforcement discretion. See Price, *supra* note 29, at 666–68 (offering a typology of enforcement discretion).

361. See, e.g., Price, *supra* note 28, at 673–75, 677–78.

impermissible because it violates the executive's constitutional obligations and is more akin to the legislative function.³⁶² Others defend the practice, at least under certain conditions.³⁶³

Both sides of this debate share the view, however, that case-by-case discretion is different. All recognize the executive's prerogative in particular cases.³⁶⁴ While this debate is of somewhat modern vintage, the distinction between categorical and case-by-case discretion has constitutional roots.³⁶⁵ Administrative law makes a similar distinction, operating with a "presumption of unreviewability" for particular instances of inaction,³⁶⁶ leaving the door open for review if the agency "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."³⁶⁷

The hesitancy to get involved in reviewing case-by-case discretion rests on notions of executive prerogative and judicial manageability. Under the former, certain matters are committed to the discretion of the executive as a matter of separation of powers.³⁶⁸ Under the latter, judicial intervention is inappropriate because courts lack the institutional capacity to decide questions according to neutral criteria.³⁶⁹ In such cases, the argument goes, executive action is better left to political checks.³⁷⁰

The neglect-of-duty law discussed above, however, suggests that neither of these concerns is insurmountable. First, as a historical matter, nonenforcement never was committed to the sheriff's sole prerogative.³⁷¹ Sheriffs were beholden to judicial orders to enforce.³⁷² Courts removed sheriffs who failed to investigate allegations of criminal activity or who failed to take enforcement actions when

362. See, e.g., *id.* at 674–75.

For a discussion of English monarchs' power to suspend and dispense with application of statutes, and the Founders' desire not to vest the federal executive with that power, see, for example, *id.* at 675; Bellia, *supra* note 28, at 1774–75; Delahunty & Yoo, *supra* note 28, at 784–85, 796–98.

In fact, state legislatures attempting to reign in local prosecutors cite categorical nonenforcement as a basis for removal or discipline. See TENN. CODE ANN. § 67-5-2406(b).

363. See, e.g., Markovic, *supra* note 28, at 1525–26, 1542–43; Murray, *supra* note 12, at 200, 255; Sawyer, *supra* note 28, at 603, 608–10; Wright, *supra* note 28, at 828, 857.

364. See, e.g., Price, *supra* note 28, at 675 (proposing two default presumptions to "structure the law of federal enforcement discretion": "first, that [executive officials] hold discretion to decline enforcement in particular cases, but second, that they lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions").

365. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 7 (1964) ("Although the area of police and prosecutorial discretion not to invoke the criminal process is demonstrably broad, it is common ground that these officials have no general dispensing power.").

366. *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

367. *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159 (1973)).

368. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1662, 1689, 1697–702 (2004) (advocating a narrow view of matters committed to agency discretion by law).

369. As the Supreme Court explained in *Heckler*, judicial review of agency inaction is difficult because it often turns on "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." 470 U.S. at 831.

370. See Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1619–20 (2016).

371. See *supra* Section III.C.

372. See *supra* Section III.C.2.

confronted with criminal behavior.³⁷³ Some strategic choices were reserved for sheriffs—if, how, and when to patrol, for example³⁷⁴—but enforcement discretion was not beyond judicial review.

Second, the neglect-of-duty law discussed above undermines the notion that courts cannot develop manageable standards to adjudicate nonenforcement disputes. At bottom, the assumption that courts cannot do so rests on the assumption that courts are ill-suited to make judgments about which regulatory targets are most deserving.³⁷⁵ While there is some truth to this, it is a mistake to assume that the mine run of cases turn on such judgments. There will be instances for which the sheriff has no explanation for nonenforcement or only an impermissible one. For example, high courts across the country confronted sheriffs who justified their inactivity based on a lack of warrants and uniformly rejected the notion that a sheriff was a “mere process server”³⁷⁶ who could otherwise “shut his eyes, or close his ears, to what he might see and hear.”³⁷⁷ These are the cases for which legal limits on nonenforcement are critical and workable.

Some justifications will be more difficult for courts to assess on the merits. Allocating resources among competing public safety priorities is one example. But, even in those instances in which the judiciary ought to defer to the sheriff, there is much to be gained through judicial review. One can stipulate that there will be instances of nonenforcement that turn on judgments better suited for the sheriff than a court, but even in such cases, judicial review should require law enforcement to commit its reasoning to the public record to allow courts to evaluate the genuineness of the claim and to further public debate on the matter.³⁷⁸ The analogy in administrative law is judicial review to ensure “reasoned decisionmaking” based “on a consideration of the relevant factors.”³⁷⁹

373. See *supra* Section III.C.1, 4.

374. See *supra* notes 309–11 and accompanying text.

375. See Price, *supra* note 370, at 1601 (discussing resource constraints and explaining that “[n]onenforcement, in other words, is judicially unmanageable because it is practically inevitable”).

376. *State ex rel. Thompson v. Reichman*, 188 S.W. 225, 228 (Tenn. 1916).

377. *Barbee v. Murphy*, 141 S.E. 237, 240 (Va. 1928).

378. See Bressman, *supra* note 368, at 1697 (“If an agency bases a nonenforcement decision on legitimate reasons of resource allocation and priority setting, then it is entitled to demand judicial respect. I maintain, however, that the agency is not entitled to evade judicial review. At a minimum, it must *demonstrate* to a court that it has rational, public-minded reasons for a particular nonenforcement decision. It also should demonstrate to a court that it has promulgated and followed rational, public-minded standards governing all enforcement decisions.”); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. REV. 1609, 1636 (2012) (discussing the value of requiring police to seek a warrant before a judge even if the judge is likely to defer to their judgments); cf. Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 93–94 (2015) (“Specifically, as a result of increasing the salience of nonenforcement decisions and by serving as a means of committing the agency to a policy of nonenforcement, categorical nonenforcement, under certain circumstances, may increase the accountability, deliberation, and nonarbitrariness of an agency’s inevitable nonenforcement of the law.”).

379. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (first quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); and then quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)); *id.* at 750–51 (finding the EPA’s decision to improve public health and protect the environment by reducing power plants’ emissions to be unlawful because “[t]he

In short, judicial review of the sheriff's choices on a case-by-case basis is not as unmanageable as assumed in modern canon.

Of course, permitting review of nonenforcement decisions takes a particular view of the tradeoffs involved. Leaving nonenforcement decisions beyond the reach of the judiciary likely would make the sheriff's operations more efficient. Oversight has costs—courts will be called upon to adjudicate cases; there is a risk of political misuse of the system. These costs will need to be calibrated through standing and evidentiary requirements. Admittedly, the neglect-of-duty law discussed above is not a fully-formed doctrine. But these are surmountable problems of law and procedure. In contrast, leaving enforcement discretion to pure politics ensures those without power will have no recourse.

C. MITIGATING THE HARMS OF ENFORCEMENT

Another hesitation with limiting nonenforcement discretion might stem from the harms that result from additional enforcement. These concerns are critically important, but they too can be addressed.

It is difficult to predict empirically whether the regime described in this Article would result in additional incarceration. On the one hand, any limit on nonenforcement discretion would seem to lend itself to an increase in the number of arrests. On the other hand, sheriffs already have financial incentives to keep their jails full, and rural incarceration is spiking under our current regime of nonenforcement discretion.³⁸⁰ Rather than decrease overall incarceration, nonenforcement discretion may simply make it easier for sheriffs to direct resources against politically popular targets.³⁸¹

Still, given the enormous human costs of arrests,³⁸² it is essential to pair any limits on nonenforcement with specific reforms to mitigate those harms.

First, rather than seeing the sheriff's duty as a command to eliminate discretion throughout the criminal system, it is more appropriate to view limits on a sheriff's enforcement discretion as an imperative to reinvigorate other avenues for nonenforcement discretion.³⁸³ For example, as discussed in more detail in Section IV.E,

Agency gave cost no thought *at all*, because it considered cost irrelevant to its initial decision to regulate”).

380. See *supra* Section I.A.

381. See *supra* Section I.C.

382. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 19–38 (2018) (exploring the wide-ranging impact of misdemeanor enforcement); Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 241 (2018) (“Each day in jail is a missed day of work and time with family, and each day increases the likelihood of losing employment and housing.”); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715–16 (2017) (identifying consequences of pretrial detention for misdemeanor offenses); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1303–23 (2012).

383. One might also consider reviving another historical site of nullification authority that we have abandoned: the jury. See Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 67 (2021) (“This vision of the jury is one that is more tolerant of jury nullification than our judicial

legislatures should codify scenarios in which nonenforcement is acceptable or preferred,³⁸⁴ as well as the circumstances in which citation is required in lieu of arrest.³⁸⁵ In fact, because sheriff investigation and enforcement would otherwise be mandatory, legislatures should be more motivated to create these alternative avenues than they are today.³⁸⁶

Second, it is important to pair limits on nonenforcement with reforms that substantially reduce the use of pretrial detention. Today, pretrial detention is the norm, particularly for those who are financially unable to pay for their freedom.³⁸⁷ As a result, jails, often run by the county sheriff,³⁸⁸ are about two-thirds full of pretrial detainees.³⁸⁹ These people are presumed innocent, and yet, because of the burdens of detention (independent of actual guilt or innocence), many are forced to plead guilty.³⁹⁰ To ease these harms, jurisdictions might implement a number of changes, such as providing appointed counsel at pretrial release hearings,³⁹¹ accounting for a person's ability to pay when imposing bail,³⁹² and imposing "the

system is today."'). Jury nullification has a substantial historical pedigree. *See* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1415–18 (2017) (discussing the centrality of the jury in early America, including the jury's ability "to both create and control the content of the colony's substantive law"); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–61 (2003) (explaining how the jury's power to nullify served "as a potent check on the legislature"). But even under a system that permits greater jury nullification, it is likely to serve a modest few. Jury trials are vanishingly few, and they cannot mitigate the harms of the initial arrest. *See Jury Trials Still on the Decline, Other Trends Identified in National Jury Improvement Survey*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/at-the-center/2024/jury-trials-still-on-the-decline.-other-trends-identified-in-national-jury-improvement-survey> [<https://perma.cc/8SRP-ZJDH>] (last visited Mar. 28, 2025).

384. *See* Price, *supra* note 28, at 674–75 (discussing the defeasibility of presidential nonenforcement authority).

385. *See* Littman, *supra* note 53, at 906–07 (describing state "cite and release" policies).

386. *See* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 828–31 (2016) (arguing that more adversarial prosecutors may reduce legislative incentives to draft overly broad and overly harsh statutes); *cf.* Goldstein, *supra* note 228, at 573 ("Full enforcement will place the legislature in a position to evaluate its . . . laws by providing a basis for answering such questions as: . . . [W]ill full enforcement reduce . . . the frequency of connected crimes?" (emphasis omitted)).

387. *See* Sawyer & Wagner, *supra* note 224.

388. Littman, *supra* note 53, at 870 & n.28, 876 & n.55.

389. *Id.*

390. *See* Wiseman, *supra* note 382, at 250 ("A group of studies published in the past five years shows a compelling empirical connection between bail and convictions and bail and guilty pleas, specifically."); *see also* SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 84 (2018).

391. *See* Andrew Davies & Alyssa Clark, Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places, 71 ME. L. REV. 245, 247–48, 263 (2019) (finding that criminal defendants in rural Texas were significantly less likely to receive appointed counsel in misdemeanor cases than in urban Texas).

392. *See* Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 756 (2020); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1472–73, 1475–76 (2017); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 434 (2016); *see also* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507–08 (2018).

least restrictive conditions of release.”³⁹³ The details of these reforms will depend on the particularities of the jurisdiction, which injects an important element of local democracy.

Finally, reining in the sheriff's nonenforcement discretion should not be seen as a command to eliminate other potential sites of leniency, such as via the prosecutor. At first, this might seem an odd distinction. Both the sheriff and the prosecutor are law enforcement officials answerable to their county electorate.³⁹⁴ And unchecked prosecutorial discretion raises serious concerns, as many scholars have noted.³⁹⁵ But the sheriff and the prosecutor diverge in important ways that suggest prosecutors ought to retain greater nonenforcement discretion. First, as a historical matter, while courts were establishing a sheriff's duty to enforce the laws,³⁹⁶ the prosecutor wielded the power to *nol pros*—to decline to prosecute a case.³⁹⁷ Second, many states view their prosecutors as quasi-judicial officers,³⁹⁸ which arguably gives them more authority to recognize leniency-argument defenses or otherwise decline a case. Third, prosecutors may be a better site of nonenforcement discretion because unlike a sheriff's decision not to arrest, a prosecutor's decision to decline a case is not invisible (there will be an arrest record and paperwork dismissing the charges).³⁹⁹ Fourth, unlike sheriffs, prosecutors can exercise their discretion in more nuanced ways. The sheriff's enforcement decision essentially is binary—arrest or not. But prosecutors can vary the charges brought, offer a plea, seek a non-carceral sentence, and engage in a host of other options short of complete nonenforcement.⁴⁰⁰

393. Jordan Gross, *Pretrial Justice in Out-of-the-Way Places – Including Rural Communities in the Bail Reform Conversation*, 84 MONT. L. REV. 159, 193 (2023) (considering pretrial reforms as applied to rural communities).

394. See, e.g., *State v. Annala*, 484 N.W.2d 138, 146 (Wis. 1992) (“On numerous occasions, we have explained that in general the district attorney is answerable to the people of the state and not to the courts or the legislature as to the manner in which he or she exercises prosecutorial discretion.”). But see Cassandra Bryne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 45 (2023) (explaining the shortcomings of elections at producing accountability for prosecutors); *supra* Section II.A.

395. Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 UC DAVIS L. REV. 2133, 2140 (2022); STUNTZ, *supra* note 147; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981). Though, to be fair, these concerns focus on instances when prosecutors *enforce* (or over-enforce). See Wright et al., *supra*; STUNTZ, *supra* note 147. Nonenforcement discretion, by contrast, has its supporters. See *supra* note 18.

396. See *supra* Section III.C.1.

397. See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, SETON HALL CIR. REV. 1, 19 (2009).

398. See Hessick & Su, *supra* note 235, at 1687; Brown, *supra* note 226, at 1242–43.

399. See Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 63 (2000); Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1546 (2018).

400. See sources cited *supra* note 114 and accompanying text.

D. MODERATING LIABILITY CONCERNS

Another practical concern should be brought to the fore—that recognizing a sheriff’s duties to investigate and arrest, enforceable by the judiciary, might bring about financial exposure for the state.⁴⁰¹ Jurisdictions have paid billions in judgments resulting from police-misconduct lawsuits.⁴⁰² Although the impact of expanding liability for nonenforcement is debatable,⁴⁰³ the prospect is likely to give courts pause. Similar liability concerns have driven the expansion of qualified immunity, for example.⁴⁰⁴ In another context, to avoid liability, the Supreme Court in *Town of Castle Rock v. Gonzales* converted a statute that made police enforcement of restraining orders mandatory into a discretionary statute.⁴⁰⁵ Other courts have followed suit, emphasizing the discretionary nature of arrest decisions in order to immunize police failures to enforce.⁴⁰⁶

However, the notion that liability must accompany accountability for nonenforcement is a fallacy. Even assuming one shares concerns about financially exposing the state, it does not follow that nonenforcement must be beyond the judiciary’s reach. The Missouri Supreme Court, for example, rejected a civil cause of action arising from a sheriff’s failure to enforce the gambling statute while still accepting that courts could review the sheriff’s failure and have it serve as the basis for removal.⁴⁰⁷

401. Sheriffs, like law enforcement officers generally, typically are indemnified by the county. *See, e.g.*, 55 ILL. COMP. STAT. ANN. 5/5-1002; NEB. REV. STAT. ANN. § 23-1720. *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

402. *Settlements*, NAT’L POLICE FUNDING DATABASE (July 17, 2023), <https://policefundingdatabase.org/explore-the-database/settlements> (<https://perma.cc/QJ3P-KAE3>) (identifying “217 publicly reported settlements that resulted in policy changes and over \$2,340,780,094.00 in monetary compensation”).

403. For a debate in the context of constitutional torts, compare Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 975 (2019) (noting concerns that eliminating immunity could result in “frivolous and distracting litigation” and impose “unanticipated financial drains on the public fisc”), and John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 248 (2013) (“[Without qualified immunity], every extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious.”), with Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316 (2020) (predicting even without qualified immunity, “settlements and judgments would continue to have a limited impact on officers’ and municipalities’ dollars and decisionmaking”).

404. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 223 (1988) (“Special problems arise[] . . . when government officials are exposed to liability for damages. . . . [T]he threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties.”).

405. 545 U.S. 748, 764–66, 768–69 (2005).

406. *See, e.g.*, *Diaz v. Comm’r of Corr.*, 279 A.3d 147, 160–61 (Conn. 2022); *Everton v. Willard*, 468 So. 2d 936, 939 (Fla. 1985); *Hildenbrand v. Cox*, 369 N.W.2d 411, 416–17 (Iowa 1985) (noting that the state statutes regarding drunk driving and public drunkenness state that the officer “may” arrest, and thus finding no “duty” to arrest, and thus no basis for tort liability); *see also* Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 IND. L.J. 873, 894 & n.100 (1989) (arguing that criminal laws are “not specific commands” and “officers are to exercise their judgment in enforcing the criminal laws,” and citing case law relating to government liability to make the point).

407. *Parker v. Sherman*, 456 S.W.2d 577, 580–81 (Mo. 1970).

There already exists doctrine to accommodate this distinction among available remedies. Under well-established law, a sheriff's duty, when owed to the public and not to a particular individual, is insufficient to sustain a private action for damages but sufficient to warrant proceedings against a sheriff for neglect of duty.⁴⁰⁸ It is entirely plausible to understand the sheriff's duties to investigate and to enforce as duties owed to the public, thus providing a basis for judicial review but not monetary liability. Exceptional circumstances, such as when a police officer has a special duty to an individual, might give rise to liability in a particular case.⁴⁰⁹ And states can, of course, craft more specific rules that better suit their needs.⁴¹⁰ As a general matter, however, financial liability is not a necessary byproduct of limiting a sheriff's nonenforcement discretion.

E. RESTORING LEGISLATIVE SUPREMACY

Finally, one might reasonably ask what role a system of judicial review of non-enforcement leaves for the legislature. The answer is, a robust one.

At present, the status quo looks something like this: The legislature formally defines what is criminal, but enforcement practices give those laws shape.⁴¹¹ Legislatures know this. In fact, they depend on it, drafting broad laws that criminalize a range of relatively common everyday behavior and leaving it to police to sort out the result.⁴¹² Law enforcement is thus left with expansive authority to pick and choose which laws to enforce and which to disregard.

408. See, e.g., *Massengill v. Yuma County*, 456 P.2d 376, 379 (Ariz. 1969) (“[I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution.”), *overruled on other grounds by* *Ryan v. State*, 656 P.2d 597 (Ariz. 1982) (en banc); *South v. Maryland*, 59 U.S. 396, 401 (1855) (“Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.”); *People v. Md. Casualty Co.*, 132 F.2d 850, 852 (7th Cir.) (“[T]he law seems to be clear that if the duty discharged is a public duty and not a duty which the individuals owe to any particular person, then by their negligence or wanton or wilful omission in the performance of this public duty, the officers are not liable except to the State.”).

409. See, e.g., *Dauffenbach v. City of Wichita*, 667 P.2d 380, 385 (Kan. 1983) (“Police officers have immunity from liability on claims arising from performance or nonperformance of an officer's general duties to prevent crime and enforce the laws. Liability arises only where an officer breaches a specific or special duty owed an individual.”); *Hurd v. Flores*, 221 S.W.3d 14, 29 (Tenn. Ct. App. 2006) (“The Hurds have alleged nothing more than Deputy Flatt's refusal to enforce the applicable law, a duty which he owed to the public in general.”).

410. Compare, e.g., CAL. GOV'T CODE § 821 (“A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment.”), with *Annala v. McLeod*, 206 P.2d 811, 815 (Mont. 1949) (“It was not until 1947, being almost a year after the plaintiffs' claimed cause of action arose, that the legislature of the state of Montana finally passed a law as to the civil liability of a sheriff in instances such as are here alleged [neglect of sheriff duties].”).

411. See generally Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561 (2024).

412. See Luna, *supra* note 159, at 522.

A regime of judicial review that enforces the sheriff's duties to investigate and to enforce leaves substantial room for legislative action to refine the boundaries of permissible enforcement discretion.

First, legislatures should define circumstances in which sheriffs (and other law enforcement officials) retain nonenforcement discretion. Although courts began the task of defining the contours of the sheriff's enforcement obligations,⁴¹³ much remains unresolved, particularly given the modern expansion of our criminal codes.⁴¹⁴ For example, although the sheriff's historical duties are clear as to certain categories of offenses—felonies, offenses committed in the sheriff's presence, breaches of the peace, and so forth⁴¹⁵—it is largely an open question what sort of discretion should apply to misdemeanor, non-breaches-of-the-peace offenses committed outside of the sheriff's presence.⁴¹⁶ The legislature could cede enforcement discretion for certain offenses.⁴¹⁷ Or it could provide explicit alternatives to arrest, such as issuing a warning or a citation.⁴¹⁸

A legislature that prefers to leave nonenforcement decisions to local officials could do so while also taking steps to ensure greater transparency and accountability. Drawing inspiration from administrative law,⁴¹⁹ legislatures might create

413. See *supra* Section III.C.

414. See *supra* note 325 and accompanying text.

415. See *Prosser v. Parsons*, 141 S.E.2d 342, 345 (S.C. 1965) (“At common law sheriffs, constables, and other peace officers had the power and authority to arrest without warrant felons or persons reasonably suspected of having committed a felony and also those who had committed a misdemeanor in his presence which amounted to a breach of the peace.”).

416. See, e.g., *Commonwealth v. Copenhaver*, 229 A.3d 242, 259 (Pa. 2020) (Wecht, J., concurring & dissenting) (“*Leet* was incorrect when it was decided, and it should be overruled. . . . This Court’s fitful, episodic case-by-case common law approach to defining breach of the peace—an approach the General Assembly already had rejected when it abolished common law crimes—can never prove equal to the task of providing the necessary guidance. That is why we elect lawmakers.”).

417. For instance, in New Mexico, it is “the duty of every sheriff . . . to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware,” but the sheriff is required to file criminal charges only “if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken.” N.M. STAT. ANN. § 29-1-1.

Some of the mask mandates that were the subject of sheriff opposition in Washington state provided that the mandates “may” be criminally enforced, thus perhaps implying discretion. See, e.g., *In re Snaza*, 480 P.3d 404, 409 (Wash. 2021) (“While it is correct that Snaza has a duty to enforce the Order, he is not required to *criminally* enforce it. The plain language of the Order gives law enforcement officers discretion—it states that violators *may* be subject to criminal penalties. . . . Officers are under no mandatory duty, statutory or otherwise, to criminally enforce the Order. Therefore, Snaza had discretion. Such discretion is fundamental to his office.”).

418. See, e.g., 705 ILL. COMP. STAT. ANN. 405/5–301 (describing discretionary authority given to juvenile police officers to handle juvenile offenses through “station adjustments”—essentially, handling a juvenile offender based on an informal or formal agreement between the juvenile and officer).

419. See, e.g., Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1837 (2019) (calling for greater review of inaction and arguing that although “a judge cannot dive into a record, she or he can expect an agency to offer more than a perfunctory defense of its inaction and to back up its claims about priorities with an explanation that is ‘adequate’ to back up these claims”); Bressman, *supra* note 368, at 1661 (arguing “administrative nonenforcement decisions should be subject to the familiar requirement that agencies articulate reasons supporting their affirmative regulatory decisions” and that “administrative nonenforcement decisions should be subject to the important requirement that agencies promulgate and follow standards guiding their affirmative regulatory authority”).

a safe harbor that protects local law enforcement officials against charges of neglect-of-duty if they provide advance notice, explanation, and public input on their enforcement priorities. Such a system of internal policy-development controls would provide greater transparency and accountability while still preserving nonenforcement as an option.⁴²⁰

Finally, the legislature will have a critical role in defining the procedures by which a sheriff's duties are enforced. At common law, the writ of *quo warranto* allowed courts "to hear challenges to a person's right to hold public office and remove an unqualified individual from office."⁴²¹ Today, almost every state has codified its *quo warranto* procedures, and more than two-thirds of states allow private individuals to initiate *quo warranto* proceedings.⁴²² State statutes also provide for specific removal procedures.⁴²³ In developing these procedures, states should erect some barriers to filing suit against the sheriff in order to avoid unduly harassing sheriffs with litigation. Some sort of basic standing requirement might be sufficient. At the same time, making enforcement too difficult risks that the duty to enforce will be marginalized like other rights against selective enforcement or vindictive prosecution.⁴²⁴

CONCLUSION

Ceding unfettered nonenforcement discretion to the county sheriff (or any law enforcement official) comes with serious risks. Our experiences with the county sheriff make clear that the office will wield its authority in ways that favor its political supporters and pose grave risks to those with minority views, thus threatening basic principles of the rule of law. Today's constitutional sheriffs are only the latest manifestation of this certainty.

420. Cf. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1246 (2017) ("A legal regime that envisions external control as the only protection against administrative abuse is fundamentally at odds with the logic of contemporary administrative governance.").

421. LIZ HEMPOWICZ, DAVID JANOVSKY & NORMAN EISEN, PROJECT ON GOV'T OVERSIGHT, THE CONSTITUTION'S DISQUALIFICATION CLAUSE CAN BE ENFORCED TODAY 8 (2022), https://s3.amazonaws.com/docs.pogo.org/report/2022/14.3_Report_Constitutions-Disqualification-Clause-Can-be-Enforced%20today.pdf [<https://perma.cc/2X4D-ZZ53>].

422. *Quo Warranto Processes: States and Territories Survey*, PROJECT ON GOV'T OVERSIGHT (Jan. 26, 2023), <https://www.pogo.org/resources/quo-warranto-processes-states-and-territories-survey> [<https://perma.cc/KQ6S-ESBM>] (listing forty-five states with statutory *quo warranto* procedures and thirty-nine that permit private initiation).

423. See Timothy D. Lanzendorfer, Note, *When Local Elected Officials Behave Badly: An Analysis and Recommendation to Empower State Intervention*, 82 OHIO ST. L.J. 653, 659, 674–78 (2021) ("This Note argues that the age-old practice of impeachment (a legislative solution) and the comparatively modern practice of recall (an electoral solution) are not wholly adequate removal mechanisms for today. After examining the pros and cons of various methods, this Note recommends that states implement removal mechanisms for local officials that are initiated by state-level executives followed closely by expedited review by a judicial or quasi-judicial body.").

424. On the difficulties of establishing a selective enforcement claim, see *supra* note 226 and accompanying text.

Understanding this, state courts historically played a role in curbing the sheriff's discretion. Routinely called upon to determine when sheriffs' failures to enforce the law amounted to a neglect of their duties, courts across the country developed a jurisprudence regarding the permissibility of nonenforcement. These decisions offered a clear retort to sheriff nullification—effectuating legally enforceable duties to investigate and to enforce the criminal law while also preserving a degree of flexibility and leniency. And yet, this approach largely has fallen by the wayside, replaced with broad pronouncements of law enforcement discretion.

This Article seeks a revival, or at least a reconsideration, of these past conceptions of the bounds of enforcement discretion. Doing so calls for a reassessment of much of our modern canon—such as the false choice between full enforcement and unfettered discretion and the unassailability of case-by-case discretion. To be sure, this approach imposes costs. It also calls for a variety of legislative actions—from specifying circumstances in which a citation (not an arrest) is mandated to limiting pretrial detention and restoring discretion elsewhere in the criminal process. These are challenges. But the alternative is to allow conceptions of law enforcement discretion to run unchecked, risking a regime of arbitrary enforcement that converts criminal law enforcement into politics and likely imposes costs on the most vulnerable in our society.