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THE AMERICAN LAW INSTITUTE

Principles of the Law
Policing

Tentative Draft No. 2

(March 18, 2019)

SUBJECTS COVERED

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1600 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

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The American Law Institute

Principles of the Law, Policing
Tentative Draft No. 2

Comments and Suggestions Invited

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Reporter
Professor Barry Friedman
New York University School of Law
40 Washington Square South
Room 317
New York, NY 10012-1005
Email: barry.friedman@nyu.edu

Director
Professor Richard L. Revesz
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Deputy Director
Ms. Stephanie A. Middleton
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: smiddleton@ALI.org

Associate Reporters
Professor Brandon L. Garrett
Duke University School of Law
210 Science Drive
Durham, NC 27708-9985
Email: bgarrett@law.duke.edu

Professor Rachel A. Harmon
University of Virginia School of Law
580 Massie Road
Room WB379
Charlottesville, VA 22903-1738
Email: rharmon@virginia.edu

Professor Tracey L. Meares
Yale Law School
127 Wall Street
Room L35
New Haven, CT 06511-8918
Email: tracey.meares@yale.edu

Professor Christopher Slobogin
Vanderbilt University Law School
131 21st Ave South, Floor 1
Nashville, TN 37203-1181
Email: c.slobogin@law.vanderbilt.edu

Project Fellow
Professor Maria Ponomarenko
New York University School of Law
40 Washington Square South
Room 225
New York, NY 10012-1005
Email: maria.ponomarenko@nyu.edu

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The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

Principles of the Law, Policing

REPORTER

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

ASSOCIATE REPORTERS

BRANDON L. GARRETT, Duke University School of Law, Durham, NC
RACHEL A. HARMON, University of Virginia School of Law, Charlottesville, VA
TRACEY L. MEARES, Yale Law School, New Haven, CT
CHRISTOPHER SLOBOGIN, Vanderbilt University Law School, Nashville, TN

PROJECT FELLOW

MARIA PONOMARENKO, New York University School of Law, New York, NY

ADVISERS

ART ACEVEDO, Houston Police Department, Houston, TX
HASSAN ADEN, The Aden Group, Public Safety Consulting, Alexandria, VA
SCOTT BALES, Arizona Supreme Court, Phoenix, AZ
KEVIN BANKSTON, New America, Washington, DC
MICHAEL BOSWORTH, MacAndrews & Forbes, New York, NY
MICHAEL R. BROMWICH, The Bromwich Group, Washington, DC
BRIAN BUCHNER, National Association for Civilian Oversight of Law Enforcement, Tucson, AZ
GREGG COSTA, U.S. Court of Appeals, Fifth Circuit, Houston, TX
MARIANO-FLORENTINO CUÉLLAR, California Supreme Court, San Francisco, CA
MICHAEL A. DAVIS, Northeastern University, Boston, MA
BRANDON DEL POZO, Burlington Police Department, Burlington, VT
ADRIAN DIAZ, Seattle Police Department, Seattle, WA
JAMES M. DOYLE, Bassil Klovee & Budreau, Boston, MA
ZACHARY T. FARDON, U.S. Attorney's Office, Northern District of Illinois, Chicago, IL
ANDREW G. FERGUSON, University of the District of Columbia, David A. Clarke School of Law, Washington, DC
KENNETH C. FRAZIER, Merck & Co., Inc., Kenilworth, NJ
GEORGE GASCON, San Francisco District Attorney's Office, San Francisco, CA
MITCHELL S. GOLDBERG, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA
VANITA GUPTA, Leadership Conference for Civil and Human Rights, Washington, DC
ROBERT C. HAAS, Police Commissioner (retired), Cambridge Police, Dover, MA
WILLIAM C. HUBBARD, Nelson Mullins Riley & Scarborough, Columbia, SC
SHERRILYN IFILL, NAACP Legal Defense and Educational Fund, Inc., New York, NY
CRAIG ISCOE, Superior Court of the District of Columbia, Washington, DC
ADALBERTO J. JORDAN, U.S. Court of Appeals, Eleventh Circuit, Miami, FL
NOLA JOYCE, Philadelphia Police Department, Philadelphia, PA
ORIN S. KERR, University of Southern California, Gould School of Law, Los Angeles, CA
MIRIAM A. KRINSKY, Fair and Just Prosecution, Los Angeles, CA
CHRISTY LOPEZ, Georgetown Law Center, Washington, DC
CYNTHIA LUM, George Mason University, Fairfax, VA
JOHN G. MALCOLM, The Heritage Foundation, Washington, DC
ANNE M. MILGRAM, New York University School of Law, New York, NY
SYLVIA M. MOIR, Tempe Police Department, Tempe, AZ
ALEXANDRA NATAPOFF, University of California, Irvine School of Law, Los Angeles, CA
CLARK M. NEILY, CATO Institute, Washington, DC
BRITTANY PACKNETT, Campaign Zero, Florissant, MO
SAMANTHA PAILCA, Microsoft, Redmond, WA
SUE RAHR, Washington State Criminal Justice Training Commission, Seattle, WA
CHARLES H. RAMSEY, Police Commissioner (retired), Philadelphia Police Department, Philadelphia, PA
HENRY R. REEVE, Office of the District Attorney, Eighteenth Judicial District, Centennial, CO
NORMAN L. REIMER, National Association of Criminal Defense Lawyers, Washington, DC

GARY L. SASSO, Carlton Fields, Tampa, FL
S. ANDREW SCHAFFER, New York University School of Law, New York, NY
JOANNA C. SCHWARTZ, University of California, Los Angeles School of Law, Los Angeles, CA
DARPANA SHETH, Institute for Justice, Arlington, VA
STEPHEN WM. SMITH, Stanford Law School, Center for Internet and Society, Palo Alto, CA
SEAN SMOOT, Illinois Police Benevolent and Protective Association, Springfield, IL
CHRISTOPHER SOGHOIAN, American Civil Liberties Union, Washington, DC
DARREL STEPHENS, Major Cities Chiefs Police Association, Charlotte, NC
GEOFFREY R. STONE, University of Chicago Law School, Chicago, IL
SETH STOUGHTON, University of South Carolina School of Law, Columbia, SC
J. SCOTT THOMSON, Camden Police, Camden, NJ
NINA VINIK, The Joyce Foundation, Gun Violence Prevention Program, Chicago, IL
SAMUEL WALKER, University of Nebraska at Omaha, Omaha, NE
ROBERT WASSERMAN, Policy Partners, West Tisbury, MA
ANDREW WEISSMANN, U.S. Department of Justice, Washington, DC

LIAISONS

For International Association of Chiefs of Police
TERRENCE CUNNINGHAM, Alexandria, VA

For the Police Foundation
JIM BURCH, Washington, DC

MEMBERS CONSULTATIVE GROUP

Principles of the Law, Policing
(as of March 18, 2019)

RONALD J. ALLEN, Chicago, IL
JAMES M. ANDERSON, Pittsburgh, PA
JOSÉ F. ANDERSON, Baltimore, MD
DONALD B. AYER, Mc Lean, VA
MIRIAM H. BAER, Brooklyn, NY
NANNETTE A. BAKER, Saint Louis, MO
SUSAN A. BANDES, Chicago, IL
WILLIAM W. BARRETT, Greenwood, IN
DEBRA LYN BASSETT, Los Angeles, CA
RONALD G. BLUM, New York, NY
ANDREW S. BOUTROS, Chicago, IL
STEVEN M. BRADFORD, Muscatine, IA
DENNIS J. BRAITHWAITE, Camden, NJ
DAVID M. BRODSKY, New York, NY
JEAN-JACQUES CABOU, Phoenix, AZ
ELENA A. CAPPELLA, Philadelphia, PA
CATHERINE L. CARPENTER, Los Angeles, CA
W. TUCKER CARRINGTON, Oxford, MS
NICOLE B. CASAREZ, Houston, TX
JENNIFER CHACÓN, Los Angeles, CA
HENRY L. CHAMBERS JR., Richmond, VA
STEVEN L. CHANENSON, Villanova, PA
GABRIEL J. CHIN, Davis, CA
COLM F. CONNOLLY, Wilmington, DE
BEVERLY WINSLOW CUTLER, Palmer, AK
MICHAEL R. DREEBEN, Washington, DC
JOSHUA DRESSLER, Columbus, OH
KRISTI K. DUBOSE, Mobile, AL
RONALD EISENBERG, Philadelphia, PA
ILANA H. EISENSTEIN, Philadelphia, PA
J. WILLIAM ELWIN JR., Chicago, IL
ANNE S. EMANUEL, Atlanta, GA
ANTHONY C. EPSTEIN, Washington, DC
KATIE R. EYER, Camden, NJ
ROGER A. FAIRFAX JR., Washington, DC
MARY FAN, Seattle, WA
DANIEL M. FILLER, Philadelphia, PA
GERALD M. FINKEL, Charleston, SC
MATTHEW L.M. FLETCHER, East Lansing, MI
MARY ANNE FRANKS, Miami, FL
ERIC M. FREEDMAN, Hempstead, NY
PAUL L. FRIEDMAN, Washington, DC
DOROTHY J. GLANCY, Santa Clara, CA
CHRISTOPHER S. GONTARZ, Newport, RI
HERVÉ GOURAIGE, Newark, NJ
DAVID C. GRAY, Baltimore, MD
LINDA SHERYL GREENE, Madison, WI
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LISA KERN GRIFFIN, Durham, NC
JOHN J. GROGAN, Philadelphia, PA
AYA GRUBER, Boulder, CO
JOHN O. HALEY, Tucson, AZ
RONALD J. HEDGES, Hackensack, NJ
RONALD K. HENRY, Washington, DC
EDWIN E. HUDDLESON, Washington, DC
HERMAN N. JOHNSON JR., Huntsville, AL
RICHARD GIBBS JOHNSON, Cleveland, OH
JOSHUA KARSH, Chicago, IL
ORIN S. KERR, Los Angeles, CA
CECELIA M. KLINGELE, Madison, WI
JOSEPH P. KLOCK JR., Coral Gables, FL
MICHAEL J. KRAMER, Albion, IN
CHERYL A. KRAUSE, Philadelphia, PA
ERIN C. LAGESEN, Salem, OR
PETER F. LANGROCK, Middlebury, VT
WILLIAM J. LEAHY, Albany, NY
PETER E. LECKMAN, Philadelphia, PA
BILL LANN LEE, Berkeley, CA
CYNTHIA K. LEE, Washington, DC
ANDREW D. LEIPOLD, Champaign, IL
BENJAMIN LERNER, Philadelphia, PA
WAYNE A. LOGAN, Tallahassee, FL
MARGARET COLGATE LOVE, Washington, DC
ERIK LUNA, Phoenix, AZ
C. SCOTT MARAVILLA, Washington, DC
PAUL MARCUS, Williamsburg, VA
DAVID CHARLES MASON, Saint Louis, MO
MARY MASSARON, Bloomfield Hills, MI
ALFRED D. MATHEWSON, Albuquerque, NM
JAMES R. MAXEINER, Baltimore, MD
JASON MAZZONE, Champaign, IL
DAVID MCCORD, Des Moines, IA
JAMES C. MCKAY JR., Washington, DC
THEODORE A. MCKEE, Philadelphia, PA
JOSEPH MCLAUGHLIN, New York, NY
BENJAMIN C. MCMURRAY, Salt Lake City, UT
MARJORIE A. MEYERS, Houston, TX
NATASHA MINSKER, Sacramento, CA
S. DAVID MITCHELL, Columbia, MO

JENNIFER L. MNOOKIN, Los Angeles, CA
PAUL MOGIN, Washington, DC
PAUL W. MOLLICA, Chicago, IL
KIMBERLY J. MUELLER, Sacramento, CA
RICHARD L. NEUMEIER, Boston, MA
MICHAEL M. O'HEAR, Milwaukee, WI
JAN P. PATTERSON, Waco, TX
DAVID E. PATTON, New York, NY
BRIAN J. PAUL, Indianapolis, IN
MARY MARGARET PENROSE, Fort Worth, TX
LUCIAN T. PERA, Memphis, TN
KRISTINA PICKERING, Las Vegas, NV
W. MICHEL PIERSON, Baltimore, MD
ELLEN S. PODGOR, Gulfport, FL
EDWARD M. POSNER, Philadelphia, PA
GERALD S. REAMEY, San Antonio, TX
NOELLE M. REED, Houston, TX
JUDITH RESNIK, New Haven, CT
L. SONG RICHARDSON, Irvine, CA
ALICE RISTROPH, Brooklyn, NY
IRA P. ROBBINS, Bethesda, MD
JAMES L. ROBERTSON, Jackson, MS
JACK M. SABATINO, Trenton, NJ
JANET L. SANDERS, Boston, MA
LYNN HECHT SCHAFRAN, New York, NY
RICHARD HENRY SEAMON, Moscow, ID
MATTHEW R. SEGAL, Boston, MA
MORRIS SILBERMAN, Tampa, FL
KAMI CHAVIS SIMMONS, Winston Salem, NC
KENNETH W. SIMONS, Irvine, CA
WENONA T. SINGEL, Lansing, MI
DAVID ALAN SKLANSKY, Stanford, CA
VIRGINIA E. SLOAN, Washington, DC
JONATHAN M. SMITH, Washington, DC
DAVID A. SONENSHEIN, Philadelphia, PA
ARTHUR B. SPITZER, Washington, DC
JEFFREY W. STEMPEL, Las Vegas, NV
H. MARK STICHEL, Baltimore, MD
ELIZABETH S. STONG, Brooklyn, NY
DEAN A. STRANG, Madison, WI
GUY MILLER STRUVE, New York, NY
JEANNIE SUK GERSEN, Cambridge, MA
JOHN S. SUMMERS, Philadelphia, PA
MARY ELLEN TABOR, Des Moines, IA
JEROME T. TAO, Las Vegas, NV
MICHAEL VITIELLO, Sacramento, CA
BILL WAGNER, Tampa, FL
SARAH N. WELLING, Lexington, KY

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

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

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

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

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

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

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

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

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

§ 1.01 Rules of Statewide Application

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

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

Principles of the Law of Family Dissolution: Analysis and Recommendations

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

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

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

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

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

Principles of the Law of Family Dissolution: Analysis and Recommendations

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

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

PROJECT STATUS AT A GLANCE

Chapter 7. Use of Force (formerly Chapter 5)

§§ 7.01 to 7.06 (T.D. No. 1 and T.D. No. 1 Revised) (formerly §§ 5.01-5.06) – approved at 2017 Annual Meeting

History of Material in This Draft

This project was initiated in 2015.

Earlier versions of Chapter 1 can be found in Preliminary Draft Nos. 1 and 2 (2016), Council Draft No. 2 (2018), and the Appendix to Council Draft No. 3 (2018); two additional Sections of that Chapter, §§ 1.08 and 1.09, were drafted for Preliminary Draft No. 4 but have not yet been presented to Council for approval. Earlier versions of Chapter 4 (previously Chapter 3) can be found in Council Draft Nos. 2 and 3 (2018) and Preliminary Draft Nos. 1 and 3 (2016, 2018). Earlier versions of Chapter 10 can be found in Council Draft No. 3 (2018) and Preliminary Draft No. 1 (2016) (as Chapter 9). Earlier versions of Chapter 11 can be found in Council Draft Nos. 2 and 3 (2018) and Preliminary Draft Nos. 2 and 3 (2016, 2017).

Foreword

Principles of the Law, Policing, is coming to the Annual Meeting for the second time. The project was launched in 2015 under the leadership of Reporter Barry Friedman of New York University School of Law. Barry directs a very talented group of Associate Reporters: Brandon L. Garrett of Duke University School of Law, Rachel A. Harmon of the University of Virginia School of Law, Tracey L. Meares of Yale Law School, and Christopher Slobogin of Vanderbilt University Law School. Also, the project has benefited enormously from the excellent substantive work of its Fellow, Maria Ponomarenko of New York University School of Law.

At the Annual Meeting in 2017, the membership approved the portion of the project dealing with use of force. Even casual readers of major newspapers know how salient and controversial the issue of excessive police force has been in in recent years, particularly in metropolitan areas. In New York City, where I live, the issue captured the front pages in July 2014 with the tragic death of Eric Garner after a police officer put him in a chokehold while arresting him for the sale of single cigarettes from packs without tax stamps. Now, the Reporters are submitting four Chapters for approval: Chapter 1 on general principles, Chapter 4 on police encounters, Chapter 10 on eyewitness identifications, and Chapter 11 on police questioning.

As I wrote in one of my quarterly letters to the ALI membership, because we undertook a "Principles" project, rather than a Restatement, our goal is not to synthesize judicial precedent. Instead, the Reporters are working to develop best practices for issues concerning policing that have significant legal underpinnings. Our work is informed by a variety of sources, including existing policies and practices in various jurisdictions, social-science research, and constitutional norms. Finally, the audience for the project is quite broad, including legislatures, policing agencies, bodies that regulate or conduct oversight on policing, the public, and also, in some instances, the courts.

This project is distinctive in terms of the breadth of experiences of its Advisers. The group includes police chiefs and leaders of organizations that have expressed concern about policing practices, as well as judges, prosecutors, and defense attorneys.

As all close observers of the ALI's work know, it takes a village to produce an ALI project. I am therefore very grateful to the team of Reporters and to the very dedicated Advisers and

Members Consultative Group. At a time when our society appears unusually divided, observing individuals from very different walks of life approach very difficult issues civilly and constructively is a real privilege!

RICHARD L. REVESZ
Director
The American Law Institute

March 17, 2019

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New York University
A private university in the public service

School of Law

Barry Friedman
Jacob D. Fuchsberg Professor of Law

MEMORANDUM

TO: ALI Membership

DATE: March 6, 2019

RE: Second Set of Policing Principles

Your Reporters on *Principles of the Law, Policing*, are pleased to come to you with our second set of Principles, for consideration at the May 2019 Annual Meeting.

You will recall that our first set of Principles dealt with Use of Force. Those Principles were adopted at the May 2017 Annual Meeting, and we since have sent them to many people in response to inquiries.

In this installment, we are bringing considerably more of our project before the membership.

Before turning to the specific Chapters you are about to read, I'd like to remind everyone of something it is extremely easy even for the Reporters to forget at times: what we are *not* doing is synthesizing the rules of constitutional law. As is common knowledge to this body, constitutional law provides a floor for government conduct, but in no way limits what self-regulation government imposes. Although nothing we propose here dips below the constitutional floor, on some occasions we are exceeding that floor, at least as the Constitution has been defined by the courts. When we do so, our Commentary and Reporters' Notes make that clear.

More commonly, we simply are taking a different approach from that of the constitutional doctrine. Police departments (and other entities that engage in policing practices) are complex bureaucracies that cannot possibly be governed in their entirety by a limited set of constitutional doctrines. Instead, what is needed are legal principles that address much of what constitutional law leaves untouched. To that end, much of what we are adopting is a regulatory approach. The

enormous value of this ALI project—which we hear from all quarters regularly—is the deep need for legal guidance on these many issues not resolved by constitutional law.

Relatedly, I want to remind the body that our Advisers for this project run the gamut from civil-liberties advocates and defense lawyers to many police officials and prosecutors. We are lucky to have a wealth of expertise, and our discussions—cordial, intellectually rigorous, and sometimes humorous to boot—are invaluable to making sure the Principles we bring to you are well suited to implementation. We are lucky to hear and take on board a wealth of perspectives before we come to you, and those perspectives have been highly supportive of our approach.

We come to you now with four Chapters of our work.

First, you have Chapter 1, on General Principles, which identifies the guiding principles and themes that inform much of what follows. Consistent with a regulatory approach, you will see our emphasis on agencies having policies on the books formulated in advance of action, when possible with public input.

Chapter 4, on police encounters, deals with seizures of persons—from street stops to arrests—as well as some searches that occur as a part of those stops, such as searches incident to a lawful arrest. Of all our Chapters, this is the one that follows constitutional doctrine the most, though it also goes beyond that doctrine in order to deal more directly with a set of street-level enforcement practices—particularly the frequent use of traffic and pedestrian stops—that have drawn considerable criticism (and a great deal of litigation) in recent years. (Just FYI, we have been working hard on principles for what is commonly thought of as "searches and seizures" of property and data, and those will come to you in the future.)

Chapter 10 is intended to address the variety of eyewitness identification procedures such as showups, lineups, photo arrays, and the like. These Principles are based on sound science, and heavily influenced by the recent National Academy of Sciences report on this subject.

Finally, Chapter 11 contains principles governing Police Questioning, what often is referred to in criminal constitutional law as "interrogation." We use the phrase police questioning instead, in part because these Principles govern not just the acquisition of information from suspects, but from witnesses and the public as well.

That is what you have before you now. In case you are curious about our direction, you might again consult the Projected Overall Table of Contents. We currently are working hard on the remainder of the project—in addition to searches, seizures, and databases, we are focusing in particular on the two Chapters at the end on remedies and accountability, which we view as a crucial part of our project.

We look forward to meeting with you in May.

PROJECTED OVERALL TABLE OF CONTENTS

CHAPTER 1
GENERAL PRINCIPLES

§ 1.01. Scope and Applicability of Principles

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

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

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

Comment:

a. Functional definition of "agencies." These Principles are intended to apply to the exercise of particular state functions, no matter which agency performs them. For this reason, subsection (a) adopts a functional approach. It makes clear that the Principles apply to all agencies—at the federal, state, regional, and local levels—if and when they exercise state power to engage in the various practices addressed herein. This includes government agencies not traditionally understood as law-enforcement agencies, such as welfare agencies authorized to conduct home inspections. It also includes private entities—such as university police departments or private security agencies—whose agents are authorized by law to perform the functions enumerated in this Section. Any time agencies search or seize persons or property, use or threaten to use force, investigate criminal activity, conduct surveillance, gather evidence, or question potential witnesses or suspects, they should do so in accordance with these Principles.

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

b. Limitations on applicability. Although these Principles generally adopt a functional approach, there nevertheless are important differences between traditional law-enforcement agencies—such as police departments and sheriffs' offices—and other entities that may from time to time exercise some of the functions enumerated in subsection (a). Traditional law-enforcement agencies often are the primary agencies of government to which community members look to promote public safety, maintain order, and address other issues of community concern. These differences require additional guidance beyond the general principles applicable to all agencies. For this reason, a subset of these Principles—such as the Principle on community policing, see § 1.07—addresses approaches and practices that are of particular importance to traditional law-enforcement agencies, and may not apply to other agencies—such as welfare agencies or health-inspection agencies—that also are authorized to conduct searches or seizures.

c. Nature of Principles and attendant liability of covered agencies and actors. Three things follow from the fact that these are "Principles." First, they are stated at a high level of generality, and may need to be made more specific through legislation or agency policy. Second, standing alone they are not intended to create liability in agencies or their employees. They contain none of the appropriate limits on liability, such as fault or causation standards. Rather, they are intended to inform the principled development of policies and rules by governmental actors, including legislative bodies, administrative bodies (including public-safety agencies themselves), and courts. Adoption of such rules, including liability rules, is a necessary predicate to imposing liability. Chapters 13 and 14 advance Principles for compliance, auditing, accountability, and liability. Third, although at present much of the law governing policing is constitutional law, these Principles are not intended merely to replicate those constitutional rules. Constitutional law is a necessary floor that governs policing in certain areas, but many if not most policing leaders believe they can and ought to do better. These Principles at times either go beyond constitutional

requirements, or—more commonly—apply in situations in which constitutional limitations have not been developed, and may not in fact be appropriate.

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

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

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

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

It is important to emphasize that these are principles, and are not intended as a restatement of governing law. They would need to be adopted by either legislatures or policing agencies

themselves to make them binding. And they are at times stated more broadly than may be appropriate as a liability rule. Subsection (c) makes clear that before liability can attach, a recognized lawmaking body needs to formally adopt a liability rule, as well as an underlying conduct rule.

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

§ 1.02. Goals of Policing

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

Comment:

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

Agencies advance these goals in a variety of ways, including: by detecting and arresting violators of the law; by rendering aid when necessary; by adopting deterrent strategies; and by working cooperatively with the public to develop crime-prevention strategies. In choosing among the many tools at their disposal, policing agencies should—consistent with these Principles—adopt strategies that best advance the goals of policing while minimizing the potential harms that policing can impose. See § 1.03. The duty to uphold the law includes not only the responsibility to *enforce* the law, but also to *adhere* to the law. Importantly, this includes a duty to uphold and adhere to constitutional law, and to respect the rights of all people.

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The goals of policing enumerated in this Section are consistent with how many policing agencies define their missions and responsibilities. For example, the Law Enforcement Code of Ethics—first adopted by the International Association of Chiefs of Police in 1957 and included as part of the oath that many officers take—begins by recognizing that the "fundamental duty" of law-enforcement officers "is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, the peaceful against violence and disorder; and to respect the Constitutional rights of all people to liberty, equality and justice." See also Austin Police Department Policy Manual at 6 ("The Austin Police Department's basic goal is to protect life, property, and to preserve the peace in a manner consistent with the freedom secured by the United States Constitution."); American Bar Association, Standards on Urban Police Function 1.2-4 (1980) ("The highest duties of government, and therefore the police, are to safeguard freedom, to preserve life and property, to protect the constitutional rights of citizens and maintain respect for the rule of law by proper enforcement thereof, and, thereby, to preserve democratic processes."). In his influential book, *Policing a Free Society*, Herman Goldstein similarly details how the purposes of policing are to promote individual rights and to safeguard the processes of democracy. HERMAN GOLDSTEIN, POLICING A FREE SOCIETY (1977).

A number of law-enforcement organizations likewise have recognized the importance of ensuring not only the physical safety of residents but their sense of security as well. As a former director of the Department of Justice COPS Office emphasized, "people not only need to be safe, but they also need to feel safe. Treating both of these issues as two parts of a greater whole is a critical aspect of community policing." Bernard K. Melekian, *Letter from the Director*, *in* GARY CORDNER, REDUCING FEAR OF CRIME: STRATEGIES FOR POLICE (2010); Police Bureau, The City of Portland, Oregon, "Our Mission Statement," https://www.portlandoregon.gov/police/ ("The mission of the Portland Police Bureau is to reduce crime and the fear of crime. We work with all community members to preserve life, maintain human rights, protect property and promote individual responsibility and community commitment."). Throughout its Final Report, the Presidential Task Force on 21st Century Policing emphasized the corrosive effects that fear—both of crime and of the police—can have on communities, and encouraged policing agencies to view community trust as essential to their mission of promoting public safety. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT (2015).

§ 1.03. Reducing Harm

Agencies that exercise policing powers should, to the extent feasible, pursue the goals of policing in a way that reduces attendant or incidental harms. Toward that end, agencies should adopt rules, policies, and procedures that respect and uphold constitutional rights; guard against arbitrary or discriminatory policing; promote the preservation of life, liberty,

and property; reduce the risk of injury to both officers and members of the public; ensure the accuracy of investigations; and promote the wellbeing of officers and community members alike.

Comment:

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

Many of the Principles included in the Chapters that follow are intended to promote this principle. For instance, agencies' use-of-force policies should be guided by a "sanctity of life" philosophy that recognizes the preservation of all life as a core principle of policing. See §§ 7.01-7.05. In the arrest context, agencies should encourage officers to utilize alternatives to arrest—such as warnings and citations—when doing so is consistent with promoting public safety and preserving order. See § 4.05 (discussing use of citations in lieu of arrest).

Agencies have an obligation to respect and uphold the constitutional rights of suspects and other members of the public. Demonstrating a commitment to upholding constitutional rights and values can promote agency legitimacy and trust, improve the quality of police–citizen interactions, and make it easier for officers to carry out their duties. Both in their values statements and through training, agencies should emphasize that state and federal constitutions are not an obstacle to effective policing, but rather are among the laws that officers are sworn to uphold and protect. In formulating agency rules, policies, and procedures, agencies should consider not only the letter of the constitutional law as interpreted by the courts, but also the underlying constitutional norms of equality, non-arbitrariness, privacy, security, and free expression. Thus, in addition to fulfilling their constitutional obligation to avoid engaging in arbitrary and discriminatory policing, agencies also should strive to the extent possible to reduce the overall discriminatory *impact* that policing can have on communities of color and other marginalized groups. Agencies also should strive to minimize unnecessary invasions of privacy, including privacy harms that may not be cognizable as a matter of constitutional law.

Consistent with Chapter 8, policing agencies should strive to ensure the accuracy and reliability of their investigations, and should work diligently not only to identify wrongdoers but also to rule out innocent suspects. Agencies should adopt clear guidance on evidence gathering, documentation, and compliance with discovery obligations in criminal proceedings.

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

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Agencies that engage in policing play a vital role in protecting public safety and preserving order. As the President's Commission on Law Enforcement and the Administration of Justice recognized in 1965, "[t]he freedom of Americans to walk their streets and be secure in their homes—in fact, to do what they want when they want—depends to a great extent on their policemen." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 92 (1967). Police are, and ought to think of themselves as, the "guardians of democracy"—the proper functioning of policing agencies is essential to the enjoyment of liberty. Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NEW PERSPECTIVES IN POLICING BULLETIN 2 (2015).

In recognition of their important function, policing officials are entrusted with wide-ranging powers—to utilize force, engage in surveillance, seize persons and property, and question suspects—but in a democratic society, these powers must be regulated carefully. Policing officials have a duty to respect and uphold constitutional law—and to the extent that use of these powers encroaches on the constitutional rights of the public, they must be limited accordingly. More generally, policing officials should ensure that the use of these powers is limited to the minimum amount necessary to achieve the goals of policing. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3106-3110 (2015); see also § 1.01. Accordingly, agencies and their constituent communities should work together to define those powers and monitor their use so as to ensure that they are exercised in a way that protects officers and the public and reduces or eliminates unnecessary harms.

The values expressed in this Section reflect the idea that policing should "impose[] harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms." See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792 (2012). The principle of harm-minimization already informs a variety of specific policing policies and practices. The National Institute of Justice, for instance, calls on police to "use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm." Nat'l Inst. of Justice, *Police Use of Force*, http://nij.

gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx (last visited Dec. 1, 2015). See also LOS ANGELES POLICE DEP'T MANUAL, Vol. 1 § 115; U.S. Gov't Accountability Office, Report No. GAO-05-464, *Taser Weapons: Use of Tasers by Selected Enforcement Agencies* 7-8 (2005). This principle is part of standard police officer training. UNITED STATES DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA vii (1999).

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

1. Respecting and upholding constitutional rights. Agencies that engage in policing have a duty to protect the constitutional rights of all persons, including criminal suspects. As a number of leading law-enforcement officials have recognized, protecting constitutional rights is not "an impediment to the public safety mission. [It] is the mission of police in a democracy." Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NEW PERSPECTIVES IN POLICING BULLETIN 2 (2015); see also Charles H. Ramsey, *The Challenge of Policing in a Democratic Society: A Personal Journey Toward Understanding*, NEW PERSPECTIVES IN POLICING BULLETIN (2014). Indeed, ensuring the constitutional rights of the people is essential to promoting a safe and secure society—for residents to feel secure in their persons and property they must have the assurance that their constitutional rights will be respected by the police.

Policing agencies should stress the importance of upholding constitutional values both in their policy manuals and through officer training. A number of agencies already do so. For example, the Los Angeles Police Department's management principles state that "[a] peace officer's enforcement should not be done in grudging adherence to the legal rights of the accused . . . . We peace officers should do our utmost to foster a reverence for the law. We can start best by displaying a reverence for the legal rights of our fellow citizens and a reverence for the law itself." Los Angeles Police Department, "Management Principles of the LAPD." See also Phoenix Police Department Manual § 1.01 ("The department is committed to an aggressive response to criminal enforcement of the law and the protection of constitutional rights throughout the City of Phoenix."). The Philadelphia Police Department has introduced a new training program for police recruits, "Policing in a More Perfect Union," which takes officers on a tour through the National Constitution Center and focuses on the role of police in a democratic society. See also Rahr & Rice, supra (discussing a similar training program in Washington State).

2. Avoiding arbitrary or discriminatory policing. Police agencies must, consistent with constitutional law, avoid engaging in arbitrary or discriminatory policing. Policing agencies also should strive to minimize the overall discriminatory impact that policing can have on communities of color or other marginalized groups. Various studies have shown that certain policing

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

3. Preserving life, liberty, and property; avoiding physical injuries. One of the core goals of policing is to preserve human life. The sanctity of all life—including the lives of officers, suspects, and community members whose safety may be threatened by criminal activity—is central to policing. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 19 (2015) ("[A] clearly stated 'sanctity of life' philosophy must also be in the forefront of every officer's mind."). Policing agencies should incorporate the "sanctity of life" principle into their use-of-force policies both for the safety of officers and the safety of the public. See POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 34 (2016) ("Agency mission statements, policies, and training curricula should emphasize the sanctity of all human life—the general public, police officers, and criminal suspects—and the importance of treating all persons with dignity and respect."); see also Albuquerque Police Department, *Our Mission*, http://apdonline.com/our-mission.aspx (last visited Jan. 4, 2016) ("We respect the sanctity of life, the dignity of all people, and use only that force necessary to accomplish our lawful duty."); Philadelphia Police Department, Directive 10.1 "Use of Force—Involving Discharge of Firearms" (emphasizing that officers should "hold the highest regard for the sanctity of human life, dignity, and liberty of all persons"). Policing agencies also should take steps to minimize the risk of physical injury to officers, suspects, and bystanders; to avoid unnecessary damage to property; and to minimize the infliction of emotional or psychological distress.

Agencies also should minimize undue restrictions on liberty, including arrests as well as lesser intrusions, such as investigative stops. As discussed in greater detail in Chapter 4, although stops and arrests further a number of important law-enforcement purposes, they also can have significant consequences both for the individuals and officers involved and for police–community relations more broadly. See §§ 4.03-4.05 (Sections on investigative stops and arrests). For individuals, the costs of an arrest potentially may include fines and fees, loss of public housing, loss of a job, deportation, and child-custody consequences, in addition to intangible consequences such as embarrassment and resentment. See Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313-319 (2017). Arrests also carry a risk of injury for officers, suspects, and the community. See CYNTHIA LUM & GEORGE FACHNER, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE

PURSUITS IN AN AGE OF INNOVATION AND REFORM: THE IACP POLICE PURSUIT DATABASE 7 (2008) (reporting that 14.9 percent of police officer deaths were caused by "arrest situations"). Individuals who are stopped by the police—particularly if they are not in fact involved in any wrongdoing—may perceive that they are being unfairly targeted, which can undermine agency legitimacy. See, e.g., Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization* (Columbia Law School Public Law & Legal Theory Working Paper Group Paper No. 14-380, April 2014).

In view of these concerns, agencies should—to the extent authorized by law—develop policies to encourage officers to limit the use of stops and arrests to circumstances in which (a) they are constitutional; (b) they are necessary to advance legitimate purposes; and (c) the social benefits of initiating a given stop or arrest clearly justify the costs. PRESIDENT'S TASK FORCE, supra, at 43. Agencies should also ensure that stops and arrests are not incentivized by officer-performance measures. See PRESIDENT'S TASK FORCE, supra, at 26-27.

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

The need for agencies to take care to protect privacy interests is particularly acute in light of new technologies that have expanded the potential scope and pervasiveness of government surveillance. This includes both law enforcement use of technology—such as GPS tracking, bulk data collection, license-plate tracking, and closed-circuit television (CCTV) cameras—as well as the public's use of technologies like cell phones, computers, and social media that are vulnerable to surveillance. As the U.S. Supreme Court recognized in Riley v. California, 134 S. Ct. 2473, 2491 (2014), "a cell phone search [today] would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." Policing agencies therefore should, consistent with the Principles that follow, develop rules, policies, and procedures to address the use and surveillance of new technologies—and should involve the public in the process to ensure that these decisions are consistent with community values. See PRESIDENT'S TASK FORCE, supra, at 35. See Chapters 2, 3, and 5.

5. Ensuring the accuracy of police investigations. Policing agencies have an obligation to seek the truth and to work diligently both to identify potential wrongdoers and to clear the innocent. Consistent with these obligations, a number of major law-enforcement organizations have incorporated a commitment to accuracy and reliability both as part of their organizational value statement and as a basis for specific department rules, policies, and procedures. For example, the

IACP Canons of Police Ethics state that "The law enforcement officer shall be concerned equally in the prosecution of the wrong-doer and the defense of the innocent." Likewise, the Austin Police Department's policies on eyewitness identification emphasize the importance of complying with the outlined procedures to "maximiz[e] the reliability of identifications, exonerate innocent persons, and establish[] evidence that is reliable and conforms to established legal procedure." Austin Police Department Manual at 243. See also Chapter 10.

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

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

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

§ 1.04. Transparency and Accountability

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

Comment:

a. Transparency. Agencies should be transparent both internally and externally. Internal transparency—which refers to the culture and practices within an organization—is important for building officer morale and promoting effective management. Agencies can improve internal transparency by establishing clear and comprehensive rules, policies, and procedures and by ensuring that agency decisionmaking processes are open and straightforward. External transparency is essential to building trust and legitimacy between policing agencies and the general public. To promote external transparency, agencies should, consistent with § 1.05, make department rules, policies, and procedures available to the public, and should maintain and make public data on various aspects of department practice and procedure. Many jurisdictions already collect and make public data on police–citizen encounters, including arrests, summonses, stops, searches, and uses of force. Governments at the federal, state, or local levels can support these efforts by investing in tools to simplify data collection and reporting.

b. Accountability. Accountability likewise has both internal and external components. Internal accountability requires that officers be accountable to their departments through the chain of command—but also that police executives and agency heads hold themselves accountable to line officers and to the agency as a whole. Agencies in turn must be accountable to the public both directly and through various channels, including oversight bodies or inspectors general, executive officials, legislatures, and courts. Importantly, there must be both front-end and back-end accountability for agency actions. Back-end accountability addresses misconduct once it has already happened, through mechanisms such as officer discipline, civilian review boards, inspectors general, and judicial review. See Chapters 13 and 14. Front-end accountability requires that initial policymaking decisions be made in an open and transparent manner, with the input of the community. See § 1.05. These two forms of accountability work in tandem: for there to be effective back-end accountability, there must be clear rules enacted in advance, against which officer and agency conduct may be judged.

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

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

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

External transparency is a prerequisite to public confidence and trust in the police: an ill-informed community is unlikely to participate in and engage with law enforcement. See Letter from Chief Jim Bueermann, President, Police Foundation, to President's Task Force on 21st Century Policing, January 6, 2015. External transparency requires that—to the extent possible given needs of confidentiality, see § 1.05—agencies make their rules, policies, and procedures available for public review. Agencies also should collect public data on policing operations, including data on searches, stops, frisks, summonses, citations, and uses of force. See PRESIDENT'S TASK FORCE, supra, at 14-15 (recommending robust data collection). A number of states already require policing agencies to collect such data. See, e.g., CAL. GOV'T CODE § 12525.2 (use of force); COLO. REV. STAT. ANN. § 24-33.5-517 (officer-involved shootings); N.C. GEN. STAT. § 143B-904 (use of force resulting in death); 625 ILL. COMP. STAT. ANN. 5/11-212 (pedestrian and traffic

stops); CAL. GOV'T CODE § 12525.5 (traffic stops, frisks, searches, summons, and arrests); CONN. GEN. STAT. ANN. § 54-1m (traffic stops); N.C. GEN. STAT. § 143B-903 (same). A growing number of agencies collect such data voluntarily. See, e.g., POLICE FOUNDATION, PUBLIC SAFETY OPEN DATA PORTAL, https://publicsafetydataportal.org/stops-citations-and-arrests-data/ (last visited: Oct. 26, 2016) (collecting publicly available data on stops, citations, and arrests). New technologies, such as body-worn cameras, also can help facilitate more robust data collection and promote external transparency—though countervailing privacy concerns may limit at least to some extent the information that can be made public.

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

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

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

§ 1.05. Written Rules, Policies, and Procedures

(a) Agencies should operate subject to clear and accessible written rules, policies, and procedures. At a minimum, agencies should have rules, policies, or procedures on all aspects of policing that meaningfully affect the rights of members of the public or implicate the public interest.

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

Comment:

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

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

At the same time, subsection (b) recognizes that there are certain aspects of police investigations that cannot be open for public inspection. This Section thus provides for an exception for policies that, if revealed, could either substantially undermine ongoing investigations or put officers or members of the public at risk. This exception should generally be limited to policies that reveal operational details or investigative tactics, and should not apply to policies that set out in general terms the circumstances under which a particular practice or technology may be deployed. For sensitive law-enforcement matters—for example the use of confidential informants or the deployment of SWAT teams—agencies should make an effort to release those portions of the policy that can safely be made public, with sensitive portions redacted.

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

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

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

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

Policing Services (COPS) can assist in these efforts by disseminating information about approaches that have worked in other jurisdictions.

d. Periodic review. Policing agencies should establish a process for conducting periodic review of all policies. Periodic review helps to ensure that agency policies comply with statutory and constitutional law, that they continue to reflect best practices within the profession, and that they effectively address the needs of the agency and the community it serves.

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

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

REPORTERS' NOTES

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

Yet, all too often, agencies lack policies on critical aspects of policing. For example, a 2013 Police Executive Research Forum (PERF) survey showed that 64 percent of law-enforcement agencies lacked policies on the use of photo lineups, despite the fact that 94 percent of responding agencies reported using the procedure, and the fact that the National Academy of Sciences has made clear that there is a risk of erroneous convictions when inappropriate procedures are used. POLICE EXECUTIVE RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES (2013); NATIONAL RESEARCH COUNCIL REPORT, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 1 (2014). Another PERF survey similarly found that nearly one-third of departments using body-worn cameras did not yet have policies in place to govern their use. POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM 2 (2014). The same is true in many other areas of policing. See, e.g., ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 26 (2009) (citing lack of policies on use of confidential informants).

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

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

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

Insofar as possible, however, the need for confidentiality in policing ought not to stand in the way of policy transparency. For many aspects of policing—such as the use of consent searches and investigative stops, the handling of mass demonstrations, the adoption of surveillance technologies, or the use of force—department policies can be made public and publicly debated without endangering public safety. A number of police departments have made their policy manuals on these issues available to the public without any apparent detriment to public safety. See, e.g., Metropolitan Police Department: Directives for Public Release, available at http://mpdc.dc.gov/page/directives-public-release; Seattle Police Department Manual, available at http://www.seattle.gov/police-manual.

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

One useful distinction for agencies to consider in deciding what can safely be made public is between policies that describe specific tactics or operational details, and those that articulate overarching rules or norms. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1884-1885 (2015). Operational details regarding specific SWAT deployments or the department's tactical approaches to serving high-risk warrants should typically be kept secret. But general guidelines about the use of SWAT—the guiding philosophy, the requirements of supervisor approval, the need for after-action review—can often be made public without putting officers at risk. For example, the Charlotte-Mecklenburg Police Department's publicly available SWAT policy describes the procedures by which department officers can request SWAT assistance, the kinds of situations that may warrant SWAT deployment, and the process for completing after-action review. Charlotte-Mecklenburg Police Dep't, *Directive 900-001*, available at http://charmeck.org/city/charlotte/CMPD/resources/DepartmentDirectives/Documents/CMPDDirectives.pdf. The difference between general guidelines and specific tactics is sometimes captured in the distinction between "policies" and "standard operating procedures,"

though many agencies use these terms differently. See, e.g., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, BEST PRACTICES GUIDE: DEVELOPING A POLICE DEPARTMENT POLICY-PROCEDURE MANUAL 2, available at http://www.theiacp.org/portals/0/documents/pdfs/BP-PolicyProcedures.pdf. Two federal statutes—both of which endeavor to balance the goal of transparency against the need to keep certain investigative details confidential—draw similar distinctions. The Stored Communications Act, which typically requires that individuals be notified when law-enforcement agencies obtain records of their communications from third parties via subpoena, permits delayed notification when disclosure would "endanger[] the life or physical safety of an individual" or create other adverse consequences for an investigation. 18 U.S.C. § 2705. Likewise, the Freedom of Information Act permits agencies to withhold records and documents "compiled for law enforcement purposes" from public disclosure if disclosing them would allow individuals to evade the law by using information about specific law-enforcement procedures and techniques. 5 U.S.C. § 552(b)(7)(E).

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

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

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

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

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

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

§ 1.06. Promoting Police Legitimacy

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

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

Comment:

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

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

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

c. Truthfulness. Policing agencies should be truthful in all of their interactions with the public and with other government agencies, and should develop policies and procedures to ensure that officers do the same. Agencies should take special care to ensure that officers are truthful in their testimony in court or in the course of disciplinary proceedings, and hold officers accountable whenever it becomes apparent that they have not been. There unfortunately have been countless

examples of officers giving misleading or false testimony in court—so common that officers themselves coined the term "testilying" to describe the phenomenon. A lack of truthfulness, particularly in the course of legal proceedings, poses a threat not only to agency legitimacy but also to the rule of law, and must be actively discouraged.

REPORTERS' NOTES

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

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

Internal procedural justice requires that agencies involve employees, officers, and civilians alike in formulating organizational values and disciplinary procedures, promotional decisions, and performance management. See Community Oriented Policing Services, U.S. Dep't of Justice, *Comprehensive Law Enforcement Review: Procedural Justice and Legitimacy Summary* 2 (2014). It also requires that agency rules, policies, and procedures be clear, transparent, grounded in organizational values, and developed in partnership with officers. PRESIDENT'S TASK FORCE, supra, at 14. By practicing the principles of procedural justice within the department, supervisors can increase officer compliance with agency rules, policies, and procedures and encourage officers to adopt the values of procedural justice in their interactions with the public. Research suggests that officers who feel like their supervisors treat them fairly are more likely to abide by policy and voluntarily comply. See Nicole Haas et al., *Explaining Officer Compliance: The Importance of Procedural Justice and Trust Inside a Police Organization*, COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE (2015). Research also has demonstrated that employees who themselves feel respected by their supervisors are more likely to support external procedural-justice programs. See WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE (1999); Ben Bradford & Paul Quinton, *Self-Legitimacy, Police Culture and Support for Democratic Policing in an English Constabulary*, 54 BRIT. J. OF CRIMINOLOGY 1023 (2014).

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

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

Over the years, studies and reports have pointed to a variety of practices that threaten agency credibility and undermine public trust. Many, for example, have expressed concern about the prevalence of "testilying"—giving false or misleading testimony in court in order to avoid the suppression of evidence or civil liability. Capers, supra at 868-869; Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (surveying judges and prosecutors in Chicago criminal court and estimating that officers gave false testimony about 20 percent of the time). Others have pointed to the "code of silence" that encourages officers to cover up for colleagues who engage in misconduct. See, e.g., Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence*,

2016 U. CHICAGO LEGAL FORUM 213 (describing the phenomenon); U.S. Department of Justice, Investigation of the Chicago Police Department 75 (2017) (citing numerous instances of officers lying in official reports, and concluding that "a code of silence exists, and . . . is apparently strong enough to incite officers to lie even when they have little to lose by telling the truth."). Still others have noted lack of candor on the part of agencies themselves—particularly around the use of surveillance technologies. See, e.g., U.S. House Committee on Oversight and Reform, *Law Enforcement Use of Cell-Site Simulation Technologies* (2016) (criticizing the Federal Bureau of Investigation's use of nondisclosure agreements to prohibit local law-enforcement agencies from disclosing to courts or defense attorneys when a cell-site simulator—or "Stingray"—was used to locate a suspect in the course of a criminal investigation); Kim Zetter, "Emails Show Feds Asking Florida Cops to Deceive Judges," WIRED (June 19, 2014) (quoting emails between two Florida law-enforcement agencies discussing instructions from the U.S. Marshals Service to describe location information acquired using a Stingray as having been obtained from "a confidential source").

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

§ 1.07. Community Policing

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

Comment:

a. Community policing. This Section adopts the view—shared by many within the law-enforcement community—that policing agencies and their communities jointly share in the responsibility for promoting public safety and community wellbeing, and should work in partnership to identify and address community problems and concerns. Although community

policing has come to mean many things to many people, most definitions of community policing embrace several core, overarching ideals, each of which is discussed in the following Comments.

b. Community policing as an organizational strategy. The principles of community policing should inform policing-agency decisionmaking at all levels of the organization—including decisions about hiring, deployment, and evaluation—and should not simply be seen as an adjunct of the primary law-enforcement mission. As many law-enforcement professionals have recognized, some of the core aspects of community policing are incompatible with more traditional approaches to agency management and organization. For example, so long as officers are evaluated primarily on the basis of metrics like stops and arrests, they are unlikely to invest time and energy into working with residents or developing alternative strategies for dealing with public-safety concerns. Likewise, few of the problems that community members identify can be addressed effectively by patrol officers alone—most require cooperation from others in the department or from other units and departments in a municipality.

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

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

dealing with nonemergency calls for service—including dedicated nonemergency complaint systems like 311, as well as other delayed-response protocols.

d. Collaborative decisionmaking. If policing agencies and community members are to work together to "co-produce" public safety, it is essential that residents have meaningful input into the priorities, strategies, and practices that shape how their communities are policed. Members of the public know best the difficulties and challenges they face. They can provide valuable insight into which practices are likely to be successful in their communities, and can alert agencies to the unintended consequences of rules, policies, and procedures they wish to adopt. Policing a community without involving its residents may lead to mismatched priorities, a loss of trust, and, ultimately, a loss of legitimacy. For these and many other reasons, agencies should engage residents in an ongoing dialogue over all aspects of agency practice, including officer training, hiring, and evaluation; use of new technologies; crime-reduction strategies; and new community-policing programs and initiatives. See also § 1.05. Agencies should consider using a variety of mechanisms to engage the community—including forums, questionnaires, small-group meetings, conversations with various stakeholders, and the agencies' social-media presence—and should tailor their approaches to the needs of the various communities they serve. In particular, agencies should consider establishing more formal organizational structures—such as police commissions or citizen advisory boards—that ensure that members of the public have a clear and consistent role in articulating the needs of communities and in identifying strategies to address them.

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

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

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

REPORTERS' NOTES

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

although "community policing" has come to mean many things and have many elements, there has been wide agreement on the importance of its core ideals.

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

Still, the consensus of many well-respected policing leaders is that the legitimacy of law enforcement ultimately depends on forging close ties between the community and the police. The President's Task Force on 21st Century Policing called for police and communities to "co-produce" public safety. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: FINAL REPORT 3 (2015). The International Association of Chiefs of Police likewise urged departments to "reevaluate, reinvigorate, renew, re-instate, rebuild, and restart department efforts to build meaningful police-community relationships." IACP NATIONAL POLICY SUMMIT ON COMMUNITY-POLICE RELATIONS: ADVANCING A CULTURE OF COHESION AND COMMUNITY TRUST 13 (2015). The task is not an easy one—but it is essential.

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

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

As a result, the objective in the early-middle 1900s was to "professionalize" the police and make them autonomous from politics. SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977); Stephen J. Schulhofer et al., *American Policing at the Crossroads: Unsustainable Policies and the Procedural Justice Alternative,* 101 J.

CRIM. L. & CRIMINOLOGY 335, 339 (2011). Officers received civil-service protection and the only clear tether to politics was the appointment of the chief of police by the mayor or other city officials. Nothing quite captured that notion of the professional and autonomous model of policing so much as radio-dispatched police cars racing around the city to answer calls.

By the 1960s, however, it had become clear to the nation that the move to autonomy had created a rift between the community and the police. In its 1967 Report—in words that undoubtedly will sound familiar today—the President's Commission on Law Enforcement and Observance lamented that in "the very neighborhoods that need and want effective policing the most . . . there is much distrust of the police, especially among boys and young men." THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 99 (1967). The Commission noted that "too many policemen . . . misunderstand or are indifferent to minority-group aspirations, attitudes, and customs, and that incidents involving physical or verbal mistreatment of minority-group citizens do occur and do contribute to the resentment against police." Id. at 100. It described the hostility and mistrust between police and communities of color as "as serious as any problem the police have today." Id. at 99; see also THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (noting same).

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

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

Yet, in 2015, a new presidential task force made many of the very same observations as the ones made almost 50 years earlier. It highlighted the profound mistrust between police and

community. PRESIDENT'S TASK FORCE, supra, at 5. And it urged policing agencies to embrace community policing as organizational strategy, to work collaboratively with the public to "co-produce public safety," and to give community members a real voice in how their communities are policed. Id. at 3.

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

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

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

Today, there is growing consensus that effective policing requires a renewed commitment to community policing and its core ideals. And, commendably, some departments across the

country have begun to take tangible steps toward giving communities a greater say in how they are policed.

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

The emphasis in this Section on close partnership and collaboration between police and the communities they serve reflects what many have identified as the defining feature of community policing. See, e.g., BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING at vii (1994) ("Community policing is, in essence, a collaboration between the police and the community that identifies and solves community problems."); PRESIDENT'S TASK FORCE, supra, at 41 ("Community policing is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues."); Wesley G. Skogan, *Community Participation and Community Policing*, *in* HOW TO RECOGNIZE GOOD POLICING at 88 (Jean-Paul Brodeur ed., 1998) ("Every definition of community policing shares the idea that the police and the community must work together to define and develop solutions to problems."). This Section recognizes that partnering with the community often means partnering with community organizations and other government entities, which requires agencies to both proactively seek out those relationships and to be open to overtures by other groups. Often, addressing community problems will require a coordinated response by both governmental and nongovernmental actors. See, e.g., *Developing Coordinated Community Response Teams*, UN WOMEN, http://www.endvawnow.org/en/articles/319-developing-coordinated-community-responses-.html (last visited May 22, 2017). This Section also is consistent with research on procedural justice, which underscores the importance of transparency and voice, not only in the context of individual encounters but also for the agency's relationship with its community. See, e.g., TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND COURTS (2002); Tracey L. Meares & Peter Neyroud, *Rightful Policing* 5, NAT'L INST. OF JUSTICE 11-12 (2015).

Likewise, many of the core components of community policing identified here—including organizational transformation, collaborative problem-solving, community participation, and police–community interaction in social and other nonenforcement settings—are consistent with what law-enforcement professionals have long emphasized as essential components of the community-policing approach. See, e.g., COMMUNITY ORIENTATED POLICE SERVICES, COMMUNITY POLICING DEFINED (2012) (identifying the three components of community policing as "community partnerships," "organizational transformation," and "problem-solving"); Wesley G. Skogan, *The Promise of Community Policing*, *in* POLICE INNOVATION: CONTRASTING

PERSPECTIVES 27, 28 (David Weisburd & Anthony A. Braga eds., 2006) (noting that community policing has "three core elements: citizen involvement, problem solving, and decentralization").

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

CHAPTER 4
POLICE ENCOUNTERS

§ 4.01. Officer-Initiated Encounters with Individuals

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

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

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

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

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

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

Comment:

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

At the same time, as discussed in greater detail throughout this Chapter, these sorts of interactions have the potential to erode the very sense of public safety and security that they are meant to promote. When officers treat residents in a harsh or aggressive manner, routinely stop

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

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

b. Social interactions excluded. The focus of this Chapter is on interactions between officers and members of the public conducted for an investigative or community-caretaking purpose. The community-caretaking purpose refers to actions that are not initiated for the purpose of investigating crime, such as when an officer enters a home to render aid to someone inside. Beyond investigative and community-caretaking actions, officers also interact with members of the public in order to better get to know the community and learn about its problems and concerns. These sorts of interactions are not the subject of this Chapter, and are addressed separately in the Section on community policing, § 1.07.

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

a concern that at least some of the encounters characterized this way by courts are not in fact voluntary or consensual.

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

e. Custodial arrests. These Principles distinguish between a custodial arrest—in which an individual is taken into custody and transported to the stationhouse or to a temporary detention facility—and a brief detention out in the field conducted for the purpose of issuing a citation. Although both a citation and a custodial arrest must be supported by probable cause, a custodial arrest involves a much greater intrusion into the interests of the arrested person's privacy, autonomy, and bodily integrity, and also potentially exposes the arresting officer to a greater risk of harm. For those reasons, these Principles urge legislatures and agencies to permit officers to issue a summons or a citation in lieu of custodial arrest, and encourage officers to in fact do so when permissible under state law and consistent with the goal of public safety. See § 4.04. These Principles also distinguish between custodial arrests and stops for the purpose of issuing a summons in describing the circumstances under which officers should be permitted to conduct a frisk or a search. See § 4.06.

REPORTERS' NOTES

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

2. Initial encounters and stops. Studies have shown that individuals may not in fact feel free to terminate encounters that courts would describe as "consensual" or "voluntary" as a matter of law. Janice Nadler writes that "empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse is extremely limited under situationally induced pressures" that are common to police–citizen encounters. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (2002); David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. LAW & CRIMINOLOGY 51 (Fall 2008); Alisa M. Smith, et al., *Testing Judicial Assumptions of the "Consensual" Encounter*, 14 FLA. COASTAL L. REV. 285 (2013); Kathryne M. Young & Christin L. Munsch, *Fact and Fiction in Constitutional Criminal Procedure*, 66 S.C. L. REV. 445 (2014). In one survey, less than one-quarter of respondents said that they would feel free to walk away if an officer approached them on the sidewalk and asked to speak with them, even if respondents did not wish to talk with the officer. Kessler, supra, at 53. Respondents who said they knew they had a legal right to walk away were only slightly more likely to feel free to do so. Id. at 78. As William Stuntz notes, "the truth is that ordinary people never feel free to terminate a conversation with a police officer." William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1215 (1998). See also Tracey Maclin, *Black and Blue Encounters—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race*

Matter?, 26 VAL. U. L. REV. 243, 250 (1991) ("common sense teaches us that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost.'").

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

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

§ 4.02. Justification for Encounters

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

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

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

(3) issue a summons or a citation to an individual based on probable cause that a crime or a violation has been committed; and

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

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

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

Comment:

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

b. Initial encounters. As a matter of federal constitutional law, an officer may approach an individual for any reason so long as the officer does nothing to impede the individual's freedom to leave or otherwise terminate the encounter—and so long as a reasonable person would feel free to walk away or otherwise terminate the encounter. These Principles accept that understanding, recognizing nonetheless that there is a degree of fiction in the claim that individuals do indeed feel free to leave or terminate encounters with the police. Some jurisdictions have imposed additional requirements on initial encounters—New York, for example, requires that officers have an "objective, credible reason" to approach a person on the street—these Principles do not go that route. Experience suggests that such requirements are both difficult to enforce and largely ineffective in addressing the concerns with the officer-initiated

encounters described throughout this Chapter. Instead, it is important for agencies, consistent with § 4.03, to provide guidance and training to officers as to when these sorts of encounters are appropriate, as well as how they should be conducted to minimize the risk of undermining legitimacy and trust.

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

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

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

Whenever possible, the grounds for the stop should be memorialized in some fashion, preferably prior to the stop. Many officers today wear body cameras, which typically must be turned on before such stops. It should be a simple matter for the officer to state—when time permits—the basis for the stop. When time does not permit, the basis for the stop can be

recorded on a form pertaining to the stop immediately after the fact. In addition, principles of procedural justice require that, absent some public-safety reason to the contrary, officers inform individuals why they are being stopped at some point during the encounter.

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

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

f. Programmatic seizures. The Principles in this Chapter apply to officer-initiated encounters that are based on suspicion specific to the individual or individuals involved. As discussed in greater detail in Chapter 5, officers also are permitted to search and seize individuals as part of a suspicionless search and seizure program, such as a sobriety checkpoint or airport security. Such programmatic searches and seizures need not be based on individualized suspicion, but must instead be conducted in an evenhanded and nonarbitrary manner, according to a policy that is set out in advance. See § 4.05.

REPORTERS' NOTES

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

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

In the decades after *Terry* was decided, however, courts—including the U.S. Supreme Court—have interpreted reasonable suspicion to require much less than the constellation of facts that had prompted Officer MacFadden to act. In Illinois v. Wardlow, 120 S. Ct. 673 (2000), for example, the Court upheld a stop based on "unprovoked flight" from the police in a "high crime area." As many have since pointed out, factors such as these may not be indicative of criminality, particularly in communities in which there is considerable fear or mistrust of the police. See, e.g., Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (the fact that in some communities Black and Hispanic males are disproportionately singled out by the police "suggests a reason for flight totally unrelated to consciousness of guilt."). Courts also have permitted stops at airports and bus terminals based on a drug-courier profile that deems virtually *all* conduct potentially suspect. As Judge Pratt pointed out in U.S. v. Hooper, a traveler's actions under the profile may be suspicious if the person "arrived late at night" or "arrived early in the morning"; used a "one-way ticket" or a "round-trip ticket"; "traveled alone" or "travelled with a companion"; "acted too nervous" or "acted too calm"—just to name a few. 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting); see also United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987), rev'd 490 U.S. 1 (1989) (noting the profile's "chameleon-like way of adapting to any particular set of observations").

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

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

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

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

the Constitutionality of Stop-and-Frisk as a Program, Not an Incident, 82 U. CHI. L. REV. 1, 164 (2015).

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

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

Instead, these Principles urge agencies to ensure that officers understand that initial encounters may be unwelcome or nonconsensual, and that officers should—consistent with § 4.03—limit the use of such encounters to circumstances in which they directly further important law-enforcement interests and do not cause undue harm. Officers also should minimize the intrusiveness of all encounters by following the principles of procedural justice outlined in § 4.03(b).

§ 4.03. Ensuring the Legitimacy of Police Encounters

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

(b) Officers should establish the legitimacy of their encounters with members of the public by treating individuals with dignity and respect, explaining the basis for the officers' actions, giving individuals an opportunity to speak and be heard, and engaging in behaviors that convey neutrality, fairness, and trustworthy motives.

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

Comment:

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

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

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

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

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

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

Finally, there have been serious concerns expressed regarding the practice of conducting stops in order to check for outstanding warrants. In some jurisdictions, officers stop thousands of pedestrians and motorists each year for this reason. If a warrant is found—even for a minor offense, such as an unpaid traffic ticket—the officer can then make an arrest and conduct a more extensive search. Such stops often are justified based on suspicion of minor infractions, or may be lacking in justification entirely. Experience in jurisdictions across the United States makes clear that such pretextual use of traffic and pedestrian stops can significantly undermine perceptions of police legitimacy. And, as discussed above, they also can result in unnecessary intrusions on individual liberty, and may put both officers and members of the public at greater risk of injury. In developing policies and practices to limit the use of investigative encounters generally, agencies should consider adopting specific limitations either on the conduct of stops for the purposes of identifying outstanding warrants, or on the conduct of warrant checks themselves. As discussed in § 2.XX (forthcoming Section on warrants), agencies also should consider revisiting existing warrant practices which, in some places, have resulted in there being more outstanding warrants than residents in the area.

Some have credited the use of these sorts of aggressive enforcement strategies with bringing down crime. Some studies suggest that making large numbers of stops in a particular area may have short-term effects on crime rates. But other studies suggest that situational approaches—like addressing littering or abandoned lots—contribute more to crime reduction in hotspots than proactive enforcement efforts do. Even if the evidence in favor of such efforts was stronger, using stops in this manner could raise safety and legitimacy concerns. Stops that fail to turn up evidence or contraband may not be a good use of officer time, yet still can increase the potential for violent conflict between officers and members of the public. Frequent use of stops and arrests for minor offenses may pull individuals into the criminal-justice system needlessly—at great cost both to the individuals and to others in the community. See also § 1.03. And to the extent that use of stops reduces residents' willingness to cooperate and exacerbates police–community tensions, it may make it more difficult for the department to do its job.

b. When and how encounters should be conducted. To address these concerns, agencies should, at a minimum, limit the frequency with which encounters take place. When encounters do take place, agencies should adopt policies to ensure that officers treat individuals in a

procedurally just way so as to minimize harm to individuals stopped, consistent with the principles outlined above.

First, agencies should limit the overall use of initial encounters, stops, and arrests to circumstances in which they directly promote public safety and minimize harm to the public. See also § 1.03. Arrests should not occur unless necessary to protect public safety or ensure appearance in court. And agencies should minimize the use of stops based on vague, non-individualized factors or broad demographic categories. For example, studies suggest that when officers focus on behavioral cues—such as conduct indicative of criminal activity—as opposed to nonbehavioral cues—such as an individual's location or manner of dress—they are more likely to be correct in their suspicions regarding the target's participation in criminal activity. Agencies also should avoid using stops as a pretext to investigate potential crimes that are unrelated to the basis for the stop. And agencies should, in partnership with their communities, decide under what circumstances enforcement of low-level offenses is consistent with the agencies' public-safety goals. To the extent that particular offenses are deemed a priority, they should be enforced evenhandedly throughout a jurisdiction.

Second, agencies should ensure that once an officer decides to initiate an encounter or engage in an arrest, the officer uses the encounter as an opportunity to reinforce, rather than undermine, the legitimacy of the police. Officers can do this by engaging the principles of procedural justice—treating individuals respectfully, with dignity, and, to the extent possible, explaining their reasons for initiating an encounter or taking a particular enforcement action. Officers also should give individuals an opportunity to exercise "voice" during encounters, and generally should convey trustworthy motives. Officers should abide by these principles throughout the entire encounter, including as individuals are brought to the police station and decisions are made about the possession of their property.

c. Policies, recordkeeping, and supervision. Agencies should develop policies and enforcement priorities that are consistent with these Principles. Agencies should not impose minimum quotas for officer-initiated encounters, and should not evaluate officers based on the number of stops, citations, or arrests that they conduct. In particular, agencies must never impose quotas to generate revenue. As discussed in greater detail in § 13.XX, agencies should instead evaluate officers' conduct in ways that encourage them to work cooperatively with members of their communities and address their public-safety needs. Finally, agencies should work with

other government officials and community members to develop alternative strategies for dealing with public-safety concerns.

In addition, agencies should develop policies and practices to monitor and learn from the ways in which officers interact with members of the public. Many agencies have instituted data-collection programs to track stops, searches, and arrests. Doing so enables agencies to assess whether officers' actions are effective and conducted in an unbiased manner. Requiring officers to record what actions they took—and importantly, why—also can encourage officers to reflect on their own decisions and to consider whether their actions are in fact consistent with department values and priorities. Other agencies have used body-worn-camera footage to assess whether officers are conducting themselves appropriately in the course of encounters. Video footage also can be useful for training purposes by giving officers clear examples of what is expected of them. Body cameras also can be used as an encounter occurs, or beforehand, for officers to articulate the reason for initiating an encounter. When body cameras are not available, contemporaneous stop reports are essential.

REPORTERS' NOTES

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

Those who favor aggressive use of traffic and pedestrian stops justify their use in one of two ways. First, they argue that proactive stops enable officers to uncover illegal guns and drugs. Second, they point out that stopping large numbers of people can have a deterrent effect by sending a message that criminal conduct will not be tolerated, and that individuals should leave their contraband and weapons at home. See, e.g., EDWIN MEESE III & JOHN G. MALCOLM, POLICING IN AMERICA: LESSONS FROM THE PAST, OPPORTUNITIES FOR THE FUTURE (2017); Michael R. Bloomberg, *'Stop and frisk' keeps New York safe,* WASHINGTON POST, Aug. 18, 2013. The first has not been borne out by the evidence. Study after study indicates that in situations in which proactive stops are utilized, hit rates tend to be quite low. See, e.g., Expert Report of Jeffrey Fagan at 63; Floyd v. City of New York, No. 08 Civ. 1034 (S.D.N.Y. 2008)

(0.15 percent of stops in New York City resulted in seizure of a gun, and 1.75 percent in seizure of contraband); ACLU of Massachusetts, "Stop and Frisk Report Summary" (2014) (finding that just 2.5 percent of stops turned up weapons or contraband). As for the deterrent claim, the evidence is mixed. A small number of studies suggest that proactive use of stops and arrests in cities like New York has had a modest effect on crime. See, e.g., David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime?* 15 CRIMINOLOGY & PUB. POL. 31 (2016). But that evidence is contested. See, e.g., Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003-2010*, 31 JUSTICE QUARTERLY 96 (2014) (finding few effects). In addition, studies comparing the use of proactive stops and arrests to use of more holistic problem-solving tactics have found that the latter is more effective at bringing down crime. See Anthony A. Braga, *The Effects of Hot Spots Policing on Crime*, 31 JUSTICE QUARTERLY 633 (2014).

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

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

In addition, numerous studies and reports—as well as plentiful evidence in the public sphere—make clear that proactive use of stops can significantly impact police legitimacy and public trust. See, e.g., Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization* 11 J. EMPIRICAL LEGAL STUD. 751-785 (2014); Jennifer Fratello, Andrés F. Rengifo & Jennifer Trone, Vera Institute of Justice, Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications (2013); CHARLES EPP, ET AL., PULLED OVER: HOW TRAFFIC STOPS DEFINE RACE AND CITIZENSHIP 126-133 (2014). Widespread use of "stop and frisk" has led to countless protests in cities across the country. See, e.g., John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, NEW YORK TIMES, June 17, 2012. Justice Department investigations in cities like Chicago and Newark have pointed to deep-seated frustration on the part of residents, primarily persons of color, who report being stopped repeatedly in their communities. NEWARK DOJ REPORT at 11; U.S. DEPT. OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 142 (2014). Indeed, criticism of such tactics stretches at least as far back as the 1960s, when two presidential commissions pointed to aggressive policing in minority communities as one of the root causes of hostility and mistrust. See The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders (1968); The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice (1967). Although agencies may have initiated proactive enforcement programs with all good intentions, the fact of the matter is that their overuse has alienated communities, lessened public trust in the police, and led to considerable social unrest.

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

Among the policies that agencies should specifically consider are policies to limit or prohibit the use of stops for the purpose of conducting a warrant check. There are—as countless studies have documented—an extraordinary number of outstanding warrants in the United States.

See *Strieff*, 136 S. Ct. at 2073 (Kagan, J., dissenting) (citing studies). In Ferguson, Missouri, a town with just 21,000 residents, the U.S. Department of Justice found that there were 16,000 outstanding warrants. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 55 (2015) (hereinafter FERGUSON REPORT). In Cincinnati, a study found that the city had 100,000 warrants with only 300,000 residents. See Helland & Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping,* 47 J. LAW & ECON. 93, 98 (2004) Some of these warrants may be years—or even decades—old. See, e.g., Preeti Chauhan et al., *The Summons Report: Trends in Issuance and Disposition of Summonses in New York City, 2003–2014* (2015), https://www.jjay.cuny.edu/sites/default/files/news/Summons_Report_DRAFT_4_24_2015_v8.pdf (finding that more than 73,000 of the warrants stemming from summonses issued in 2003 were still open as of 2014).

The proliferation of warrants creates an incentive for officers to conduct stops in order to look for outstanding warrants—and then, if a warrant is found, to conduct a full-blown search to look for weapons or contraband. Indeed, some police manuals encourage officers to run warrant checks during all stops precisely because it could give rise to a reason to search. See EPP ET AL., PULLED OVER at 33-36 (2014). In some jurisdictions, officers conduct thousands of stops and warrant checks each year. The use of stops in this manner raises all of the concerns about legitimacy and intrusiveness discussed above. It also potentially helps to perpetuate the system of fines and fees that falls disproportionately on the poor and on racial minorities. See, e.g., FERGUSON REPORT at 42-61. For all of these reasons, agencies should consider policies to limit the use of stops for the purpose of conducting a warrant check. Jurisdictions also should, consistent with § 2.XX (forthcoming Section on warrants), revisit existing warrant practices to minimize the various harms that the proliferation of warrants has caused.

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

§ 4.04. Permissible Intrusions During Stops

(a) During a stop, an officer may:

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

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

(b) Unless probable cause develops during the encounter, the encounter should terminate upon completion of these investigative efforts.

Comment:

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

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

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

and are immediately accessible to the driver or passenger—or would be once the driver or passenger are permitted to reenter the vehicle.

REPORTERS' NOTES

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

§ 4.05. Minimizing Intrusiveness of Stops and Arrests

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

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

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

Comment:

a. Summonses and arrests. Officers possess the power of arrest in order to further a number of societal goals: to maintain public order, initiate the criminal process against a defendant, facilitate the preservation of evidence, and help to ensure an individual's appearance at later proceedings. At the same time, an arrest can impose a variety of costs. An arrest involves a serious—even if temporary—deprivation of liberty, which can be frightening and humiliating, and can disrupt an individual's ability to fulfill family or work obligations. As a result of arrest, an individual may face significant fines and fees, loss of public housing, loss of a job,

deportation, and child-custody consequences. These in turn can have serious ripple effects on the individual's family and community. Studies show that once a person is taken into custody, and held there, the possibility of eventual incarceration increases. Any time an officer decides to make an arrest, there is some risk that the officer will encounter physical resistance that may necessitate the use of force—which can result in injury to both the officer and the civilian involved. Finally, arrests are expensive: an arrest typically takes an officer off the street for several hours, and imposes various other processing and administrative costs on agencies and courts.

In some circumstances, an arrest may be the most appropriate—and perhaps the only—way to achieve the aforementioned objectives. But in many instances, these same goals may be achieved in other ways. Officers often have options available to them other than arrest. For many defendants, a summons may be just as effective at ensuring their appearance in court. In some cases, a warning or other intervention may be sufficient to resolve the situation and deter future crimes or violations. In those situations, an arrest constitutes an unnecessary intrusion on individual liberty, and should be avoided. That is particularly true for individuals who are suspected of offenses for which the maximum penalty is a fine.

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

For all of these reasons, agencies should encourage officers to consider using lesser sanctions when doing so is consistent with the needs of public safety and permissible under

governing law. Agencies should not impose minimum quotas or targets for citations or arrests, or evaluate officers based on the quantity as opposed to quality of enforcement actions taken. In addition, states and municipalities should revisit policies that incentivize agencies to issue citations in order to raise revenues either for the agency or for the municipality as a whole. Such policies often impose disproportionate burdens on low-income and minority communities and should be discontinued.

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

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

Many states, municipalities, and agencies already have adopted various policies and programs to encourage the use of lesser sanctions and to restrict the use of arrests. Most states permit officers to issue a summons or a citation in lieu of arrest for low-level offenses. Some require officers to issue a summons or a citation in lieu of an arrest for certain offenses unless an arrest is necessary to preserve the peace, or there is some reason to believe that the individual will fail to appear at later criminal proceedings. A number of jurisdictions have provided officers with alternative mechanisms for addressing disruptive or disorderly conduct that otherwise would necessitate arrest. These include crisis drop-off centers for the mentally ill, detox centers for individuals under the influence of drugs or alcohol, and homeless shelters where officers can

take individuals who are in need of services and support. Jurisdictions also have taken steps to reduce reliance on formal sanctions for juvenile misconduct, which often can better be addressed through school discipline, counseling, or other services.

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

REPORTERS' NOTES

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

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

An arrest in particular constitutes a serious intrusion on an individual's liberty and imposes any number of additional harms, from dignitary costs to threats to one's livelihood. See,

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

Arrests may be costly for officers and agencies as well. Arrests are dangerous. An arrest may provoke a violent response, risking the physical safety of officers, bystanders, and the individual in question. See Cynthia Lum & George Fachner, Int'l Ass'n of Chiefs of Police, Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database 7 (2008), https://perma.cc/XZ96-NPDD (finding that one of the most common circumstances of officer death, second only to an automobile accident, is an arrest situation). Arrests also are expensive: studies estimate that each arrest costs departments several thousands of dollars and takes officers off the street for hours. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 319 (2016) (noting that an arrest takes an officer off the street for between four and 13.5 hours).

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

Any rational system of criminal justice would take those costs into account. The proper approach, outlined in this Section, is one of minimization. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 362-363 (2016). Stated simply, policing agencies and officers ought to

pursue legitimate public-safety purposes using the least intrusive means available, so long as their actions are within the bounds of governing law. If a less intrusive means would accomplish the public purpose equally well, the officer should not use the more intrusive tactic.

§ 4.06. Consent Searches

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

(b) Agencies should consider adopting policies to limit officers' use of consent searches, including by:

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

(2) requiring officers to explain why they want to conduct a search and that the individual has the right to refuse consent; and

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

(c) The scope of a consent search should be no broader than necessary to achieve the investigative objective motivating the request for consent.

Comment:

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

At the same time, there is a risk that consent searches may be used in ways that impose unnecessary costs on the public, and, in doing so, undermine public trust in the police. These include possible privacy and dignitary costs, among others. Individuals who consent to a search may nevertheless find the experience intrusive and unsettling. Many of the circumstances in which officers seek consent—such as traffic or pedestrian stops—are inherently coercive. Even if an individual is advised of his or her right to refuse, the individual may feel compelled to give

officers permission to search to avoid unduly prolonging the encounter or increasing the likelihood of getting a citation. It is therefore difficult to conclude with confidence that anyone who is asked by a police officer for permission to search "consents" in the ordinary meaning of that term. An individual who "consents" may nevertheless perceive the encounter as involuntary and illegitimate—particularly if the person is innocent of any crime. These concerns are exacerbated by the fact that consent searches have the potential to be used in racially disparate ways. In one jurisdiction after another, studies have shown that officers are more likely to seek consent from minority drivers and pedestrians—but that searches of minorities are in fact less likely to turn up evidence or contraband. These disparities can further undermine legitimacy and trust. Finally, a number of studies suggest that frequent use of consent searches may be a poor use of officer time. Hit rates often are extremely low, and even "successful" searches often turn up only small quantities of drugs.

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

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

c. Requirement of reasonable suspicion and explanation. Officers should not seek consent to conduct a search unless they have reasonable suspicion to believe that the search will turn up evidence of a crime and unless they can explain to the individual why they would like to conduct a search. A reasonable-suspicion standard recognizes society's interest in uncovering evidence of criminal activity, and it gives officers an important tool with which to close the

investigative gap between their initial suspicions and probable cause for a search or arrest. At the same time, the standard eliminates the use of consent searches in precisely the circumstances in which they are least likely to be efficacious, and most likely to undermine legitimacy and trust. Absent reasonable suspicion, an officer at best has a mere hunch that something is off—and at worst, is operating on the basis of explicit or implicit bias, unfounded hunch, whim, or caprice. Studies suggest these are precisely the circumstances in which officers' actions are most likely to disproportionately affect minority groups. The additional requirement of an explanation can both assuage fears that the officer is acting arbitrarily and help define the scope of the consent.

d. Written acknowledgement. A reasonable-suspicion requirement is more closely tailored to the underlying concerns with consent searches than is the requirement of written acknowledgement that the target was informed that he or she did not have to consent to the search. Research casts serious doubt on the idea that consent forms meaningfully alter the inherent coerciveness of police–citizen encounters. An individual who feels compelled to consent to a search—out of deference to authority or fear of the consequences of refusing—may feel just as compelled to consent in writing.

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

REPORTERS' NOTES

Consent searches are a common tool for police departments. Courts repeatedly have stressed the importance of permitting officers to seek cooperation from the public, as well as the fundamental value of consent itself. As the U.S. Supreme Court observed, "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." United States v. Drayton, 536 U.S. 194, 207 (2002). See also Fernandez v. California, 134 S. Ct. 1126, 1132 (2014); Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973). From the perspective of police departments, seeking consent to search saves officers time by forgoing the procedural requirements of obtaining a warrant. See, e.g., Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 McGEORGE L. REV. 27, 31 (2008). Additionally,

asking for consent is sometimes the sole investigatory tool available to an officer who believes a crime has occurred. As the Court acknowledged in *Schneckloth*, "[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence." *Schneckloth,* 412 U.S. at 227.

1. Animating concerns. Despite their legality and usefulness, various issues surrounding consent searches mitigate against their broad use. First and importantly, "consent" searches often are not voluntary in any meaningful sense. Statistics reported by police departments suggest that the vast majority of people consent to searches when asked to do so by police officers—which raises serious doubts about how voluntary these searches are. L.A. POLICE DEP'T, ARREST, DISCIPLINE, USE OF FORCE, FIELD DATA CAPTURE AND AUDIT STATISTICS AND THE CITY STATUS REPORT COVERING PERIOD OF JANUARY 1, 2006-JUNE 30, 2006, at 8 (2006) (reporting that of 16,228 requests for consensual search made during the first half of 2006, 16,225, or 99.9 percent, were granted); ALEXANDER WEISS & DENNIS P. ROSENBAUM, UNIV. OF ILLINOIS AT CHICAGO, ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNUAL REPORT: EXECUTIVE SUMMARY 10 (2011) (reporting that in 2010, requests for consent to search during a traffic stop were granted 82 percent of the time). Extensive psychological research suggests that people asked to consent often do not feel free to refuse, either because they feel required to comply with the request of an authority figure or because they fear the consequences of refusal. As Marcy Strauss writes, there is "abundant evidence" that "individuals read a police officer's request as a demand that they will . . . most assuredly obey." See, e.g., Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 240-241 (2001); see also Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155; Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority* (Unpublished Dissertation, Rutgers University, 1999). As noted earlier in this Chapter, even the U.S. Supreme Court has recognized that consent may not be truly voluntary. Schneckloth v. Bustamonte, 412 U.S. at 227, 228; § 4.01, Reporters' Notes.

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

There is also a significant risk that consent searches may be used in racially disparate ways. Department statistics consistently show that officers are significantly more likely to ask African American or Hispanic motorists or pedestrians for consent to search—but that searches of minorities are in fact less likely to turn up contraband. A 2014 study found that Illinois state troopers were 2.5 times more likely to ask Hispanic motorists for consent to search, but were 2.5 times more likely to find contraband in searches of white motorists. ACLU of Illinois, *Racial*

Disparity in Consent Searches and Dog Sniff Searches: An Analysis of Illinois Traffic Stop Data from 2013 (2014); see also Richard A. Oppel, Jr., *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES (Nov. 20, 2014) (describing similar findings of disparate impact in Durham, North Carolina, and Austin, Texas). A number of law-enforcement agencies and officials have recognized these risks. For example, the Kalamazoo, Michigan, police department revised its consent-search policy after a commissioned study found that Black motorists were stopped at a rate at least two times greater than white motorists. In explaining the need for the revisions, Chief Jeff Hadley cited the "collateral damage" to community relations caused by previous policies. Aaron Mueller, *Traffic Stops by Kalamazoo Police Down by Nearly Half in 6 Months Since Racial Profiling Study*, MLIVE.COM (March 3, 2014), http://www.mlive.com/news/kalamazoo/index.ssf/2014/03/racial_profiling_study_prompts.html.

Finally, given that consent searches often are conducted based on little or no suspicion, there is reason to doubt their effectiveness. The hit rates for consent searches generally are low. See, e.g., Illya D. Lichtenberg & Alisa Smith, *Testing the Effectiveness of Consent Searches as a Law Enforcement Tool*, 14 JUSTICE PROFESSIONAL 95, 102-104 (2001) (finding consent-search hit rates for detection of drugs ranging between 9.4 percent and 22.9 percent over various periods in Maryland and Ohio); REPORT OF THE NEW JERSEY SENATE JUDICIARY COMMITTEE'S INVESTIGATION OF RACIAL PROFILING AND THE NEW JERSEY STATE POLICE 86 (2001) (noting that just "37 seizures resulted from the 271 consent searches in the year 2000."). An Ohio study found that as officers made greater use of consent searches, hit rates went down, which suggests that consent searches are most effective when officers are more discerning in deciding when to use them. Lichtenberg & Smith, supra.

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

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

pedestrians in an arbitrary manner." Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

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

4. Additional precautions. Agencies also can take additional steps to ensure that consent searches are used in a manner that is consistent with these Principles. First, agencies should ensure there is a mechanism in place to document that officers in fact sought consent to search. Written consent forms can serve this purpose, but so too can requiring officers to document consent using an audio or video recording. See, e.g., AUSTIN POLICE DEP'T, AUSTIN PD POLICY MANUAL, supra at 147 ("For consent searches not involving a vehicle or subject stop, an officer with supervisory approval may document the voluntary consent using only video and/or audio recording.").

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

§ 4.07. Searches Incident to a Lawful Custodial Arrest

(a) A search incident to a lawful custodial arrest may only be conducted to protect the safety of officers or others, or to prevent the destruction of evidence.

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

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

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

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

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

Comment:

a. Permissible rationales. Searches conducted incident to arrest fall under one of the longstanding exceptions to the general rule that searches of persons or property must be conducted pursuant to a warrant supported by probable cause. Although a search incident to arrest is *triggered* by a suspicion-based action—an arrest supported by probable cause—the search itself need not be supported by any individualized suspicion that it will turn up evidence or a weapon. Thus, some of the same concerns about suspicionless searches reflected in § 5.01 apply here.

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

When neither of these risks is present, however, the mere fact of arrest is insufficient to justify the search. For example, courts have long held that, absent exigent circumstances, officers must obtain a warrant before searching an arrestee's home or office beyond the immediate grab

area. Officers also are not permitted to search an arrestee's vehicle absent probable cause to believe that the vehicle contains evidence related to the crime of arrest. And they are required to obtain a warrant before searching the contents of an arrestee's cellular phone or computer.

b. Potential for abuse. Although searches incident to arrest further important law-enforcement goals, they also can be subject to abuse. Such searches require no independent, individualized justification beyond the reason for the arrest itself. Thus, the authority to search incident to arrest creates an incentive for officers to arrest individuals in circumstances in which they otherwise would have issued a warning or a citation. Officers also have been known to arrest individuals for minor offenses, search them for evidence of drugs or other contraband, and then let them go without ever taking them into custody. In such instances, the search itself becomes the goal, rather than a byproduct of an officer's decision to take someone into custody. Those practices can unduly increase the overall incidence of arrest, as well as the collateral costs imposed on individuals who are arrested. See § 4.04. Still another concern is that searches incident to arrest may be more intrusive than is in fact necessary to protect officers or prevent the destruction of evidence. This is particularly true of searches conducted out in the field. Such searches often occur in a public setting in view of others, which increases the level of stigma or humiliation on the part of the arrestee. At the same time, because they take place in a noncustodial setting—and typically without a supervisor present—there is a greater potential for abuse.

c. Limitations on scope. In light of the aforementioned concerns, a number of jurisdictions have placed limits on searches incident to arrest, either by prohibiting such searches altogether following an arrest for minor offenses or by prohibiting custodial arrest for minor offenses. Such policy changes may be especially warranted in jurisdictions that are unable to address the pretextual use of arrests in other ways. These Principles do not adopt such a categorical rule. Instead, § 4.04 makes clear that agencies should limit the use of arrests in circumstances in which less intrusive means would be equally effective at promoting public safety or preserving order.

This Section adds two further limitations: (1) that searches incident to arrest should not be used as a pretext to look for evidence of crimes unrelated to the offense in question, and (2) that searches conducted in the field should generally be limited to a pat-down unless there is cause to believe that the arrestee is concealing a weapon or evidence that would not be

uncovered during a pat-down search. The policy urged here would help reduce the incentive to conduct unnecessary arrests in order to look for evidence of crime, while at the same time minimizing the intrusiveness of searches that do in fact take place. A number of jurisdictions, including New York City, have limited the use of field searches in this manner. As discussed below, officers could then conduct a more thorough search after transport—so long as the search is conducted pursuant to a written policy that is applied evenhandedly to all arrestees.

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

d. Distinguishing two kinds of searches. This Section distinguishes between searches conducted at the time of the arrest (typically out in the field) and subsequent searches that are conducted either at the stationhouse or at a detention facility. Although courts have at times justified *both* categories of warrantless searches as "incident to arrest," they differ in important ways that should be reflected in agency policy and practice. Searches conducted contemporaneously to a custodial arrest are justified by an immediate need to protect officer safety and secure evidence. In this regard, they are similar to other protective actions that officers sometimes are permitted to take in the context of a traffic or pedestrian stop—such as ordering a driver to step out of the car or conducting a frisk.

Subsequent searches of arrestees after transport to the station or to a detention facility—including fingerprinting or DNA collection, inventory searches of impounded vehicles, and searches of the arrestee's person or property—are justified by a much broader range of law-enforcement and institutional goals, which are not necessarily related to the individualized circumstances of the particular arrest in question. These include the need to identify the arrestee, to secure the arrestee's belongings, and to protect jail guards and inmates by ensuring that potential weapons or contraband are not brought into the facility. In short, they need not be justified by concerns over officer safety or the destruction of evidence alone. Although these search procedures are triggered by the fact of arrest, they are indistinguishable from other kinds of suspicionless, programmatic searches, and should be conducted according to the suspicionless

search and seizure Principles in Chapter 5. In particular, they should be conducted either pursuant to written policies that are applied evenhandedly to all individuals who are taken into custody, or on the basis of articulable, individualized suspicion, documented in advance, that a more intrusive search is required of an individual.

REPORTERS' NOTES

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

Still, there are two problems with the search-incident-to-arrest authority as presently constituted. First, in certain circumstances it enables officers to conduct searches in a manner that is more intrusive than is justified by the underlying rationales of safety and evidence gathering. Second, the authority incentivizes officers to arrest individuals in circumstances in which they otherwise would have issued a warning or a citation. See, e.g., State v. Sullivan, 16 S.W.3d 551, 552 (Ark. 2000) (officer testified that he arrested driver instead of issuing a citation because he suspected the driver of being involved with narcotics); State v. Pierce, 642 A.2d 947, 961 (N.J. 1994) (expressing concern that an expansive search-incident-to-arrest doctrine "creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits." (internal citations omitted)).

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

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

A number of states also prohibit custodial arrests for certain types of offenses, thereby eliminating the possibility of a search incident to arrest. See, e.g., ALA. CODE § 32–1–4 (1999) (prohibiting custodial arrests for all misdemeanor traffic offenses not involving injury to persons or driving while under the influence); CAL. VEH. CODE ANN. § 40504 (West 2000) (prohibiting custodial arrests, subject to certain exceptions, for non-felony traffic offenses); KY. REV. STAT. ANN. § 431.015(1), (2) (Michie 1999) (prohibiting custodial arrests, subject to exceptions, for misdemeanors if there are reasonable grounds to believe that the person being cited will appear in court); LA. REV. STAT. ANN. § 32:391 (West 1989) (prohibiting custodial arrest for traffic violation offenses, subject to exceptions; permitting custodial arrest for traffic misdemeanor and felony offenses); MINN. R. CRIM. P. 6.01, subdiv. 1(1)(a) (requiring issuance of citations in misdemeanor cases "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation."); N.M.S.A. 1978, § 66-8-123 (prohibiting custodial arrests, subject to certain exceptions, for misdemeanor traffic offenses); S.D. CODIFIED LAWS § 32–33–2 (1998) (prohibiting custodial arrests for misdemeanor traffic violations, subject to exceptions); TENN. CODE ANN. § 40–7–118(b)(1) (1997) (prohibiting custodial arrests for misdemeanors, subject to exceptions); VA. CODE ANN. § 46.2–936 (Supp. 2000) (prohibiting custodial arrests, subject to certain exceptions, for misdemeanor traffic offenses). In states that leave discretion to officers, a number of courts have held that arrests for minor misdemeanors amount to an abuse of the officers' discretion to decide whether to make an arrest. State v. Brown, 792 N.E.2d 175 (Ohio 2003) (holding that, absent certain special circumstances, an arrest for a minor misdemeanor violates the state constitution); State v. Bayard, 71 P.3d 498 (Nev. 2003) (finding that an officer abused his statutory discretion by using custodial arrest for a traffic violation); State v. Bauer, 36 P.3d 892 (Mont. 2001) (finding that an officer abused his statutory discretion by using custodial arrest for possession of alcohol by a minor); State v. Harris, 916 So.2d. 284 (La. Ct. App. 2005) (finding

that an officer abused his statutory discretion by using custodial arrest for possession of alcohol by a minor). Elsewhere, these Principles likewise urge states and agencies to encourage or require officers to consider alternatives to arrest, including warnings or citations. See § 4.05.

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

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

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

CHAPTER 10
EYEWITNESS IDENTIFICATIONS

§ 10.01. General Principles for Eyewitness Identification Procedures

Agencies should be cognizant of the scientific research regarding eyewitness perception and memory, and the limits of eyewitness evidence.

Comment:

a. Eyewitness identifications. Officers use a variety of different procedures to ask an eyewitness to identify a culprit, including: (1) showups; (2) photo arrays; (3) live lineups; and (4) mugshots and computer presentations of photos in which there is no designated suspect. In a showup, which usually occurs at or near the crime location and shortly after the crime occurred, officers present a single, live suspect to a witness. In photo arrays, officers present the eyewitness with a series of photographs, one of which is the suspect, and the others called "fillers," or known non-suspects. Live lineups are less commonly used, in which the suspect and fillers are presented in person to an eyewitness. Additional procedures may be used in which officers do not have a suspect. If so, officers may show mugbooks or sets of photographs to see if the eyewitness can identify a suspect, or they may ask the eyewitness to help prepare a composite image or drawing of a culprit. This Chapter refers to these various procedures generally as "eyewitness identification procedures," but refers to specific procedures when necessary.

b. Scientific research. A substantial body of basic research examines how humans perceive images and form visual memory. That research has been complemented by applied research in the area of eyewitness identification. All of that research has resulted in a large body of knowledge concerning how to test visual memory accurately, including face identification, and a set of best practices that are recommended to test and preserve the memory of an eyewitness. Many traditional identification methods still used by agencies were not designed carefully or based on research. Such traditional methods can alter or deteriorate the memory of an eyewitness, including because those methods may be highly suggestive. Poor eyewitness identification procedures can result in situations in which the eyewitness cannot make an identification, or in false identifications and wrongful convictions of innocent persons.

c. Procedures for eyewitness identifications. Agencies should use clear, written procedures for eyewitness identifications, developed with care and attention to the shortcomings of such identifications, as demonstrated by scientific research.

Eyewitness identification procedures can themselves affect the memory of an eyewitness, and subpar procedures can outright alter the memory of an eyewitness. Constitutional rulings on the subject preceded the body of scientific research that has resulted in a set of best practices for eyewitness identification procedures. As a result, those rulings do not provide a well-informed constitutional floor. At best, they counsel against highly unnecessary and suggestive conduct by officers during identification procedures.

Agencies should focus on practices informed by scientific research. That scientific research has resulted in consensus on a series of best practices. Certain other practices are not currently the subject of scientific consensus, and should be considered a matter of policy choice by agencies. Further, scientific research continues to advance and produce insights that can improve procedures for eyewitness identifications. Agencies that conduct eyewitness identifications should be responsive to developments in research and also in technology.

REPORTERS' NOTES

Eyewitness identifications are a staple of criminal investigations. But their reliability has been called into question by decades of scientific research and an explosion of information about just how potentially unreliable such identifications can be. As the National Academy of Sciences explained in a landmark 2014 report summarizing the scientific research in the area of human visual memory, "it is well known that eyewitnesses make mistakes, and their memories can be affected by various factors including the very law enforcement procedures designed to test their memories." NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 1 (2014). In particular, the hundreds of DNA exonerations in recent years, the vast majority of which involved eyewitness misidentifications, have brought home the malleability and fragility of eyewitness memory. Id. Research examining what transpired in misidentifications that resulted in innocent persons being convicted has revealed the role that poorly designed and suggestive agency procedures can play. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63-68 (Harvard University Press, 2011).

Unfortunately, there is wide variability among agencies on the subject of eyewitness evidence. Many agencies have policies that are decades out of date, or they have no written policies at all. See, e.g., Police Executive Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies 46-47 (2013), at http://policeforum.org/library/eyewitness-identification/NIJEyewitnessReport.pdf.

That said, false identifications and unsound lineup procedures are not a new problem. As the U.S. Supreme Court has put it: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228 (1967). In 1977, in adopting its current due process rule regulating eyewitness identification evidence, the Court emphasized how "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

At the time *Manson* was decided, however, little was known about what precisely had an impact upon the reliability of eyewitness identifications. As a result, the Supreme Court's existing framework does not comport with scientific research. Although the Supreme Court's due process test to assess eyewitness evidence asks whether police used suggestive identification procedures, any such suggestiveness can be excused based on a set of "reliability" factors. *Manson,* 432 U.S. at 114. The "reliability" factors adopted by the Court in *Manson*, having been already set out in its earlier ruling in Neil v. Biggers*,* 409 U.S. 188 (1972), ask that the judge examine: (1) the eyewitness's opportunity to view the defendant at the time of the crime; (2) the eyewitness's degree of attention; (3) the accuracy of the description that the eyewitness gave of the criminal; (4) the eyewitness's level of certainty at the time of the identification procedure; and (5) the length of time that had elapsed between the crime and the identification procedure. Id. The Court did not assign any particular weight to these various factors.

The Supreme Court more recently has held that when unreliability in eyewitness identifications is not due to intentional police action, it is not regulated under the Due Process Clause at all. Perry v. New Hampshire, 132 S. Ct. 716 (2012). The Justices in *Perry* stated that the Court did "not doubt either the importance or the fallibility of eyewitness identifications," but held that state legislation, evidence law, and safeguards such as expert testimony and jury instructions should be relied on to ensure the accurate presentation of eyewitness evidence. Id. at 728-729.

A large body of scientific research has called into question the validity of many of the Supreme Court's so-called "reliability" factors. For scholarly criticism in light of the social-science research, see, e.g., Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures,* 41 VAL. U. L. REV. 109 (2006); Suzannah B. Gambell, *The Need To Revisit the* Neil v. Biggers *Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189 (2006).

Several state courts have departed from the federal due process rule, relying on the research that has developed in the intervening decades. See, e.g., State v. Ramirez, 817 P.2d 774, 780-781 (Utah 1991) (altering three "reliability" factors to focus on effects of suggestion); State v. Marquez, 967 A.2d 56, 69-71 (Conn. 2009) (adopting detailed criteria for assessing suggestion); Brodes v. State, 614 S.E.2d 766, 771 & n.8 (Ga. 2005) (rejecting use of eyewitness certainty); State v. Hunt, 69 P.3d 571, 576 (Kan. 2003) (adopting five-factor "refinement" of federal due process test).

The Supreme Court's acquiescent approach to eyewitness identification, and the current state of research, increase the need for laws and policies that adhere to our best understanding of the reliability of eyewitness testimony and the factors that in fact heighten or diminish reliability in any given case. And in fact, several state courts have rejected the *Manson* test entirely based on that scientific research. State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012); Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); Young v. State, 374 P.3d 395 (Alaska 2016). The New Jersey Supreme Court in its *Henderson* decision endorsed the use of pretrial hearings to examine eyewitness identification evidence, together with detailed jury instructions on the issue. State v. Henderson, 27 A.3d 872 (N.J. 2011). In contrast, the Oregon Supreme Court has endorsed review of the reliability of eyewitness evidence under its evidence rules. State v. Lawson, 291 P.3d 673 (Or. 2012). The Massachusetts Supreme Judicial Court has recommended more concise jury instructions on eyewitness identification evidence. Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); see also Young v. State, 374 P.3d 395 (Alaska 2016). Each of these rulings has made it all the more important that agencies adopt best practices to ensure accuracy at the time that eyewitness identification procedures are conducted.

Scientific evidence concerning human perception, vision, and memory provides a framework that should inform the collection and use—both pretrial and at trial—of eyewitness evidence, including through jury instructions and presentations by expert witnesses. As the National Academy of Sciences (NAS) has put it, "the best guidance for legal regulation of eyewitness identification evidence comes not . . . from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision-makers." See NRC, IDENTIFYING THE CULPRIT, at 30; see also Final Report of the President's Task Force on 21st Century Policing 2.4 (May 2015) (recommending adoption of identification procedures "that implement scientifically supported practices that eliminate or minimize presenter bias or influence").

In scientific terms, the law should take account of both *estimator* variables and *system* variables. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. OF PERSONALITY & SOC. PSYCHOL. 1546-1557 (1978) (first coining the terms "estimator" and "system variables"). Both types of variables can affect the memory of an eyewitness. Estimator variables are factors relating to the conditions of the crime-scene viewing, such as the lighting, the eyewitness's eyesight, familiarity with the perpetrator, or race. Studies have shown that individuals display an "own race" bias, or a greater difficulty identifying persons of a different race. See NRC, IDENTIFYING THE CULPRIT, at 96. Estimator variables cannot be controlled by law enforcement. In contrast, *system variables* are factors associated with the procedures that officers use to obtain identifications by an eyewitness. System variables can be controlled by law enforcement.

More than three decades of scientific research into eyewitness memory has begun to have an impact on how police conduct eyewitness identifications, as well as how judges regulate eyewitness evidence in the courtroom. That research informs the specific principles recommended in this Section. It also should inform the overall approach toward police investigations relying on

eyewitness evidence, as well as subsequent judicial use and review of such evidence. Scientific research can inform each step of the process, from collection to use of eyewitness evidence in the judicial system. Although scientific consensus exists on the use of a range of crucial best practices, there is a lack of consensus on certain other factors and practices, making any recommendations on those topics more provisional and qualified. When further research is needed, these Principles note the appropriate qualifications.

We note that the same protections against suggestion are important for "earwitness" identifications, in which a witness is asked whether a suspect's voice can be recognized. Indeed, sometimes both face and voice recognition identification procedures are conducted. The same principles apply regardless of which memory task is involved in the procedure in question.

Although the procedures described here apply to identifications by human eyewitnesses, facial-recognition technology is increasingly used to identify faces from video or images. Jose Pagliery, *FBI Launches a Face Recognition System*, CNN Money (Sept. 16, 2014), http://money.cnn.com/2014/09/16/technology/security/fbi-facial-recognition. Such algorithms also can raise questions regarding reliability, as can the interpretation of the results of such technologies by human experts. John Nawara, Note, *Machine Learning: Face Recognition Technology Evidence in Criminal Trials*, 49 U. LOUISVILLE L. REV. 601, 604-607 (2011). As with the procedures for human eyewitnesses, agencies should evaluate the reliability of any technology adopted to use face recognition to identify faces or other biometric information.

§ 10.02. Eyewitness Identification Procedures

Police agencies should adopt standard, written eyewitness identification procedures to regulate the use of showups, lineups, photo arrays, and any other eyewitness identification techniques they employ, whether in the field or the station. Agencies should ensure that the specific procedures they use to test the memory of an eyewitness are informed by extant research. Those procedures should include:

(a) direction to conduct any identification as early as possible in the course of an investigation;

(b) instructions to explain the procedure to the eyewitness in easily understood terms;

(c) procedures for fairly selecting non-suspect or "filler" persons or images to display to the eyewitness;

(d) procedures for presenting persons or images to the eyewitness in a nonsuggestive manner;

(e) procedures for documenting any identification or nonidentification by the eyewitness; and

(f) procedures that employ sequential or simultaneous presentation of photos in photo lineups.

Comment:

a. Written policy. Traditionally, eyewitness identification procedures were not governed by written police policies. Rather, this was the type of task that officers would learn informally and on the job. Agencies did not have standardized instructions or procedures. Some agencies still do not have written eyewitness identification policies, and that problem remains a pressing one. This Section sets out each of the key elements of identification procedures, based on current scientific research. This Section also indicates areas that still are the subject of disagreement and ongoing research in the scientific community, such as presentation of photographs sequentially rather than simultaneously.

b. Timing. The memory of an eyewitness degrades over time. It is crucial that officers conduct eyewitness identification procedures as promptly as possible.

c. Procedures. The procedures for conducting an eyewitness identification should be clear and easily understood by witnesses. Standard procedures will ensure uniformity and avoid any misunderstanding by, or suggestion to, the eyewitness, even if inadvertent. It is important, for example, to convey that the culprit may or may not be present, because a witness may assume they have been asked to identify the culprit. Procedures should also be blind or blinded, as stated in § 10.05. The confidence of an eyewitness should be recorded, and the entire procedure should be recorded, as stated in § 10.08.

d. Fillers. The more fillers presented in an eyewitness identification procedure, the more reliable a test of the eyewitness's memory the procedure is. Typical rules require that five fillers be presented along with the suspect. Some agencies require that six or more be included, which provides a still more rigorous test.

An unfair or biased lineup, in which the suspect stands out, can lead to errors. Rules should clearly set out how to select fillers. Such rules should require that police, after obtaining a description from the eyewitness, should select fillers who each fairly reflect the eyewitness's description of the suspect. The fillers should not make the suspect stand out in a manner that is

suggestive. It may be necessary, for example, to mask a portion of the fillers' faces, if the suspect has a tattoo that the fillers would lack.

Only a single suspect should be present in any given lineup procedure. If there is more than one suspect, then additional and separate lineup procedures should be conducted for each additional suspect.

e. Documenting identifications. Eyewitness identification procedures should be documented, preferably by use of a video and audio recording, unless exigent circumstances make doing so impossible. Procedures should also be developed to mask the identity of eyewitnesses appearing in a recording, when there are investigative needs to do so. It is important that the procedure be documented, with the statements and identification decisions by the eyewitness written down. It is important to contemporaneously document the confidence of the eyewitness, because that confidence may change quite a bit based on feedback after the lineup.

f. Uniform policy and training. It is also important that agencies use standard eyewitness identification procedures, including with clear, written policies and training on their administration. The modern approach, treating eyewitness identifications as an experiment and a test of human memory, depends upon standard protocols and procedures. Absent consistent and clear procedures, there can be no uniformity or consistency of results, and eyewitnesses may themselves be confused or misled during an eyewitness identification procedure. As with all areas of agency policy, written policy must be implemented through sound training and supervision, not just in the academy, but in service. Supervision should include discipline for officers who fail to adhere to written policy and training on eyewitness identification procedures. Such supervision and training is important not just for officers who routinely conduct lineups, but for all officers who conduct investigations relying on eyewitness memory. For example, an officer's field interview with an eyewitness, designed to elicit a description of a possible suspect, can play a crucial role in any subsequent identification procedures.

g. Right to counsel. Based on U.S. Supreme Court rulings interpreting the U.S. Constitution, defendants have a right to have counsel present at in-person lineups after an indictment, but they do not have a right to counsel at photo arrays, which are the most common method employed for eyewitness identification procedures. United States v. Wade, 388 U.S. 218, 228 (1967); United States v. Ash, 413 U.S. 300, 321 (1973). Nevertheless, police should notify

counsel and permit counsel to be present during any identification procedures, in order to ensure the fairness of the procedures and to permit independent observation of the procedures.

h. Research on "sequential" or "simultaneous" is not decisive. There is a choice whether to present photos simultaneously (all at the same time) or sequentially (one at a time), and research on this issue at present is inconclusive. Many policing agencies view the sequential lineup as the more conservative option, because evidence suggests that it can prevent additional "comparison shopping" among images. Studies show that sequential lineups do reduce false identifications. Police more concerned with the cost of false identifications may choose that option. Sequential lineups also may reduce correct identifications. Some recent research suggests that for many eyewitnesses, the choice of procedure does not significantly impact results. Still, there is a live scientific debate about which type of presentation of images is the most accurate.

i. Written policy on presentation of photographs. Agencies should adopt a policy regarding the question of whether to conduct sequential or simultaneous presentation methods during eyewitness identification procedures, and should not leave this decision to the discretion of officers. In practice, some eyewitnesses may ask to view a sequential lineup a second time, which agencies commonly refer to as a second "lap." If permitted to do so, a sequential procedure is in effect much like a simultaneous one. As a result, the differences between the procedures may not turn out to be crucial in practice. In any event, the choice of which type of procedure to use, sequential or simultaneous, cannot be fully answered based on the scientific research, and thus requires a considered policy decision by the agency.

REPORTERS' NOTES

Traditionally, many agencies did not have formal policies or practices concerning eyewitness identification procedures. Often any training that was conducted was highly informal. Michael S. Wogalter, Roy S. Malpass & Dawn E. McQuiston, *A National Survey of U.S. Police on Preparation and Conduct of Identification Lineups*, 10 PSYCHOL., CRIME & L. 69 (2004) (survey of 220 agencies finding that over half reported no "formal training" on eyewitness identification procedures). Surveys indicate that many law-enforcement agencies continue to lack written policies on the subject of eyewitness identifications; other agencies adopt written policies, but ones that do not comport with best practices. See, e.g., Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* 46-47 (2013), at http://policeforum.org/library/eyewitness-identification/NIJEyewitnessReport.pdf (reporting in a national survey of over 600 agencies that 77 percent lacked written policy for showups and 64 percent reported no written policy for lineups or photo arrays); Brandon L. Garrett, *Eyewitness*

Identifications and Police Practices in Virginia, 3 VA. J. OF CRIM. L. 1 (2014) (study of Virginia law-enforcement policies, of which few complied with state model policy on lineup procedures). Without standard policies and procedures, it can be far more difficult to assess what happened during an eyewitness identification procedure. Moreover, it is difficult to ensure standard quality of the identifications if no standardized protocols are observed.

The National Academy of Sciences Committee Report made quite clear its recommendation that blind or blinded lineups be used by law enforcement. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 3 (2014). Section 10.05 develops the importance of conducting lineups in that fashion.

Policies should explain how to select "filler" photographs that fairly resemble the description of the suspect and the suspect, so that the suspect does not stand out in the photo array. Resources should be made available to police agencies so that they have access to archives of photographs and are then able to have a sufficiently wide selection of photographs for use in photo arrays. A move toward computerized selection of photographs and administration of photo arrays may improve the fairness of the photographs selected. In addition, policies should discourage the use of multiple viewings, which can raise the risk of error. See State v. Henderson, 27 A.3d 872, 900-901 (N.J. 2011) (stating that "law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.").

Agencies should adopt standard instructions for eyewitnesses. Those instructions should inform the eyewitness that a culprit may or may not be present in the lineup. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. That instruction is crucial because an eyewitness otherwise may expect that the culprit will be present and that there is a correct choice that should be made. As discussed in § 10.04, showups should be limited in their use. Such an instruction can still be given before conducting a showup, and agencies should have standard instructions and procedures to avoid undue suggestion in showup procedures. See NRC, IDENTIFYING THE CULPRIT, supra, at 108. As discussed in § 10.08, the confidence of the eyewitness should be documented, preferably through a recording of the entire eyewitness identification procedure.

Standard procedures should use terminology that is easily understandable by eyewitnesses. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. There are a number of state statutes and model policies that provide useful models for agencies. See, e.g., N.C. GEN. STAT. § 15A-284.52 (West 2007); OHIO REV. CODE ANN. § 2933.83 (West 2010); The Commission On Accreditation For Law Enforcement Agencies, Inc., CALEA Standards For Law Enforcement Agencies: 42.2.11 Line-Ups, International Association of Chiefs of Police, Model Policy: Eyewitness Identification (2010), at http://www.theiacp.org/PublicationsGuides/ModelPolicy/ModelPolicyList/tabid/487/Default.aspx; Virginia Department of Criminal Justice Services, Model Policy on Lineups/Eyewitness Identification 2-39 (2013). In addition, police should make routine accommodation in policy and in practice for non-English speakers or others requiring accommodation, due to hearing or linguistic impairment or other disability. See NRC,

IDENTIFYING THE CULPRIT, supra, at 107. A move to computerized presentation of images can similarly ensure that clear, standard instructions and procedures are consistently used.

Many jurisdictions have adopted all or some portions of these recommendations. To date, 18 states have adopted legislation regarding eyewitness identification procedures. Of those, 17 states (California, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Nebraska, North Carolina, Ohio, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin) have enacted statutes directly requiring that law-enforcement officials adopt written procedures for eyewitness identifications. Some of those states regulate the particular procedures to be used, focusing on the key features of a sound policy as outlined above, including blind or blinded lineups, clear written instructions, and documenting the confidence of an eyewitness. See CAL. PEN. CODE § 859.7 (2018); CONN. GEN. STAT. § 54-1p (West 2012); FLA. CODE ANN. § 92.70 (West 2017); GA. CODE ANN. § 17-20-2 (West 2016); 725 ILL. COMP. STAT. § 5/107A-5 (West 2003); KANSAS SB 428 (2016); LA. CODE CRIM. PRO. 251-253 (2018); MD. CODE ANN., PUB. SAFETY § 3-506 (West 2007); N.C. GEN. STAT. § 15A-284.52 (West 2007); NEB. R.S. § 81-1455 (2016); OHIO REV. CODE ANN. § 2933.83 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2011); UTAH CODE ANN. § 77-8-4 (West 1980); VA. CODE ANN. § 19.2-390.02 (West 2005); VA. CODE ANN. § 9.1-102.54; 13 V.S.A. § 5581; W. VA. CODE ANN. § 62-1E-1 (West 2013); WIS. STAT. § 175.50 (West 2005). Additional states (Nevada and Rhode Island) have passed statutes recommending further study, tasking a group with developing best practices, or requiring some form of written policy. NEV. REV. STAT. § 171.1237 (West 2011); R.I. GEN. LAWS § 12-1-16 (West 2012); 2010 LEG. REG. SESS. (Vt. 2010).

Many other jurisdictions have adopted model policies, and still others have had legislation introduced and considered on this subject. Several state courts have also issued rulings regulating lineup practices (e.g., New Jersey's Supreme Court has required documentation of identification procedures). State v. Delgado, 902 A.2d 888 (2006). Many more jurisdictions and departments also have voluntarily adopted guidelines or policies regulating eyewitness identifications. See, e.g., John J. Farmer, Jr., Attorney General of the State of New Jersey, "Letter to All County Prosecutors: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures" (April 18, 2001), available at http://www.state.nj.us/lps/dcj/agguide/photoid.pdf; CALEA Standards for Law Enforcement Agencies: 42.2.11 Lineups, at http://www.calea.org/content/standards-titles; International Association of Chiefs of Police, Model Policy: Eyewitness Identification (2010).

Traditionally, agencies used simultaneous eyewitness identification procedures, whether those procedures were live or involved photographs. The move to photo arrays made it far more feasible to present images one at a time. Research had suggested that sequential presentations eliminated "comparison shopping" by eyewitnesses who would scan across images to locate the one most similar to their recollection. Many agencies, concerned with preventing wrongful convictions, switched to sequential presentation of images in photo-array procedures. However, more recent research suggests that the differences between the procedures are harder to assess and

that it is not a straightforward choice. See NRC, IDENTIFYING THE CULPRIT, supra, at 117. More research is needed on this question.

For a detailed discussion of the current research on this question and the ongoing debate in the scientific community over the preferable approach, see NRC, IDENTIFYING THE CULPRIT, supra, at 117-118; see also, e.g., Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 457, 459-460, 462-464, 468 (2001) (recommending use of the sequential procedure to reduce use of "relative judgment"); Laura Mickes et al., *Receiver Operating Characteristic Analysis of Eyewitness Memory: Comparing the Diagnostic Accuracy of Simultaneous Versus Sequential Lineups*, 18 J. EXPERIMENTAL PSYCHOL. APPLIED 361, 374-375 (2012) (recommending further empirical research).

In sum, scientists have increasingly questioned how great the difference is between simultaneous and sequential procedures. There is some evidence that the sequential procedure is the more conservative approach, particularly in terms of reducing false identifications. At the same time, it may reduce the number of correct identifications. The practical difference between the two procedures may be particularly small when agencies typically permit a witness to take a "second lap" and look at a sequential series of photos again. Selecting the right approach requires a policy choice by the policing agency, considering research but also practical considerations. See NRC, IDENTIFYING THE CULPRIT, supra, at 119.

This question whether to adopt a sequential or simultaneous procedure highlights that, as in any scientific area, research continues to advance. Agencies, understandably, cannot revise their policies as quickly as science advances. One advantage of computerized presentations of images to eyewitnesses is that the program can readily be changed to adjust presentation methods. Funds should be made available for development and implementation of convenient computerized presentations, such as tablet-based eyewitness identifications.

Agencies should proceed cautiously regarding this topic of sequential versus simultaneous presentation. However, this scientific debate is a sign of engagement and hard work by researchers. It should not be taken as a reason not to adopt important protections, such as blind or blinded procedures, clear instructions, or recording, all of which have been endorsed by consensus in the scientific community.

§ 10.03. Threshold for Conducting Eyewitness Identifications

Policing agencies should not conduct eyewitness identifications unless they have:

(a) a strong basis to believe that the suspect was the culprit and should therefore be presented to the eyewitness, and

(b) a strong basis to believe that the eyewitness can reliably make an identification.

Comment:

a. Sufficient suspicion. Police should not place a suspect in an eyewitness identification procedure without a strong basis for doing so, including reasonable cause or suspicion that the suspect actually is responsible for the crime. Preferably, the officers should have evidence of guilt independent of the eyewitness's belief that he or she can make an identification. In addition, officers, consistent with § 10.05, should not convey to the eyewitness any of that basis for suspecting a person, because that would constitute highly suggestive conduct. Live identification procedures must be conducted within the limits of any applicable rules on seizing persons.

b. Basis to conduct identification procedure. The decision to conduct an eyewitness identification procedure should not be undertaken lightly, or without adequate cause and evidentiary support. The strong basis to conduct such a procedure should include a basis to believe that the eyewitness can make an accurate identification. Officers should inquire into the circumstances concerning the eyewitness's initial viewing of the suspect. Officers should not ask an eyewitness who lacks the ability, or who expresses an inability, to recall the appearance of the culprit to make an identification. In addition, officers, consistent with § 10.05, should not make any suggestions to the eyewitness that the eyewitness can make a successful identification.

c. No trawling. Officers normally should not conduct eyewitness identification procedures if they do not have a suspect. Officers should not engage in forms of "trawling," which is the use of mugshot presentations of large sets of images of individuals for whom there is no cause for suspicion related to the incident in question. The risks of eyewitness error are too great to justify placing large numbers of innocent individuals at risk of having their images erroneously identified.

REPORTERS' NOTES

We do not know how often eyewitness identifications are conducted, but according to one estimate, they may be conducted in many tens of thousands of cases a year. Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (January 1989). Yet, human facial recognition poses real challenges for individuals. Scientific research has documented how even under optimal viewing conditions, eyewitnesses can have great difficulty identifying strangers and even non-strangers.

Constitutional rulings do little to address the preliminary question that agencies face: whether to conduct an eyewitness identification procedure at all. The few lower courts to have considered the issue are divided on whether police must have probable cause under the Fourth Amendment to place an individual in a live (but not a photo-array) eyewitness identification

procedure. Biehunik v. Felicetta, 441 F.2d 228, 230 (2d Cir. 1971); but see, e.g., Wise v. Murphy, 275 A.2d 205, 212-215 (D.C. 1971); State v. Hall, 461 A.2d 1155 (N.J. 1983). Mug-shot arrays or composite images, or photo arrays, are not regulated under the Fourth Amendment at all, since they do not involve a "seizure" of a person, but rather the person's image.

The U.S. Supreme Court held that when officers do not engage in intentional conduct during an eyewitness identification, officers are not regulated under the Due Process Clause at all. Perry v. New Hampshire, 132 S. Ct. 716 (2012). Some state courts have adopted different rules, stating that reliability review does apply regardless of whether there was police action. See, e.g., State v. Chen, 27 A.3d 930, 937 (N.J. 2011).

In United States v. Wade, the Supreme Court held that, once indicted, a person has a right under the Sixth Amendment to have a lawyer present at a lineup. 388 U.S. 218, 235-236 (1967). However, that right does not extend to photo-array procedures, which are far more commonly used today than live or in-person lineups. U.S. v. Ash, 413 U.S. 300, 321 (1973); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009) (a "large percentage of jurisdictions in the U.S. use only photographs and never use live lineups").

It is essential, though, for agencies to determine whether an eyewitness and an identification procedure using that eyewitness are likely to be reliable. Unfortunately, many crimes occur under suboptimal viewing conditions. For example, research suggests that the presence of a weapon at a crime scene and heightened stress both can make it more difficult later to recall accurately the face of a suspect. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 93-94 (2014). In addition, eyewitness identification procedures often occur after the passage of time.

It is particularly important to resolve whether a witness is capable of making an eyewitness identification before proceeding with an identification procedure, because once an eyewitness is asked to make an identification and does so, confidence in the identification will predictably increase over time. An eyewitness may appear highly confident and reliable in court, even if the eyewitness was highly uncertain and tentative during an eyewitness identification procedure at a police station. This phenomenon is termed "confidence inflation." Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603-647 (1998).

Officers thus should carefully inquire into the viewing conditions under which an eyewitness saw the suspect, as well as the passage of time since the viewing occurred. Id. at 98. Officers should be trained to interview possible eyewitnesses in order to elicit as much information as possible and without asking leading questions that might suggest information to the witness. Research on cognitive interviewing can inform such training. Ronald P. Fisher & R. Edward Geiselman, *The Cognitive Interview Method of Conducting Police Interviews: Eliciting Extensive Information and Promoting Therapeutic Jurisprudence*, 33 INT'L. J. L. & PSYCHIATRY 321, 321 (2010); Ronald Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL., PUB. POL'Y &

L. 732, 735 (1995). Such interviews not only can produce descriptions of suspects, but they can inform an understanding of what factors may have affected the memory of an eyewitness, such as whether a weapon was present, or whether the event was highly stressful. See *Henderson*, 27 A.3d at 904-905 ("When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit.").

Similarly, one safeguard before proceeding with an identification procedure is to test the face-memory ability of an eyewitness. Different people have differing abilities to remember the faces of strangers. Agencies can, as a matter of policy and practice, assess the face-memory ability of an eyewitness prior to deciding whether to conduct an identification procedure. One such test is the Cambridge Face Memory Test. See Cambridge Face Memory Test, at http://www.bbk.ac.uk/psychology/psychologyexperiments/experiments/facememorytest/startup.php.

Finally, agencies should be cognizant that eyewitnesses may seek to identify offenders on their own. The U.S. Supreme Court has held that when unreliability in eyewitness identifications is not due to intentional police action, it is not regulated under the Due Process Clause. However, agencies should seek to prevent situations in which eyewitnesses themselves, without the supervision of officers, search online and on social media, or in physical locations, in order to try to locate suspects. In doing so, they may be affected by suggestive circumstances, and police cannot control the viewing conditions or aim to prevent misidentifications. For those reasons, agencies should discourage such trawling activities and question eyewitnesses to ascertain and to document whether or how they have engaged in any such trawling.

§ 10.04. Showup Procedures

Agencies should minimize the use of showup procedures and should adopt standard procedures for conducting prompt showups in a neutral manner and location.

Comment:

a. Minimizing showups. Showup procedures, in which a single image or live person is presented to an eyewitness, even if conducted promptly after an incident, are especially problematic because they are inherently suggestive. This is because by definition they involve a lone subject, rather than an array with fillers that can test the accuracy of an eyewitness. They create greater risks of error, including both identification of an innocent person and nonidentification of a guilty person. As such, showups should be used only rarely, and only within a very short amount of time after an incident.

Officers should instruct eyewitnesses not to look for culprits among members of the community and not to search through social media to locate images of potential culprits. Such

viewings can in effect result in a showup, in which the eyewitness looks at a single image of a person. Instead, officers should instruct eyewitnesses to provide any relevant information to officers, so that officers can obtain images of suspects and decide whether to conduct an eyewitness identification procedure.

b. Procedures for showups. Agencies should ensure that if and when showups are conducted, standard and clear instructions are used. A showup should be conducted in a neutral location, without any additional suggestion beyond the fact of the solo presentation of the suspect. The eyewitness should be told that the culprit may or may not be present even when the eyewitness is shown only a single person. The eyewitness should be told that he or she does not have to make an identification and that the investigation will continue regardless of what choice is made.

c. When to conduct showups. Exigent circumstances may support the need to conduct a showup identification immediately after an incident, including the need to rule out or identify a person near a crime scene. Such exigency should be interpreted narrowly. Agencies should seek out technology—such as software with image archives—that could permit the quick creation of photo arrays in order to present those images to witnesses in the field rather than resort to using a showup. Facial-recognition software, if properly used, can provide a means to construct fair lineups for use in eyewitness identification procedures.

d. In-court identifications. When an eyewitness is permitted to identify a defendant in court, that identification is in effect a showup, since there are no fillers present, and it is obvious where the defendant is sitting, at counsel table. Agencies should ensure through policy and practice that an eyewitness is never asked for the first time to make an identification in court, but rather, that an eyewitness identification procedure has been conducted previously. Judges should restrict the use of in-court identifications, and instead ensure that agencies conduct proper eyewitness identification procedures out of court, and then permit the eyewitness to testify concerning those procedures, rather than conduct an additional in-court identification.

REPORTERS' NOTES

Showup procedures are inherently suggestive, since they involve the presentation of a single witness to a suspect. As the U.S. Supreme Court has noted, "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967). Research confirms that showups pose special risks concerning accuracy. A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464-465 (1996); Nancy

Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A MetaAnalytic Comparison*, 27 LAW & HUM. BEHAV. 523, 538 (2003). One reason why showups are much less reliable is that they are not nearly as strong a memory test; there are no fillers present and the choice is a simple "yes" or "no." Without any fillers present, in a showup an error will result in the identification of an innocent suspect, as opposed to a filler who is known to be innocent.

In *Stovall*, however, the Supreme Court rejected any per se rule against the use of showups. Showups are legally permitted when conducted shortly after a crime. During that brief time period, an eyewitness's memory will be more recent and perhaps more accurate. Showup identifications are traditionally justified, despite their inherent suggestiveness, by the need to rule out or identify a fleeing felon or person located near a crime scene shortly after the commission of the crime. However, during that brief period, investigators may not have time to adequately investigate a potential suspect, nor inquire sufficiently into the viewing conditions.

Showups are commonly used. In one survey, 62 percent of agencies reported using showups. Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* 48 (March 2013). There is evidence that some agencies overuse showup procedures and conduct showups when it is unnecessary to do so. Procedures for the permissibility and conduct of showups were traditionally lacking. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 28 (2014) ("While some law enforcement agencies use a standard procedure with written instructions when conducting a showup, there is no indication that such procedures are used uniformly.").

There is also troubling evidence that showups, which are already inherently suggestive, can be conducted even more suggestively than necessary. For example, officers may place the suspect with proceeds of the crime or in restraints, or officers may make suggestive remarks to the eyewitness. Some officers also have shown single photographs of suspects to an eyewitness, which is completely unnecessary, since at that point officers could use that photograph to construct a photo array. (Such a procedure occurred in Simmons v. United States, 390 U.S. 377 (1968).) Showups have been unnecessarily conducted, either using photographs or a live individual, in the days and weeks after an incident, not just in the immediate hours after a crime. Clear rules should govern when showup identifications are permitted. When showups are permitted, it is important that there be standard procedures and a clear set of standard instructions used. See NRC, IDENTIFYING THE CULPRIT, supra, at 107 ("the committee recommends the development and use of a standard set of instructions for use with a witness in a showup."). Several courts have further regulated showup procedures. See, e.g., State v. Dubose, 699 N.W.2d 582, 593-594 (Wis. 2005) ("We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array."); see also Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995); People

v. Adams, 423 N.E.2d 379, 383-384 (N.Y. 1981). These Principles recommend that state courts and lawmakers further regulate showups to permit consistent rules across a jurisdiction for their use.

The U.S. Supreme Court has held that single viewings of a suspect, which would otherwise constitute a showup, are not regulated by the Due Process Clause when officers did not intend to conduct an eyewitness identification procedure. Perry v. New Hampshire, 132 S. Ct. 716, 718 (2012). In that case, for example, the witness was detained near the crime scene, and the eyewitness looked out of her apartment, saw him there, and made an identification. Id. Officers can take measures to avert such unintended eyewitness viewing, including by not unnecessarily detaining a suspect within view of possible eyewitnesses, by instructing potential eyewitnesses not to search for suspects on their own in person or online, and by instead assuring potential eyewitnesses that any leads will be investigated and any images of possible culprits will be displayed in a proper eyewitness identification procedure. There have been cases in which witnesses searched on social media for images of the culprit and made identifications as a result. New Jersey v. Chen, 27 A.3d 930 (N.J. 2011). Officers cannot control the conditions in which such identifications are made and cannot prevent suggestive circumstances from resulting in errors, except by giving strong instructions to eyewitnesses not to engage in such searches.

Judges should not permit courtroom identifications, which are not a test of an eyewitness's memory, and instead should rely on a recounting of the earlier confidence of the eyewitness at the time of the identification procedure. In-court identifications are, in effect, showup identifications. There are no fillers and there is no test of the eyewitness's memory. In-court identifications are dramatic but unreliable.

Agencies should ensure through policy and practice that an eyewitness is never asked for the first time to make an identification in court, but rather, that an eyewitness identification procedure has been conducted previously. In-court identifications are highly suggestive, and several courts have restricted the use of such identifications. The Massachusetts Supreme Judicial Court and Connecticut Supreme Court have ruled that no in-court identification is permitted if an out-of-court identification was suppressed as unduly suggestive. Commonwealth v. Johnson, 45 N.E.3d 83, 92 (Mass. 2016) ("Where the suggestiveness does not arise from police conduct, a suggestive identification may be found inadmissible only where the judge concludes that it is so unreliable that it should not be considered by the jury. In such a case, a subsequent in-court identification cannot be more reliable than the earlier out-of-court identification, given the inherent suggestiveness of in-court identifications and the passage of time."); State v. Dickson, 141 A.3d 810 (Conn. 2016). For the argument that courts should not use "independent source rules" to permit an in-court identification following suggestive out-of-court identifications, nor should they typically permit them at all, see Brandon L. Garrett, *Eyewitnesses and Exclusion,* 65 VAND. L. REV. 451 (2012). For a ruling limiting in-court-identification use for first-time identifications, see Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014). That court explained, "Where, as here, a prosecutor asks a witness at trial whether he or she can identify the perpetrator of the crime in the court room, and the defendant is sitting at counsel's table, the in-court identification is

comparable in its suggestiveness to a showup identification." Id. at 166; see also United States v. Archibald, 734 F.2d 938, 941, modified, 756 F.2d 223 (2d Cir. 1984) ("Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant . . ."). Other courts have adopted a burden-shifting approach toward in-court identifications. See State v. Hickman, 330 P.3d 551, 568 (Or. 2015) ("Courts considering the admissibility of first-time in-court identifications generally have placed the burden of seeking a prophylactic remedy on the defendant") (citing United States v. Brown, 699 F.2d 585, 594 (2d Cir. 1983), and U.S. v. Domina, 784 F.2d 1361, 1369 (9th Cir. 1986)).

§ 10.05. Blind or Blinded Procedures

For all identification procedures other than showups, agencies should adopt procedures in which the person administering the identification procedure does not know which person is the suspect. There are two options:

(a) blind procedures, in which the person who administers the procedure does not know the suspect; or

(b) blinded procedures, in which the person who administers the procedure cannot see which persons or photographs the suspect is examining. This can be accomplished with techniques such as the use of folders, or computerized presentation of images, that shield the images from the person administering the procedure.

Comment:

a. Blind procedures. A central concern with eyewitness identification procedures is that they can affect or alter the memory of the eyewitness. Officers can do so unintentionally. Indeed, just by asking an eyewitness to participate in an identification procedure, officers create an expectation that a suspect will be present and presented to the eyewitness. An eyewitness naturally will be looking to the officer for guidance, reinforcement, and feedback. Instructing an eyewitness that the officer administering the procedure does not know which is the suspect makes clear at the outset that there cannot be any such guidance, reinforcement, or feedback. As a result, blind or blinded procedures are a crucial protection. Such procedures can minimize the chance that police suggest the desired selection to an eyewitness viewing a live or a photo-array identification procedure. Scientists have long recommended that such procedures be used as an essential feature of the experimental method, to prevent experimenter-expectancy bias.

b. Blinded procedures. Subsection (b) provides alternatives to using an unrelated officer; for smaller agencies, it may be impractical to obtain a second officer unfamiliar with an investigation. To address this practical concern, an eyewitness identification procedure can be "blinded," even if the administrator is not himself or herself "blind" and unfamiliar with the suspect. One extremely inexpensive way to accomplish blinding is to place the images in folders and shuffle them, so that the eyewitness can examine the images in folders without the administrator being able to see which images are being viewed. A number of jurisdictions and state model policies incorporate this "folder shuffle" method for blinding eyewitness identifications, particularly to facilitate blinded identification procedures among smaller departments that cannot spare officers unfamiliar with investigations. Using computerized presentation of images also can remove the administrator from the process of presenting images to the eyewitness, and can minimize opportunity for suggestion.

REPORTERS' NOTES

The use of a blind or blinded method is extremely important to the use of any technique designed to test evidence. The use of blinding is "central to the scientific method" because it "it minimizes the risk that experimenters might inadvertently bias the outcome of their research, finding only what they expected to find." See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 107 (2014). Thus, blinding is essential to any objective factfinding and is central to any type of experiment.

This recommendation is based upon decades of research in a number of fields on the ways in which the expectations of an administrator can bias subjects, including through inadvertent means of communication. "Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of his or her location in the lineup or photo array." Id. at 73. "The 'blinded' procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system." Id.

It is particularly important to ensure blinding in the context of eyewitness evidence, because eyewitnesses are particularly suggestible. Eyewitnesses naturally may look to law enforcement for guidance and reassurance, and they may be highly motivated to try to reach the answer that an officer thinks is the correct answer. Officers themselves may be motivated to assist the eyewitness in reaching the answer believed to be correct. As the National Academy of Sciences has put it, "[t]he 'blinded' procedure minimizes the possibility of either intentional or inadvertent suggestiveness and thus enhances the fairness of the criminal justice system." See id. at 73; see also Final Report of the President's Task Force on 21st Century Policing 2.4 (May 2015) (recommending adoption of procedures "that implement scientifically supported practices that eliminate or minimize presenter bias or influence").

Some in law enforcement have raised concerns regarding the costs of conducting blind procedures. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. One common practical concern raised regarding the use of blind procedures is that smaller jurisdictions may not be able to spare an additional officer unfamiliar with an investigation. There is a ready, practical, and cost-effective alternative available for such agencies. The folder-shuffle method is an inexpensive and practical solution. In addition, agencies can use computerized administration of eyewitness identification procedures. See NRC, IDENTIFYING THE CULPRIT, supra, at 107. Using folder-shuffle methods or computerized presentation can minimize the costs of using blind or blinded methods.

By using blind or blinded methods, agencies can avoid the risks of error created by suggestiveness. And because constitutional rules focus on undue suggestiveness, blind or blinded methods can avert constitutional challenges to eyewitness identification evidence. Indeed, agencies can avert any cross-examination or state-evidence-law challenge to eyewitness evidence by showing that no suggestion could have occurred during an eyewitness identification procedure that was blind or blinded. See NRC, IDENTIFYING THE CULPRIT, supra, at 107.

§ 10.06. Obtaining and Documenting Eyewitness Confidence Statements

Agencies should ask eyewitnesses to express verbally how confident they are in their identification at the time it is made.

Comment:

a. Documenting confidence. It is crucial to document, preferably using a recording following § 10.08, the confidence of an eyewitness at the time of an initial eyewitness identification procedure. The reason why is that confidence can change over time. The confidence of an eyewitness is comparatively more reliable at the time of the initial identification procedure than subsequently, such as in the courtroom. Although eyewitness memory and confidence are both malleable, they do not naturally improve over time. Absent documentation of the confidence of an eyewitness, there may be no record that the confidence of an eyewitness has been artificially enhanced over time, for example, by suggestion, reinforcement, or feedback.

b. Qualitative statements. Although scientists might prefer that confidence be recorded using a numerical scale, few agencies have followed such an approach, due to a concern that quantitative scores might be misunderstood in the courtroom. Instead, the approach has been to record confidence by asking an eyewitness to express it in his or her own words. It is important that the confidence statement not be anchored by any suggestions from the administrator. For example, an eyewitness should not be given a constrained set of pre-selected responses, or be

simply asked if he or she is absolutely sure or not. An officer should ask an eyewitness to report his or her confidence and the officer should document it verbatim.

c. Recording. Recording or videotaping entire identification procedures also can ensure that a confidence statement is recorded accurately. Whether recorded or not, however, police should be trained carefully not to provide any suggestion or encouragement prior to the lineup procedure, which would make the confidence statement a less reliable indicator.

REPORTERS' NOTES

At trial, a confident eyewitness can be extremely powerful to jurors. That confidence may not correspond to reliability, however; the eyewitness may not in fact have been sure at the time of the earlier eyewitness identification procedure. "At trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability." Perry v. New Hampshire, 132 S. Ct. 716, 731-732 (2012) (Sotomayor, J., dissenting).

Although courts sometimes have focused unduly on the confidence of an eyewitness in the courtroom, the confidence of an eyewitness at the time of an eyewitness identification procedure can provide important information about the reliability of an identification. John Wixted & Gary Wells, *The relationship between eyewitness confidence and identification accuracy: A new synthesis*, 18 PSYCHOL. SCI. PUB. INT., 10-65 (2017).

For that reason, leading scientific groups have recommended strongly that the confidence of an eyewitness be carefully documented, in a manner in which that confidence is not influenced by the officer conducting the procedure. Such a confidence statement should permit the eyewitness to express confidence without any influence or suggestion. Although a numerical score might be more objective, agencies have favored asking the witnesses to express confidence in his or her own words. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 107 (2014) ("the administrator should obtain level of confidence by witness' self-report (this report should be given in the witness' own words) and document this confidence statement verbatim."). The procedures outlined here are cumulative: the confidence statement is only reliable evidence if the procedure itself was blind or blinded and conducted properly, and if there has not been any suggestion to otherwise affect the confidence of the eyewitness. Wixted & Wells, supra.

Courts have long treated the confidence of an eyewitness as a marker of the eyewitness's reliability, but in a manner not supported by scientific research. For example, in Manson v. Brathwaite, the U.S. Supreme Court emphasized the eyewitness's level of certainty as a factor that should be considered when evaluating the reliability of an eyewitness identification once it has been determined that there was undue suggestion. 432 U.S. 98, 114 (1977). Although confidence at the time of an eyewitness identification procedure can provide evidence of reliability—as opposed to confidence at the time of a court procedure, which is not reliable—confidence at the

time of an eyewitness identification is not a reliable indicator if officers have engaged in suggestion.

Suggestion, including signaling or bias in the lineup, or reinforcement or feedback, can increase the confidence of an eyewitness in predictable ways. Such false confidence is not to be credited. And yet, the Supreme Court's "reliability" test in *Manson* does exactly that: it excuses undue suggestion by allowing a judge to point to the resulting confidence of an eyewitness. For that reason, scientists have condemned that test as itself unreliable. See NRC, IDENTIFYING THE CULPRIT, supra, at 6 ("the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors."); see also Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009).

The experience from known wrongful-conviction cases bolsters the concern among researchers that confidence statements provide useful information, but only if an eyewitness identification procedure is conducted properly to eliminate suggestion. Among persons exonerated by DNA testing, not only did mistaken eyewitness identifications occur in three-quarters of the cases, but—almost without exception—those mistaken eyewitnesses testified at trials that they had complete confidence that they had chosen the culprit, despite earlier uncertainty expressed at the time of their identifications. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63-68 (2011).

Careful documentation of confidence at the time of an eyewitness identification is particularly important given the malleability of confidence and the changes in a witness's confidence that may occur during the preparation for a trial. As the National Academy of Sciences put it, "confidence levels expressed at later times are subject to recall bias, enhancements stemming from opinions voiced by law enforcement, counsel and the press, and to a host of other factors that render confidence statements less reliable." See NRC, IDENTIFYING THE CULPRIT, supra, at 74.

Thus, the recommendation is that police ask about eyewitness confidence in an open-ended way, without leading or suggesting (for example) that an eyewitness must be 100 percent certain. The recommendation is also that police ask an eyewitness to describe confidence in their own words. Doing so avoids forcing an eyewitness into rigid boxes, such as "completely sure, not sure," and the like, which similarly may lead the eyewitness or affect confidence. More research may develop improved methods for assessing eyewitness accuracy and confidence in the future. See NRC, IDENTIFYING THE CULPRIT, supra, at 79. For example, the time that an eyewitness takes to make an identification may be associated with accuracy, but further research is necessary to examine that possibility.

§ 10.07. Reinforcement or Feedback

Officers should not provide feedback, encouragement, or reinforcement to eyewitnesses before, during, or after an identification procedure.

Comment:

a. Avoiding suggestion. An overarching goal of these Principles is to avoid suggestion so that an eyewitness's memory is assessed in a reliable manner. Suggestion in the form of feedback or reinforcement from officers can powerfully affect an eyewitness. Consistently applied, clear and neutral verbal instructions can help to prevent any such feedback. If officers depart from that script and make additional encouraging or confirming remarks, the memory of the eyewitness can be affected or even altered. It can be quite understandable and natural for an officer to desire to congratulate or support an eyewitness who is able to make an identification. That is why it is important that policies forcefully bar any such feedback or reinforcement.

b. Preventing reinforcement or feedback. Blind or blinded procedures can minimize the opportunity for suggestive comments, feedback, or reinforcement to occur, before, after, or during an eyewitness identification, as discussed in § 10.05. Policy and training should reflect the need to minimize interaction with an eyewitness, and particularly the type of encouraging remarks or conduct that might contaminate the eyewitness identification by providing feedback.

c. Trial preparation. Following an eyewitness identification, the eyewitness then may have additional conversations with officers and with prosecutors. In particular, as part of the preparation for hearings or a trial, the eyewitness may be given information about the defendant. That information can powerfully affect the eyewitness's confidence that the correct identification was made. Officers and lawyers should encourage cooperation and participation of witnesses without disclosing information that might affect the memory of a witness. However, because such information may be communicated, the effect of such interactions on memory makes it all the more important that a careful confidence statement be taken at the time of the initial eyewitness identification procedure.

REPORTERS' NOTES

Eyewitness memory is highly malleable. Suggestion can powerfully affect the reliability of an eyewitness, and suggestion can occur before, during, and after an eyewitness identification procedure. Scientific research has shown that the accuracy and confidence of an eyewitness can be affected by feedback or reinforcement provided by officers before, during, or after the

procedure. See, e.g., Nancy K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 LAW & HUM. BEHAV. 262, 271 (2011); A. B. Douglass & Nancy K. Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect,* 20 APPLIED COGNITIVE PSYCHOL. 859-869 (2006); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 630-631 (1998).

Blind or blinded procedures seek to eliminate the possibility of reinforcement or feedback during an eyewitness identification procedure, because the officer does not know which person is the suspect and cannot provide any cues even inadvertently; that is the purpose of such procedures. However, blind procedures, together with an accurate record of an eyewitness identification procedure, will not necessarily prevent suggestion in the form of reinforcement or feedback that occurred before or after that procedure. For example, if an eyewitness is told that the culprit has been arrested and is present in a photo array, even if the eyewitness identification procedure is videotaped, the suggestion already will have occurred and may affect the eyewitness's memory and decisionmaking. Similarly, if an eyewitness is congratulated on making the correct choice and given other confirming information after the procedure, that eyewitness will be predictably more confident at the time of any hearing or trial. Carl M. Allwood, Jens Knutsson & Pär A. Granhag, *Eyewitnesses Under Influence: How Feedback Affects the Realism in Confidence Judgements*, 12 PSYCHOL., CRIME & L. 25-38 (2006).

This Section recognizes that as part of trial preparation, officers and prosecutors must discuss many aspects of the case with an eyewitness. That process inevitably will cement the eyewitness's confidence, including based on the simple fact that a case is going forward based in part on the identification evidence. However, even as part of that preparation process, agencies should, through policy and training, counsel against reinforcement or feedback to the eyewitness.

§ 10.08. Recording Eyewitness Identification Procedures

As a matter of standard practice, eyewitness identification procedures should be recorded when feasible.

Comment:

a. Recording procedures. A video and audio recording creates a record of the eyewitness identification procedure, documenting the sorts of issues discussed in these Principles, including the procedures that were followed, the confidence of any witness who makes an identification, and additional important information, such as the length of time or the ease with which the eyewitness made the identification. Such information may be quite probative in court, either to bolster the accuracy and reliability of an identification, or to identify flaws in an eyewitness's identification.

REPORTERS' NOTES

The National Academy of Sciences, in its report, strongly recommended recording eyewitness identification procedures. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 74 (2014). There are few practical obstacles to doing so in the case of photo-array identification procedures. Field identifications, such as showups, also can be recorded, but doing so may not always be as feasible; police body cameras can make such recordings feasible in the field.

This recommendation is consistent with statements in these Principles that evidence should be recorded. It is particularly important to record eyewitness identification evidence, because many subtle features of the eyewitness identification can provide extremely important information. These features include: any extraneous, reinforcing comments made by officers; the precise time taken to make an identification; how the photographs are presented; the body language of the officers; and the words the eyewitness uses to express confidence in an identification.

One practical consideration with electronic recording of identifications is that in some cases, the confidentiality of an eyewitness should be safeguarded. In such situations, law enforcement should use procedures, such as covering the face of the eyewitness, or masking, in the video and perhaps also in the audio, to protect eyewitnesses from potential retaliation.

Judicial review of eyewitness identification evidence can be usefully informed by recordings. A recording can demonstrate that an identification procedure was conducted blind and in the appropriate manner, and it can show vividly how confident an eyewitness is. On the other hand, a recording can demonstrate that an identification was not conducted properly or that an eyewitness was uncertain. There should be no judicial presumption of regularity of adherence to eyewitness identification procedures if law-enforcement officials failed to adhere to a policy requiring video recording of eyewitness identification procedures and it was feasible to record such a procedure.

CHAPTER 11
POLICE QUESTIONING

§ 11.01. Objectives of Police Questioning

The goal of police questioning is to obtain accurate and reliable information, while seeking to minimize the amount of undue coercion used and treating persons with dignity and fairness.

Comment:

a. Accuracy. Law enforcement has a strong interest in obtaining accurate and reliable evidence using police questioning. Police questioning can produce highly probative evidence, including incriminating statements and witness statements, which can be the most important evidence in criminal investigations. However, police questioning also can produce unreliable evidence. The central goal of interviews and interrogation—of a suspect or others—is to secure accurate information. The use of procedures and methods designed to elicit accurate information, test information's accuracy, and carefully document information through recording, can ensure police questioning furthers its appropriate goal. Such safeguards are essential; the problem of false confessions is well known. Not only can physical coercion and torture lead individuals to implicate themselves and others falsely, but it is now equally understood that psychological pressure can do the same. Scientific research has shed light on the ways in which psychological pressure can induce false confessions, and that research—as well as innovations by law-enforcement agencies—provides methods to minimize the risk of obtaining false or unreliable confession statements. Individuals are different and may react to a police interview in very different ways. If officers begin questioning, they should keep an open mind and seek to corroborate the individual's story to assess its veracity.

These Principles do not always track constitutional rulings. Constitutional rulings recognize the dangers of "involuntary" confessions, but do not provide significant protection against false confessions, and largely do not address the reliability of confessions. Traditional constitutional standards require heightened attention to questioning conducted when a suspect is placed in "custody." As discussed in the next Section, these Principles do not rest on this distinction. However, these Principles recognize that the more serious an offense, the greater the law-enforcement interest, such that more sustained questioning may be appropriate.

b. Coercion. These Principles reflect the view that agencies should minimize the coercion that is placed on individuals during police questioning. By coercion, these Principles mean pressure placed upon individuals to cooperate with police questioning in a responsive way. Neither witnesses nor suspects should be unduly coerced. These Principles focus on the questioning of suspects. Though there typically is less reason to place pressure on witnesses who are not suspected of wrongdoing because they less often are reluctant to share information with law enforcement, to the degree that officers seek to persuade reluctant witnesses, the same principles apply. Coercion can produce false-confession evidence and false statements, implicating accuracy concerns. In addition, while effectiveness alone would not justify undue coercion, less coercive techniques have been used by agencies with great success, and there is no evidence that they are less effective. Coercion also harms the legitimacy interests described next, because applying undue pressure to individuals during police questioning harms individual dignity.

The following Principles identify methods aimed at minimizing the coercion used during interviews and interrogations. Although these Principles reflect the values important to constitutional rulings concerning the Fifth Amendment, they do not track constitutional standards, which typically do not address the degree of coercion that police may use during questioning.

c. Legitimacy. An important goal of police questioning, as with policing generally, is legitimacy, including whether members of the public support and cooperate with the police. Legitimacy requires treating individuals with dignity, and it harms the dignity of individuals to subject them to undue pressure to incriminate themselves. As a society, we abhor the use of torture to secure information from citizens. We equally abhor the use of undue psychological coercion to secure information from citizens. Thus, in addition to the goal of obtaining accurate information useful in criminal investigation—and minimizing coercion—it is important that agencies conduct interrogations in a manner that is fair and respectful of dignity. The use by agencies of unduly coercive or deceptive techniques can undermine the legitimacy of law enforcement.

d. Characteristics of persons being questioned. As is further developed in § 11.05, vulnerable populations—including but not limited to juveniles and persons with mental-health needs—should be questioned with particular care, and to the minimal extent possible. Doing so serves each of the three interests described above: accuracy, minimizing coercion, and legitimacy. Before questioning, officers should assess the characteristics of the person to be questioned, in

order to identify such vulnerable individuals. Policy, training, and additional resources, such as the collaboration of mental-health professionals, can assist officers in making such assessments.

e. Types of questioning. Officers speak to witnesses in circumstances ranging from informal information gathering from cooperative witnesses in the field to questioning of suspects at a police station. These Principles recognize that all police questioning has as its common goal the accurate, minimally coercive, and legitimate investigation of criminal matters. As a result, while interviews of suspects are the focus of these Principles, there is no a firm dividing line between relatively more informal interviews—often conducted outside the police station, of persons who may be witnesses or potential suspects—and interrogations, conducted in a more formal manner and typically in a room at a police station. Each of those types of questioning is vitally important to the preparation of many criminal cases. Information from witnesses as well as suspects can provide crucial information to officers and agencies.

A detailed body of constitutional law applies to police questioning of suspects. One important area of constitutional law—the *Miranda* doctrine—draws a line by asking whether a person is deemed to be in "custody." See Miranda v. Arizona, 384 U.S. 436, 444 (1966). A determination that an individual is in custody, broadly speaking, establishes an obligation to: (1) provide a set of warnings before a custodial interrogation begins, and (2) honor requests for counsel. Constitutional law has very little to say about noncustodial questioning by officers, other than requiring any statement to have been "voluntarily" obtained. The focus in constitutional law on the issue of "custody" can be quite formalistic, and remote from the concerns that motivate these Principles. For example, an innocent person who is not formally in custody still may face great pressure to confess falsely. A vulnerable person, such as a juvenile or mentally ill person, may receive unfair treatment that implicates concerns of legitimacy, even if not considered a suspect and not formally deemed to be in custody during the questioning. That said, the concerns with accuracy, coercion, and legitimacy may well be greater in the settings in which more formal custodial questioning occurs. No matter in what form or setting questioning occurs, police professionals ought to have an abiding interest in getting it right. Thus, these Principles do not take as their starting place the line between custodial and noncustodial interviews. Rather, the focus is on obtaining accurate statements with minimal coercion.

f. Policy, training, and supervision. To ensure that police questioning yields accurate information, while minimizing coercion, law-enforcement agencies should have in place sound

policy, appropriate training, and adequate supervision. Written policies should describe in advance how police questioning should be conducted, consistent with § 1.05, and those policies should be as detailed as is necessary to ensure compliance with these Principles. Training should provide officers with techniques to carry out these policies. Supervisors should review transcripts or video of questioning carried out by officers in order to improve training and to provide guidance to officers.

REPORTERS' NOTES

Police questioning is indispensable to criminal investigations. It can include relatively informal police questioning of witnesses, as well as more formal interrogation of suspects, as discussed in § 11.04. A confession can help to solve a crime that otherwise might have gone unsolved. If a suspect volunteers details about a crime that were not made public, that can provide officers with very probative evidence of guilt. Moreover, many suspects volunteer their guilt quite readily. Careful and professional questioning of non-suspect witnesses can elicit further information that may prove crucial to understanding and solving a crime. These Principles focus primarily on suspects, and not witnesses, because the concerns with coercion and legitimacy are heightened when suspects face pressure to potentially incriminate themselves. However, it is important that sound practices also be used when witnesses, including fully cooperative witnesses, are questioned.

Police interrogation methods have evolved in important ways. That torture or use of physical coercion can cause false confessions has been long known. Well-known false confessions in America date back to Colonial times, to the Salem Witch trials of 1692. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 4 (2010). While use of the third degree has been forbidden for decades by law enforcement, training and policy still commonly permit, if not encourage, the use of a high degree of psychological coercion of suspects. The leading interrogation training manual emphasizes the use of detailed methods designed to secure confessions using psychological techniques, including threats, promises, and deception of suspects. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATIONS AND CONFESSIONS (5th ed. 2013). In recent decades, it has become better understood that such forms of psychological coercion similarly can produce false confessions. See, e.g., Steve A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 968-974; See Richard J. Ofshe & Richard J. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 984 (1997). Many of the wrongful convictions overturned in recent decades involved psychological, as opposed to physical, coercion. Over time, concerns have grown that psychological techniques can manipulate suspects into falsely confessing. For an overview, see RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 181 (2008).

False confessions are an important cause of wrongful convictions. False confessions have led to over 60 exonerations in cases involving DNA testing and many more cases not relying upon

DNA evidence to exonerate. The individuals often spent a decade or more in prison before obtaining their exoneration. Almost without exception, those exonerees were said to have confessed in detail, offering inside information that only the culprit could have known; in retrospect, it is evident that their confession statements were contaminated and that law enforcement must have disclosed those details. See Brandon L. Garrett, *Confession Contamination Revisited,* 101 VA. L. REV. 395 (2015). In addition, the National Registry of Exonerations includes over 200 exonerations that involved confessions, the majority of which were non-DNA exonerations. The National Registry of Exonerations, Joint Project of Mich. Law & Nw. Law, Exonerations by Contributing Factor, at https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx. Agencies have had substantial civil-damages awards imposed in cases in which contaminated confessions led to wrongful convictions. See, e.g., Warney v. State, 16 N.Y.3d 428 (N.Y. 2011); Jerry Markon, *Wrongfully Jailed Man Wins Suit*, WASHINGTON POST, May 6, 2006, B01.

Researchers have documented distinct types of false confessions caused by psychological coercion. Some individuals comply due to pressure placed on them by officers. Others internalize what they are told and actually become convinced of their guilt even though they are innocent. Saul M. Kassin & Katharine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996). Researchers also have raised concerns that innocent individuals face special risks during interrogations. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?,* 60 AM. PSYCHOL. 215, 216, 223 (2005) (describing how innocent individuals may place more trust that law enforcement will ultimately clear them and as a result, place themselves at risk of falsely confessing). Researchers have described the dangers of false confessions for many years. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 523-537 (2003).

An additional problem is that even false confessions can appear to be extremely reliable, and as a result, they can play a powerful role in criminal cases. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1084 (2010). Confession evidence is extremely compelling before a jury. In well-known cases, jurors have convicted individuals even despite DNA testing that excluded them, on the strength of confession statements. Id. The power of confession evidence may be so strong that it also enhances perceptions of the strength of other evidence in a case. Jeff Kukucka & Saul M. Kassin, *Do Confessions Taint Perceptions of Handwriting Evidence? An Empirical Test of the Forensic Confirmation Bias,* AM. PSYCHOLOGIST (2014). Indeed, once a confession has been secured—false or otherwise—officers may cease investigating other leads and attorneys may be highly motivated to secure a plea.

Constitutional rulings do not provide significant protection against false confessions; they largely do not even address the reliability of confession statements. Rather, they try to rule out police questioning practices that implicate concerns with coercion as well as with legitimacy. See, e.g., Brown v. Mississippi, 297 U.S. 278 (1936); Haynes v. Washington, 373 U.S. 503 (1963); Frazier v. Cupp, 394 U.S. 731 (1969). Nonetheless, the concern with accuracy has been present in some rulings as well. In its ruling in Miranda v. Arizona, the U.S. Supreme Court cited the well-

known false-confession case of George Whitmore and how he had confessed due to "brainwashing, hypnosis, [and] fright." 384 U.S. 436, 455 n.24 (1966). More recently, the Supreme Court has cited examples of false confessions uncovered by DNA testing in capital cases. Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) ("in recent years a disturbing number of inmates on death row . . . [including] at least one mentally retarded person [Earl Washington, Jr.] who unwittingly confessed to a crime that he did not commit.").

It has been common among American police interrogators to use the "Reid method," see FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 347 (5th ed. 2013). That method emphasizes a set of psychological techniques designed to confront and accuse a suspect, and then maximize the pressure placed on the suspect to incriminate themselves, while appearing to minimize the consequences for the suspect in doing so. The techniques tend to rely on "some form of deception," ranging from "rationalization" of the person's actions to outright "evidence fabrication." Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After 50 Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 BOSTON U. L. REV. 1157, 1161 (2017).

However, these traditional interrogation methods have been evolving in the United States. A leading interrogation training provider, Wicklander-Zulaski & Associates, no longer trains on the Reid Method. Eli Hager, *A Major Player in Law Enforcement Says it Will Stop Using a Method that is Linked to False Confessions*, Marshall Project, March 9, 2017. The federal High-Value Detainee Interrogation Group (HIG), which includes members of the Central Intelligence Agency, Federal Bureau of Investigation, and other federal law enforcement, has developed interrogation best practices that similarly focus on questioning that is designed to build rapport and "draw out what the detainee knows as opposed to only focusing on the intelligence the team would like to obtain." High-Value Detainee Interrogation Group, Interrogation Best Practices 2 (August 26, 2016), at https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view. Police departments, including in Dallas, Philadelphia, and Los Angeles, have begun to use the approach developed by the HIG.

In response to concerns about several high-profile false confessions, U.K. interrogators also developed an alternative: the PEACE model (for Planning and Preparation; Engage and Explain; Account; Closure; and Evaluation). Slobogin, supra, at 1161-1162. The PEACE interrogation methods used in the United Kingdom, and now in Australia, Denmark, New Zealand, Norway, Sweden, and other countries, adopts an "investigative interviewing" approach, geared toward obtaining rapport with a suspect and maximizing the amount of information gathered from that suspect. See, e.g., JAMES TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS 218 (2016). Christian A. Messner, Christopher E. Kelly & Skye A. Woestehoff, *Improving Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 213 (2015), citing John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOL. 325 (1993); REBECCA MILNE & RAY BULL, INVESTIGATIVE INTERVIEWING: PSYCHOLOGY & PRACTICE (1999); Thomas M. Williamson, *From Interrogation to Investigative Interviewing: Strategic Trends in Police Questioning*, 20 PSYCHONOMIC BULL. REV. 812 (1993). This model is

characterized by the use of noncoercive tactics and open-ended questions. Colin Clarke & Rebecca Milne, *National Evaluation of the PEACE Investigative Interviewing Course*, Police Research Award Scheme (2001); Stavroula Soukara et al., *What Really Happens in Police Interviews of Suspects? Tactics and Confessions*, 15 PSYCHOL. CRIME & L. 492 (2009); David W. Walsh & Rebecca Milne, *Keeping the PEACE? A Study of Investigative Interviewing Practices in the Public Sector*, 13 LEGAL & CRIMINOL. PSYCHOL. 39 (2008). Other alternatives include the approach developed for counterterrorism efforts by the High-Value Detainee Interrogation Group Research Unit. Slobogin, supra.

This Section does not require that agencies adopt any one model of police interrogation, but it rejects the most coercive and deceptive techniques and discourages using methods that have been shown to produce false confessions. The larger thrust of these Principles, that agencies should be most concerned with obtaining accurate information in a fair and dignified manner, is more compatible with training and processes used by approaches, such as the PEACE approach, that depart from the Reid method.

Related to, but separate and apart from, the accuracy-based concern with false confessions, the legitimacy and dignitary concern with physical and psychological coercion is equally important and longstanding. Torture, or use of physical force to secure information from a person, has long been forbidden under the Fifth Amendment. As the U.S. Supreme Court has put it in its rulings, the Fifth Amendment's self-incrimination clause reflects the view that: "important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." Blackburn v. Alabama, 361 U.S. 199, 206-207 (1960). The concern with coercion dates back long before the Fifth Amendment was drafted. Justice Hugo Black famously wrote that "The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations." Chambers v. Florida, 309 U.S. 227, 237-238 (1940). The 1931 National Commission of Law Observance and Enforcement examined the problem of police use of torture and noted that: "the third degree is especially used against the poor and uninfluential." IV Nat'l Comm'n on L. Observance & Enf't, Report on Prosecution 159 (1931). The U.S. Supreme Court has long been concerned with the state using interrogations to coerce individuals "whether by physical force or by psychological domination . . ." In re Gault, 387 U.S. 1, 47 (1967). Legitimacy concerns are also raised by use of deception, which may undercut credibility of law enforcement in other contexts. Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817 (1997).

However, constitutional rulings do not address adequately the concern with psychological coercion during police questioning, and, as a result, these Principles directly counsel minimizing coercion rather than relying on language in constitutional rulings. The U.S. Supreme Court's Fifth Amendment "voluntariness" test provides a remedy for undue coercion during custodial interrogations. Arizona v. Fulminante, 499 U.S. 279, 303 (1991). However, that test is multi-factored and highly case-specific, and it does not provide clear guidance to law enforcement. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114

MICH. L. REV. 1, 3 (2015). Courts have upheld, for example, extremely lengthy interrogations. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2046-2047 (1998). Courts have found as voluntary confessions that are now known to have been false. Garrett, *The Substance of False Confessions*, supra; Drizin & Leo, supra, at 944-945, 963-971. Indeed, the Supreme Court has itself noted that the voluntariness test does not provide clear guidance to law enforcement. Dickerson v. United States, 530 U.S. 428, 444 (2000) ("[T]he totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."); Haynes v. Washington, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw"). For that reason, these Principles address the problem of undue coercion directly, and without relying on the constitutional voluntariness test.

Whether a person is deemed to be in "custody" while being "interrogated" can trigger a range of constitutional protections, such as the Fifth Amendment right to remain silent and the Sixth Amendment right to counsel. One goal of these Principles is to move beyond the unwieldy concept of "custody."

The test for whether a person is deemed in custody is not clear. The U.S. Supreme Court recently explained that: "As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." Howes v. Fields, 132 S. Ct. 1181, 1189-1190 (2012). Yet, despite this seeming connection to coercion, the Court's cases often are quite divorced from it. In some cases, the Court engages in a formalistic inquiry about whether it believes a person would feel free to leave, even if the questioning took place behind closed doors at a police station. See Oregon v. Mathiason, 429 U.S. 492 (1977) ("Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."). At other times, the Court relies on an objective "totality of the circumstances" test. *Howes*, 132 S. Ct. at 1189-1910. The Court has held that relevant factors include: "the location of the questioning, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." Id. The individual characteristics of the person being questioned are also relevant, including whether the person is a juvenile. J.D.B. v. North Carolina, 564 U.S. 261 (2011). In other cases, the Court has held that age and experience with law enforcement were not relevant circumstances. Yarborough v. Alvarado, 541 U.S. 652 (2004). The Court has held that questioning during traffic stops does not constitute custodial interrogation. Berkemer v. McCarty, 468 U.S. 420, 437-438 (1984). Yet, the Court also has said that people who are in prison are not necessarily in "custody" when questioned. *Howes*, 132 S. Ct. at 1190 (reasoning that "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest.").

As the language from those tests and the outcomes in those cases suggest, the U.S. Supreme Court's Fifth Amendment "totality of the circumstances" test does not provide very useful guidance to law enforcement. The distinctions set out in the cases are not intuitive. They create

opportunities for gaming the system, rather than a clear set of best practices for interviews and interrogations. These rulings also suggest that absent custody, no regulation or guidance is necessary for police. Thus, in rulings such as Salinas v. Texas, 133 S. Ct. 2174 (2013), the U.S. Supreme Court has been highly tolerant of police questioning of individuals deemed not to be in "custody," without providing warnings under *Miranda* and the accompanying constitutional protections. Informal questioning is a valuable and important practice, but, like formal questioning of suspects, it too should be governed by careful principles and policy.

The rulings in constitutional litigation are geared toward determining whether evidence will be admissible at a criminal trial, are not focused primarily on what is desirable as a matter of sound policy and practice, and often have very little to do with reliability or coercion. These Principles, by contrast, encourage officers to follow procedures designed to ensure that rights are respected and reliable information is obtained, no matter what the interview or interrogation setting. Constitutional law sets a floor and must be followed, but these Principles are intended to address concerns, often neglected by constitutional law, regarding reliable confessions, statements obtained with minimal coercion, and ensuring legitimacy and treatment of individuals with dignity.

§ 11.02. Recording of Police Questioning

Written policies should set out the procedures for the recording of questioning, and for the disclosure and the retention of recorded evidence, and should provide that:

(a) absent exigent circumstances, officers should record questioning of suspects in its entirety;

(b) officers should record questioning of witnesses whenever feasible; and

(c) in situations in which recording is not conducted, officers should document questioning, taking notes contemporaneously when possible, and memorializing conversations immediately thereafter.

Comment:

a. Recording questioning of suspects. A suspect, or a person who police have reason to believe committed a crime being investigated, may be questioned in a manner that is inherently more accusatory and coercive than the manner in which police question a witness, or a person who police believe has information about a crime. Police may not know whether a person is a witness or also a suspect when they initiate questioning, and when in doubt, they should therefore err on the side of providing the procedures available to suspects. Unless exigent circumstances make it impossible, questioning of suspects should be recorded, in its entirety, including the provision and waiver of *Miranda* rights. This is essential to ensure a complete record and to prevent any doubt

about what happened outside the record. Video recording is preferable. Exigent circumstances might include equipment failure combined with a pressing public-safety need to conduct questioning without delay. Recording may be less feasible in the field, though body-worn cameras may be available for recording purposes. Cost considerations also are relevant, both for police and legal actors, particularly if recording is extended beyond questioning of suspects.

Suspects should be told that they are being recorded. For some suspects who are not willing to speak if recorded, procedures should make available the option of not recording or using methods to redact video or audio to mask the identity of the witness. Policy and procedure should make available and define such special precautions to officers. Video cameras should be positioned so that the field of view includes both the officer and the person being questioned. Policies, at the agency level or preferably at the state level, should provide procedures for recording interrogations. Such policies should provide clear instructions for stopping and starting the recording. Governments should make resources available to agencies to purchase and maintain equipment needed to record the questioning of individuals.

b. Recording questioning of witnesses. Questioning of witnesses may sometimes be conducted in less formal settings, but such questioning should be recorded whenever feasible. Witnesses should be told that they are being recorded. As with suspects, there may witnesses who are not willing to speak if recorded and there may be safety and security concerns that counsel redacting video or audio to mask the identity of the witness. Policy and procedure should make available and define such special precautions to officers. When such a recording is not conducted, officers should take notes contemporaneously to provide as accurate and timely a record as possible of what transpired. If there is not a recording, any reporting or memorialization of those conversations similarly should occur immediately after questioning.

c. Disclosure. Agency policies should set out rules for disclosure of recordings to lawyers in discovery and for storage of archived records.

d. Retention. As discussed elsewhere in these Principles, clear policies should set out the rules for retention of recorded statements. Such evidence should be retained in a manner designed to be usable in the future, and should not be dependent on technology that is proprietary or likely to be obsolete in a way that might hamper future access.

REPORTERS' NOTES

A large body of high-profile exonerations of innocent persons have occurred in cases in which false confessions were obtained during interrogations that were not recorded. Absent a recording, officers asserted that suspects had volunteered "inside" information or details about a crime that only the culprit and the investigators had known. With the benefit of DNA testing, the public learned years later that the suspects were in fact innocent and that such details must have come from police. The problem is known as "confession contamination." BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 21-44 (2011).

Recording police questioning assists law-enforcement agencies and furthers the important goal of documenting evidence and ensuring the conviction of those who commit wrongdoing. Orin Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L. J. 700, 715 (2010) ("To create a record of the event, the officer might record a suspect's confession.").

Video recordings also empower judges to better assess the reliability of interrogation evidence, both to reject false claims of police overreaching and to examine potential wrongful convictions. Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 503 (Winter 1998); Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in The Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions,* 85 TEMP. L. REV. 759 (2013). Agencies have reported positive experiences with recording interrogations because it provides powerful documentation that interrogations are conducted professionally and non-coercively. Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOL. 215, 220-221, 228-234 (2009). Fears that "few would allow themselves to be interviewed or interrogated" if it were known that interviews and interrogations are recorded have not been realized in jurisdictions in which recording has been introduced. NATHAN J. GORDON & WILLIAM L. FLEISCHER, ACADEMY FOR SCIENTIFIC INVESTIGATIVE TRAINING, EFFECTIVE INTERVIEWING & INTERROGATION TECHNIQUES 209 (2d ed. 2006). That said, some flexibility with reluctant witnesses may be important. In addition, it may be increasingly feasible to conduct video recording in the field, as body-worn cameras are utilized more widely by agencies.

In response to the problem of false confessions, and to better document professionally conducted questioning, law-enforcement agencies themselves have shifted to requiring recordings. Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs,* 31 LAW & HUM. BEHAV. 381, 382 (2007). Most prominently, videotaping evidence during interviews and interrogations is increasingly ubiquitous. Doing so provides a complete record of who said what during an interrogation. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications,* 37 J. AM. ACAD. PSYCHIATRY & L. 332, 337 (2009) ("Interrogators help create the false confession by pressuring the suspect to accept a particular account and by suggesting facts of the crime to him, thereby contaminating the suspect's postadmission narrative . . . . If the entire interrogation is captured on audio or video recording,

then it may be possible to trace, step by step, how and when the interrogator implied or suggested the correct answers for the suspect to incorporate into his postadmission narrative."); see also Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 311 (2003) (arguing that due process requires recording interrogations).

State statutes increasingly have required recording at least some categories of police questioning. ANN. CAL. PENAL CODE § 859.5 (West 2014) (requiring recordings for juveniles suspected of murder; exception for "exigent circumstances"); CONN. GEN. STAT. § 54-10 (West 2014) (requiring recordings for suspects of capital or class A or B felonies; statements made during or after unrecorded interrogations presumptively inadmissible); D.C. CODE § 5-116.01 (2009) (requiring police to record all custodial investigations); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2009) (requiring police to record interrogations in all homicide cases); 705 ILL. COMP. STAT. ANN. 401.5(b-5) (expanding range of felonies for which recording is required for juvenile suspects); 725 ILL. COMP. STAT. ANN. 103-2.1(b-5) (expanding range of felonies for which recording is required for adult suspects); ME. REV. STAT. ANN. tit. 25, § 2803-B (2009) (mandating recording "interviews of suspects in serious crimes"); MD. CODE ANN., CRIM. PROC. § 2-402 (2009) (requiring that law enforcement make "reasonable efforts" to record certain felony interrogations "whenever possible"); MICH. COMP. LAWS ANN. §§ 763.8, 763.9 (West 2013) (requiring recordings for individuals suspected of major felonies); MO. REV. STAT. ch. 590.700 (Vernon 2013) (requiring recording for certain felonies); MONT. CODE ANN. § 46-4-408 (West 2009) (requiring the recording of all custodial interrogations); NEB. REV. STAT. ANN. §§ 29-4503, 29-4504 (West 2008) (requiring recording for interrogations relating to certain offenses and providing for jury instructions in the event of failure to do so); N.M. STAT. ANN. § 29-1-16 (West 2006) (requiring recordings of all custodial interrogations); N.C. GEN. STAT. § 15A-211 (2009) (requiring complete electronic recording of custodial interrogations in homicide cases); OHIO REV. CODE ANN. § 2933.81 (Baldwin 2010) (providing for a presumption of voluntariness for recorded statements made in response to interrogation); OR. REV. STAT. § 133.400 (West 2009) (requiring the recording of interrogations of suspects for aggravated murder, crimes requiring imposition of a mandatory minimum sentence, or adult prosecution of juvenile offenders); WIS. STAT. ANN. §§ 968.073, 972.115 (West 2009) (requiring recording of felony interrogations and permitting jury instruction if interrogation not recorded); 13 V.S.A. § 5581 (2014) (requiring recording of entire interrogations in homicide and sexual-assault investigations, with a burden on prosecutors to show by a preponderance of the evidence that an exception justified failure to comply); see also TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2007) (rendering unrecorded oral statements inadmissible unless the statements contain "assertions of facts or circumstances that are found to be true . . . .").

Many state courts also have required recordings of police questioning. See Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) ("[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process. . . ."); State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006) ("[E]lectronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do

so."); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[A]ll questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); State v. Cook, 847 A.2d 530, 547 (N.J. 2004) ("[W]e will establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations."); In re Jerrell C.J., 699 N.W.2d 110, 123 (Wis. 2005) ("[W]e exercise our supervisory power to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."); see also Commonwealth v. DiGiambattista, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out failure to record interrogation and calling unrecorded admissions "less reliable"); State v. Barnett, 789 A.2d 629, 663 (N.H. 2001) ("immediately following the valid waiver of a defendant's *Miranda* rights, a tape recorded interrogation will not be admitted into evidence unless the statement is recorded in its entirety"); N.J. Supreme Court Rule 3:17 (following *Cook,* requiring electronic recording of custodial interrogations).

The recording of police questioning is required or recommended in many respected quarters. The U.S. Department of Justice has a memorandum setting out a policy for recording interrogations. See Memorandum from James M. Cole, Deputy Attorney Gen., Dep't of Justice, Policy Concerning Electronic Recording of Statements 1 (May 12, 2014), http://archive.azcentral.com/ic/pdf/DOJ-policy-electronic-recording.pdf (creating a presumption that statements by individuals in federal custody, following arrest but prior to a first court appearance, will be electronically recorded). The International Association of Chiefs of Police recommends recording "all interviews involving major crimes" and prefers video recordings. International Association of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 18 (August 2013); see also International Association of Chiefs of Police, Interviewing and Interrogating Juveniles Model Policy (May 2012); International Association of Chiefs of Police, Electronic Recording of Interrogations and Confessions Model Policy (February 2006). Scholars have advocated videotaping interrogations for some time. Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL'Y 400, 427 (2012); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 520-535.

Although these Principles take no position on the admissibility of unrecorded statements, others have. The Alaska Supreme Court has ruled that judges should suppress unrecorded statements unless failure to record is excused by good cause. Stephan v. State, 711 P.2d 1156 (Alaska 1985). The Restatement of the Law, Children and the Law, calls for the exclusion of unrecorded statements in court. RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.23, Reporters' Notes (AM. LAW INST., Tentative Draft No. 1, 2018) (citing authority including State v. Scales, 518 N.W.2d 587, 592-593 (Minn. 1994); In re Dionicia M., 791 N.W.2d 236, 241 (Wis. 2010); State v. Barnett, 789 A.2d 629 (N.H. 2001); IND. R. EVID. 617; WIS. STAT. ANN. §§ 938.195, 938.31; WIS. STAT. ANN. §§ 968.073, 972.115; TEX. FAM. CODE ANN. § 51.095; MONT. CODE

ANN. § 46-4-409(1); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (same)). See also Thomas Sullivan, *Video Recording of Custodial Interrogation: Everybody Wins*, 95 J. CRIM. L. & CRIMINOL. 1127 (2005) (proposed model statute presumptively excluding unrecorded interrogation statements). Many state statutes also retain exceptions for exigent circumstances, such as for equipment malfunctions. See, e.g., N.C. GEN. STAT. ANN. § 15A-211(e); VT. STAT. ANN. tit. 13, § 5585(c)(1); N.J. CT. R. 3:17(b); IND. R. EVID. 617(a); WIS. STAT. ANN. § 972.115(2)(a); MONT. CODE ANN. § 46-4-409(1). Others create an exception for a spontaneous statement that could not be recorded in time. See, e.g., ARK. R. CRIM. P. 4.7(b)(2); CONN. GEN. STAT. ANN. § 54-1*o*(e); 725 ILL. COMP. STAT. ANN. 5/103-2.1(b-10); IND. R. EVID. 617(a); N.C. GEN. STAT. ANN. § 15A-211(g); N.J. CT. R. 3:17(b); N.M. STAT. ANN. § 29-1-16(C); MONT. CODE ANN. § 46-4-409(1); MO. ANN. STAT. § 590.700(3); OR. REV. STAT. ANN. § 133.400(2); TEX. CRIM. PROC. CODE ANN. art. 38.22, § 5; WIS. STAT. ANN. § 972.115(2)(a). Some statutes include a "good cause" provision like that stated in this Section. See, e.g., N.M. STAT. ANN. § 29-1-16(F); N.C. GEN. STAT. ANN. § 15A-211(e); OR. REV. STAT. ANN. § 133.400(2); WIS. STAT. ANN. § 968.073(2). This Section also adopts the approach of Restatement of the Law, Children and the Law § 14.23 (Am. Law Inst., Tentative Draft No. 1, 2018), except that it extends the same rule to adult interrogations and not just to juvenile interrogations.

Through their grant programs, governments should make resources available to agencies to purchase and maintain the equipment needed to record questioning of individuals. The equipment needed to record police questioning is increasingly inexpensive; however, resources also should be made available to facilitate the storage of data from recordings, as well as to reproduce those recordings in a form that is easily accessible to attorneys and judges.

§ 11.03. Informing Persons of Their Rights Prior to Questioning

Officers should inform suspects of their right to refrain from answering and their right to counsel, and ensure that any waivers of those rights are meaningfully made. Any invocation of rights must be respected, and if there is any uncertainty as to whether rights are being invoked, officers should take the time to clarify that. Waivers of rights should be documented using appropriate agency forms, and must be recorded in accordance with § 11.02.

Comment:

a. Constitutional rights. The Fifth and Sixth Amendments to the U.S. Constitution require that officers provide warnings to suspects in custody before questioning them, and the U.S. Supreme Court has held that no statement can be admitted unless the suspect has waived those rights. However, *Miranda* protections that apply during police questioning have been undermined

in a range of Supreme Court decisions. As a result, this Section adopts the view that if constitutional safeguards are to be meaningful, care must be taken when securing waivers of rights.

b. Best practices. When in doubt about whether constitutional law requires obtaining a waiver or not, it is the better practice to err on the side of providing warnings, and clearly documenting any waivers of rights by an individual, *before* an interview or interrogation commences. Officers must ensure that any waiver of rights is voluntary, well-informed, and understood. Officers must make the meaning of the rights clear to suspects. In doing so, additional warnings may be necessary. Officers must take special care when questioning individuals who are members of vulnerable populations. See § 11.05 (vulnerable populations). After providing a standard statement of available rights, officers must ask questions to secure an affirmative waiver of rights. If a suspect invokes his or her rights, officers must respect that invocation promptly. Any ambiguity concerning an invocation should be promptly clarified to ensure that the rights of a person are carefully respected.

c. Right to counsel. Under the Fifth and Sixth Amendments of the U.S. Constitution, a person has the right to request an attorney during an interrogation. Agencies must take measures to ascertain if an individual already is represented by counsel, and if so to cease questioning in order to ensure that counsel is notified or present. If questioning a person who has, or has requested, counsel, officers must document and—when possible—obtain written verification that the person initiated the communication despite being aware of the right to have counsel present.

d. Documentation. Officers should record the process of informing persons of their rights, the persons' responses, and any subsequent questioning, as described in § 11.02.

REPORTERS' NOTES

This Section emphasizes that agencies must ensure that suspects only waive their rights after a meaningful opportunity to consider whether or not to do so. The focus here is not on revisiting constitutional-law requirements, but rather on making them meaningful by ensuring that all suspects, including those of varying ages, learning ability, mental health, and language skills, can understand what is transpiring, and exercise free will as to whether they wish to be questioned.

The U.S. Supreme Court ruled in several cases regarding how a waiver should be obtained and the need to ensure that a waiver is informed. For example, while the Court has said that "[t]he main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel," the Court has held that a waiver of rights may be "implied" from silence, even after several hours of a suspect remaining silent in the face of police questioning. Berguis v. Thompkins, 560 U.S. 370, 383 (2010). In addition, the Court has permitted

"a good-faith *Miranda* mistake" to excuse an officer's failure to provide the warnings, in a departure from its rules that typically impose an objective standard of care. Missouri v. Seibert, 542 U.S. 600, 611 (2004) (plurality opinion). Such standards and distinctions are complex and have been criticized as not faithful to the *Miranda* ruling itself. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L. J. 1 (2010). In any event, these rulings are not intended to define a comprehensive set of best practices for law enforcement. That makes it all the more important that agencies ensure that officers take care to inform suspects of their rights to not answer questions and to counsel.

It is important to ensure that if someone is a suspect, that person is advised of his or her rights in a clear and careful fashion, the process is documented, and assertions of rights are respected. Agencies should err on the side of advising persons of the right to remain silent and of the right to counsel. Agencies also should err on the side of notifying counsel.

Further, agencies should restrict the use of tactics in which waivers are not obtained promptly and before questioning proceeds. The concern shared by many observers is that interrogators deemphasize warnings, making them seem like an irrelevant afterthought, in order to see that such warnings are disregarded by the subject. Richard A. Leo & Welsh White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda,* 84 MINN. L. REV. 397-472 (1999).

§ 11.04. Conducting Police Questioning

When questioning individuals, officers should:

(a) minimize the length of questioning;

(b) avoid leading questions and disclosing details that are not publicly known;

(c) avoid threats of harm to the individual or others or, conversely, avoid making promises of benefits to the individual or others;

(d) avoid the use of deceptive techniques that are likely to confuse or pressure suspects in ways that might undermine accuracy of evidence;

(e) ensure the individual has access to basic physical and personal needs, including food, water, rest, and restrooms; and

(f) not question the individual in an environment that is unduly uncomfortable.

Comment:

a. General. As stated in § 11.01, the objectives of police questioning are to obtain accurate information while minimizing coercion and respecting legitimacy, dignity, and fairness values. Any police questioning inherently involves some degree of coercion; the goal should be to minimize such coercion in order to improve the accuracy of the information obtained and to protect the rights and the dignity of individuals. While the U.S. Constitution requires that a confession be voluntary and not overbear a person's will under the totality of the circumstances, constitutional law provides little clear guidance to officers in their conduct of questioning. This Section adopts the view that officers have an independent obligation to assess an individual and his or her potential vulnerability to both suggestion and coercion. Vulnerable populations, such as juveniles and individuals with mental-health issues, should be questioned with a greater degree of care. In addition, officers have an obligation not to engage in undue coercion during questioning, including by avoiding specific highly coercive techniques. The need to question with care and respect, and to minimize undue coercion, is still greater for witnesses who are not suspects, and who are not being accused of criminal involvement.

b. Length of questioning. Interrogations should be limited to the minimum amount of time required to obtain the information needed. In general, interviews and interrogations should not be conducted for more than three hours in one sitting. Shorter periods may be appropriate for vulnerable suspects, such as juveniles. Officers also should be attentive to the time of day and whether the suspect may be sleep deprived, as sleep deprivation creates risks for suggestiveness and false confessions.

c. Avoiding the use of leading questions. An interviewer or interrogator normally should not lead the subject, but rather should ask open-ended questions designed to elicit the most accurate and detailed information possible. An interview should be conducted in a manner that encourages a productive exchange of information. Officers should make in advance a checklist of key nonpublic facts, as part of the investigative file, which should not be disclosed during the investigation. During questioning, officers should ask only open-ended questions concerning itemized key facts that the culprit of the crime would be expected to know. Asking leading questions concerning facts that are important in an investigation can contaminate the record, because it cannot be later assessed whether the suspect could have volunteered that information.

Taking care to avoid disclosing those key facts will provide powerfully probative evidence of the reliability of any statement, if a person volunteers key nonpublic facts without prompting.

d. Threats of harm. Threats of harm should not be employed. For example, officers should not, in an effort to pressure a witness, threaten loss of child custody or arrest of a relative. Although some courts have admitted interrogations and confession statements despite threats of harm that officers make, such threats, whether directed at an individual or others such as family members, may cause unnecessary distress and render a statement unreliable. Because they also are implicit threats of harm if a statement is not forthcoming, promises of benefits such as leniency, to the individual or to others, also should not be used as inducements.

e. Deception. Deceptive tactics should be avoided because they both risk the accuracy of evidence and can contribute to false confessions. They also harm the legitimacy of investigations. While some types of mild use of deception, such as expressing sympathy for the defendant's situation, may not raise such concerns, officers should avoid deceptive practices that are likely to confuse or pressure suspects in ways conducive to false confessions. There are many types of lies and deception that officers have used in the past. For example, officers have used, and should not use, techniques such as false-evidence ploys or fabrication of evidence, in which officers lie to a suspect and claim to have evidence that implicates them, such as DNA evidence, confessions by others, and the like. While some courts have tolerated police use of such severe forms of deception during interrogations, such use of deception can make it far more difficult to assess the accuracy of statements made by a suspect. This is particularly the case when fictional accounts are presented and discussed in complex interchanges. Such interchanges can risk false confessions by supplying crucial investigative information to an individual during questioning, they can be highly coercive, and they also can harm legitimacy by calling into question the credibility of officers who admittedly were making false statements in an effort to elicit information.

f. Deprivation of food, water, and restroom access, and other unduly coercive practices. Deprivations of food, water, and restroom access, among many types of actions and environments that persons would find uncomfortable or harmful, are highly inappropriate. Such conduct should never occur, either for suspects or for witnesses. Persons who belong to vulnerable populations may have still greater sensitivity to environmental conditions and additional care should be taken with them. The named types of unduly coercive practices are illustrative; this Section does not

constitute an exhaustive list. Nor does this list highlight still more abusive and obviously coercive practices such as the use of physical torture, which should not be permitted.

REPORTERS' NOTES

The U.S. Supreme Court's "voluntariness" test assessing coercion during custodial interrogations is not adequate to, or even intended to, inform sound police practices or assess or safeguard the reliability of interrogations. Dickerson v. United States, 530 U.S. 428 (2000). The topics addressed in this Section relate to concerns sometimes expressed by the courts, but rarely addressed in a clear way.

To provide an example, the U.S. Supreme Court has not regulated with any care the length of interrogations. The Court has noted that "there is no authority for the proposition" that an interrogation that is three hours long "is inherently coercive." Berguis v. Thompkins, 560 U.S. 370, 387 (2010). In contrast, policing experts recognize that length of interrogations must be carefully monitored. Even the Inbau and Reid treatise recommends that interrogations not typically last more than three hours (now "three or four" hours). FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 422 (4th ed. 2001) The Fifth Edition states that "for the ordinary suspect" a "properly conducted interrogation that lasts 3 or 4 hours" would not constitute "duress." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 347 (5th ed. 2013). For those reasons, this Section counsels minimizing the length of police questioning. In addition, researchers have examined how sleep deprivation caused by lengthy interrogations can increase the susceptibility of suspects to police pressure and suggestion. Mark Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 48, 56 (1996) (studying effects of sleep deprivation).

This Section counsels avoiding asking leading questions. That is particularly crucial as to key pieces of information, in order to ensure that the individual can provide that information without prompting. The interrogation training materials, originally written by Fred Inbau and John Reid, and now in their Fifth Edition, are emphatic on this point: it is crucial not to ask leading questions that potentially contaminate confession evidence. Inbau and Reid have called it "highly important" to "let the confessor supply the details of the occurrence." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 367 (4th ed. 2001). Thus, "[w]hat should be sought particularly are facts that would only be known by the guilty person." Id. at 369. The current Fifth Edition slightly modifies that language but makes the point equally emphatically. See FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 315, 355 (5th ed. 2011) ("It is highly important . . . that the investigator let the confessor supply the details of the occurrence, and to this end, the investigator should avoid or at least minimize the use of leading questions" and "the lead investigator should decide and document on the case folder what information will be kept secret."). A further best practice involves holding back key facts and ensuring that they are carefully documented in the officers' files as important and not to be released to the public. As noted, if those facts are then disclosed by the suspect voluntarily and without prompting, the statement can provide particularly probative evidence of guilt. See also Brandon L. Garrett, *The Substance of*

False Confessions, 62 STAN. L. REV. 1051, 1066-1067 (2010) (describing police training on avoiding contamination).

Use of non-leading questions to solicit information in an open-ended way is the basis for what are called Cognitive Interviewing techniques, which have been researched and found to produce improvements in the recollection of witnesses. The Cognitive Interview was developed several decades ago by Ron Fisher and Ed Geiselman in response to requests from law enforcement for improved methods to interview witnesses. RON P. FISHER & ED R. GEISELMAN, MEMORY ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW (1992). These techniques focus on permitting the witness to provide as much information as possible. They are based on principles designed to retrieve information from memory with completeness and accuracy. A series of laboratory experiments and field tests have documented that these techniques produce more complete and accurate information about events, whether in policing situations, eyewitness recall, or events in corporate environments. See, e.g., Amona Memom, Christian Meissner & Joanne Fraser, *The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years*, 16 PSYCHOL. PUB. POL'Y & L. 340 (2010). Such techniques may be far preferable not just for interrogations, but for interviews, including with witnesses who want to cooperate but who might have difficulty recalling events, as all witnesses will. Jillian R. Rivard et al., *Testing the Cognitive Interview with Professional Interviewers: Enhancing Recall of Specific Details of Recurring Events*, 28 APPL. COGN. PSYCHOL. 917 (2014).

Psychologists have long recommended that a range of unduly coercive and deceptive techniques be discontinued during interrogations. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations,* 34 LAW & HUM. BEHAV. 3 (Feb. 2010). Legal scholars also have called for the end to techniques such as deception. See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L. J. 791 (2006); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 LAW & HUM. BEHAV. 327 (2011).

While interrogation techniques have long been touted as enabling officers to serve as human lie detectors, they have not been proven to do anything of the sort. Any so-called behavioral analysis or reliance on nonverbal or verbal cues from a suspect to detect deception should be used sparingly. Researchers have documented for some time that officers are not actually better than laypeople at detecting deception, and they perform no better than chance. See Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 500-501 (1999); Christian A. Meissner & Saul M. Kassin, "*He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 472 (2002).

These Principles emphasize, however, that in addition to the concern with the accuracy of certain highly coercive questioning methods, there is the separate concern that police questioning should ensure legitimacy, respect for dignity, and fairness.

§ 11.05. Questioning of Members of Vulnerable Populations

(a) Officers should assess carefully a person's background, age, education, language access, mental impairment, and physical condition, in order to determine vulnerability to coercion and suggestion.

(b) Officers should minimize the need to question vulnerable people and members of vulnerable populations, such as juveniles, people with mental illness, people with intellectual disability, and people affected by substance-related impairment. If they do question members of vulnerable populations, they should do so with minimal coercion and the utmost care.

(c) Hearing-impaired individuals or non-English-speaking individuals should be provided with necessary assistance or translators prior to the reading of rights or any questioning.

(d) A juvenile age 14 or younger may give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

Comment:

a. Vulnerable populations. Vulnerable populations, such as juveniles, people with mental illness, people with intellectual disability, people with substance-related impairments, and hearing-impaired individuals or non-English speaking individuals, should be questioned with caution. Officers should take steps to identify such individuals. If the officer is aware that the person is a member of a vulnerable population, additional steps should be taken to explain warnings using simplified language. Agencies have adopted enhanced warnings for juveniles and other members of vulnerable populations. An officer can assess a person's understanding of warnings simply by asking the person to repeat them in his or her own words. If a waiver occurs, any subsequent questioning should then proceed cautiously and with careful attention to these Principles, including by greatly limiting the length of the questioning.

b. Hearing-impaired and non-English-speaking individuals. Hearing-impaired and non-English-speaking individuals should be provided with necessary assistance or translators prior to the reading of rights or any questioning.

c. Juveniles under age 14. Juveniles are at heightened risk for false confessions and coercion. The U.S. Supreme Court has long observed that juveniles, due to developmental

immaturity, are more vulnerable to coercion. As a result, juvenile confession evidence has long been viewed by the courts with "special caution." In re Gault, 387 U.S. 1, 45 (1967). Juveniles waive their rights at very high rates. The U.S. Supreme Court has recognized the emotional and developmental differences between adults and juveniles, and the implications that those have for the conduct of juvenile interviews in general and interrogations in particular. Those differences must be taken into account when an officer conducts an interview or interrogation of a juvenile. In addition, a substantial body of scientific research, including neurological research, documents how juveniles, as well as young adults, are generally more impressionable and vulnerable to suggestion than adults and may be more susceptible to intimidation by the situation and the presence of police officers.

Restatement of the Law, Children and the Law § 14.22 (Am. Law Inst., Tentative Draft No. 1, 2018) states that "a juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel." The Restatement qualifies the statement with "[u]nless otherwise provided by statute." These Principles set out best practices, rather than restating existing law. Therefore, while the Restatement acknowledges that certain statutes may disregard the child's lack of capacity in establishing the legal consequences of a waiver, these Principles reject such qualification. If a juvenile is not competent to waive his or her rights, we do not believe a statute to the contrary changes that fact.

d. People with mental illness and people with intellectual disability. While officers are not psychiatrists or psychologists, a good-faith effort should be made to identify people with mental illness and people with intellectual disability. Doing so may be more challenging than identifying non-English speakers or juveniles. Officers should receive training on how to proceed when there is evidence that an individual has mental-health issues. Officers should be encouraged to consult with mental-health professionals before proceeding. Questioning of people with mental illness or intellectual disability should be short, and conducted using short, simple words and sentences. Officers should be sensitive to the tendency of such individuals to defer to authority figures.

e. People affected by substance-related impairments. A good-faith effort should similarly be made to identify persons affected by temporary or long-term effects of substances, including alcohol and drugs. Such individuals should receive any needed monitoring and medical treatment before questioning proceeds.

REPORTERS' NOTES

The questioning of members of vulnerable populations should proceed quite differently, from beginning to end, than the questioning of other, non-vulnerable individuals. Although judicial rulings have long expressed concerns with the questioning of individuals such as intellectually disabled persons and juveniles, no clear or consistent guidance has been offered to law enforcement from the courts. As a preliminary matter, individuals who belong to such populations should be identified. Screening instruments should be developed to assist in doing so, and resources should be made available to law enforcement, such as consulting mental-health professionals or social workers experienced with juveniles or other populations, as should resources to accommodate non-English speakers and the hearing impaired.

Persons that belong to vulnerable populations may not understand what they are told by officers during provision of warnings or during questioning, particularly when legal or technical language is used. This includes comprehending the *Miranda* warnings. Jessica Owen-Kostelnik, et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality,* 61 AM. PSYCHOL. 286 (2006). Thus, particularly for juveniles, intellectually disabled individuals, and mentally ill individuals, officers should read, in addition to their standard warnings, simplified *Miranda* warnings that require only a grade- and individual-appropriate comprehension level. They should ensure that any waiver is obtained clearly and definitively. Officers should tailor their questions to the person's age, maturity, level of education, and mental ability. Written materials cannot be relied upon fully for persons, such as juveniles, who enter the criminal-justice system with lower-than-average reading ability. Officers should avoid police or legal jargon when speaking to members of vulnerable populations; use short, simple words and sentences; and use non-leading questions that elicit a narrative response. The admonition about minimizing deception in § 11.04 is particularly pertinent here. Officers should not make promises or threats when speaking to members of vulnerable populations. See also RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.21 (AM. LAW INST., Tentative Draft No. 1, 2018) (describing requirement of a knowing, intelligent, and voluntary waiver by juveniles). Courts should carefully evaluate not only age, but the intelligence of a juvenile, as well as other circumstances. See, e.g., id. at Reporters' Notes to § 14.21 (surveying cases). As a result, great care should be taken to ensure a knowing, intelligent, and voluntary waiver of rights.

Research on juveniles in particular has shown that juveniles are far more likely to conform to authority, including officers, and comply when asked to do so, whether the officers are being truthful or not. Phillip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level,* 37 CHILD DEV. 967 (1966); BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 58 (2012). As one survey observed: "Archival analyses of false confessions, surveys, and laboratory experiments have shown that juveniles are at increased risk of falsely confessing." Christian A. Meissner, Christopher E. Kelly & Skye A. Woestehoff, *Improving Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 214 (2015). Substantial research has documented the risk that juveniles will falsely confess due to their increased likelihood of complying with authority without understanding the consequences of their

decisions. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003); Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession and Individual Differences: A National Study among Icelandic Youth*, 41 PERSONAL. & INDIVID. DIFFER. 49 (2006); Ingrid Candel et al., *"I hit the shift-key and then the computer crashed": Children and False Admissions*, 38 PERSONALITY & INDIVID. DIFFER. 1381 (2005); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141 (2003).

As a result, judicial rulings have long reflected concern about juvenile interrogations. The U.S. Supreme Court in J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), held that a juvenile's age must be considered in examining whether the juvenile should have been deemed in police custody. Questioning by school resource officers or other government officials also may be considered as a factor that indicates to a juvenile that it is a custodial situation. In re Welfare of G.S.P., 610 N.W.2d 651 (Minn. Ct. App. 2000). In rulings concerning life without parole, the Supreme Court has found states cannot impose mandatory life-without-parole sentences on juvenile offenders, noting the particular danger that juveniles may confess falsely. Miller v. Alabama, 132 S. Ct. 2455 (2012). Courts have held that police stations are inherently coercive for some juveniles. Jeffley v. State, 38 S.W.3d 847, 857 (Tex. Ct. App. 2001); United States v. IMM, 747 F.3d 754, 767 (9th Cir. 2014). All of those rulings support minimizing the questioning of juveniles, and approaching any such questioning, and particularly interrogations, with great sensitivity.

The Restatement of the Law, Children and the Law, provides as follows:

§ 14.20 Rights of a Juvenile in Custody; Definition of Custody

(a) A juvenile in custody has the right to the assistance of counsel and the right to remain silent when questioned about the juvenile's involvement in criminal activity by a law enforcement officer.

(b) A juvenile is in custody if, under the circumstances of the questioning:

(1) a reasonable juvenile of the suspect's age would feel that his or her freedom of movement was substantially restricted such that the juvenile was not at liberty to terminate the interview, and

(2) the officer is aware that the individual being questioned is a juvenile or a reasonable officer would have been aware that the individual is not an adult.

RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.20 (AM. LAW INST., T.D. No. 1, 2018).

Officers should make every effort to notify parents or guardians prior to any questioning of a juvenile. Parents should be offered the opportunity to be present whenever a juvenile is questioned, taken into custody, or charged. Parents should consult with the juvenile's attorney before making any recommendations that their child speak to law enforcement. However, a parent's consent is neither necessary nor sufficient for the juvenile's waiver of these rights.

While officers should be able to identify non-English speakers, hearing-impaired individuals, and many, if not most, juveniles, identifying people with mental illness and people with intellectual disability can sometimes pose a real challenge for officers who are not trained

mental-health professionals. Yet, many of those individuals known to have confessed falsely possessed such mental-health problems. It has been long known that such individuals are more vulnerable to police coercion, but few agencies have responded to such awareness with appropriate policies and training. Finlay & Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation,* 40 MENTAL RETARDATION 14 (2002). One noteworthy agency that has done so is Florida's Broward County Sheriff's Office. See Broward County Sheriff's Office, G.O. 01-33 (Nov. 17, 2001) (detailed policy concerning interrogation of suspects with developmental disabilities, including guidelines for interrogation and post-confession analysis).

A person with an intellectual disability is defined as having "significantly subaverage general intellectual functioning, existing concurrently [at the same time] with deficits in adaptive behavior and manifested during the developmental period, that adversely affects . . . educational performance," under the Individuals with Disabilities Education Act (IDEA). Such disability can be difficult to recognize without visual cues, since some people are mildly affected. See The Arc, Introduction to Intellectual Disability, at http://www.thearc.org/page.aspx?pid=2448.

Mental illness refers to a wide range of mental disorders or health conditions. Severe mental illness, for example, is defined as a mental, behavioral, or emotional disorder, diagnosable currently or diagnosed within the past year, that meets criteria in the current Diagnostic and Statistical Manual of Mental Disorders, and that results in a "serious functional impairment, which substantially interferes with or limits one or more major life activities." See National Institute of Mental Health, Serious Mental Illness (SMI) Among U.S. Adults, at https://www.nimh.nih.gov/health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml. Such serious mental illnesses can include schizophrenia, paranoid or psychotic disorders, bipolar disorders, post-traumatic stress disorders, and others. Such individuals may be found competent in a criminal case and found not criminally insane, but such standards are not designed to inform whether reliable information can fairly be obtained from such individuals.

Finally, persons affected by substances, whether alcohol or drugs, may require monitoring or medical treatment, and should not be questioned while impaired. Many individuals suffer co-occurrence of substance abuse and mental-health needs. For an overview of a wide range of screening and assessment instruments used in the area of co-occurring mental and substance-abuse disorders, see Substance Abuse and Mental Health Services Administration, *Screening and Assessment of Co-Occurring Disorders in the Justice System* (2015).

Many agencies do not have detailed policies on police questioning of members of vulnerable populations. Resources should be made available to develop such written policies, as well as training and supervision directed specifically at questioning of members of vulnerable populations.

APPENDIX
BLACK LETTER OF TENTATIVE DRAFT NO. 2

§ 1.01. Scope and Applicability of Principles

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

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

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

§ 1.02. Goals of Policing

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

§ 1.03. Reducing Harm

Agencies that exercise policing powers should, to the extent feasible, pursue the goals of policing in a way that reduces attendant or incidental harms. Toward that end, agencies should adopt rules, policies, and procedures that respect and uphold constitutional rights; guard against arbitrary or discriminatory policing; promote the preservation of life, liberty, and property; reduce the risk of injury to both officers and members of the public; ensure the accuracy of investigations; and promote the wellbeing of officers and community members alike.

§ 1.04. Transparency and Accountability

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

§ 1.05. Written Rules, Policies, and Procedures

(a) Agencies should operate subject to clear and accessible written rules, policies, and procedures. At a minimum, agencies should have rules, policies, or procedures on all aspects of policing that meaningfully affect the rights of members of the public or implicate the public interest.

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

§ 1.06. Promoting Police Legitimacy

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

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

§ 1.07. Community Policing

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

§ 4.01. Officer-Initiated Encounters with Individuals

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

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

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

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

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

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

§ 4.02. Justification for Encounters

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

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

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

(3) issue a summons or a citation to an individual based on probable cause that a crime or a violation has been committed; and

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

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

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

§ 4.03. Ensuring the Legitimacy of Police Encounters

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

(b) Officers should establish the legitimacy of their encounters with members of the public by treating individuals with dignity and respect, explaining the basis for the officers' actions, giving individuals an opportunity to speak and be heard, and engaging in behaviors that convey neutrality, fairness, and trustworthy motives.

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

§ 4.04. Permissible Intrusions During Stops

(a) During a stop, an officer may:

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

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

(b) Unless probable cause develops during the encounter, the encounter should terminate upon completion of these investigative efforts.

§ 4.05. Minimizing Intrusiveness of Stops and Arrests

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

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

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

§ 4.06. Consent Searches

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

(b) Agencies should consider adopting policies to limit officers' use of consent searches, including by:

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

(2) requiring officers to explain why they want to conduct a search and that the individual has the right to refuse consent; and

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

(c) The scope of a consent search should be no broader than necessary to achieve the investigative objective motivating the request for consent.

§ 4.07. Searches Incident to a Lawful Custodial Arrest

(a) A search incident to a lawful custodial arrest may only be conducted to protect the safety of officers or others, or to prevent the destruction of evidence.

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

(c) A search conducted at the time of arrest generally should be limited to a pat-down search of the arrestee and a search of the immediately surrounding area from which the arrestee could access a weapon or evidence. Agencies should limit the use of more intrusive

searches to circumstances in which there is reasonable suspicion to believe that the arrestee is concealing a weapon or evidence that would not be uncovered through a pat-down search.

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

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

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

§ 10.01. General Principles for Eyewitness Identification Procedures

Agencies should be cognizant of the scientific research regarding eyewitness perception and memory, and the limits of eyewitness evidence.

§ 10.02. Eyewitness Identification Procedures

Police agencies should adopt standard, written eyewitness identification procedures to regulate the use of showups, lineups, photo arrays, and any other eyewitness identification techniques they employ, whether in the field or the station. Agencies should ensure that the specific procedures they use to test the memory of an eyewitness are informed by extant research. Those procedures should include:

(a) direction to conduct any identification as early as possible in the course of an investigation;

(b) instructions to explain the procedure to the eyewitness in easily understood terms;

(c) procedures for fairly selecting non-suspect or "filler" persons or images to display to the eyewitness;

(d) procedures for presenting persons or images to the eyewitness in a nonsuggestive manner;

(e) procedures for documenting any identification or nonidentification by the eyewitness; and

(f) procedures that employ sequential or simultaneous presentation of photos in photo lineups.

§ 10.03. Threshold for Conducting Eyewitness Identifications

Policing agencies should not conduct eyewitness identifications unless they have:

(a) a strong basis to believe that the suspect was the culprit and should therefore be presented to the eyewitness, and

(b) a strong basis to believe that the eyewitness can reliably make an identification.

§ 10.04. Showup Procedures

Agencies should minimize the use of showup procedures and should adopt standard procedures for conducting prompt showups in a neutral manner and location.

§ 10.05. Blind or Blinded Procedures

For all identification procedures other than showups, agencies should adopt procedures in which the person administering the identification procedure does not know which person is the suspect. There are two options:

(a) blind procedures, in which the person who administers the procedure does not know the suspect; or

(b) blinded procedures, in which the person who administers the procedure cannot see which persons or photographs the suspect is examining. This can be accomplished with techniques such as the use of folders, or computerized presentation of images, that shield the images from the person administering the procedure.

§ 10.06. Obtaining and Documenting Eyewitness Confidence Statements

Agencies should ask eyewitnesses to express verbally how confident they are in their identification at the time it is made.

§ 10.07. Reinforcement or Feedback

Officers should not provide feedback, encouragement, or reinforcement to eyewitnesses before, during, or after an identification procedure.

§ 10.08. Recording Eyewitness Identification Procedures

As a matter of standard practice, eyewitness identification procedures should be recorded when feasible.

§ 11.01. Objectives of Police Questioning

The goal of police questioning is to obtain accurate and reliable information, while seeking to minimize the amount of undue coercion used and treating persons with dignity and fairness.

§ 11.02. Recording of Police Questioning

Written policies should set out the procedures for the recording of questioning, and for the disclosure and the retention of recorded evidence, and should provide that:

(a) absent exigent circumstances, officers should record questioning of suspects in its entirety;

(b) officers should record questioning of witnesses whenever feasible; and

(c) in situations in which recording is not conducted, officers should document questioning, taking notes contemporaneously when possible, and memorializing conversations immediately thereafter.

§ 11.03. Informing Persons of Their Rights Prior to Questioning

Officers should inform suspects of their right to refrain from answering and their right to counsel, and ensure that any waivers of those rights are meaningfully made. Any invocation of rights must be respected, and if there is any uncertainty as to whether rights are being invoked, officers should take the time to clarify that. Waivers of rights should be documented using appropriate agency forms, and must be recorded in accordance with § 11.02.

§ 11.04. Conducting Police Questioning

When questioning individuals, officers should:

(a) minimize the length of questioning;

(b) avoid leading questions and disclosing details that are not publicly known;

(c) avoid threats of harm to the individual or others or, conversely, avoid making promises of benefits to the individual or others;

(d) avoid the use of deceptive techniques that are likely to confuse or pressure suspects in ways that might undermine accuracy of evidence;

(e) ensure the individual has access to basic physical and personal needs, including food, water, rest, and restrooms; and

(f) not question the individual in an environment that is unduly uncomfortable.

§ 11.05. Questioning of Members of Vulnerable Populations

(a) Officers should assess carefully a person's background, age, education, language access, mental impairment, and physical condition, in order to determine vulnerability to coercion and suggestion.

(b) Officers should minimize the need to question vulnerable people and members of vulnerable populations, such as juveniles, people with mental illness, people with intellectual disability, and people affected by substance-related impairment. If they do question members of vulnerable populations, they should do so with minimal coercion and the utmost care.

(c) Hearing-impaired individuals or non-English-speaking individuals should be provided with necessary assistance or translators prior to the reading of rights or any questioning.

(d) A juvenile age 14 or younger may give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

APPENDIX B
OTHER RELEVANT BLACK-LETTER TEXT

§ 7.01. Scope and Applicability of Principles (T.D. No. 1 Revised) (approved in 2017)

(formerly § 5.01)

The following Principles:

(a) are intended to guide the conduct of all agencies that possess the lawful authority to use force, which are referred to throughout this Chapter as "agencies";

(b) are intended for consideration by an informed citizenry, and for adoption as deemed appropriate by legislative bodies, courts, and agencies;

(c) are not intended to create or impose any legal obligations or bases for legal liability absent an expression of such intent by a legislative body, court, or agency.

§ 7.02. Objectives of the Use of Force (T.D. No. 1 Revised) (approved in 2017)

(formerly § 5.01 in T.D. No. 1 and § 5.02 in T.D. No. 1 Revised)

Officers should use physical force only for the purpose of effecting a lawful seizure (including an arrest or detention), carrying out a lawful search, preventing imminent physical harm to themselves or others, or preventing property damage or loss. Agencies should promote this objective through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 7.03. Minimum Force Necessary (T.D. No. 1 Revised) (approved in 2017)

(formerly § 5.02 in T.D. No. 1 and § 5.03 in T.D. No. 1 Revised)

In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 7.04. De-escalation and Force Avoidance (T.D. No. 1 Revised) (approved in 2017)

(formerly § 5.03 in T.D. No. 1 and § 5.04 in T.D. No. 1 Revised)

Agencies should require, through written policy, that officers actively seek to avoid using force whenever possible and appropriate by employing techniques such as de-escalation. Agencies should reinforce this Principle through written policies, training, supervision, and reporting and review of use-of-force incidents.

§ 7.05. Proportional Use of Force (T.D. No. 1 Revised) (approved in 2017)

(formerly § 5.04 in T.D. No. 1 and § 5.05 in T.D. No. 1 Revised)

Officers should not use more force than is proportional to the legitimate law-enforcement objective at stake. In furtherance of this objective:

(a) deadly force should not be used except in response to an immediate threat of serious physical harm or death to officers, or a significant threat of serious physical harm or death to others;

(b) non-deadly force should not be used if its impact is likely to be out of proportion to the threat of harm to officers or others or to the extent of property damage threatened. When non-deadly force is used to carry out a search or seizure (including an arrest or detention), such force only may be used as is proportionate to the threat posed in performing the search or seizure, and to the societal interest at stake in seeing that the search or seizure is performed.

§ 7.06. Instructions and Warnings (T.D. No. 1 Revised) (approved in 2017)

(formerly § 5.05 in T.D. No. 1 and § 5.06 in T.D. No. 1 Revised)

Officers should provide clear instructions and warnings whenever feasible before using force. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.