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PREEMPTING THE POLICE

DAVID M. JAROS*

Abstract: The challenge of regulating police discretion is exacerbated by the fact that a great deal of questionable police activity exists in the legal shadows—unregulated practices that do not violate defined legal limits because they have generally eluded both judicial and legislative scrutiny. Local law enforcement strategies, like the maintenance of unauthorized police DNA databases and the routine practice of initiating casual street encounters, threaten fundamental notions of a free society but have largely failed to elicit a judicial or legislative response. This Article argues that, instead of establishing a floor for impermissible police misconduct and then ceding responsibility to the legislative branch, state courts should become more interventionist—prodding legislators to provide greater guidance about police activities that they condone by forcing them to explicitly endorse questionable police practices. Accordingly, state courts should use the intrastate preemption doctrine, which holds that state law can supplant municipal authority, to find that local police officers may not engage in certain activities. Rather than stifle municipal policy innovation, a finding of preemption can precipitate a policy debate that engages both legislators and the electorate in evaluating police activity. This “information-forcing” approach can promote a more democratic dialogue about police practices, provide stronger protections for the community, and confer greater legitimacy on the police activities that legislators choose to sanction.

INTRODUCTION

How do we police the police? The practicalities of fighting crime require that we vest the police with extensive discretion so that they can effectively identify and arrest criminal activity. Unfortunately, the nature of police work, and the political and social context in which police officers function, make it difficult to ensure that this power is not abused. Striking an appropriate balance between civil liberty interests and pressing public safety concerns is particularly difficult because a great deal of questionable police activity exists in the legal shadows—unregulated practices that do not violate defined legal lim-

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its because they have generally eluded both judicial and legislative scrutiny. Law enforcement strategies, like the maintenance of unauthorized police DNA databases and the routine practice of initiating casual street encounters, threaten fundamental notions of a free society but have largely failed to elicit either a judicial or legislative response.

Given the significant challenges of regulating police conduct effectively,¹ it's not surprising that there is little agreement about which governmental branch should be tasked with policing the police. Since the Warren Court's revolution of criminal procedure, the primary approach to regulating law enforcement has been to rely on the Constitution and the judiciary to establish threshold standards to restrain the police.² Seminal U.S. Supreme Court cases like *Monroe v. Pape*,³ *Mapp v. Ohio*,⁴ and *Miranda v. Arizona*⁵ established the courts as the institution primarily responsible for reining in police misconduct.⁶ Many have argued, however, that the Supreme Court's decisions regulating law enforcement have pushed judges beyond the limits of their institutional capacity,⁷ produced poorly developed or inadequate rules for officers in the field,⁸ and led courts to overstep their legal authority to regulate police mis-

¹ See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762 (2012) (describing the many challenges to regulating police activities).

² See *id.* at 763 ("The problem of regulating police power through law has been shoehorned into the narrow confines of constitutional criminal procedure."); see also Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970) ("[T]he ubiquitous lack of legislative and executive attention to the problems of police treatment of suspects . . . forces the Court into the role of lawmaker in this area . . ."); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 747 (2005) ("Since the criminal procedure revolution of the Warren Court era, the courts have been the primary rule makers in the field of criminal procedure.").

³ See generally 365 U.S. 167 (1961) (applying Federal Civil Rights law to constitutional violations by city employees).

⁴ See generally 367 U.S. 643 (1961) (mandating the exclusion of evidence gained through constitutional violations from the police).

⁵ See generally 384 U.S. 436 (1966) (excluding statement by accused when police fail to inform of them of their constitutional rights).

⁶ Harmon, *supra* note 1, at 766 ("If the holdings in *Monroe*, *Mapp*, *Katz*, and *Miranda* enabled courts to regulate police conduct, their reasoning established courts, especially federal courts, as the primary institution for performing this task."); Solove, *supra* note 2, at 747.

⁷ See Harmon, *supra* note 1, at 764 ("[C]ourts lack the institutional capacity to undertake complex empirical analysis of policing or to constrain the police beyond identifying and enforcing constitutional rights."); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004) (arguing that courts are ill-equipped to develop protective rules in cases involving developing technologies).

⁸ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (arguing that the Supreme Court's Fourth Amendment jurisprudence regarding warrant requirements and probable cause for all searches is "misguided"); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1473-74 (1985) (accepting the Court's application of the Constitution to regulate police conduct, but questioning the scope of the *Miranda* decision).

conduct.⁹ Indeed, some scholars contend that the judiciary's mere involvement in efforts to regulate the police exacerbates the problem by crowding out or excusing lawmakers from complementary legislative action.¹⁰

Several scholars claim that the legislative branch enjoys more legitimacy, flexibility, and authority to define procedural rules for the police—particularly in areas where rapid technological change constantly reshapes how police conduct investigations and how criminals break the law.¹¹ Unfortunately, although egregious cases of police misconduct can temporarily galvanize the public and, for a short time, their representatives, the politics of crime tends to deter politicians from taking an active role in limiting police power.¹² Thus, even if the legislative branch has certain institutional advantages with respect to identifying and instituting rules governing police conduct, it may be difficult to convince politicians to take on the task. Critics therefore argue that regulating police conduct must necessarily fall to the courts.¹³

⁹ See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 954 (1965) (“The Bill of Rights ought not to be read as prohibiting the development of ‘workable rules,’ or as requiring the states forever to conform their criminal procedures to the preferences of five Justices”); see also Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1513–15 (arguing that courts’ current approach to the Fourth Amendment has “led to a complicated morass of doctrines and theories” and also ignored problems caused by “inadequately constrained government power, lack of accountability of law enforcement officials, and excessive police discretion”).

¹⁰ See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792 (2006) (“The Court drove legislators, along with the dollars they control, away from those areas where legislation might have done the most good (policing and procedure), and into those areas where it is bound to do the most harm (crime definition and sentencing).”); see also David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1295 (2002) (suggesting that the *Miranda* decision, and the Fourth Amendment exclusionary rule “may have slowed legislative innovation by a kind of informal preemption, occupying the field and providing a single, pre-approved solution”).

¹¹ See Harmon, *supra* note 1, at 776–77 (explaining that, because constitutional criminal procedure rights set “unbreakable rules,” they must be more generous to law enforcement than a true measure of the interests at stake); Kerr, *supra* note 7, at 857–81 (describing the advantages that legislatures have when it comes to regulating police activity involving new technologies). The inflexibility of constitutional rules also means that courts can only set the actual limits of police behavior rather than identify a standard for how law enforcement *should* behave. See Harmon, *supra* note 1, at 776–77.

¹² See Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 29 (1997) (“The epithet ‘soft on crime’ is the contemporary equivalent of ‘soft on Communism.’ In the United States, politicians have learned that to win you need to convince the public that you are tough on crime.”). But see Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 537 (2013) (noting that Congress has, at times, demonstrated a greater willingness to protect privacy concerns than the courts).

¹³ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001) (describing powerful legislative incentives to give police and prosecutors broad discretion to fight crime); see also David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1978–79 (2012) (“For several decades, the politics of crime have been dominated by forces which

Increasingly, scholars have recognized that an effective regime for regulating the police will require the active involvement of multiple institutions applying complementary approaches to curtailing improper police conduct.¹⁴ Unfortunately, a coordinated approach to regulating the police is difficult to construct. A coordinated regulatory regime cannot simply encourage both the legislature and the judiciary to regulate the police in parallel fashion. Each institution must instead adopt strategies which both conscript its sister branch of government into the regulatory regime and compensate for the other institution's weaknesses.¹⁵

For the judiciary, this may mean reversing its approach to police regulation. Traditionally, courts have established a basic floor for impermissible police misconduct and then ceded responsibility for checking police activity to a legislative branch with arguably greater expertise. Instead, in some cases, the judiciary should become more interventionist—encouraging state legislators to provide greater guidance about police activities that the legislature condones by forcing them to endorse questionable police practices explicitly. This “information-forcing”¹⁶ or “clear statement”¹⁷ approach, which scholars have proposed in other contexts, would prompt a more democratic dialogue regarding police practices that often escape public scrutiny and confer greater legitimacy on police activities that legislators choose to sanction.

To illustrate how such a dynamic approach might work, this Article examines how the “intrastate preemption” doctrine—a doctrine associated with the distribution of power between state and local governments—can improve the regulation of some police activities that, to date, have escaped efforts at oversight or control. Intrastate preemption occurs when state law precludes local

tend to promote punitive approaches that have been regarded as unproductive by many criminal justice experts.”).

¹⁴ See, e.g., Harmon, *supra* note 1, at 817 (describing the need to allocate among various institutions “the complex task of articulating and implementing a form of policing that is both effective and harm efficient”); Murphy, *supra* note 12, at 537 (arguing that “it is undesirable for either the Court or Congress to assume sole or even primary responsibility for regulating privacy in the twenty-first century”).

¹⁵ Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 728 (2007) (“A second and perhaps larger lesson for institutional reformists is the need to combine institutions in a way that maximizes their respective capabilities to correct or compensate for underlying participatory imbalances.”); see Sklansky, *supra* note 10, at 1232–33 (suggesting that courts adopt “strategies designed to promote ongoing dialogue between the judiciary on the one hand and the political branches on the other”).

¹⁶ See, e.g., Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 457 (2008) (suggesting that a justification for courts refusing to preempt state products liability laws is that such a strategy is “information-forcing”).

¹⁷ See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 359 (1999) (“[T]he clear statement principles are a paradigmatic form of ‘democracy-promoting minimalism.’ They reflect a cautious judicial role, one that does not preempt democratic processes but instead attempts to fortify them, by ensuring that certain sensitive questions receive explicit and sustained attention from the national legislature.”); see also Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 533 (1997).

governments from exercising their authority in a particular field.¹⁸ Critics often accuse the intrastate preemption doctrine of stifling municipal policy innovation by allowing powerful business and industry groups to block local democratic efforts to advance important community interests, such as environmental protection and public safety.¹⁹ In fact, the doctrine has decidedly different implications depending upon the political strength of the parties involved.²⁰ When the doctrine is applied to statutes implicating police conduct and historically disfranchised groups, a finding that state law preempts the police from engaging in problematic discretionary activities may actually precipitate a policy debate that engages both legislators and the electorate in evaluating police activity that would otherwise avoid scrutiny.

Law enforcement practices that occur outside the boundaries of the law undermine the legitimacy of the police and reduce the public's respect for the law.²¹ By preempting certain police practices, courts can promote a dialogue about police activities that currently reside in a legal wilderness. Moreover, when prodded to act, legislatures have not always favored unbridled police discretion. Some states, after considering the benefits of collecting genetic profiles of their citizens, have chosen to include various protections that expressly limit how those databases can be used.²²

This Article focuses on law enforcement regulation at the state, rather than federal level, for several related reasons. First, the police, as municipal employees, do not have inherent powers to act. Instead their authority is entire-

¹⁸ See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1116 (2007) (describing the intrastate preemption doctrine and its impact on local policy innovation); see also Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 237 (2000) (“[P]reemption is a simultaneous expansion in power of a higher level of government and reduction in power of a lower level of government.”).

¹⁹ See, e.g., Diller, *supra* note 18, at 1140 (“[B]usinesses also frequently turn to the courts to overturn local regulations they dislike. . . .”); Darwin Farrar, *In Defense of Home Rule: California’s Preemption of Local Firearms Regulation*, 7 STAN. L. & POL’Y REV. 51, 55–57 (1996) (describing how state law has been used to preempt local gun control regulations); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 376 (2008) (questioning “the wisdom of the current preemption doctrine that limits local governments’ ability to be Petri dishes for innovative policies”); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 640 (2001) (suggesting that implied preemption creates “severe constraints on local innovation and choice”); Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 505 (1999) (“[P]reemption may actually restrict legitimate efforts to protect human health and the environment . . .”).

²⁰ See *infra* notes 90–164 and accompanying text.

²¹ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1119 (2000) (“Mistrust of the police not only undermines the perceived authority of the law and agent in question, but also the legitimacy of all laws and all officials.”).

²² See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 297 (2010) (discussing Maryland statute barring the police from conducting familial searches with the statewide database).

ly delegated to them from the state by either statute or constitutional provision.²³ Second, unregulated police practices—like “rogue” DNA databases and “stop and talk” strategies—occur at the municipal level without any express authorization or debate by the state legislature. Third, although the federal government has, on occasion, sought to curb police misconduct,²⁴ federal authority to regulate the police is relatively limited when it comes to police activity that doesn’t implicate a constitutional right.²⁵ Moreover, even if the federal government had the power to act, questionable law enforcement activities may not garner sufficient attention at the federal level to reliably elicit a legislative response.²⁶ Finally, state legislatures and courts have traditionally shouldered significant responsibility in designing and overseeing criminal procedure.²⁷

John Hart Ely famously suggested that courts should intervene when the political process fails to protect minority interests.²⁸ Generally, Professor Ely’s

²³ See *State v. Backstrand*, 313 P.3d 1084, 1111 (Or. 2013) (“The community caretaking statute is not an exception to the warrant requirement; it is the statutory expression of the well-settled precept that the actions of law enforcement officers, like all other government actors’ actions, must be traceable to some grant of authority from a politically accountable body.”); see also *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.”); William D. McElyea, *Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts*, 14 *ECOLOGY L.Q.* 325, 335 (1987) (“A local government has no inherent police power; therefore, as a subdivision of the state, it only possesses powers delegated to it by the state.”).

²⁴ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 378–79 (1974) (explaining that legislatures are largely reluctant to regulate police behavior).

²⁵ See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see also *United States v. Orso*, 275 F.3d 1190, 1190–91 (9th Cir. 2001) (“To begin, let us remember that this court does not sit as a kind of super-Citizens’ Police Review Board, creating some set of federal common-law police regulations for local law enforcement officers in this circuit by distinguishing, on a case-by-case basis, ‘good’ police conduct from ‘bad.’”); *id.* at 1191 (“Instead, our only proper role in this context is to determine whether police conduct has in some way rendered the admission of evidence at a criminal trial violative of a defendant’s constitutional rights. In short, not everything that this court might consider ‘bad’ (or ‘improper’) is accordingly unconstitutional.”).

²⁶ See Sanford Levinson, *Why It’s Smart to Think About Constitutional Stupidities*, 17 *GA. ST. U. L. REV.* 359, 371 (2000) (“Congress is very, very busy. It is no easy matter to capture Congress’ attention on any given issue, especially one that has not captured widespread public attention and when the polls do not indicate that a legislator’s investing his or her scarce time and energy on that issue will win any votes.”).

²⁷ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 *MICH. L. REV.* 519, 522 (2011) (explaining that “states have the primary responsibility for law enforcement in the United States”).

²⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980) (suggesting that it is the function of the courts to “keep the machinery of democratic government working as it should, to make sure the channels of political participation and communication are kept open” and that the judiciary should “concern itself with what majorities do to minorities”); Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 *U. MIAMI L. REV.* 1, 2–3

arguments have been used to justify the use of heightened scrutiny when courts evaluate the constitutionality of government activity affecting “discrete and insulated minorities.”²⁹ The potential for intrastate preemption to stimulate a public debate over questionable police practices suggests that there may be other roles that courts can play when it comes to protecting minority interests. Rather than circumvent the democratic process with rigid constitutional pronouncements, courts can use the intrastate preemption doctrine to make sure that minority perspectives are debated in a public forum. This less intrusive means of intervention can help develop rules that dictate, not only the outer limits to what police can do, but rules for how we want them to act. Such a strategy can ultimately yield greater legitimacy for the police, stronger protections for the community, and a more effective functioning democracy.

This Article proceeds in three parts. Part I delves further into the challenges of regulating police conduct and identifies how particular obstacles to police regulation suggest distinct roles and strategies for the institutions tasked with curtailing police misconduct.³⁰ Part II examines the use of the intrastate preemption doctrine at the state level and suggests that, contrary to the critiques leveled at its application in cases involving business and environmental regulation, a robust preemption doctrine can facilitate policy experimentation and increase civic engagement when it is applied to statutes that implicate police conduct.³¹ Part III examines two instances of troubling police conduct—the maintenance of unauthorized police DNA databases and the routine practice of making casual street stops that arguably do not rise to the level of a constitutionally impermissible seizure—and explores the impact that adoption of a robust intrastate preemption doctrine would have on identifying and curtailing undesirable police conduct.³²

I. THE CHALLENGES OF REGULATING THE POLICE: COMPARING JUDICIAL AND LEGISLATIVE STRENGTHS AND WEAKNESSES

In light of the difficulties of regulating police conduct effectively, it is not surprising that there is little agreement about which branch of government should be tasked with policing the police.³³ Indeed, scholars’ estimation of

(1995) (“*Democracy and Distrust* developed the notion that judges should intervene when they have reason to distrust the political process . . .”).

²⁹ See *United States v. Carolene Prods.*, 304 U.S. 144, 152–53 n.4 (1938) (suggesting that heightened scrutiny may be justified when “prejudice against discrete and insular minorities” curtail the operation of political processes that ordinarily protect minorities).

³⁰ See *infra* notes 33–89 and accompanying text.

³¹ See *infra* notes 90–164 and accompanying text.

³² See *infra* notes 165–274 and accompanying text.

³³ Compare Kerr, *supra* note 7, at 805 (arguing that the courts are ill-equipped to develop rules to govern law enforcement investigatory practices that involve new technologies), with Solove, *supra* note 2, at 761 (“Kerr is too quick to extol the virtues of Congress and . . . is especially misguided in

whether the legislative or judicial branch is in the best position to curtail undesirable police activity tends to depend on the specific obstacle on which the particular scholar chooses to focus. This is not to suggest that “Comparative Institutional Analysis”³⁴ does not offer valuable insights into the problem of policing. Rather, the error that scholars tend to make is that they evaluate the relative strengths of the two branches of government with an eye towards picking a single institutional winner.³⁵ Instead, by examining how each challenge inhibits each institution, it is possible to identify ways in which the two branches can complement each other’s efforts.³⁶

Conspicuously absent from this analysis is the role that the executive branch plays in regulating its own conduct. The executive branch and, more importantly, independent agencies, such as civilian complaint review boards, have been moderately successful in identifying and punishing police conduct that violates accepted standards of policing.³⁷ The executive branch, however, demonstrates little interest in reining in police activity that does not violate clearly defined legal standards. Likewise, independent review boards lack the authority to impose limits on police activity that is not clearly proscribed by law.³⁸ As a result, the following analysis focuses primarily on the strengths and weaknesses of the judicial and legislative branches.

suggesting that courts take a back seat to legislatures in creating criminal procedure rules for new technologies.”).

³⁴ “Comparative Institutional Analysis” is a method for identifying the best (or least flawed) institution to resolve a legal issue. See Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 575 (2001) (“As a positive matter, the analysis predicts the different outcomes that will arise in various institutional settings based on the actors’ incentives in each setting. As a normative matter, comparative institutional analysis chooses the best institution by determining the outcome that best furthers a particular social policy goal.”); Neil K. Komisar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465, 465–66. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994) (providing further discussion).

³⁵ Wagner, *supra* note 15, at 728 (“Rather than conceiving of comparative institutional analysis as a horse race that seeks out a single institutional winner with respect to resolving a social problem, the best institutional response may be a mix of institutions that enter the decision-making process at different points in the life cycle of an issue or offer different services to overcome different types of participation deficiencies.”).

³⁶ See, e.g., *id.* at 695 (identifying the potential for private tort litigation to complement agency efforts to regulate dangerous products).

³⁷ See Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L.J. 209, 220 (1998) (suggesting that civilian review boards can help resolve bias and intimidation problems related to police complaints, but also noting such boards’ limits).

³⁸ See Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 1–2 (2009) (describing the function of civilian review boards).

A. Identifying Undesirable Police Behavior

When considering which government branch is best equipped to regulate police activity, scholars tend to ignore the basic question of how the legislature and the judiciary identify police activity that needs regulation.³⁹ This Section addresses both why identifying problematic police conduct is difficult,⁴⁰ and describes the judiciary's⁴¹ and the legislature's⁴² relative strengths and weaknesses in locating police activity that requires attention.

Police officers are tasked with combatting a broad spectrum of criminal activity in vastly differing circumstances. Moreover, policing implicates a wide variety of interrelated interests from privacy rights to the freedom to travel to more general community interests in safety and economic security. The multitude of cases police officers handle, the variety of issues that arise as officers seek to protect the public, and the need to respect individual constitutional interests, create a significant challenge for any institution tasked with identifying police practices that need regulation.

Scholarly discussions describing “hidden police abuses” tend to focus on the most apparent and egregious behaviors, including physical abuse, witness intimidation, and falsifying evidence.⁴³ Such instances of misconduct are difficult to expose, but there is little doubt that they occur and that they violate any acceptable standard of policing. Other police conduct—such as individual investigation practices and other discretionary activities—may not readily be apparent to regulators.⁴⁴ It is, therefore, critical that the institutions tasked with regulating police conduct are capable of identifying police activities that require supervision and control.

Although scholars suggest that legislatures have abdicated their responsibility for managing police conduct,⁴⁵ both the legislative and judicial branches, in fact, play an important role in identifying police activity that warrants some form of intervention. Moreover, because the two regimes rely on different

³⁹ See generally, e.g., Kerr, *supra* note 7, at 857–60 (discussing whether courts or legislatures are more equipped to regulate new technologies without discussion on how to determine which technologies need regulation).

⁴⁰ See *infra* notes 40–71, and accompanying text.

⁴¹ See *infra* notes 46–57, and accompanying text.

⁴² See *infra* notes 58–73, and accompanying text.

⁴³ See, e.g., Luna, *supra* note 21, at 1112–13 (describing “hidden police abuses” involving physical abuse, witness intimidation, and racial discrimination); see also Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 360 (2011) (“Typically, the concept of police misconduct conjures images of police officers physically abusing criminal suspects . . .”).

⁴⁴ Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 818 (1999) (“Scholars have long lamented that the ‘low visibility’ of much police work is a factor that complicates—or even frustrates—the supervision of line officers.”).

⁴⁵ Amsterdam, *supra* note 24, at 378–79; see Solove, *supra* note 2, at 763 (describing the “numerous technologies Congress has failed to regulate”).

mechanisms to alert them to undesirable police conduct, each branch uncovers activity that the other branch might not detect.

Courts generally identify policing issues when they are contested through the criminal process. Indeed, one of the concerns associated with the rise of plea-bargaining and the decline of the criminal trial is the fear that problematic police activity will not be identified before the defendant pleads guilty.⁴⁶ Courts have proven relatively effective at identifying questionable investigation practices that produce evidence prosecutors might seek to use at trial. Police interrogation techniques,⁴⁷ identification procedures,⁴⁸ and practices related to various kinds of physical and electronic searches⁴⁹ have been identified by courts as potential areas of abuse when defendants have challenged the “fruit” of questionable police conduct.

Although court decisions restricting standing for injunctive relief has hampered some efforts to use civil suits to promote police reform,⁵⁰ civil litigation also helps to draw attention to problematic police activity.⁵¹ Lawsuits challenging police conduct that involved denying suspects their right to counsel,⁵² physically coercing involuntary confessions,⁵³ and suppressing exculpatory evidence⁵⁴ have shined a light on additional police activities in need of regulation.

⁴⁶ See Stephanos Bibas, Response, *Exacerbating Injustice*, 157 U. PA. L. REV. PENUMBRA 53, 56 (2008), http://scholarship.law.upenn.edu/faculty_scholarship/260, archived at <http://perma.cc/BP22-GKVX> (expressing concern that guilty pleas forego trials that could expose “unjust arrests, crooked police informants, testilying, racial profiling, and the like”); see also Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 330 (2005) (“For too long, police corruption has been buried under an avalanche of guilty pleas . . .”).

⁴⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 456 (1966) (holding that a defendant’s responses to custodial interrogation may not be used against the defendant unless law enforcement advise the defendant of certain rights).

⁴⁸ See, e.g., *Simmons v. United States*, 390 U.S. 377, 383 (1968) (acknowledging that “[I]mproper employment of photographs by police may sometimes cause witnesses to err in identifying criminals.”).

⁴⁹ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 27 (2001) (challenging the use of a thermal imaging device to detect infrared radiation emanating from the suspect’s house).

⁵⁰ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (dismissing suit seeking an injunction preventing police from using illegal chokeholds because plaintiff could not establish real and immediate threat that he would be stopped by the police and be choked into unconsciousness in the future).

⁵¹ See, e.g., *Floyd v. City of New York*, 813 F. Supp. 2d 417, 421 (S.D.N.Y. 2011) (alleging that New York City police officers stop and frisk suspects based upon their race); see also *Casale v. Kelly*, 710 F. Supp. 2d 347, 350 (S.D.N.Y. 2010) (challenging police enforcement of three unconstitutional New York loitering statutes after the judicial invalidation of those laws). Indeed, even litigation losses can help mobilize public pressure and promote a positive political response. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 944 (2011) (“[W]ins in court may not directly produce the desired results but may nonetheless provide a favorable environment for the social movement’s broader reform campaign.”).

⁵² See, e.g., *Cooper v. Dupnik*, 963 F.2d 1220, 1248–49 (9th Cir. 1992) (en banc) (holding that deliberately denying a defendant the right to counsel “shocks the conscience” and was therefore actionable under 42 U.S.C. § 1983 as a violation of substantive due process).

⁵³ See, e.g., *Duncan v. Nelson*, 466 F.2d 939, 941, 945 (7th Cir. 1972) (determining that plaintiff had standing to sue when police officers sought to elicit a confession by placing the suspect in the

Courts are less adept, however, at identifying policing behavior that does not directly implicate the trial process. Police practices that may disturb the public but do not breach established constitutional boundaries are unlikely to be investigated and exposed in the course of a defendant's trial.⁵⁵ For example, as discussed below, if defendants lack a legitimate expectation of privacy in their "abandoned DNA" then a court may have little reason to investigate a police department's unauthorized DNA database.⁵⁶ Similarly, questionable arrest tactics may never come to light if prosecutors offer defendants attractive plea bargains early in the criminal process.⁵⁷

Unlike the courts, legislators can rely on media reports and political lobbying to identify policing concerns. Although courts typically see only the information as developed through the record,⁵⁸ legislatures can proactively solicit information from agencies, experts, and the general public.⁵⁹ Indeed, because constituents and interest groups routinely lobby legislators, legislatures can gather substantial information on a variety of issues with relative ease.⁶⁰ So long as not-for-profit organizations exist at the state level and can voice less influential constituents' concerns,⁶¹ legislators can gather and assimilate vast quantities of information when they are adequately motivated to investigate police activities.

Despite politicians' notorious reluctance to regulate the police,⁶² there have been notable instances in which legislatures have identified and sought to regulate problematic police conduct. For instance, in the wake of the brutal

"hole," a form of solitary confinement, for eighteen days, where he slept on the floor, received one meal a day, and saw neither family nor friends).

⁵⁴ See, e.g., *Jones v. City of Chicago*, 856 F.2d 985, 988 (7th Cir. 1988) (holding police officers liable for conspiring to suppress evidence of suspect's innocence).

⁵⁵ See *supra* note 40 and accompanying text.

⁵⁶ Cf. Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 865 (2006) ("With abandoned DNA, existing Fourth Amendment law appears not to apply at all.").

⁵⁷ See M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance" Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 376–77 (2012) (describing the practice of offering non-criminal pleas on questionable arrests for criminal trespass and that "[d]eclining this offer and contesting the charges requires a commitment of resources and perseverance that privilege assumes and poverty precludes").

⁵⁸ Harmon, *supra* note 1, at 773 (arguing that, when deciding criminal procedure cases, courts are unable to incorporate empirical data into normative judgments); Kerr, *supra* note 7, at 875 ("The information environment of judicial rulemaking is usually poor. Judges decide cases based primarily on a brief factual record, narrowly argued legal briefs, and a short oral argument.").

⁵⁹ Kerr, *supra* note 7, at 875 ("Legislative rules tend to be the product of a wide range of inputs, ranging from legislative hearings and poll results to interest group advocacy and backroom compromises.").

⁶⁰ *Id.*

⁶¹ See *infra* note 164 and accompanying text.

⁶² See Amsterdam, *supra* note 24, at 378–79; Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079 (1993); Stuntz, *supra* note 13, at 529–30.

beating of Rodney King by Los Angeles police officers, Congress held hearings and ultimately passed legislation authorizing the attorney general to sue localities in which there was “a pattern or practice of conduct by law enforcement officials” that would deprive a person of “rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁶³ At the state level, grassroots women’s rights advocates, frustrated by police officers’ unwillingness to arrest domestic abusers, successfully lobbied legislators in the early 1990s to adopt mandatory arrest laws that would compel officers to charge suspected batterers with a crime.⁶⁴

Legislative identification and subsequent regulation of troubling police activity is not limited to conduct that physically harms victims. In response to the United States Supreme Court’s initial determination that the Fourth Amendment did not bar the police from wiretapping a suspect’s phone,⁶⁵ Congress passed legislation explicitly prohibiting wiretapping.⁶⁶ In fact, Congress has proven relatively responsive to the criminal justice concerns of politically influential constituencies.⁶⁷ In response to staunch advocacy by business and white-collar defense lawyers, Congress significantly weakened the government’s ability to seize assets from criminal defendants under civil forfeiture laws.⁶⁸ Congress also demonstrated a willingness to address the privacy con-

⁶³ See Pub. L. 103-322, 108 Stat. 2071 (current version at 42 U.S.C. § 14141 (2006)); see also Livingston, *supra* note 44, at 816 (describing the role that the Rodney King beating and the findings of the Christopher Commission, which investigated the L.A. Police after King’s assault, played in the adoption of § 14141).

⁶⁴ See Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 15 (2004) (“Advocates soon began to press for another tool to ensure that batterers would be held accountable: mandatory arrest laws.”); David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1452 (2010) (describing how feminist activists successfully championed the adoption of domestic violence mandatory arrest laws cases that limited police discretion); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 277 (2005) (describing grassroots campaigns to enact mandatory arrest laws).

⁶⁵ *Olmstead v. United States*, 277 U.S. 438, 456–57, 464 (1928).

⁶⁶ See Communications Act of 1932, Pub. L. No. 73-416, § 605(a), 48 Stat. 1064, 1103–04 (codified as amended at 17 U.S.C. § 605 (2006)); see also Kerr, *supra* note 7, at 888 (describing the important role that legislative statutes have played in protecting privacy interests). Communications Act of 1934, ch. 652, § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (2006)).

⁶⁷ See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 618–20 (describing congressional responsiveness to business and the “white collar defense lobby” on a variety of criminal justice issues); see also Dripps, *supra* note 62, at 1083 (explaining that when “law enforcement methods offend some powerful interest group, an interest group with enough influence to move the legislature to protect it from the police or the prosecutor” can spur legislatures to regulate law enforcement activities”); Stuntz, *supra* note 10, at 798 (noting that federal statutes regulating law enforcement activities “protect mostly (though not exclusively) middle—and upper-class suspects”).

⁶⁸ See Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-85, 114 Stat 202.

cerns of middle and upper class voters by passing statutes that protect the confidentiality of Internet communications⁶⁹ and the privacy of bank records.⁷⁰ Perhaps the most conspicuous example of legislators' willingness to examine and regulate police practices when it is in their political interest to do so is Congressional scrutiny of police practices that affects their own members.⁷¹ Congress had demonstrated little interest in examining law enforcement's use of undercover investigations and informants prior to the Abscam investigation, which revealed that several members of Congress were accepting bribes.⁷² Following the investigation, Congress held hearings and proposed legislation that would require the FBI to establish either "probable cause" or "reasonable suspicion" before agents could initiate an undercover investigation.⁷³

Yet although state legislatures tend to be sensitive to the concerns of politically powerful constituents, they are notoriously less responsive to the law enforcement concerns of citizens in poorer, less influential communities.⁷⁴ Because legislatures are far less likely to investigate questionable police practices that are confined to those populations, the judiciary plays a key role in drawing attention to police activity that warrants regulation that the legislature has little political incentive to investigate. At the same time, because many law enforcement strategies do not directly implicate the trial process, the political process remains an important mechanism for identifying police practices that otherwise elude judicial scrutiny.

⁶⁹ See Electronic Communications Privacy Act, 18 U.S.C. § 2701–2712 (2000); see also Lerner, *supra* note 67, at 618–20 (white collar criminal defense bar lobbyists influenced passing of the Civil Asset Forfeiture Reform Act of 2000).

⁷⁰ Right to Financial Privacy Act, 12 U.S.C. §§ 3401–3422 (2000).

⁷¹ See Lerner, *supra* note 67, at 602 (“[L]egislators have on several occasions confronted the possibility of criminal prosecutions, and this prospect has profoundly shaped the legislative development of Anglo-American criminal procedure.”).

⁷² See generally Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 EMORY L.J. 75 (1987) (describing the Abscam investigation and the legislative responses to the scandal).

⁷³ *Id.* at 93 (describing legislative proposals that would create a factual predicate standard that the FBI would have to satisfy before initiating an undercover investigation).

⁷⁴ Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 283 (2010) (“Poor urban racial minorities face terrific challenges in being heard at all, but their voices are particularly muted before state and federal legislatures.”); see David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1062 (1999) (“Reliance on the political process in [poor communities] will simply ensure that minority interests within inner-city communities will be ignored.”). *But see* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1167 (1998) (“African-American citizens are no longer excluded from the political process, and in fact exercise significant power in the nation’s inner-cities.”).

B. Political Insulation and the Regulation of Law Enforcement

The politics of crime are not particularly conducive to the vigorous regulation of law enforcement.⁷⁵ Some scholars have attributed politicians' perceived need to appear "tough on crime" to the "culture of fear" created by graphic depictions of crime in news and entertainment media.⁷⁶ Others focus on broader social and economic shifts⁷⁷ and even cognitive bias⁷⁸ to explain the dominance of "law and order" politics.⁷⁹ Whatever the explanation, it may well be that the political risks associated with promoting policies that constrain law enforcement are too great for elected officials to overcome easily.⁸⁰ Although, as discussed above, legislators demonstrate a willingness to identify and regulate police activity that implicates their own or other powerful constituencies' interests,⁸¹ they are generally reluctant to suffer the political costs of limiting police discretion in favor of criminal suspects' privacy interests.⁸²

⁷⁵ Dripps, *supra* note 62, at 1081 ("Public choice theory suggests that an overwhelming preponderance of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods or convicting the innocent.").

⁷⁶ JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 114, 208, 239 (2007) (suggesting that the media has created a public perception of extreme danger of criminal violence in many aspects of daily life); *see* Beale, *supra* note 12, at 47 (describing how media depictions of crime help to shape public attitudes and political agendas on the issue of crime).

⁷⁷ *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (explaining the shift in criminal justice policy as a societal response to social, economic, and cultural shifts as well as the political realignments that responded to these changes).

⁷⁸ Beale, *supra* note 12, at 57–60 (suggesting that the psychology of cognition and risk assessment may explain public support for "tough on crime" politics); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 342 (2004) (describing how cognitive bias can skew judgments about criminal law and policy).

⁷⁹ *See* Harry A. Chernoff et. al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 532–33 (1996) (tracing the politicization of the crime issue to Richard Nixon's successful promotion of his "law and order" platform in 1968); David Michael Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1493 (2014) (describing the decline of the rehabilitative ideal and the increasing political dominance of conservative law and order ideologies). *But see* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 640 (2012) (suggesting that fiscal concerns have begun to shift the political necessity of appearing "tough on crime" and politicians growing willingness to support less punitive reforms if they will save money).

⁸⁰ Beale, *supra* note 12, at 29 ("In the United States, politicians have learned that to win you need to convince the public that you are tough on crime.").

⁸¹ *See supra* notes 57–63 and accompanying text.

⁸² Dripps, *supra* note 62, at 1094 ("[It] is perfectly rational for legislators to perceive that there is considerable political risk, and very little return, to taking the side of the suspect."); Joshua S. Levy, *Towards A Brighter Fourth Amendment: Privacy and Technological Change*, 16 VA. J.L. & TECH. 502, 510 (2011) ("[L]egislatures face little or no political pressure to protect the rights of the criminal-ly accused, but face strong political pressure to ensure crime control.").

Similarly, courts are not wholly immune from political pressure to let the police do what it takes to fight crime.⁸³ Elected judges are particularly motivated to avoid unduly restricting law enforcement.⁸⁴ Nonetheless, although the politics of crime complicates both branches' efforts to strike a balance between the crime-fighting needs of the police and the privacy interests of the public, judges tend to be more politically insulated than their legislative counterparts.

It may well be, however, that the political challenge of restraining the police is an asset—rather than a hindrance—to developing an effective approach to regulating law enforcement behavior. The legislature's responsiveness to law enforcement needs may actually complement the more politically independent judiciary's efforts to balance citizen's privacy interests against public safety demands. As discussed below, judicial decisions interpreting state statutes that take into account the political dominance of law enforcement interests may best promote an informed public debate about law enforcement activities that have heretofore largely escaped legislative scrutiny. At the same time, legislative sensitivity to the demands of pro-law enforcement constituencies can help to ensure that judicial interventions do not restrict critical police activities without allowing the legislature an opportunity to craft rules that adequately restrain the police without unduly limiting their crime fighting abilities.

C. The Ability to Develop Effective Regulatory Regimes

Identifying police conduct that warrants regulation and resisting the political pressure to ignore it is, of course, only half the battle. In addition to calling attention to law enforcement strategies that implicate important privacy and liberty interests, effective regulation requires the formulation of rules or institutional mechanisms that adequately curtail undesirable police activity without excessively limiting law enforcement's ability to protect the public. To successfully craft policies that balance these competing concerns, the institutions tasked with "policing the police" must have access to ample information about law enforcement activities and the challenges that the police face, as well as the flexibility to adjust interventions that don't function effectively.

⁸³ See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2294–99 (2002) (describing the "saga of Judge Baer," a U.S. District Court judge in New York who faced calls for impeachment as a result of a ruling suppressing evidence that he later retracted after what some considered "a successful assault on judicial independence").

⁸⁴ See Michael Tonry, *Determinants of Penal Policies*, 36 *CRIME & JUST.* 1, 35–36 (2007) (describing how the impartiality and independence of elected judges is threatened by the political risks associated with making unpopular decisions in cases that are notorious or involve controversial policies); cf. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. REV.* 759, 798–99 (1995) (elected judges face political pressure in death penalty and habeas corpus cases).

Amassing data about police activities, the concerns of constituents, and the opportunities and threats of new technology may be the first step in developing tools to regulate the police effectively, but few regulatory efforts are perfected in the first attempt. One asserted advantage that legislatures have over courts when it comes to regulating the police is their ability to amend regulatory regimes that are ineffective or produce undesirable results.⁸⁵ Courts certainly can revisit doctrinal prescriptions,⁸⁶ but both the facts of the specific cases before the court and the inflexible demands of *stare decisis* limit courts' discretion.⁸⁷ The "everlasting eye or nay of constitutional decision," although not entirely eternal, cannot be easily modified.⁸⁸ Indeed, the very inflexibility of constitutional pronouncements may explain courts' reluctance to find constitutional limits to police activity.⁸⁹ Legislators' ability to amend the statutory schemes they develop not only allows them to perfect the rules they impose, but also lowers the risks of intervening in the first place.

Thus, each branch of government possesses advantages towards effectively regulating law enforcement. Although courts are adept at identifying problematic police activity that directly impacts the trial process, legislatures are attuned to the demands of their constituents and the media. Similarly, although legislatures can easily gather information and can revisit statutory schemes to improve their effectiveness, courts enjoy a substantial degree of political insulation that may be a prerequisite to developing policies that constrain law enforcement. The ideal regime for regulating police conduct, therefore, is one which utilizes both branches and allows for the strengths of one to compensate for the weaknesses of the other. By adopting a robust preemption doctrine, courts may be able to overcome legislatures' reluctance to investigate and debate suspect police practices, but also leave elected officials the opportunity to evaluate the problem and propose and amend their own solutions.

⁸⁵ Kerr, *supra* note 7, at 871 (noting that courts lack a legislature's abilities to experiment and frequently amend, to restrict both public and private actors, and to "sunset" rules after a certain amount of time.)

⁸⁶ See, e.g., Robert M. Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 CAL. L. REV. 579 (1968) (discussing the evolution of the "fruit of the poisonous tree" doctrine); Solove, *supra* note 2, at 762 (identifying court decisions finding exceptions to the warrant and probable cause requirements).

⁸⁷ Kerr, *supra* note 7, at 871 (arguing that *stare decisis* and the need to resolve the specific decisions that come in front of them, limit courts' ability to develop flexibility rules to protect privacy); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 379 (2010) (noting that judicial decision-making tends to be more rigid than agency decision-making because of *stare decisis*).

⁸⁸ Friendly, *supra* note 9, at 930.

⁸⁹ The inflexibility of constitutional rules also means that courts set the actual limits of police behavior rather than identify a standard for how law enforcement *should* behave. See Harmon, *supra* note 1, at 776–77 (explaining that, because constitutional criminal procedure rights set "unbreakable rules," they must be more generous to law enforcement than to the privacy interests at state).

II. INTRASTATE PREEMPTION AND THE POLICE

Despite their different strengths and the important roles that both institutions have played in curtailing undesirable police conduct, judicial and legislative efforts to regulate the police have historically been uncoordinated and even detrimental to each other.⁹⁰ Rather than compensate for the political challenges that deter legislators from actively regulating police activity, the judiciary has arguably adopted baseline protections which have excused further legislative action without adequately limiting undesirable police conduct.⁹¹ The judiciary has likewise failed to expose many police practices that legislators have ignored but that warrant greater democratic scrutiny. Finally, although legislatures have proven themselves willing to intercede to protect powerful political constituencies from undesirable police intrusion,⁹² they have been unwilling to investigate and restrict police practices that affect less politically powerful groups.⁹³

The criticism typically leveled at judicial efforts to regulate the police is that they are antidemocratic, ineffective, and likely to justify inaction by deferring to the other branches of government.⁹⁴ The judiciary nonetheless has the potential to improve the effectiveness of police regulation without undermining democratic values. By adopting a robust preemption doctrine, the judiciary can force hidden police practices into the public debate and compel legislators to engage in the task of investigating and regulating undesirable police activity. Rather than inhibit policy experimentation, such an approach will engender public deliberation about unexamined police practices without cutting off experimentation with rigid constitutional limits on policing practices.

⁹⁰ See Luna, *supra* note 21, at 1114 (describing the failure of courts or legislatures to curb police misconduct); Stuntz, *supra* note 10, at 849–50 (illustrating the conflicts in the policies of the Supreme Court and politicians).

⁹¹ See Stuntz, *supra* note 10, at 794 (“Constitutional regulation raises the political price of legislative regulation.”).

⁹² See *supra* notes 67–73 and accompanying text.

⁹³ See *supra* note 74 and accompanying text.

⁹⁴ See Lino A. Graglia, *In Defense of Federalism*, 6 HARV. J.L. & PUB. POL’Y 23, 28 (1982) (describing the court’s criminal procedure jurisprudence as “totally undemocratic”); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3 (2009) (“[T]he traditional federal legal means of regulating police officer conduct—federal criminal prosecutions, civil suits for damages under 42 U.S.C. § 1983, and the exclusionary rule—do not spur widespread change in the pathological police departments.”); Fred E. Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 329, 329–30 (1962) (criticizing the Supreme Court’s *Mapp* decision for overriding Michigan’s democratically derived solution to illegal searches); Stuntz, *supra* note 10, at 851 (arguing that the constitutionalization of criminal procedure encourages politicians to undermine civil liberty interests and “risks stifling experiment and innovation in America’s criminal justice system”).

A. The Intrastate Preemption Doctrine

“Intrastate preemption” occurs when state law precludes local governments from exercising their authority in a particular field.⁹⁵ The doctrine of intrastate preemption is often accused of stifling municipal policy innovation by allowing powerful business and industry groups to obstruct local democratic efforts to protect important community interests such as the environment and public health.⁹⁶ In fact, the doctrine has decidedly different consequences depending upon the political strength of the parties involved.⁹⁷ When the doctrine is applied to statutes implicating police conduct, it may actually promote a policy debate that engages both legislators and the electorate in evaluating police activity that would otherwise escape scrutiny.

Intrastate preemption operates much like federal preemption.⁹⁸ State law can preempt a local ordinance in one of two ways. Express preemption occurs when a state statute explicitly bars local lawmaking in a particular field.⁹⁹ Alternatively, implied preemption occurs when a statute fails to provide clear guidance as to what it allows, and a judge concludes that the legislature had intended to bar local lawmaking.¹⁰⁰ Although the semantics and details of individual state approaches vary, in general, courts will find that a state statute impliedly preempts local action when either the local policy “conflicts” with the state law by frustrating the state law’s objectives¹⁰¹ or the legislature has so

⁹⁵ See Diller, *supra* note 18, at 1116 (describing the doctrine of state preemption and its impact on local policy innovation); see also Weiland, *supra* note 18.

⁹⁶ See *supra* notes 18–20 and accompanying text.

⁹⁷ See *infra* notes 123–129 and accompanying text.

⁹⁸ Diller, *supra* note 18, at 1140 (“Despite some superficial distinctions, most states’ preemption analyses are similar in form to the federal model.”).

⁹⁹ See *Goodell v. Humboldt Cnty.*, 575 N.W.2d 486, 492 (Iowa 1998) (“Express preemption occurs when the general assembly has specifically prohibited local action in an area.”); Diller, *supra* note 18, at 1115 (“When a state legislature explicitly declares that local laws are preempted within a certain field—so-called ‘express preemption’—the courts’ task is relatively simple: to determine whether the challenged ordinance falls within the subject matter that the legislature expressly preempted.”).

¹⁰⁰ Diller, *supra* note 18, at 1116–17 (“But when the state legislature has given no clear guidance regarding preemption, state courts ask whether local authority has nonetheless been impliedly preempted.”). Every state, with the exception of Illinois, embraces some form of implied preemption. *Id.* at 1141 (“Nonetheless, all but one state—Illinois—embraces some form of implied preemption.”); cf. ILL. CONST. art. VII, § 6(i) (“Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”).

¹⁰¹ See, e.g., *Hill v. Tschannen*, 590 S.E.2d 133, 135 (Ga. Ct. App. 2003) (ruling that a local fire ordinance was impliedly preempted by state statute regulating smoke detectors because the local ordinance would “hinder the operation of the state law”).

fully regulated the legal area in question that the court can infer that the legislature intended to “occupy the entire field.”¹⁰²

There are some critical differences between federal preemption and intra-state preemption. At the federal level, the Supremacy Clause, which empowers Congress to preempt state law¹⁰³ is counterbalanced by the Tenth Amendment, which reserves non-enumerated powers to the states.¹⁰⁴ Conversely, at the state level the presumption is essentially reversed—the powers of local governments are limited to what has been delegated to them either by statute or by the state constitution.¹⁰⁵ As a result, although federalism concerns might militate against the application of the preemption doctrine, the structural relationship between state government and local municipalities is more conducive to a judicial policy favoring preemption.

Importantly, the flow of authority from the state to local governments applies to municipal employees as well.¹⁰⁶ As a result, “the actions of law enforcement officers, like all other government actors’ actions, must be traceable to some grant of authority from a politically accountable body.”¹⁰⁷

This is not to suggest that local governments (and their employees) are powerless. In the late nineteenth and first half of the twentieth century, courts followed “Dillon’s Rule,”¹⁰⁸ which provides that state delegation of power to local municipalities should be interpreted narrowly with a general presumption that municipal corporations lack the ability to act when there was any doubt as

¹⁰² See, e.g., *City of Northglenn v. Ibarra*, 62 P.3d 151, 163 (Colo. 2003) (holding that state statutes regulating juvenile homes were so complete and pervasive that they implied the Colorado General Assembly’s intent to “occupy the field”).

¹⁰³ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁰⁴ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

¹⁰⁵ See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state.”); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.”); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990) (“As a matter of conventional legal theory, the states enjoy complete hegemony over local governments”).

¹⁰⁶ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062 (1980) (“Under current law, cities have no ‘natural’ or ‘inherent’ power to do anything simply because they decide to do it.”); see 2A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 10:3 (3d ed. 1996 & Supp. 1999) (“[M]unicipalities have no inherent powers and possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred.”).

¹⁰⁷ *State v. Backstrand*, 313 P.3d 1084, 1111 (Or. 2013); see *State v. Bridewell*, 759 P.2d 1054, 1059 (Or. 1988) (“Whether law enforcement officers have specific functions is a matter of statutory law.”).

¹⁰⁸ See JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 102 (1872).

to their authority.¹⁰⁹ Gradually, however, Dillon's rule gave way to the "home rule movement," which endowed local governments with considerably more legislative power.¹¹⁰

Initially, home rule provisions followed the *imperium in imperio* doctrine, which granted municipalities the power to regulate matters that were of solely local concern.¹¹¹ Advocates who favored broader local authority nonetheless expressed frustration with court decisions that narrowly interpreted what was "local" and that "generally reflected either hostility toward home rule or undue deference to legislative intervention."¹¹² As a result, civic organizations like the American Municipal Association proposed a new approach to home rule that would strengthen local governments' ability to establish policy.¹¹³ The new formulation of home rule became known as "legislative home rule," because it sought to shift the authority to determine what constituted a "local matter" from the courts to the state legislature.¹¹⁴

By 1990, 48 states had adopted some form of home rule for at least some of their cities. Although each state has evolved its own unique balance of state and local power, state legislatures have largely retained the ability to withdraw the authority that has been endowed to municipal governments for all but the most local concerns.¹¹⁵ For those states that adopted legislative home rule, the state legislature has almost unlimited authority to preempt local government action.¹¹⁶ For these states there is little question that state law bars any municipal police activity that either frustrates a state law's objectives or that would

¹⁰⁹ See *id.* ("Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.")

¹¹⁰ See Briffault, *supra* note 105, at 7–11 (describing the shift from Dillon's Rule to home rule).

¹¹¹ See Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 1–2 (1975).

¹¹² See *City of New Orleans v. Bd. of Comm'rs*, 640 So. 2d 237, 242 (La. 1994) (describing the origins of legislative home rule).

¹¹³ See RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 332 (7th ed. 2009) (describing the evolution of home rule); see also Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL'Y 1, 28 (2006) ("The rise of the legislative home rule model—which trades away all immunity in order to assure greater scope to local initiative—is surely at least in part attributable to the sense that local governments usually lose when balancing is the rule.")

¹¹⁴ See BRIFFAULT & REYNOLDS, *supra* note 113, at 333–34. By 1990, 48 states had adopted some form of home rule for at least some of their cities. *Id.* at 317. It is worth noting that many state home rule provisions combine *imperio in imperio* language with the home rule language suggested by the American Municipal Association. As a result, scholars' estimates of the number of states with home rule charters do differ. See Diller, *supra* note 18, at 1127 n.65.

¹¹⁵ Diller, *supra* note 18, at 1127 (explaining that, despite the differing approaches to local authority across the states, preemption remains "the primary battleground for determining the parameters of local authority").

¹¹⁶ See Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U.L. REV. 1271, 1276 (2009) ("[L]egislative home rule contemplates a much reduced judicial role, with the determination of the scope of home rule power left almost entirely in the hands of the legislature."); Vanlandingham, *supra* note 111, at 6.

supplement state policies in an area where the state legislature has intended to “occupy the field.”¹¹⁷

Even in states that have adopted the *imperio* home rule model, which purports to reserve authority over local matters to municipal governments,¹¹⁸ courts have held that state law nonetheless preempts municipal law in matters that are of “mixed local and state concern.”¹¹⁹ When police activity implicates both local and statewide interests, there is little question that local authority to act can be preempted by state law even in municipalities with *imperio* home rule.¹²⁰ Thus, although municipalities have considerable delegated power to maintain public safety, state governments generally remain the ultimate authority over issues related to law enforcement and crime suppression.¹²¹ To the extent that a police activity implicates only local interests, however, judges may be reluctant to hold that state law preempts local law enforcement’s authority.

B. Preemption, Innovation, and the Promotion of Democratic Engagement in Policing Policy

Some scholars criticize judges’ “overzealous” application of implied preemption claiming that such decisions thwart local governments’ development of new, innovative policies.¹²² Local efforts to promote gay rights,¹²³ en-

¹¹⁷ See, e.g., *Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 195 (Iowa 2012) (“[U]nder legislative home rule, the legislature retains the unfettered power to prohibit a municipality for exercising police powers, even over matters traditionally thought to involve local affairs.”) (quoting *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008)).

¹¹⁸ In practice, courts have closely circumscribed the authority of *imperio* home rule municipalities by narrowly interpreting what constitutes a “local” concern. See Diller, *supra* note 18, at 1125.

¹¹⁹ See *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002) (“[I]f a home-rule ordinance or charter conflicts with a state statute in a matter of mixed concern, the state statute supersedes the home-rule provision.”); see also Frug, *supra* note 106, at 1062–63 (“[M]ost state constitutions have been amended to grant cities ‘home rule,’ but local self-determination free of state control is still limited even in those jurisdictions to matters ‘purely local’ in nature.”).

¹²⁰ *Axberg v. City of Lincoln*, 2 N.W.2d 613, 615 (Neb. 1942) (matters regarding fire, police, and health departments are matters of state-wide concern subject to preemption regardless of home rule).

¹²¹ See *Van Gilder v. City of Madison*, 267 N.W. 25, 32 (Wis. 1936) (“[E]nforcement of the law, the preservation of order, the protection of persons and property and the suppression of crime must always be matters of state-wide concern . . . because for a long time these duties have been delegated to and performed by the various municipal subdivisions of the state, these functions are ordinarily thought of as being in part the primary duties of cities and other municipalities. However, it would be within the competency of the Legislature if it so desired to entirely rearrange the law of the state with respect to these matters.”).

¹²² See Diller, *supra* note 18, at 1114 (“[T]he primary threat to local innovation is the charge of *intrastate* preemption”); Parlow, *supra* note 19, at 372 (“[L]ocal governments’ powers have been drastically limited by a perhaps overzealous preemption doctrine which may run afoul of the original intent of the home rule movement in state and local government law.”).

¹²³ See, e.g., *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995) (holding the City of Minneapolis’s extension of insurance benefits to domestic partners to be in conflict with an area the state had sought to occupy exclusively and therefore preempted by state law). *But see, e.g., S.D. Myers, Inc. v. City & County of San Francisco*, 336 F.3d 1174, 1180 (9th Cir. 2003) (determi-

sure that workers earn a living wage,¹²⁴ protect the environment,¹²⁵ and promote public health,¹²⁶ have been stymied by opponents' lawsuits arguing that state law impliedly preempted the local enactment of such polices.¹²⁷ Supporters of greater autonomy for local governments often argue that state courts' use of implied preemption to block local policy efforts not only undermines the potential for local governments to serve as "laboratories of innovation,"¹²⁸ it also allows powerful political parties to undermine participatory democracy and weaken civic engagement.¹²⁹

Such attacks on preemption may often be warranted. Lawsuits asserting implied preemption can obstruct innovative responses to pressing social concerns that advocates have been unable to implement at the state or federal level.¹³⁰ Local efforts can be particularly valuable because they can spark statewide—and even national—debates and serve to incubate new approaches to seemingly intractable political and social problems.¹³¹ Indeed, at least one

ing that San Francisco's prohibiting city agencies from contracting with businesses that discriminate on the basis of sexual orientation does not conflict with the California law on domestic partnerships and therefore is not subject to preemption).

¹²⁴ See *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1108 (La. 2002) (concluding that Louisiana state law preempted New Orleans's minimum wage law).

¹²⁵ See, e.g., *Envirosafe Servs. of Idaho, Inc. v. Owyhee Cnty.*, 735 P.2d 998, 1004 (Idaho 1987) (determining that Owyhee County's effort to regulate the disposal of hazardous waste was impliedly preempted by state law); *Town of Wendell v. Attorney General*, 476 N.E.2d 585, 592 (Mass. 1985) (holding that the town's by-law limiting the use of pesticides was preempted by the state's Pesticide Control Act).

¹²⁶ *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 92 (Md. 1993) (ruling that the state legislature "manifested an intent for the State to completely occupy the field of the sale of cigarettes through vending machines rendering any local or municipal ordinances . . . constitutionally invalid").

¹²⁷ See Parlow, *supra* note 19, at 375–76.

¹²⁸ *Id.* at 384 ("However, the narrow construction of home rule powers, coupled with the frequency with which implied preemption is used by state courts to invalidate local laws, raises questions as to whether we are foreclosing a significant opportunity to use local governments as the forums for experimentation as Justice Brandeis once envisioned of the states.") (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")).

¹²⁹ Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1525 (2008) ("Preemption disempowers local government, and with that loss of power goes loss of a reason for citizens to participate in civic life.").

¹³⁰ Parlow, *supra* note 19, at 375 ("In many ways, local governments have led the way in many areas of public policy where the federal and state governments have either failed, avoided issues altogether, or been unable to reach an agreement because of the divergent interests of their constituencies.").

¹³¹ David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 490 (1999) ("[O]ur towns and cities are what we know them to be: important political institutions that are directly responsible for shaping the contours of 'ordinary civic life in a free society.'" (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996))); Briffault, *supra* note 113, at 31 (describing the potential for local governments to serve as "laboratories of public policy formation" and "provide thousands of arenas for innovation and for testing the costs and benefits of those innovations").

scholar suggested that towns and cities play such a critical role in developing policies that they “give content to substantive constitutional principles,” and the Federal Constitution should be interpreted to protect them from state or federal interference.¹³²

The claim that preemption undermines civic engagement in favor of special interests that have too much clout at the state and national level is also born out in many instances. Powerful business and industry interests often resist local laws that threaten to impose additional financial burdens on them by asserting that state law precludes local governments from regulating their activities.¹³³ When the citizens of New Orleans passed a living wage ordinance that raised the minimum wage for employees working in the city, well-funded business groups filed suit and successfully argued that state law preempted the city’s ordinance.¹³⁴ Although the living wage ordinance enjoyed popular support at the local level, business interests possessed greater influence at the state level where they proactively persuaded the state legislature to pass a blanket prohibition barring local governments from establishing a minimum rate.¹³⁵ Powerful business interests have routinely asserted preemption arguments to block popular local democratic initiatives from laws that restrict access to cigarette vending machines¹³⁶ to efforts to regulate the dumping of hazardous waste.¹³⁷

On its face, therefore, preemption might appear to unduly restrict policy experimentation, undermine participatory democracy and diminish citizens’ incentive to participate in public life.¹³⁸ Such criticism, although valid in many circumstances, rests on two critical presumptions: first, that interest groups lacking in political clout at the state (or national) level favor the local policy; and second, that the local polity has been actively engaged in shaping the policy being preempted. When, as in the case of policies governing policing, the proponents of the policy are politically powerful at higher levels of govern-

¹³² Barron, *supra* note 131 at 491 (“It is necessary to inquire, therefore, whether the Federal Constitution may be understood to protect local governments from state attempts to prevent local governments from bringing their special institutional capacities to bear in these constitutional contexts.”).

¹³³ Diller, *supra* note 18, at 1114 (“Business and industry groups are the litigants who most commonly assert preemption to block local policies that may impose additional costs and regulatory burdens.”).

¹³⁴ See Laura Gavioli, *New Orleans Campaign for a Living Wage v. City of New Orleans: State Police Power Swallows Up Constitutional Home Rule in Louisiana*, 77 TUL. L. REV. 1129, 1129 (2003).

¹³⁵ See *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1100; Gavioli, *supra* note 134, at 1129.

¹³⁶ *Allied Vending*, 631 A.2d at 78.

¹³⁷ See *Goodell*, 575 N.W.2d at 489 (ruling that local ordinances regulating toxic air emissions and instituting groundwater protection policies were invalid because they addressed a matter of statewide concern and because the county’s authority has been preempted by the Iowa legislature).

¹³⁸ See *supra* note 124 and accompanying text.

ment and local citizens possess little voice in the formation of the local rule or practice, implied preemption may actually promote greater civic engagement and strengthen policy innovation.

In his seminal article, *Preference-Eliciting Statutory Default Rules*, Professor Einer Elhauge recognized that judicial determinations of statutory construction do not occur in a political vacuum.¹³⁹ Rather, judges interpret statutes with the knowledge that their decisions can prompt the legislature to correct interpretations that contradict the legislature's original intention.¹⁴⁰ As a result, Professor Elhauge reasoned, when faced with uncertain statutes, judges can "serve as honest agents for a democratic polity" by interpreting statutes in ways that favor the politically powerless, trusting that influential interests can successfully lobby the legislature if the judges get it wrong.¹⁴¹

In cases involving local ordinances implicating business interests, Professor Elhauge's reasoning favors a weak preemption doctrine.¹⁴² In such cases, it is reasonable to expect that influential business groups will be able to seek redress from the state legislature if a court erred in rejecting their preemption claims. Indeed, Professor Roderick Hills contended that courts should resist arguments in favor of federal preemption of state law precisely because influential business groups opposing state regulation are well equipped to lobby Congress for legislation clarifying the limits of states' regulatory authority.¹⁴³ Notably, Professor Hills's argument does not rest solely on the proposition that an anti-preemption default rule is likely to maximize the chance that the legislature's original intention is realized.¹⁴⁴ A critical benefit of favoring the politically less influential position is that a court's refusal to preempt state laws regulating powerful interests groups will "promote vigorous debate."¹⁴⁵

¹³⁹ See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002).

¹⁴⁰ See *id.*

¹⁴¹ *Id.*

¹⁴² See Diller, *supra* note 18, at 1149 (applying Elhauge's default rule analysis to intrastate preemption issues).

¹⁴³ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007) ("By analogy, I argue that, where a statute is ambiguous, a court ought to interpret the preemptive force of federal statutes to burden interest groups favoring preemption, on the assumption that these pro-preemption groups are more capable of promoting a vigorous debate in Congress than their opponents.").

¹⁴⁴ See *id.* Unlike Professor Hills, Professor Elhauge advocated for the adoption of canons of construction that favor the politically powerless on the grounds that this strategy was the one most likely to result in the outcome the legislature originally intended. Compare Elhauge, *supra* note 139, at 2165–66 (suggesting that statutory default rules disfavoring powerful interest groups will "maximize the accurate measurement of political preferences"), with Hills, *supra* note 143, at 17 n.54 ("I am more interested in the quality of the congressional debate rather than the outcome of congressional votes . . .").

¹⁴⁵ Hills, *supra* note 143, at 28.

Although Professor Hills's intuition that "interests favoring preemption are best suited for promoting an open and vigorous debate on the floor of Congress" may be valid in cases involving state and local regulations that effect industrial and business interests, as discussed above, the parties who are subjected to controversial police practices are ill-equipped to seek legislative intervention.¹⁴⁶ Poor urban minority communities, which experience a disproportionate share of police activity and are more likely to encounter questionable police practices,¹⁴⁷ often have little political influence and lack the means to press legislators to openly debate issues.¹⁴⁸ Moreover, citizens tend not to foresee themselves as the subjects of future police investigations and, consequently, are unlikely to push their legislators to examine questionable policing methods *ex ante*.¹⁴⁹ Finally, some policing practices may not be disclosed to the general public. As a result, there may be times when the only constituency that is fully informed of a dubious police practice is the group of defendants alerted to its existence in the course of their own arrest and prosecution. Given the politics of crime at both the state and national level, it is hardly surprising that legislators are not particularly responsive to the interests of criminal defendants.¹⁵⁰ As a result, the legislature may never investigate or even consider

¹⁴⁶ See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233 (2007) ("Rarely does an interest group of significant influence emerge to counter the influence of prosecutors"); Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1618 (2002) ("[C]riminal defendants have no powerful lobby at either the state or federal level."); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 362 (1991) (explaining that "state and federal law enforcement officials are powerful interests that can command congressional attention, while criminal defendants and suspects are more diffuse, marginalized, and less sympathetic groups"); Hill, *supra* note 143, at 28.

¹⁴⁷ Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 382 (1998) ("The point is that more blacks are arrested for misdemeanors—rather than not arrest them—is a policy that has a disparate impact on minorities."); Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1473 (2010) ("[P]olice tend to focus their crime-fighting activities in poor urban neighborhoods"); Taslitz, *supra* note 74, at 282 (explaining that the police are more likely to conduct surveillance in poor urban neighborhoods populated by racial minorities).

¹⁴⁸ See *supra* note 73 and accompanying text.

¹⁴⁹ Lerner, *supra* note 67, at 643 ("Those of us constituting the (blandly law-abiding) middle class are more apt to see ourselves as the victims of crime than as the perpetrators; and few of us, I suspect, lie awake at night, fearful that the executive branch will trouble to persecute us."); see Dripps, *supra* note 62, at 1089 ("I suggest that legislators undervalue the rights of the accused for no more sinister, and no more tractable a cause than that a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant.").

¹⁵⁰ Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 OR. L. REV. 939, 950–51 (2008) ("Criminal defendants, on the other hand, are likely to constitute a weaker interest group as compared to cities, at least when the defendants are, as in most cases, a motley collection of individuals rather than corporations or wealthy, white-collar criminals."); Elhauge, *supra* note 139, at

prevailing police practices that, if properly debated, might lack popular support.

Conversely, the law enforcement community has considerable sway at the state (and national) level, and can spur legislative debate over police practices if courts hold that certain practices are preempted by state law.¹⁵¹ Rather than cut off democratic debate, an accusation often leveled at courts that recognize constitutional limits to police activity,¹⁵² a finding of preemption can engender exactly the kind of democratic dialogue that is lacking when it comes to police practices.¹⁵³

There is also little reason to believe that the majority of police practices evolved out of a democratic process that is entitled to a presumption of legitimacy. Although many preemption challenges to local authority emerge from business interests trying to counter democratically initiated regulatory efforts, police practices generally develop without community participation and often with little or no notice to the local population.¹⁵⁴ Not only are formal police procedures developed internally without significant community input, many dubious police practices are developed informally and are entirely insulated from public debate.¹⁵⁵ Court decisions preempting the police thus do not frustrate local democratic efforts or deter civic engagement. On the contrary, they can stimulate a debate over practices that might otherwise never receive democratic scrutiny.

There is some irony to the claim that dubious police conduct should be presumptively preempted and disallowed by state law, given that state gov-

2193 (“Most legislatures and their polities are hostile to criminal defendants.”); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991) (finding that “the political process does not adequately represent the interests of those societal groups largely populating the criminal class”).

¹⁵¹ See Dripps, *supra* note 62, at 1091 (describing the political strength of police and prosecutors and how they “devote substantial effort to persuading legislators not to impose statutory restraints on [them]”); see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005) (“[O]ne of the most—if not the most—powerful lobbying groups in criminal law consists of those charged with exercising the penal power: law enforcement and, in particular, prosecutors.”); Stuntz, *supra* note 13, at 534 (explaining that prosecutors and the police are “a very powerful lobby on criminal law issues”).

¹⁵² See Inbau, *supra* note 94, at 330 (describing how the Court’s criminal procedure decisions cut off democratic efforts to develop solutions to difficult law enforcement issues); see also Graglia, *supra* note 94, at 28 (criticizing Supreme Court lawmaking in a number of areas, including criminal procedure, for being “totally undemocratic”).

¹⁵³ See Luna, *supra* note 21, at 1108 (“Nowhere is the conflict among democracy, liberty, and discretion more evident, and the need for openness more urgent, than in the execution of the penal code.”).

¹⁵⁴ *Id.* at 1111 (detailing the “dark side of discretionary authority” not authorized by statute nor consistent with constitutional precedents”).

¹⁵⁵ *Id.* at 1146 (describing hidden police practices).

ernment is notoriously unwilling to limit police authority.¹⁵⁶ Indeed, this is precisely why a presumption in favor of preemption is likely to elicit a public debate over questionable police practices. Professor Einer Elhauge argued that the use of the rule of lenity, which requires “ambiguous criminal laws to be interpreted in favor of the defendants,”¹⁵⁷ is best understood as an effort by judges to elicit clarifying laws from the legislature rather than as a default rule that implausibly assumes that legislators generally prefer to limit criminal liability.¹⁵⁸ Similarly, the application of a robust preemption doctrine to judicial review of questionable police practices can be justified by the very fact that the legislature is more responsive to law enforcement concerns than the interests of those subject to police activity.¹⁵⁹

The relative political strength of the law enforcement lobby is not the only reason that a presumption in favor of intrastate preemption is likely to result in a more public and active debate over policing practices. Although local legislators tend to be more responsive to community pressure to regulate the police than their state counterparts,¹⁶⁰ local citizens groups will not always coalesce to voice opposition to a questionable police practice. Instances of egregious (and clearly illegal) police misconduct, like the infamous physical assaults on Rodney King and Abner Louima respectively, have given rise to effective grassroots campaigns.¹⁶¹ Other questionable police practices, however, may not engender sufficient local opposition to elicit a local debate over the

¹⁵⁶ See Dripps, *supra* note 62, at 1091 (“If broad police powers and pro-government trial procedures had no beneficiaries, legislatures might be motivated to protect the rights of the accused. But there are beneficiaries, and they wield far more clout than the likely losers.”).

¹⁵⁷ See *United States v. Santos*, 553 U.S. 507, 514 (2008).

¹⁵⁸ See Elhauge, *supra* note 139, at 2193 (“[I]f one had to make an educated estimate (and given the premise of ambiguity, one must), one might perhaps even conclude that in ambiguous cases the legislature would likely prefer a ‘rule of severity’ It seems highly unlikely that any legislature is likely to prefer the weakest possible punishment.”); see also *Santos*, 553 U.S. at 514 (“[The rule of lenity] also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.”).

¹⁵⁹ See Kerr, *supra* note 7, at 885 (“It is true that law enforcement groups will often lobby for greater powers. It is also true that law enforcement interests often prove highly influential among legislators.”); see also Murphy, *supra* note 12, at 535 (“[L]aw enforcement has a clear and constant voice in the political process, whereas the interests of privacy tend to be represented by groups interested less in privacy vis-à-vis policing (and the poor that make up the vast majority of criminal defendants) than privacy as experienced by the middle and upper classes.”).

¹⁶⁰ Taslitz, *supra* note 74, at 291 (“Local legislators may be limited in what they can do, but they find it impossible to ignore entirely the constant local public pressure for action to regulate the police and to improve the problems of crime and the criminal justice system.”).

¹⁶¹ See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1283 (1999) (crediting public outcry after Rodney King beating as a factor in uncovering systematic police brutality in the Los Angeles Police Department); Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 *WASHBURN L.J.* 211, 213–15 (2000) (linking public response to the Abner Louima case to increased media coverage of subsequent police brutality cases).

practice.¹⁶² As discussed below, a police department's unauthorized DNA database, for example, may not produce sufficient outrage at the local level to prompt municipal governments to seriously examine and debate the propriety of the police maintaining an unregulated database of their citizens' DNA. At the state level, institutional actors such as the American Civil Liberties Union (ACLU) and Human Rights Watch can offer a counter point to law enforcement's defense of a particular policing practice.¹⁶³ Although such state level not-for-profit organizations may lack substantial political clout,¹⁶⁴ they can help to ensure that the troublesome aspects of certain police practices are adequately articulated in the public debate.

III. PREEMPTING ROGUE DNA DATABASES AND CASUAL POLICE ENCOUNTERS

This Part examines two instances of troubling police conduct. Section A outlines the maintenance of unauthorized police DNA databases. Section B examines the routine practice of making casual street stops that arguably do not rise to the level of a constitutionally impermissible seizure. This Part then explores the impact that adoption of a robust intrastate preemption doctrine would have on identifying and curtailing undesirable police conduct.

A. Preempting Rogue DNA Databases

On July 10, 2012, police officers from Anne Arundel County Maryland informed George Varriale that he was a suspect in a case involving the assault and rape of a thirty-year-old local woman.¹⁶⁵ Mr. Varriale, who was homeless

¹⁶² Taslitz, *supra* note 74, at 308 (“My argument here has been only that minorities generally do better politically in the area of criminal justice at the local level than they do at the state level. But I have not argued that poor, urban racial minorities either control local legislative outcomes or even have an equal voice there.”).

¹⁶³ Both Former Attorney General Ed Meese and Orange County Sheriff Brad Gates have referred to the ACLU as the “Criminals’ lobby.” See *Topics; Offensive Defensive; Unfair Attack*, N.Y. TIMES (May 19, 1981), available at <http://www.nytimes.com/1981/05/19/opinion/topics-offensive-defensive-unfair-attack.html>, archived at <http://perma.cc/J5MF-VWP8>; Ramona Ripston, Letter to the Editor, *Sheriff Gates and the ‘Criminal Lobby,’* L.A. TIMES (Mar. 24, 1985), available at http://articles.latimes.com/1985-03-24/local/me-30247_1_sheriff-gates-aclu-criminals, archived at <http://perma.cc/3W89-WFSY>. Human Rights Watch has been vocal about the need for lawmakers to investigate and prevent police misconduct; see also Roberto Suro & Cheryl W. Thompson, *Group Says Police Abuses Persist Because of Lack of Prosecution*, WASH. POST, July 8, 1998 at A6.

¹⁶⁴ Dripps, *supra* note 62, at 1092 (“Sure, there’s the ACLU on the other side. But the ACLU’s real strength in legislative deliberations is rarely the electoral clout that organization can claim to represent.”).

¹⁶⁵ See Defendant’s Motion to Suppress State’s DNA Match Evidence at 4, *State v. Varriale*, No. K-13-548; see also Ian Duncan, *Maryland Police DNA Tactics Again at Issue in Top Courts*, BALT. SUN (Apr. 10, 2014), articles.baltimoresun.com/2014-04-10/news/bs-md-dna-court-challenge-2014

at the time, agreed to let the officers search his tent and voluntarily provided the police with both a DNA saliva sample and a penile swab.¹⁶⁶ Mr. Varriale never heard from the police regarding the rape allegations again.¹⁶⁷

Unbeknownst to Mr. Varriale, however, the DNA samples he offered to exonerate himself were not discarded. Police instead uploaded the sample into a local databank that was neither authorized nor regulated by any state statute or local ordinance.¹⁶⁸ One year later, officers investigating a break-in at a warehouse recovered an open can of soda that they suspected was discarded by the burglar. When the local database matched the DNA from the can with the sample taken from Mr. Varriale, he was arrested and subsequently indicted for burglary. On August 12, 2013, a judge denied Mr. Varriale's motion to suppress the DNA evidence.¹⁶⁹

Across the country, police have begun to assemble unrestricted, unregulated databases containing DNA samples from arrestees, suspects, and even victims.¹⁷⁰ These "rogue" databases include none of the safeguards that have been included in legislation authorizing state and federal DNA databases.¹⁷¹

0410_1_dna-anne-arundel-county-police-police-use, archived at <http://perma.cc/Y6ZM-MPYQ> (describing the circumstances of Mr. Varriale's arrest).

¹⁶⁶ Defendant's Motion to Suppress, *supra* note 165, at 5.

¹⁶⁷ *Id.* It was later revealed that the rape kit failed to identify any foreign blood or semen samples and that the complaining witness alleged that she had been raped after being arrested on separate prescription fraud and theft charges. See Mary Gale Hare, *Glen Burnie Woman Charged with Prescription Fraud*, BALT. SUN (July 10, 2012), http://articles.baltimoresun.com/2012-07-10/news/bs-md-ar-prescription-fraud-20120710_1_glen-burnie-woman-prescription-fraud-oxycodone, archived at <http://perma.cc/7T7D-RJLJ>.

¹⁶⁸ All 50 states have established a statewide DNA database programs. See, e.g., ALA. CODE §§ 36-18-24 (2013); ALASKA STAT. § 44.41.035 (2013); ARIZ. REV. STAT. ANN. § 41-2418 (2013); ARK. CODE ANN. § 12-12-1105 (2013); CAL. PENAL CODE § 295 (Deering 2014); COLO. REV. STAT. § 16-23-102 (2013); CONN. GEN. STAT. § 54-102g (2013); DEL. CODE ANN. tit. 29 § 4713 (2013); FLA. STAT. § 943.325 (2013); GA. CODE ANN. § 35-3-160 (2013).

¹⁶⁹ On August 13, 2013, Mr. Varriale entered a guilty plea to Second Degree burglary that reserved his right to appeal the court's suppression decision. See Duncan, *supra* note 165.

¹⁷⁰ See Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES, June 13, 2013, at A1 (describing the proliferation of unregulated police DNA databases); Ben Finley, *Bensalem DNA Database Helps Nab Low-level Criminals*, PHILA. INQUIRER (June 24, 2013), articles.philly.com/2013-06-24/news/40148323_1_stephen-mercer-state-dna-database, archived at <http://perma.cc/K7EV-VDSH>.

¹⁷¹ Finley, *supra* note 170, at A1. There are two notable exceptions in that both Alaska and Washington have included provisions requiring that local databases contain provisions for collection, storage and expungement that do not conflict with the statute establishing the statewide database. See ALASKA STAT. § 44.41.035(d) (2013) ("[A] local law enforcement agency may not establish or operate a DNA identification registration system unless . . . (3) procedure and rules for the collection, analysis, storage, expungement, and use of DNA identification data do not conflict with this section and procedures and rules applicable to the department's DNA identification registration system") and WASH. REV. CODE § 43.43.758 (2013) ("Except as provided in subsection (2) of this section, no local law enforcement agency may establish or operate a DNA identification system before July 1, 1990, and unless . . . (c) The procedure and rules for the collection, analysis, storage, expungement, and use

Had the officers arrested Mr. Varriale and forcibly collected his DNA pursuant to the Maryland statute that established a statewide databank, the sample would have been destroyed and all records would have been expunged when the rape allegation did not “result in a conviction.”¹⁷² Because Mr. Varriale provided his DNA voluntarily, however, the police were free to maintain the record of his sample in perpetuity.

Perhaps the most problematic aspect of police maintenance of rogue databases is the fact that the practice has never been subjected to significant public debate. Legislation authorizing the police to establish DNA indexes and to collect DNA samples has acknowledged citizens’ privacy concerns and has included safeguards that allow citizens to have their records expunged under certain conditions.¹⁷³ These regulations suggest that the public does not favor the wholly unrestricted cataloguing of DNA profiles by the police. Unfortunately, although legislation authorizing the police to forcibly collect DNA is generally limited to individuals arrested for specific crimes,¹⁷⁴ there are other tactics that the police can use to acquire genetic samples.

Law enforcement can acquire an individual’s DNA sample in a number of ways. As in Mr. Varriale’s case, the easiest method for the police to acquire a DNA sample is often just to ask. Requests for DNA samples are not made only to individuals suspected of committing crimes. It is not uncommon for the police to ask victims to submit to a cheek swab in order to distinguish between the suspect’s and the victim’s DNA.¹⁷⁵ In many instances, however, police do not even need to request consent. Indeed, many individuals may not be aware

of DNA identification data do not conflict with procedures and rules applicable to the state patrol DNA identification system”).

¹⁷² See MD. CODE ANN., PUB. SAFETY § 2-511(West 2009) (requiring the destruction and expungement of DNA information when “(i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual; (ii) the conviction is finally reversed or vacated and no new trial is permitted; or (iii) the individual is granted an unconditional pardon”). Forty four states include expungement provisions in the statutes authorizing statewide DNA databases. See, e.g., ALA. CODE §§ 36-18-26 (2013); ALASKA STAT. § 44.41.035(h)(1) (2013); ARIZ. REV. STAT. ANN. § 13-610(J) (2013); ARK. CODE ANN. § 12-12-1113 (2013); CAL. PENAL CODE § 299 (Deering 2014); COLO. REV. STAT. § 16-23-105 (2014); CONN. GEN. STAT. § 54-102i (2013); DEL. CODE ANN. tit. 29 § 4713(i) (2013); FLA. STAT. § 943.325(16) (2013); GA. CODE ANN. § 35-3-165 (2013); HAW. REV. STAT. § 844D-71 (2013).

¹⁷³ See Phillip Rucker & Anne Bartlett, *Black Caucus Members Protest DNA Bill Process*, WASH. POST (Mar. 19, 2008) http://voices.washingtonpost.com/annapolis/2008/03/black_members_protest_d.html, archived at <http://perma.cc/HC8G-UEQ4> (describing Maryland legislators insistence that safeguards be included in the state’s DNA database legislation); Laura Smitherman, *Democrats See Victory as Session Concludes*, BALT. SUN (Apr. 8, 2008), http://articles.baltimoresun.com/2008-04-08/news/0804080087_1_omalley-special-session-general-assembly, archived at <http://perma.cc/HW9T-BD8A>.

¹⁷⁴ See, e.g., MD. CODE ANN., PUB. SAFETY § 2-504(a) (West 2009).

¹⁷⁵ See Goldstein, *supra* note 170, at A3 (describing how homeowners are routinely asked for DNA samples ostensibly so that the victim can be eliminated as a potential source for DNA recovered at the crime scene).

that their DNA has been obtained by the police. Medical examiners have begun to take DNA samples from autopsies performed on crime victims under the premise that people who die violent deaths may have committed crimes themselves.¹⁷⁶ The police also collect “abandoned” DNA samples from cigarette butts,¹⁷⁷ water bottles,¹⁷⁸ and a variety of other items that come in contact with a suspect’s saliva, blood, or hair.¹⁷⁹ Indeed, courts acknowledge that it is almost impossible for citizens to avoid leaving behind “a bread-crumbs trail of identifying DNA matter.”¹⁸⁰

There is no question that advances in DNA technology have yielded substantial public safety benefits.¹⁸¹ DNA forensics has helped to solve decades old murder and rape cases,¹⁸² and the same technology has exonerated hundreds of wrongly convicted defendants incarcerated for crimes they didn’t commit.¹⁸³ Yet the wealth of personal information that can be gleaned from DNA and the prospect of the government maintaining massive databases of the genetic profiles of its citizens raise serious concerns of unwarranted invasions privacy and potential misuse.¹⁸⁴ In this respect, the government’s collection

¹⁷⁶ See Richard Willing, *Authorities Find More Uses for DNA Databases*, USA TODAY Mar. 26, 2007, at 8A (describing the expanding use of DNA databases and the search for new sources for DNA samples).

¹⁷⁷ *Commonwealth v. Ewing*, 854 N.E.2d 993, 1001 (Mass. App. Ct. 2006) (denying motion to suppress DNA evidence because “[t]he defendant had no expectation of privacy in cigarette butts that he voluntarily abandoned as trash”).

¹⁷⁸ *Commonwealth v. Bly*, 862 N.E.2d 341, 356–57 (Mass. 2007) (holding that suspect had no subjective expectation of privacy when leaving cigarette butts and a used water bottle in police possession).

¹⁷⁹ See Joh, *supra* note 56, at 860–61; Albert E. Scherr, *Genetic Privacy & the Fourth Amendment: Unregulated Surreptitious DNA Harvesting*, 47 GA. L. REV. 445, 452 (2013).

¹⁸⁰ See *United States v. Kincade*, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting) (describing the lack of any impediment “to having the government collect what we leave behind”); see also Joh, *supra* note 56, at 860 (“As a practical matter, why do police choose to collect abandoned DNA when looking for incriminating evidence? The simple answer is that it is easy to collect.”).

¹⁸¹ See David H. Kaye, *The Science of DNA Identification: From the Laboratory to the Courtroom (and Beyond)*, 8 MINN. J.L. SCI. & TECH. 409, 421 (2007) (“These [DNA] databases help police to solve cases that have baffled them for decades and to catch previously convicted offenders who commit new crimes.”).

¹⁸² *Id.*; N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., *DNA Case Highlights*, <http://www.criminaljustice.ny.gov/forensic/dnacasehighlights.htm>, archived at <http://perma.cc/U8N8-NLGG> (last visited June 25, 2014) (providing anecdotes about crimes solved by DNA forensics).

¹⁸³ BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 5 (2011).

¹⁸⁴ See Joh, *supra* note 56, at 874 (“[I]t is a backdoor to population-wide data banking. The risk of discriminatory treatment or harassment by the police surely increases when no legal justification for their actions is required.”); Scherr, *supra* note 179, at 505 (“To have the government present in one’s DNA and to have the government store one’s DNA without any limits on its use speaks of a limit on individual autonomy. That presence and that storage, secret as it may be, might affect one’s conduct and self-identity.”); Frank Green, *Good Forensics or an Invasion of Privacy?: DNA-Databank Debate, Should Everyone be There?*, RICHMOND TIMES DISPATCH, Mar. 8, 2007, at A1 (“[P]utting everyone’s DNA in the databank is a cure worse than the disease . . .”).

and preservation of DNA samples is the latest iteration of the long running debate over which institutions are best equipped to establish the rules that regulate the police and balance civil liberty interests against pressing public safety concerns.

To date, neither courts nor legislatures have proven particularly effective at limiting law enforcement's ability to assemble and exploit the genetic material that they acquire. Courts have uniformly rejected claims that the Fourth Amendment bars the police from collecting "abandoned" or "shed" DNA,¹⁸⁵ and it is generally assumed that DNA profiles, once lawfully collected, can be retained and searched indefinitely.¹⁸⁶ Similarly, individuals who voluntarily provide the police with DNA do not appear to retain any legitimate expectation of privacy that would prevent the police from maintaining their sample and records for other purposes.¹⁸⁷

Federal and state legislatures have not entirely ignored the dangers posed by databasing citizens' genetic profiles. Indeed, the law governing the federal DNA database, CODIS,¹⁸⁸ bars the government from uploading and retaining DNA profiles submitted by individuals for the purpose of eliminating themselves as suspects.¹⁸⁹ Federal law also provides for the expungement of CODIS records obtained on the basis of an arrest or conviction if the conviction is overturned or the charges are subsequently dropped.¹⁹⁰

State statutes explicitly authorizing law enforcement to collect and store suspects' DNA can provide even greater protection. The Maryland statute authorizing a statewide database, for example, requires that DNA samples and records generated as part of a criminal investigation or prosecution be destroyed and expunged if a criminal action initiated against the individual does

¹⁸⁵ See, e.g., *Bly*, 862 N.E.2d at 356 (holding that the defendant had no expectation of privacy in the genetic material he left on abandoned cigarette butts and a water bottle); *State v. Athan*, 158 P.3d 27, 31 (Wash. 2007) (holding that the defendant did not have a privacy interest in the genetic information retrieved from the saliva he used to seal an envelope that the police tricked him into sending); *Commonwealth v. Cabral*, 866 N.E.2d 429, 433–34 (Mass. App. Ct. 2007) (holding that the defendant had no legitimate expectation of privacy in the genetic material in the saliva he had expectorated on to a public street); Scherr, *supra* note 179, at 454 ("Courts have uniformly rejected Fourth Amendment protection against surreptitious harvesting of out-of-body DNA by the police.").

¹⁸⁶ Joh, *supra* note 56, at 875 ("Thus, assuming its collection is constitutionally proper, an abandoned DNA sample can be analyzed as many times as the police wish.").

¹⁸⁷ See *Washington v. State*, 653 So. 2d 362, 364 (Fla. 1994) (holding that once a suspect has voluntarily provided hair and blood samples, they may be used in any investigation); *State v. Barkley*, 551 S.E.2d 131, 135 (N.C. Ct. App. 2001).

¹⁸⁸ CODIS is an acronym for "Combined DNA Index System," the "massive centrally-managed database linking DNA profiles culled from federal, state, and territorial DNA collection programs" that was established by federal law and is managed by the Federal Bureau of Investigation. See Sasha E. Polonsky, "Banking" on Law Enforcement: Advocating a New Balancing Test for DNA Storage *After United States v. Kincade*, 83 WASH. U. L.Q. 1331, 1337 (2005).

¹⁸⁹ See 42 U.S.C. § 14132(a)(1)(C) (2006).

¹⁹⁰ See *id.* § 14132(d).

not result in a conviction.¹⁹¹ The Maryland statute also bars “familial” or “kinship searches”¹⁹²—the process by which a DNA database can be used to identify relatives of the individuals whose samples are contained in the database.¹⁹³

These legislative safeguards, however, do not explicitly curb the police’s ability to maintain their own database of DNA they otherwise lawfully collect. Although the officers in Mr. Varriale’s case were barred by statute from uploading his DNA profile into either CODIS or the state-wide DNA archive created by the Maryland legislature, the trial court found no impediment to the police keeping his DNA in their own “rogue” database.¹⁹⁴ Similarly, the police have adopted the position that the Maryland statute does not prevent them from conducting familial searches of the DNA maintained in their own unregulated databases.¹⁹⁵

The absence of any appreciable limit on the police’s ability to maintain a private database of citizens’ genetic records has led commentators to call for a new approach to DNA analysis under the Fourth Amendment.¹⁹⁶ Arguing that “traditional Fourth Amendment analysis is poorly suited for a world in which ‘the body itself may become a rather antiquated way of defining the individual,’” such scholars have sought to extend privacy protections either by proposing legislative solutions¹⁹⁷ or by suggesting new interpretations of the Fourth Amendment that would expand the scope of its protection to searches of lawfully obtained DNA.¹⁹⁸

To date, however, federal and state legislatures have been reluctant to take on the politically unpalatable task of limiting the police’s capacity to solve

¹⁹¹ See MD. CODE ANN, PUB. SAFETY § 2-511 (West 2009); see also, e.g., N.Y. EXEC. LAW § 995-c (Consol 2013). Many other states have included provisions that permit destruction of DNA samples after an applicant petitions the state for such removal from the database. See, e.g., HAW. REV. STAT. §§ 844D-71 to -72 (2013); IOWA CODE § 81.9 (2014); N.D. CENT. CODE § 31-13-07 (2013).

¹⁹² MD. CODE ANN, PUB. SAFETY § 2-506(d) (West 2009) (“A person may not perform a search of the statewide DNA data base for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired.”).

¹⁹³ See Murphy, *supra* note 22, at 297 (Familial searching refers generally to the idea of looking in a DNA database not for the person who left the crime-scene sample, but rather for a relative of that individual.”).

¹⁹⁴ See *supra* note 168 and accompanying text.

¹⁹⁵ Defendant’s Motion to Suppress, *supra* note 165, at 18; see MD. CODE REGS. 29.05.01.06(B) (2014).

¹⁹⁶ See, e.g., Scherr, *supra* note 179, at 526 (suggesting that rapid advances in genetic research and technology warrant a reevaluation of Fourth Amendment jurisprudence to require that the police obtain a search warrant before testing abandoned or shed DNA samples). *But see* Kaye, *supra* note 181, at 420 (rejecting the notion that the courts should prefer genetic and DNA evidence over other types of evidence).

¹⁹⁷ Joh, *supra* note 56, at 881, 886 (“[L]egislatures can offer flexibility and greater protection where judicial interpretation of the Fourth Amendment falls short.”).

¹⁹⁸ See Scherr, *supra* note 179, at 526 (arguing Fourth Amendment jurisprudence suggests police should obtain warrants before harvesting DNA from an abandoned item containing DNA).

heinous crimes in order to preserve the privacy interests of potential criminal suspects.¹⁹⁹ Although legislatures have fashioned privacy safeguards for the specific databases that they established by statute, lawmakers have proven reluctant to investigate and constrain the police's ability to assemble and maintain their own searchable genetic records.

Similarly, courts frequently refuse to find constitutional limits on the police's authority to assemble and maintain DNA databases. Limitations on the forcible collection of DNA samples have been rendered largely meaningless by advances in technology that enable the police to gather DNA from microscopic samples that are all but impossible to avoid leaving behind.²⁰⁰ The courts have analogized shed DNA to trash willingly exposed to the public in routinely holding that that citizens have no privacy interest in the genetic information that the police can glean from discarded items like cigarette butts,²⁰¹ the back of envelopes,²⁰² or even hair taken from a jailhouse barber.²⁰³

Although legislative inaction may best be explained by the lack of political incentives to constrain the police, the courts' refusal to "constitutionalize" the collection and storage of DNA profiles may be due to concerns about their own institutional competence and the long term implications of establishing inflexible rules for a nascent technology.²⁰⁴ Moreover, even if the courts were inclined to regulate the maintenance of rogue DNA databases, at best, a court could only establish the outer limit of what the police can lawfully collect and retain. Courts lack the authority to establish standards for how society might

¹⁹⁹ See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 662 (1997) ("Politicians, afraid of being viewed as 'anti-police,' may be reluctant to require that police promulgate guidelines for the enforcement of public order laws.").

²⁰⁰ See Rachel Ross, *A Trail of Genetic Evidence Follows Us All*, TORONTO STAR, Feb. 2, 2004, at D03 ("Everywhere we go, doing anything we do, we leave behind a trail of genetic evidence: cells that are naturally shed over time. Hair falls out, blood drips and cheek cells are gradually washed away by saliva, only to stick to the rim of a cup, utensil or drinking straw."); see also Joh, *supra* note 56, at 858 (describing the inevitability of leaving behind abandoned DNA); Scherr, *supra* note 179, at 450 (describing the evolution of DNA technology over the past twenty-five years).

²⁰¹ See *State v. Wickline*, 440 N.W.2d 249, 253 (Neb. 1989) (determining that the defendant abandoned cigarette butts in trash and thus and sufficiently exposed them to the officer and the public to defeat his claim to fourth amendment protection for genetic information derived from his saliva), *disapproved on other grounds*, *State v. Sanders*, 455 N.W.2d 108 (Neb. 1990).

²⁰² *Athan*, 158 P.3d at 33 (holding that the defendant did not have a protected privacy interest in the saliva the police recovered from an envelope he had licked and mailed to them).

²⁰³ See *United States v. Cox*, 428 F.2d 683, 688 (7th Cir. 1970) ("Having voluntarily abandoned his property, in this case his hair, Cox may not object to its appropriation by the Government."); see also Joh, *supra* note 56 at 865 (describing court decisions in treating abandoned DNA like trash that is "knowingly exposed" to the public and therefore does not warrant Fourth amendment protection).

²⁰⁴ Kerr, *supra* note 7, at 871 ("Judicial rulemaking is limited by strong stare decisis norms that limit the ability of judicial rules to change quickly; in contrast, legislatures enjoy wide-ranging discretion to enact new rules.").

want the police to behave.²⁰⁵ Courts do, however, have the means to help overcome the political barriers that discourage legislators from scrutinizing law enforcements' practice of maintaining libraries of citizens' DNA. By adopting a robust preemption doctrine when analyzing the admissibility of evidence generated from rogue databases, courts can "prod" state legislatures to review police activity and either affirmatively sanction such strategies or otherwise restrain them.²⁰⁶ As discussed above, a municipality and its employees may only act pursuant to an affirmative grant of power from the state.²⁰⁷ Because states have generously endowed local governments with broad authority to fight crime and protect the public,²⁰⁸ police almost certainly can, absent the legislature's withdrawal of that authority, assemble databases of genetic information that lawfully comes into their possession.²⁰⁹ State legislatures that enacted legislation governing the creation and maintenance of DNA databases have not, to date, explicitly indicated their intention to revoke local law enforcement's ability to compile their own private genetic records. As a result, to find that the police cannot assemble their unregulated databases, the court must conclude either that these state statutes impliedly preempt local governments

²⁰⁵ Harmon, *supra* note 1, at 777 ("Constitutional criminal procedure rights are therefore commands about what the police cannot do, not standards for what they should do.").

²⁰⁶ See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 354 (2011) ("One way in which government actors in the United States can promote greater openness and responsiveness is by performing their official roles with a self-conscious appreciation for the ways in which they can signal to other institutional actors that a given problem demands attention and action.").

²⁰⁷ See *City of Philadelphia v. Fox*, 64 Pa. 169, 180 (1870) (holding that a municipality "is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government . . . having no vested right to any of its powers or franchises . . . and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion"); see also *supra* note 108–109 and accompanying text (explaining that, pursuant to the Tenth Amendment, all non-enumerated powers are reserved to the States or to the people).

²⁰⁸ See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (recognizing broad municipal authority to protect public health and safety); see also Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1356 (2009) ("[S]tate courts have long affirmed the police powers of home rule local governments to promote health, safety, and welfare . . ."); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1413–14 (2001) ("Although municipalities traditionally have enjoyed wide leeway in matters pertaining to zoning, taxes, education, and the regulation of obscenity, it often escapes attention that they also enjoy considerable authority to enact criminal laws pursuant to their expansive home rule and police powers.").

²⁰⁹ The particular source of the municipality's grant of authority is, of course, dependent on the jurisdiction. For constitutional home rule jurisdictions, the authority derives directly from the state constitution, while legislative home rule jurisdictions may derive their authority from state statute. Compare CAL. CONST. art. XI, § 7 (granting counties and cities the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."), with N.Y. MUN. HOME RULE LAW § 10 (McKinney 2014) (granting local governments the authority to adopt laws that promote the welfare and safety of persons so long as there is no conflict with state law).

from exercising a power that they have heretofore possessed by “occupying” the DNA collection field, or that the practice of assembling local databases conflicts with established state law.²¹⁰

Although state courts have largely resisted calls to endow local governments with greater political autonomy,²¹¹ a finding that state legislatures intended to preempt local law enforcement’s ability to establish unregulated genetic databases would, admittedly, require a significant shift in courts’ willingness to apply the intrastate preemption doctrine.²¹² Nothing in the state statutes establishing statewide databases evinces an obvious intent by legislatures to occupy the entire field of DNA record keeping.²¹³ Such a finding would not be implausible, however, if the courts were to embrace a more robust preemption analysis recognizing both the political strength of the law enforcement community and the concomitant danger of under scrutinized police activity. Taken as a whole, the state statutes establishing DNA record systems provide ample grounds for finding that municipal governments and their employees are preempted from maintaining unregulated records of citizen’s genetic information.

Maryland, where police stored Mr. Varriale’s DNA profile in an unregulated local police database,²¹⁴ provides a useful example. First, the Maryland legislature chose to limit DNA collection to individuals convicted of serious crimes²¹⁵ and arrestees charged with violent crimes or burglary.²¹⁶ Second, when the Governor of Maryland initially sought to expand the statute to allow the collection of genetic data from criminal suspects who had not yet been convicted of any crime, a number of state legislators, including the Legislative Black Caucus, strongly opposed the bill.²¹⁷ The opponents of the DNA Collection bill successfully demanded that the bill be “substantially weaken[ed]” and that safeguards be adopted to expunge the records of defendants whose charges did not result in a conviction.²¹⁸ The legislature, in so doing, affirmatively

²¹⁰ See *supra* notes 100–101 and accompanying text.

²¹¹ See Frug, *supra* note 106, at 1059–60.

²¹² See *id.* (“[O]ur highly urbanized country has chosen to have powerless cities, and that this choice has largely been made through legal doctrine.”).

²¹³ *Cnty. Council for Montgomery Cnty. v. Montgomery Ass’n*, 333 A.2d 596, 600 (Md. 1975) (“[O]rdinances which deal with an area in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied, are invalid.”).

²¹⁴ See Defendant’s Motion to Suppress, *supra* note 165.

²¹⁵ MD. CODE ANN., PUB. SAFETY § 2-504(a)(1) (West 2009) (authorizing the collection of DNA from individuals convicted of either misdemeanor burglary or any felony).

²¹⁶ *Id.*

²¹⁷ See Smitherman, *supra* note 173.

²¹⁸ See *id.* (describing how the DNA sampling bill hit a “roadblock” that was resolved when proponents “forged a compromise that would increase protections for defendants”); see also MD. CODE ANN., PUB. SAFETY § 2-511 (providing for the expungement of DNA records if the cases does not

demonstrated its intent that the police were not allowed to permanently retain DNA profiles of non-criminal members of the community.²¹⁹

The Maryland statute also explicitly barred the police from using the database to conduct familial searches.²²⁰ As a result, the legislature arguably demonstrated a concern about the impact of DNA searches on the privacy of individuals who were not the direct subjects of the collection statute. The maintenance of private police databases would appear to frustrate the Maryland legislature's effort to ensure that community members cannot be identified by searching the genetic records of their relatives. Indeed, it would be ironic if the police were allowed to effectively include the relatives of homicide victims in their private databases but were barred from searching for the same information from individuals convicted of serious crimes.

Further, unregulated police DNA databases could conceivably frustrate one of the DNA collection statutes' legislative purposes—to assist criminal investigations.²²¹ If the DNA collection statute were interpreted to allow the police the unfettered discretion to retain indefinitely any DNA acquired through non-statutory means, suspects would be well-advised to wait for the police to arrest them and demand a DNA swab rather than volunteer to provide a sample. Such an outcome would slow many police investigations, increase costs, and arguably frustrate the statute's goal of promoting public safety and facilitating the investigation of crime.

Finally, police DNA databases are not the kind of purely "local" activity that municipalities are traditionally empowered to control. Although the different models for delegating power to municipal governments make it difficult to identify the precise contours of local authority, both the *imperium in imperio* model of home rule and the legislative home rule model leave the state legislature as the ultimate authority over activities that extend beyond the municipality's borders.²²² Unregulated police databases are not limited to samples gathered from local residents or even people who pass through the local jurisdiction. Nothing bars municipal police officers from traveling throughout the state and warehousing discarded DNA from residents of other cities and counties. Because the databases implicate the interests of people outside the municipality, these databases would seem to fall within the scope of state rather than local power regardless of the source of the municipality's authority. It therefore

result in a conviction, the case is subsequently reversed on appeal, or if the defendant receives a pardon).

²¹⁹ Collection of DNA Samples, ch. 5, § 2, 2003 Md. Acts 103, 103 (West) (codified as amended MD. CODE ANN., PUB. SAFETY § 2-504(d)(2)).

²²⁰ § 2-504(d)(2).

²²¹ *Id.* (citing one of the purposes of collecting and testing DNA is to serve "as part of an official investigation into a crime").

²²² See *supra* note 105 and accompanying text.

seems likely that, so long as the legislature has the will to preempt the police's ability to maintain local DNA databases, lawmakers have the power to do so.

Needless to say, the fact that the legislature demanded safeguards for defendants from whom the state forcibly obtained a DNA sample does not conclusively demonstrate lawmakers' intention to "occupy the entire field of DNA collection," nor does it irrefutably conflict with the retention of non-forcibly collected DNA by municipal actors. Generally, field preemption is determined by indications that the legislature developed a comprehensive statutory scheme, which, by virtue of its completeness, forecloses the possibility that local governments were allowed to develop their own regulations.²²³

In many respects, the Maryland legislature's DNA collection statute is striking, not for its completeness, but rather for its failure to account for a variety of related police activities that implicate similar interests but are not openly acknowledged. It does seem incongruous that the legislature would establish safeguards for arrestees for whom there was probable cause to believe they had committed a serious crime, yet leave the police with the unfettered authority to do anything they want with DNA volunteered by individuals seeking to demonstrate their own innocence. Absent a significant shift in courts' willingness to identify legislative intent to preempt local law enforcement activity, it is unlikely however that a court would find that the "[l]egislature has acted with such force that an intent by the State to occupy the entire field must be implied[.]"²²⁴

Diminishing the burden on parties seeking to demonstrate legislative intent to preempt the police would reflect a marked shift in the use of the intra-state preemption doctrine, but it may well be warranted. Rogue DNA databases are precisely the kind of unregulated police activity that tends to avoid judicial and legislative scrutiny. State legislators have little incentive to expose law enforcement's practice of maintaining records of the genetic profiles of private citizens and little reason to bear the political consequences of appearing soft on crime and antagonizing the "law enforcement lobby."²²⁵ Moreover, without a substantial change in Fourth Amendment jurisprudence, courts are unlikely to intervene either to investigate or limit local law enforcements' "private" DNA

²²³ See *Bd. of Child Care of Balt. Annual Conference of the Methodist Church, Inc. v. Harker*, 561 A.2d 219, 226 (Md. 1989) ("The primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field.").

²²⁴ *Montgomery Ass'n*, 333 A.2d at 600.

²²⁵ Dripps, *supra* note 62, at 1091–92 ("The strength of the law enforcement lobby can be seen in its relatively even matches with the NRA—the lobby regarded by many in Washington as the most efficient pressure group this side of the AARP."); see Jennifer Utter Heston, *Crime and Rhetoric*, 25 AM. J. CRIM. L. 659, 663 (1998) ("[L]aw enforcement lobbies and correctional worker unions have become extremely powerful organizations.").

databases.²²⁶ Even if the courts were inclined to extend the reach of the Fourth Amendment to cover rogue databases, the rapid evolution of DNA technology would pose a significant challenge as constitutional limits on police behavior are not easily adjusted in response to changing technological circumstances.

Were the courts instead to find that state law preempts local law enforcement's maintenance of unregulated DNA databases, the legislature would be exceedingly likely to address the issue. The considerable public safety benefits of assembling DNA records and the powerful influence of the law enforcement lobby, makes it almost inevitable that a ruling barring municipal authorities from assembling such records would elicit a response from the legislature.²²⁷ Prompted by the courts, the legislature would have to publicly debate the merits of broadly authorizing the compilation of private citizens' genetic profiles and decide whether the safeguards that govern forcible DNA collection should apply to the DNA profiles the police otherwise assemble. The benefit of such a debate would not be limited to any safeguards the legislature might adopt, but would also enhance the legitimacy of any practice the legislature ultimately chose to sanction.²²⁸

This is not to say that the courts would not retain their responsibility to police the limits of what the Fourth Amendment allows. Whatever rules a legislature ultimately chose to adopt, courts would still have the final say over what the Constitution commands. But in keeping with a longstanding tradition of interpreting statutes so as to avoid a constitutional conflict,²²⁹ courts could give legislatures the initial opportunity to identify the appropriate rules to govern police activities. Indeed, prompting the legislature to adopt a complete statutory framework for DNA records might ultimately result in greater judicial deference to law enforcement's interest in developing such databases.²³⁰

²²⁶ See *supra* note 185 and accompanying text; see also Joh, *supra* note 56, at 868 (“[T]he Fourth Amendment’s protections appear to fall short of providing a constitutional basis from which to challenge abandoned DNA collection.”).

²²⁷ Elhauge, *supra* note 139, at 2173 (“Preference-eliciting default rules only make sense when one believes they might elicit legislative correction, either in the initial drafting (ex ante) or after the interpretation (ex post).”).

²²⁸ See Luna, *supra* note 21, at 1155 (arguing that democratic debate about police practices can increase their legitimacy and promote greater respect for the police and compliance with the law).

²²⁹ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

²³⁰ See Murphy, *supra* note 22, at 339 (noting that the constitutionality of police activities, especially with respect to “burgeoning technologies” often hinges on whether the legislature develops its own regulatory structure).

B. Preempting Casual Street Encounters

*Lena gets her son ready for school.
She says "on these streets, Charles,
you've got to understand the rules.
If an officer stops you,
promise you'll always be polite,
that you'll never ever run away.
Promise Mama you'll keep your hands in sight."*

—Bruce Springsteen, *American Skin (41 Shots)*²³¹

On the evening of July 22, 2005, Officer Michael Salser observed Steven Campbell park in an empty lot and exit his car while talking on his cell phone.²³² Aware that the neighborhood had experienced a number of break-ins and car thefts, the officer approached Mr. Campbell and asked if everything was okay.²³³ Mr. Campbell explained that he became lost while trying to pick up his girlfriend from work and that she was on the phone giving him directions.²³⁴ Mr. Campbell handed the cell phone to Officer Salser, who confirmed that the caller was, indeed, Campbell's girlfriend, and that she worked at Treeman Industries.²³⁵ The officer provided Mr. Campbell with the address for Treeman Industries and returned the cell phone.²³⁶ Officer Salser then explained that there had been several recent burglaries in the area and said that he would "like" to see Mr. Campbell's ID in order to log their conversation.²³⁷ Campbell responded that he did not have identification and said, "Officer, I don't want any trouble, please."²³⁸ At that point, the officer repeated his request to see some identification, explaining that Mr. Campbell could be on his way just as soon as he "ID'd him."²³⁹

According to Officer Salser, Mr. Campbell grew increasingly nervous and kept saying "I don't want any trouble. I just want to pick up my girlfriend."²⁴⁰ Officer Salser called for backup and patted Mr. Campbell down for weapons.²⁴¹ Feeling a bulge in Mr. Campbell's pocket, Officer Salser asked for

²³¹ BRUCE SPRINGSTEEN, *American Skin (41 Shots)*, on HIGH HOPES (Columbia 2001).

²³² *United States v. Campbell*, 486 F.3d 949, 952 (6th Cir. 2007).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 959–60.

²⁴¹ *Id.* at 953.

permission to remove the item.²⁴² It turned out to be a bag of marijuana.²⁴³ Mr. Campbell was placed under arrest.²⁴⁴

Mr. Campbell's story raises a host of potentially troubling questions about the scope of the police powers and the rights of citizens to go about their business. When can the police approach citizens with offers of assistance? Does it matter if the offer of assistance is merely a guise to search for evidence of criminality? When Officer Salser stated that he would "like" to see Mr. Campbell's identification, was this a request or a demand?²⁴⁵ What was the significance, if any, of Mr. Campbell's statement that he didn't have identification and that he didn't "want any trouble?"

Street level encounters between private citizens and the police represent some of the most difficult areas of law enforcement activity to regulate.²⁴⁶ The need to vest the police with the power necessary to ensure their personal safety and to fight crime must be weighed against private citizens' right "to be free from government intrusion into their privacy."²⁴⁷ The difficulty in striking a balance between these competing interests is exacerbated by the fact that street level encounters are particularly complex, involving a multiplicity of factual circumstances and subjective evaluations of danger, potential criminality, and the belief that one can refuse an officer's "request" for either information or the authority to search.²⁴⁸ Street encounters also tend to be "fluid"—information gathered during an initial interaction may lay the foundation for

²⁴² *Id.*

²⁴³ *Id.* An inventory search of Mr. Campbell's vehicle uncovered an unlicensed firearm. *Id.* Mr. Campbell was charged with its possession as well. *Id.*

²⁴⁴ *Id.*

²⁴⁵ The Sixth Circuit found that the use of the word "like" was significant and that the officer had merely made a request. *See id.* at 956 ("The use of the word 'like,' as opposed to 'need' or 'want,' suggests that a reasonable person would feel free to decline this request and leave the scene.").

²⁴⁶ *See* *People v. Chestnut*, 409 N.E.2d 958, 960 (N.Y. 1980) ("Street encounters between private citizens and law enforcement officers are inherently troublesome This is so because two competing, yet equally compelling, considerations inevitably clash, to wit: the indisputable right of persons to be free from arbitrary interference by law enforcement officers and the nondelegable duty placed squarely on the shoulders of law enforcement officers to make the streets reasonably safe for us all.").

²⁴⁷ *Adams v. Williams*, 407 U.S. 143, 161–62 (1972) (Brennan, J., dissenting) (describing the delicate balancing of interests that underlay the court's "stop and frisk" precedent); *see* *People v. Howard*, 408 N.E.2d 908, 912 (N.Y. 1980) ("The principles that have evolved seek to balance society's interest in the detection and prevention of crime and in the protection of the lives and safety of law enforcement officers with the interest of individuals in living their lives free from governmental interference.").

²⁴⁸ *See* *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997) ("We have repeatedly noted that the evaluation of the constitutionality of a search is a complex calculation, requiring careful balancing of the competing interests inherent in a police-citizen encounter. In such a situation, the requirement of voluntariness reflects an accommodation of the complex values implicated in police questioning of a suspect.") (internal quotations omitted) (citing in part *Schneckloth v. Bustamonte*, 412 U.S. 218, 224–25 (1973)).

increasing levels of police intervention.²⁴⁹ Finally, the police interact with the public for a variety of reasons. Rules designed to regulate how an officer identifies criminal activity may not make sense in instances where the officer attempts to determine if a citizen is in need of assistance.

Although the courts have actively regulated police interactions deemed to involve physical detentions,²⁵⁰ they have been far more reluctant to investigate and restrict police activities that involve less obviously intrusive behavior.²⁵¹ In 1991, in *Florida v. Bostick*, the U.S. Supreme Court held that encounters between the police and private citizens do not trigger Fourth Amendment scrutiny “[s]o long as a reasonable person would feel free to disregard the police and go about his business.”²⁵²

Mr. Campbell’s case demonstrates how police interactions that do not involve forcible detentions easily morph into more intrusive investigations. The Sixth Circuit held that Mr. Campbell could have simply declined Officer Salser’s request for identification and left the scene.²⁵³ Unfortunately, by responding and explaining that he did not have identification, Mr. Campbell inadvertently admitted that he had been driving without a license—a misdemeanor offense that gave the police probable cause to then arrest and search him.²⁵⁴ As a result, although Officer Salser never indicated that he searched the defendant on those grounds, and Mr. Campbell was never charged with driving without a license, the court held that the marijuana recovered after Mr. Campbell’s admission was lawfully recovered as the “consensual encounter” with Mr. Campbell had provided the officer with probable cause to believe Mr. Campbell had committed a misdemeanor driving violation.²⁵⁵ Critically, all of Officer Salser’s actions prior to his

²⁴⁹ Emily J. Sack, *Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v. De Bour*, 66 N.Y.U. L. REV. 512, 550 (1991) (describing the “rapid escalation” of police behavior from an initial approach to the more intrusive forcible stop and arrest.); Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 520 (2001) (“Furthermore, as the courts have long recognized, and the police well know, facts discovered through one form of interaction can provide the basis to move to a more intrusive level.”).

²⁵⁰ *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring) (emphasizing the difference between a forcible stop by a police officer and a casual encounter during which a citizen has the right to walk away).

²⁵¹ There have been some notable exceptions as some state courts have found independent state constitutional grounds to investigate low level police intrusions. As discussed *infra* note 263 and accompanying text, in 1976, in *People v. De Bour*, the New York Court of Appeals established a four-tiered constitutional model that regulated low level encounters that had been found to be beyond the reach of the Federal Constitution. See 352 N.E.2d at 571–74. The *De Bour* decision stands as a notable exception that proves the more general rule that courts have largely found that they lacked authority to regulate police interactions not involving citizens’ detention. *Id.*

²⁵² 501 U.S. 429, 434 (1991) (citing *California v. Hodari D.*, 499 U.S. 621, 628 (1991)) (internal quotations omitted).

²⁵³ *Campbell*, 486 F.3d at 957.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 958

statement that the defendant could only leave *after* he had been ID'd were deemed to be beyond the court's regulatory power.²⁵⁶

The Court's refusal to scrutinize casual encounters has been widely criticized as "out of touch with societal reality"²⁵⁷ and has left a wide range of police activity outside the scope of the Fourth Amendment and beyond the purview of the courts. This "consensual encounter" doctrine however ignores the reality that people, particularly young people and people-of-color, generally do not feel free to refuse an officer's request.²⁵⁸ The Court's Fourth Amendment jurisprudence also leaves the police and the public with little guidance on how to interact in situations that involve police inquiries that do not amount to what courts recognize as "forcible detention."

There has been one recent notable exception to the courts' general refusal to regulate low-level casual police encounters. On August 12, 2012, in *Floyd v. City of New York*, the U.S. District Court for the Southern District Court of New York held that the New York City Police Department was liable for its racially discriminatory use of stop and frisk tactics that targeted young black and Hispanic men.²⁵⁹ Although the *Floyd* decision did not explicitly involve casual street encounters that occur below the Supreme Court set in *Terry*

²⁵⁶ *Id.* ("In short, Campbell could have declined Officer Salser's initial request and left the scene of the encounter. The fact that he chose not to do so did not convert that request into a seizure within the meaning of the Fourth Amendment.")

²⁵⁷ Steinbock, *supra* note 249, at 521–22 (describing the consensual encounter doctrine as a "fictional construct" that is "flawed in conception by its use of the reasonable person"); see *State v. Backstrand*, 313 P.3d 1084, 1106 (Or. 2013) ("When, albeit politely, a uniformed police officer approaches a person on the street and requests the person's identification, it is a fiction to suggest that most people would believe that they have a right to refuse the request or that, if they did, it would be prudent or safe to do so."); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 (1990) ("In the real world, however, few people are aware of their fourth amendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear."); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2002) ("Although courts pay lip service to the requirement that a person's consent to a search must be 'the product of a person's free will and unconstrained choice' in order to be valid, in reality that requirement means very little.")

²⁵⁸ See Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 248 (1991) (describing the Court's refusal to acknowledge "the reality that exists on the street" and the role that race plays in shaping citizens' "reasonable expectation" that they can refuse a police officer's demands); see also Jonathan S. Carter, *You're Only as "Free to Leave" as You Feel: Police Encounters with Juveniles and the Trouble with Differential Standards for Investigatory Stops Under In Re I.R.T.*, 88 N.C. L. REV. 1389, 1389–90 (2010) ("Tempting as it may be to view an individual's response to the police as a function of their respective guilt or innocence, factors such as race, geographic location, immigration status, and age may influence the most upright citizen to react nervously to law enforcement.") (citations omitted); David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 61–64 (2009) (providing empirical evidence that people generally do not feel free to end their encounters with the police).

²⁵⁹ 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013), *appeal dismissed sub nom.* *Ligon v. City of New York*, 736 F.3d 231 (2d Cir. 2013).

threshold,²⁶⁰ it did cast a spotlight on street level interactions that occur between the police and private citizens. The *Floyd* decision subsequently became an important theme in the New York Mayoral election, where the eventual winner, Bill De Blasio, pledged to eliminate stop and frisk tactics that rely on racial profiling.²⁶¹

Although proposals prompted by *Floyd* have been restricted to preventing improper racial profiling,²⁶² the case demonstrates that the courts can effectively prod elected officials to openly debate and regulate problematic police activity. Unfortunately, *Floyd*, like *Terry* and its progeny, focused on police activity involving forcible detention. Courts and legislatures have continued largely to ignore “consensual” police encounters.²⁶³

Courts can, however, prompt a legislative debate on the propriety of these low-level encounters without imposing rigid constitutional limitations that would stifle democratic discourse. Based on the Uniform Arrest Act of 1941,²⁶⁴ a number of states have adopted statutes that authorize the police to stop suspects under certain specified conditions.²⁶⁵ By finding that these statutes impliedly preempt the police from questioning individuals when those conditions are *not* satisfied, the courts can prod legislatures to wrestle with the difficult question of how the police should interact with the public during casual street encounters.

Ironically, some courts have presumed that state statutes authorizing the police to stop individuals were an attempt to codify the Supreme Court’s 1968

²⁶⁰ See *Terry*, 392 U.S. at 27 (holding that to stop and detain a suspect officer must have reasonable suspicion that the suspect has committed, is committing, or is about to commit a crime).

²⁶¹ On January 30, 2014, Mayor De Blasio made good on his pledge and announced that he would adopt a variety of the reforms suggested by Judge Scheindlin in *Floyd*, including the appointment of a federal monitor and changes to the police department’s “policies, training, supervision, monitoring and discipline regarding stop and frisk.” See Benjamin Wesier, *Mayor Says City Will Settle Suits on Frisk Tactics*, N.Y. TIMES, Jan. 30, 2014, at A1.

²⁶² *Id.*

²⁶³ There remain notable exceptions. See, e.g., *De Bour*, 352 N.E.2d at 566 (holding state constitutional grounds to regulate police encounters below the *Terry* threshold).

²⁶⁴ Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343–44 (1942) (quoting the act and discussing its provisions). The actual title of the Act is An Act Concerning Arrests by Peace Officers, Providing for the Questioning and Detention of Suspects, Searching Suspects for Weapons, the Force Permissible in Making and Resisting Arrest, Arrests without a Warrant, the Use of Summons instead of Arrest, the Release and Detention of Persons Arrested and the Identification of Witnesses, Prescribing Penalties, and Making Uniform the Law Relating Thereto. *Id.*

²⁶⁵ See, e.g., ALA. CODE § 15-5-30 (2014); COLO. REV. STAT. § 16-3-103 (2014); DEL. CODE ANN. tit 11, § 1902 (2014); FLA. STAT. § 901.151 (2014); 725 ILL. COMP. STAT. 5/107-14 (2014); KAN. STAT. ANN. § 22-2402 (2014); LA. CODE CRIM. PROC. ANN. art. 215.1 (West 2013); MO. REV. STAT. § 84.710 (2014); MONT. CODE ANN. § 46-5-401 (2013); NEB. REV. STAT. § 29-829 (2013); NEV. REV. STAT. § 171.123 (2013); N.H. REV. STAT. ANN. § 594:2 (2014); N.Y. CRIM. PROC. LAW § 140.50 (McKinney, 2014); N.D. CENT. CODE § 29-29-21 (2013); OR. REV. STAT. § 131.615 (2014); R.I. GEN. LAWS § 12-7-1 (2013); UTAH CODE ANN. § 77-7-15 (West 2013); WIS. STAT. § 968.24 (2013).

decision in *Terry v. Ohio*.²⁶⁶ In fact, the statutes substantially predate *Terry*, and the Uniform Arrest Act, on which the majority of the state statutes are based, was enacted partly in response to the recognition that “the great majority of arrests by police officers [were] illegal” and that “the violation of the law by police officers sets a bad example for ordinary citizens and arouses hostility toward the police.”²⁶⁷ It is, therefore, reasonable for courts to interpret these statutes as setting boundaries on police activity rather than simply authorizing the police to do anything that is not otherwise barred by the Fourth Amendment.

Although the language of the many state laws authorizing the police to stop private citizens tends to mirror the Uniform Arrest Act closely, the statutes do not use precisely the same language.²⁶⁸ In general, each state explicitly authorizes the police to stop and question suspects when an officer has a “reasonable suspicion” that the person is committing or has committed a crime.²⁶⁹ Although the statutes do not explicitly prohibit any specific police conduct, they suggest an obvious corollary—that the legislature believed there is activity that the police *cannot* do absent reasonable suspicion. The only question is the extent to which the prohibited conduct extends to police encounters that the Supreme Court has determined to be “consensual” and, therefore, outside the scope of the Fourth Amendment.

Like a decision finding that statewide DNA database legislation bars the police from maintaining rogue DNA databases, a determination that legislatures preempt the police from using casual street encounters to form a basis for more intrusive police detentions would likely prompt elected officials to take up the heretofore ignored issue of what the proper boundaries of police behav-

²⁶⁶ See, e.g., *State v. Rollins*, 922 A.2d 379, 383 (Del. 2007) (determining that Delaware stop and frisk statute was intended to codify the *Terry* principles). In fact, Delaware adopted the statute based on the Uniform Act in 1951. See *State v. Deputy*, 433 A.2d 1040, 1042 (Del. 1981) (describing the history of § 1902); Charles B. Vincent, *An Analysis of the Shift-in-Purpose Approach to Fourth Amendment Jurisprudence in Delaware*, 13 DEL. L. REV. 95, 101 (2012).

²⁶⁷ See Warner, *supra* note 264, at 315–16. Sam Warner was the reporter for the Interstate Commission on Crime which drafted the Uniform Arrest Act. In addition to the concern that illegal police activity “aroused hostility” towards the police, Professor Warner believed that the law at the time unrealistically limited what the police could lawfully do to preserve their safety and protect the public. See *id.*

²⁶⁸ Compare, e.g., ALA. CODE § 15-5-30 ([An officer] may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or other public offense and may demand of him his name, address and an explanation of his actions”), and FLA. STAT. § 901.151 (“Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicated that such person has committed, is committing, or is about to commit a violation of the criminal laws . . . the officer may temporarily detain such person . . .”), with Warner, *supra* note 264, at 328–30 (providing the full text of the Uniform Arrest Act).

²⁶⁹ See, e.g., ALA. CODE § 15-5-30 (2014); NEV. REV. STAT. § 171.123 (2013); N.D. CENT. CODE § 29-29-21 (2013); UTAH CODE ANN. § 77-7-15 (West 2013); WIS. STAT. § 968.24 (2013).

ior should be. Considering the politics of crime and the need for the police to engage the public, it is hard to imagine that the legislature would not ultimately authorize the police to perform many of the activities that the courts have left unregulated. By finding that state statutes preempt this otherwise entirely unregulated activity, however, courts can promote a vigorous debate in state legislatures not simply on the boundaries of legal police behavior but how the police ought to act. Moreover, by explicitly authorizing the police to initiate casual street encounters, the legislature can better educate the public about their rights to terminate such interactions. At the same time, the legislature can legitimize those tactics that it wants the police to rely upon to fight crime and ensure public safety.

Unfortunately, finding that state laws preempt police authority in low level street encounters may be more difficult than finding that statewide DNA database legislation preempts the ability of police to establish their own databases. Although the actions of the police, like any other municipal actor, must be traced to an affirmative delegation of power from the state,²⁷⁰ the nature of that delegation varies from state to state. Municipalities with home rule charters based on legislative home rule are presumed to have been delegated broad authority to take actions that the state legislature has not proactively reserved for itself.²⁷¹ This substantial delegation of power comes at a price—the legislature retains the unilateral right to withdraw that authority through legislative action.²⁷² As a result, there is no question that, in legislative home rule states, statutes can preempt police activities, including activities of an arguably local nature such as how the police interact with citizens on the streets.

The issue is somewhat murkier for municipalities with *imperium in imperio* home rule. *Imperio* municipalities theoretically have complete control over purely local affairs.²⁷³ Thus, the degree to which low level police street encounters are considered “local” may affect the degree to which a state statute can preempt this local authority. Although courts have generally found that law enforcement and crime suppression is of “state-wide concern,”²⁷⁴ the specific behavior of the police in the streets is likely more “local” than a police department’s DNA database that might contain a genetic profile for citizens who have never entered the municipality’s jurisdiction. That said, local residents are

²⁷⁰ See *supra* note 24 and accompanying text.

²⁷¹ See *supra* note 111–121 and accompanying text.

²⁷² See *supra* notes 95–101 and accompanying text.

²⁷³ See Briffault, *supra* note 105, at 10 (“The original form of home rule amendment treated the home rule municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference.”); Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 112 (2005) (“In an *imperio* state, municipalities have power over local affairs.”).

²⁷⁴ See *supra* note 120 and accompanying text.

not the only people who have casual encounters with the police. Indeed, the police may be more likely to stop a stranger passing through town than a local resident. As a result, courts may have a sound basis to find that state laws preempt the police's ability to conduct casual or consensual stops even in municipalities that have *imperium in imperio* home rule.

CONCLUSION

Using state law to preempt troubling police practices is not a panacea. The endemic challenges to policing—the need to balance civil liberties against public safety; the need to endow police with sufficient discretion that they can protect themselves and the community in a wide range of factual scenarios while ensuring that they are not a law unto themselves—are not easily resolved. Moreover, the very reason that courts might comfortably assert that the legislature intended to limit local law enforcement authority is a presumption that the police have a disproportionately strong influence at the state level. Given this political imbalance, one might expect that policies ultimately emerging from the political process will strongly favor the police over the interests of those communities with weaker political voices.

Preemption nonetheless offers an opportunity to develop rules in areas that are currently lawless. Police practices that occur outside the boundaries of the law weaken the perceived legitimacy of law enforcement and diminish the public's respect for the law.²⁷⁵ Moreover, when prompted to act, legislatures have not always favored unbridled police discretion. States that have authorized the police to assemble libraries of their citizens' DNA, for example, have included various protections that expressly limit how law enforcement can use those databases.²⁷⁶

Finally, even if the ultimate legislative response does not substantially curb police discretion, intrastate preemption has the potential to stimulate a "vigorous debate"²⁷⁷ over questionable police practices. By prodding the legislature to either limit or affirmatively sanction police conduct, courts can help ensure that the interests of the disenfranchised are at least debated in a public forum.²⁷⁸ Such a strategy can ultimately promote greater legitimacy for the police, stronger protections for the community, and a more effective functioning democracy.

²⁷⁵ Luna, *supra* note 21, at 1119 (explaining that the "undemocratic opaqueness in law enforcement discretion [is] irreconcilable with democratic theory [and] generates distrust of law enforcement and disrespect towards the legal system").

²⁷⁶ See, e.g., MD. CODE ANN, PUB. SAFETY § 2-506(d) (West 2009) (barring the police from conducting familial searches with the statewide database).

²⁷⁷ See *supra* note 143 and accompanying text.

²⁷⁸ See Ewing & Kysar, *supra* note 206, at 354.

