UNCONSTITUTIONAL POLICE PRETEXTS

NADIA BANTEKA*

This Article unearths the pernicious effects of pretextual policing on civil rights and democratic principles. The Fourth Amendment's pretext doctrine has faced widespread criticism for enabling police to shield the real reasons for searches and seizures from constitutional scrutiny. In its ruling on *Whren v. United States*, the Supreme Court established that police actions, not their motivations, are the relevant factor in determining the constitutionality of searches and seizures. As a result, police can use ostensibly legal justifications as a cover for unconstitutional conduct. This Article breaks new ground by arguing that pretextual policing extends beyond searches and seizures. It reveals a broader alarming phenomenon in which police use existing laws as a pretext to avoid accountability and expand the state's carceral power.

Drawing on surveys of police departments and judicial decisions, this Article traces how the police deploy pretext in new and different contexts to justify actions that would otherwise be unconstitutional. It proffers case studies from three distinct law enforcement practices to illustrate this trend. The first study exposes that police pretextually claim crime victim status under laws that protect the confidentiality of victims' identities to shield themselves from public accountability for misconduct. The second case study reveals police exploiting juvenile privacy laws to extend privacy protections to officers, thereby evading accountability and curtailing minors' due process rights. A third case study shows how the police abuse their authority by manipulating criminal statutes intended to protect pregnant people by instead criminalizing their conduct.

This Article thus brings to light new constitutional concerns with pretextual policing and calls for a reexamination of its constitutionality beyond the Fourth Amendment. It highlights how the expansion of pretext imperils civil rights and democratic principles, including separation of powers. By exploiting the constitutional irrelevance of pretextual motivations, police undermine free speech, access to information, and due process rights that empower individuals to scrutinize and hold state actors accountable. Ultimately, this Article raises the stakes of an already controversial doctrine

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* Gary & Sallyn Pajcic Professor, Florida State University College of Law. I thank Todd Aagaard, Aliza Bloom, Michelle Dempsey, Jacob Eisler, Hillary Farber, Miguel de Figueiredo, Brett Frischmann, Frank Gevurtz, John Kirlin, Wayne Logan, Brian Landsberg, Erika Nyborg-Burch, Teri Ravenell, Itay Ravid, Alexander Tsesis, and Mike Vitiello for their insightful feedback. Thank you also to the participants of the University of Florida Levin College of Law, Florida State University College of Law, Villanova University Charles Widger School of Law, and University of the Pacific McGeorge School of Law faculty workshops for your helpful comments. Finally, I am especially grateful to Abigail Palmquist, Joshua Jendian, and Madison Sykes for their excellent and invaluable research assistance. All remaining errors are my own.

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and cautions that its continued expansion will further erode civil rights and police accountability.

INTRODUCTION

The Fourth Amendment pretextual searches and seizures doctrine is just as contentious as it is ubiquitous. When the Supreme Court in *Whren*

v. United States[1] held that pretextual traffic stops do not violate the Fourth Amendment, the Court made the reasonableness of the stop contingent only on the police officer's actions rather than the motivations driving these actions.[2] Rendering officer motivation constitutionally irrelevant and thus removing the real reasons for police searches and seizures from constitutional scrutiny engendered a swarm of criticism that condemned the decision's many vices. These critics have emphasized the pervasive and overreaching effects of condoning pretexts in policing.[3] They decry the unbounded discretion pretexts give officers,[4] as well as the disproportionate enforcement against people of color.[5] They protest

1. 517 U.S. 806 (1996).

2. *Id.* at 811–13.

3. *See, e.g.*, Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 222–23 (1989) (explaining how police discretion to arrest for traffic violations allows pretextual stops and arrests of almost anyone); Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 307 (2016) (arguing that Fourth Amendment doctrine should limit police enforcement undertaken "for reasons of power, money, or dogma"); Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1077–78 (2007) (arguing that pretextual searches are problematic because they give the police too much power). There are some scholars who have defended the Court's decision. *See, e.g.*, Margaret M. Lawton, *The Road to* Whren *and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 957–58 (2008) (advocating for the use of the "could have" test endorsed in *Whren*); Celia Guzaldo Gamrath & Iain D. Johnston, *The Law of Pretext Stops Since* Whren v United States, 85 ILL. BAR J. 488, 488 (1997) (arguing for Illinois's adoption of the *Whren* test and against legislation seeking to ban pretextual stops).

4. *See* Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1442–43 (2000); Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 648 (2019); Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1033 (1996); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 29 (2011).

5. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 644–45 (2021); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 894, 941 (2015); Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling after* Whren v. United States*: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 726–27 (2000); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997); Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 597 (1999).

the abdication of courts' duty to protect individual rights.[6] And they emphasize that police hiding the real reasons for their actions leads to more community distrust and undermines the rule of law.[7] At least six justices of the unanimous *Whren* Court have since voiced concern with the Court's decision to ignore police officers' motivations in assessing the constitutionality of government action.[8] Yet, for the most part, these critiques have not altered how the Court articulates the doctrine or how states and localities implement it in policing.

Baked into these critiques is an assumption that pretextual police motivations are unique to Fourth Amendment searches and seizures. This Article challenges that assumption. It shows that pretextual policing is, in fact, part of a broader shift in police use of objective legal justifications to further otherwise unconstitutional ends: a shift that began within the Fourth Amendment and has continued beyond it. Drawing on judicial opinions and surveys among police departments, this Article is the first to trace the proliferation of police pretexts—from their origin in police investigations to their infiltration into other constitutional doctrines. This Article argues that the Court's ruling in *Whren* sent a message to law enforcement that the Court is only interested in officers following the letter of the law—not how and why law enforcement interprets and applies the law.[9] The Court has allowed police to act pretextually without concern for repercussions by making it apparent that officer pretextual objectives are not relevant to determining the constitutionality of police conduct, let alone deterrent worthy. This has caused pretextual policing to spill over from the context of searches and seizures into multiple other areas of law enforcement practices.

These effects were not limited to individual officers: police departments also began to act pretextually as a matter of policy.[10]

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6. *See* Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1624 (2019).

7. *See* Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RSRV. L. REV. 931 (2016).

8. *See District of Columbia v. Wesby*, 583 U.S. 48, 70 (2018) (Ginsburg, J., concurring); *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting); *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) Justices Stevens, Ginsburg, and Breyer also signed onto this dissent. *Id. See also United States v. Knights*, 534 U.S. 112, 122–23 (2001) (Souter, J., concurring).

9. *Whren v. United States*, 517 U.S. 806, 811–13 (1996).

10. *See, e.g.*, CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 36, 45 (2014) (observing that police departments across the country trained officers to use pretextual justifications for investigatory stops); Kathryne M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1324–25 (2016) (reviewing EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra*); CHARLES REMSBERG, TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS,

Condoning individual officers' use of pretext in one area affected how entire departments represented officers and their actions to the public. The pretext evolved from a single officer misrepresenting their purpose to the broader structures of entire departments misrepresenting theirs and their officers' motivations and actions.

This trend first emerged in the realm of criminal investigations, where courts followed the rule that officer conduct is constitutional insofar as it is objectively reasonable despite subjective motivations.[11] Because the appropriate measure of reasonableness does not hinge on what an officer thinks, but only on what an officer does, courts have not meaningfully evaluated why police act as they do.[12] Courts have thus given law enforcement officers the freedom to act pretextually, finding objectively lawful reasons for actions that were in fact illegitimately motivated. This phenomenon has since spilled into other areas of constitutional doctrine and statutory interpretation, undercutting other constitutional and statutory rights beyond the Fourth Amendment.[13]

This Article identifies three areas that reveal the unexpected breadth and impact of this troublesome phenomenon. First, in the context of victims' rights laws, officers and departments have claimed crime victim status pretextually to shield on-duty officers from public accountability for misconduct. While these laws were meant to enhance victims of crime rights, police pretextually invoke their provisions to withhold critical information about misconduct from the public, press, and victims of misconduct.[14] This policy impairs the ability of the public, press, and potential individual plaintiffs to access the information necessary to scrutinize government actions or hold governmental actors accountable, including by establishing grounds for legal redress. This Article demonstrates how the pretextual use of these laws contravenes First Amendment and common law rights to access this information, as well as similar state constitutional and statutory rights.[15] Second, police officers and departments pretextually invoke juvenile privacy laws intended to protect minors in criminal proceedings to delay or escape accountability for officer misconduct and intensify prosecution of these

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DRUG DISCOVERY AND OFFICER SURVIVAL 36–37 (1995) (advising officers to follow steps in investigatory stops, including first developing suspicion or curiosity about a driver and then identifying some legal justification to then justify the traffic stop).

11. *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) ("[T]he issue is not his state of mind, but the objective effect of his actions.").

12. *See* Daniel B. Yeager, *The Stubbornness of Pretexts*, 40 SAN DIEGO L. REV. 611, 628 (2003); Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 474–77 (2021).

13. *See infra* Part III.

14. *See infra* Part II.

15. *See infra* Part III.

minors.[16] This Article shows how this policy infringes on individual defendants' First and Fourteenth Amendment rights of access to courts and due process, and raises separation of powers concerns.[17] Third, law enforcement has pretextually used fetal homicide and child endangerment laws originally intended to protect pregnant people and children in order to arrest pregnant people for their conduct while pregnant.[18] This Article establishes how this policy raises issues of unconstitutionally vague criminal statutes as well as separation of powers.[19]

Identifying this phenomenon of law enforcement's more widespread use of pretexts carries significant benefits. It forces us to look beyond traffic stops and the Fourth Amendment by compelling us to reevaluate the reach of judicial reasoning in police practices. By aiming to ensure an objective basis for police reasonableness in the Fourth Amendment, judicial disregard for police motivations has weakened constitutional scrutiny of police enforcement tactics beyond searches and seizures.[20] This raises intrinsic due process concerns about the legitimacy of judicial rules regulating the police. It also presents a challenge for democratic principles. By abusing the constitutional irrelevance of pretextual motivations, officers and departments have undercut constitutional rights necessary for individuals to adequately scrutinize and hold police accountable,[21] adding to an environment where police are effectively unchecked.[22] Finally, this phenomenon illustrates the profound interconnectivity of the legal process: the seemingly discrete sphere of constitutional criminal procedure influenced the development and enforcement of legal rules in other areas of federal and state constitutional and statutory law, not only through its doctrinal content but also through its inadvertent policy effects.

This Article explains and elaborates on this thesis in three parts. Part I critically reviews the development of the Court's doctrine regarding police officers' motivations and pretexts that ultimately rendered them constitutionally irrelevant. Part II argues that ignoring pretext in Fourth Amendment law has had a much broader yet unidentified impact on policing. It suggests that police officers and

16. *See infra* Section II.C.

17. *See infra* Part III.

18. *See infra* Section II.D.

19. *See infra* Sections III.C–D.

20. *See infra* Part III.

21. *See infra* Section III.A.1.

22. *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120, 1131 (2000); Eric Citron, *Police Pretext as a Democracy Problem*, YALE L.J.F. (Apr. 30, 2007), https://www.yalelawjournal.org/forum/police-pretext-as-a-democracy-problem [https://perma.cc/VK24-J63V].

departments have taken advantage of the Court's permission in *Whren* and deployed pretext in new and different contexts to justify otherwise illegitimate ends. It illustrates this proposition in three examples from different law enforcement practices suggesting that police have abused victim rights laws, juvenile privacy laws, and criminal laws enforced against pregnant people. Finally, Part III examines the constitutional, statutory, and common law repercussions of police officers' and departments' expansive use of pretexts beyond searches and seizures. Ultimately, this Article demonstrates that the broader impact of police pretexts both heightens existing criticisms of an already controversial doctrine and brings to the fore new concerns that may further erode civil rights and police accountability.

I. THE CONSTITUTIONALITY OF POLICE PRETEXTS

The Fourth Amendment protects individuals from unreasonable searches and seizures by the government.[23] The Court has consistently emphasized the importance of reasonableness in the Fourth Amendment as a measure of both the permissibility of government intrusion and its scope.[24] Courts examine the totality of circumstances of a search or seizure to determine if it is reasonable and thus constitutional, including factors such as the degree of government intrusion and the manner in which officers conduct a search or seizure.[25] In recent decades, the Court's understanding of what constitutes reasonable governmental conduct has shifted. This Part tracks the development of this doctrine particularly regarding police officers' motivations for action and pretexts. It also underscores the heavy impacts that the Court's decision to render police motivations constitutionally irrelevant has had on policing.

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23. U.S. CONST. amend. IV.

24. *United States v. Knights*, 534 U.S. 112, 118 (2001) (reaffirming reasonableness as the touchstone of the Fourth Amendment); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (same); *Illinois v. Rodriguez*, 497 U.S. 177, 184–86 (1990) (discussing reasonableness required by the Fourth Amendment in each stage of a search and seizure); *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985) (noting that reasonableness is the "fundamental command" of the Fourth Amendment).

25. *See Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020) (noting that the Fourth Amendment analysis requires a view of totality of the circumstances); *Samson v. California*, 547 U.S. 843, 848 (2006) (discussing the balancing of the "individual's privacy" with "legitimate governmental interests" (quoting *Knights*, 534 U.S. at 118–19)).

A. The Origins of Police Pretext

Before the Court's decision in *Terry v. Ohio*,[26] an officer's search or seizure was only reasonable if the officer had a warrant or probable cause, unless the case came within a narrow exception to that rule.[27] In *Terry*, the Court expanded the circumstances in which officers could lawfully stop and search someone.[28] The Court held that, to perform a stop, officers only need reasonable suspicion that they would encounter evidence of a crime that had been or would be committed. And, to perform a search, officers only need reasonable suspicion that the person may be armed.[29] The Court thus changed the requisite standard to justify certain police conduct from probable cause to reasonable suspicion. Soon after, the Court also began to crystallize its approach towards the role of an officer's subjective intentionality in evaluating the reasonableness of officer action.

The Court's approach to officer intentionality goes hand in hand with the issue of pretextual officer motivation. Beginning with *United States v. Lefkowitz*,[30] the Court started scrutinizing certain kinds of officer action that it classified as pretextual.[31] In *Lefkowitz*, the Court held that an arrest could not be used "as a pretext to search for evidence."[32] Although the Court never explicitly held that pretextual searches or seizures were unconstitutional, at times the Court justified its approval of certain police conduct by noting that the searches were not pretextual,[33] or that, if they were pretextual, the Court would have considered the matter differently.[34] Thus, for many decades the Court

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26. 392 U.S. 1 (1968).

27. *Id.* at 20. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 356–57 (1967); *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

28. *Terry*, 392 U.S. at 20.

29. *Id.* at 30–31.

30. 285 U.S. 452 (1932).

31. *Id.* at 467.

32. *Id.*

33. *Colorado v. Bannister*, 449 U.S. 1, 4 n.4 (1980) (per curiam) ("There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants."). The *Whren* Court later described this language on pretext as dictum, perhaps unable to distinguish *Bannister* from other stops and searches where pretext mattered. *See Whren v. United States*, 517 U.S. 806, 812 (1996).

34. *Abel v. United States*, 362 U.S. 217, 226–30 (1960) (noting that if evidence showed administrative search warrant had been used for illegitimate purposes, the court would have considered the matter differently). In dissent, Justices Douglas and Brennan stressed that the Court must actively prohibit officers from evading the requirements of

considered it constitutionally suspect for police officers to use pretextual justifications to investigate one violation as a means to find evidence of another violation.[35]

However, in *Scott v. United States*,[36] the Court set out a test to evaluate the reasonableness of officer action that undercut suggestions that pretextual justifications were unconstitutional.[37] The Court held that an objective test must be used to assess whether an officer's conduct was reasonable,[38] rejecting any consideration of an officer's subjective intent when deciding to carry out a search or seizure.[39] In *Scott*, federal agents wiretapped the defendant's phone because they suspected others were using it as part of a conspiracy to import and distribute narcotics.[40] The agents did not attempt to minimize their interception of her calls even though they were obliged to by statute.[41] When the defendant moved to suppress the evidence collected, alleging the officers had violated her Fourth Amendment rights, the Court agreed with the government's argument that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[42]

Scott's reasoning influenced the Court's later decisions when officer intent was at issue. For example, in *United States v. Villamonte-Marquez*,[43] the Court cited *Scott* when it refused to consider not only the officers' subjective intent, but also objective manifestations of law enforcement intent.[44] Federal customs agents boarded a ship with the professed purpose of inspecting its documents and, once onboard, found

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the Fourth Amendment through pretext. *See id.* at 247 (Douglas, J., dissenting); *id.* at 253–54 (Brennan, J., dissenting).

35. *United States v. Botero-Ospina*, 71 F.3d 783, 792 (10th Cir. 1995) (Seymour, C.J., dissenting). *See* Leary & Williams, *supra* note 4, at 1011; Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 7–8 (1991).

36. 436 U.S. 128 (1978).

37. *Id.* at 136–38 (confirming that officer state of mind does not invalidate action if the circumstances objectively justify that action). *See also Gustafson v. Florida*, 414 U.S. 260, 266 (1973).

38. *Scott*, 436 U.S. at 137–38.

39. *See* John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 MICH. J.L. REFORM 523, 525 (1984) [hereinafter Burkoff, *Pretext*]; John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 72–84 (1982) [hereinafter Burkoff, *Bad Faith*].

40. *Scott*, 436 U.S. at 131.

41. *Id.* at 130–31.

42. *Id.* at 135–36.

43. 462 U.S. 579 (1983).

44. *Id.* at 583–84, 584 n.3. *See* Burkoff, *Pretext*, *supra* note 39, at 531–32.

marijuana.[45] The defendants alleged the customs officers' reason for the search was a pretext to mask their real goal of conducting a criminal narcotics investigation.[46] The defendants pointed to objective circumstances they believed established pretext rather than trying to infer the officer's state of mind. For instance, the agents had received a tip about marijuana on ships in the area the night before the search.[47] Refusing to consider the alleged objective evidence of pretext, the Court reiterated that *Scott* rejected this line or reasoning and held that the search in question was reasonable.[48] The decisions in *Scott* and *Villamonte-Marquez* made evident the Court's reticence to consider officers' true motives in carrying out a search or seizure when deciding its constitutionality.[49]

During that time, however, not all of the Court's decisions supported the conclusion that the Court was unwilling to look at officers' pretextual motivations under any circumstances. Just months before the Court decided *Villamonte-Marquez*, it took pretextual searches more seriously in *Texas v. Brown*.[50] The Court upheld the warrantless search of a vehicle at a roadblock, which had resulted in the discovery of a heroin-filled balloon.[51] The Court reasoned that the officers' discovery of the drugs in plain view was constitutional because it was inadvertent and because no evidence pointed to the roadblock being a pretext for other law enforcement purposes.[52]

Brown illustrates the contexts in which the Court developed its doctrine on unconstitutional police pretexts: special needs[53] and inventory searches and seizures.[54] Where the government can conduct a search without a warrant or probable cause to advance important governmental interests outside of ordinary law enforcement, courts examine the subjective motivation of the government—often stated as the programmatic purpose—to assess whether the search or seizure was

45. *Villamonte-Marquez*, 462 U.S. at 583.

46. *See id.* at 584 n.3; Burkoff, *Pretext*, *supra* note 39, at 531.

47. *Villamonte-Marquez*, 462 U.S. at 584 n.3; Brief for the Respondents at 9–10, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (No. 81-1350). *See also* Burkoff, *Pretext*, *supra* note 39, at 531.

48. *Villamonte-Marquez*, 462 U.S. at 593; *Scott v. United States*, 436 U.S. 128, 135–39 (1978).

49. *See* Burkoff, *Pretext*, *supra* note 39, at 523–24.

50. 460 U.S. 730 (1983).

51. *Id.* at 743–44.

52. *Id.*

53. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10 (6th ed. 2020) (analyzing the special needs doctrine in different contexts).

54. 3 *id.* § 7.4(a) (analyzing inventory search doctrine).

undertaken pretextually.[55] Similarly, the Court has held inventory searches constitutional only where that impounding of property is not a pretext for law enforcement purposes.[56] The Court, however, has never fully explained why subjective motivations and pretext matter only for special needs inspections and inventories and not generally for searches and seizures. In fact, Orin Kerr recently argued that the Court's Fourth Amendment doctrine is "sprinkled throughout" with subjective intentionality of officers, making the Court's claim about relying on an objective standard of reasonableness in all other searches and seizures much weaker.[57]

For the most part, circuit courts upheld searches and seizures insofar as officer conduct in a search or seizure was objectively reasonable. This reasoning has been particularly common in the context of traffic stops.[58] However, the Ninth and Eleventh Circuits had departed from this trend, holding that, when individuals allege that they have been stopped pretextually, the correct inquiry is "whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose."[59] The Tenth Circuit initially adopted a similar test to this, but struck it down a few years later after concluding it was inconsistent and unworkable.[60]

The Court addressed this circuit split in *Whren v. United States*. Plainclothes officers in an unmarked vehicle were suspicious of and stopped a car in a "high drug area" because it had temporary license plates, young occupants, stopped at an intersection for more than twenty seconds, turned right without signaling, and sped off.[61] When the officers stopped the car and approached the window, one officer reported seeing

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55. *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–47 (2000). *See generally* Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65 (2017).

56. *See South Dakota v. Opperman*, 428 U.S. 364, 372–76 (1976) (stating that officers who discovered narcotics during the inventory search of a car did not act pretextually). An inventory search allows police to search property they have impounded to create a record of the contents involved.

57. Kerr, *supra* note 12, at 449, 451–66.

58. *See, e.g.*, *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991); *United States v. Scopo*, 19 F.3d 777, 782–84 (2d Cir. 1994); *United States v. Johnson*, 63 F.3d 242, 245–47 (3d Cir. 1995); *United States v. Jeffus*, 22 F.3d 554, 556–57 (4th Cir. 1994); *United States v. Causey*, 834 F.2d 1179, 1184–85 (5th Cir. 1987); *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993); *United States v. Trigg*, 925 F.2d 1064, 1065–66 (7th Cir. 1991); *United States v. Meyers*, 990 F.2d 1083, 1085 (8th Cir. 1993).

59. *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986) (emphasis omitted); *United States v. Cannon*, 29 F.3d 472, 474–76 (9th Cir. 1994).

60. *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995).

61. *Whren v. United States*, 517 U.S. 806, 808 (1996).

two bags of crack cocaine in one of the occupant's hands.[62] The occupants were arrested and other controlled substances were found in the car.[63]

The petitioners argued that the stop was unconstitutional because it was a pretext for a narcotics search.[64] They argued that cars are so heavily regulated that total compliance with all traffic laws is impossible.[65] As a result, officers can use any minor traffic violation as a basis for stopping motorists to pursue a different investigatory agenda.[66] The Court disagreed and held that officer subjective motivations play no role in determining whether a stop is reasonable under the Fourth Amendment, as long as the officer has requisite cause to believe a traffic violation has occurred.[67] Thus, under *Whren*, the appropriate measure of reasonableness does not hinge on what an officer thinks or why they act, but instead on whether the circumstances meet an objective standard for cause.[68] After the Court's recent decision in *Heien v. North Carolina*,[69] this objective standard for cause now includes instances where officers make reasonable mistakes about the relevant law that would otherwise provide them with requisite cause.[70]

In the wake of *Whren*, most states adopted the Court's approach, even when existing state law provided otherwise.[71] Washington and New Mexico are two notable exceptions of states that interpreted their state constitutions to prohibit pretextual stops.[72] More recently, and in recognition of the endemic issues of *Whren*, several states and cities have also limited police authority to carry out investigative stops by creating stricter procedural rules aimed at minimizing the use of pretextual

62. *Id.* at 808–09.

63. *Id.* at 809.

64. *Id.*

65. *Id.* at 810.

66. *Id.* at 811.

67. *Id.* at 813.

68. *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000).

69. 574 U.S. 54 (2014).

70. *See id.* at 68. *See generally* Nadia Banteka, *Police Ignorance and (Un)Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365 (2022).

71. Margaret M. Lawton, *State Responses to the* Whren *Decision*, 66 CASE W. RSRV. L. REV. 1039, 1044 (2016).

72. *See State v. Gonzales*, 257 P.3d 894, 897–99 (N.M. 2011); *State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008), *cert. granted*, 203 P.3d 103 (N.M. 2008); *State v. Ladson*, 979 P.2d 833, 843 (Wash. 1999); *State v. Arreola*, 290 P.3d 983, 986 (Wash. 2012) (en banc). While not resolving the state constitutional question, Alaska courts have defined a stop as pretextual "only if the defendant proves that, because of his ulterior motive, the officer departed from reasonable police practices by making the stop." *Chase v. State*, 243 P.3d 1014, 1019 (Alaska Ct. App. 2010).

motivations.[73] Nevertheless, *Whren* constitutionalized pretexts in Fourth Amendment searches and seizures and largely institutionalized problematic pretextual stops as police practice.[74] *Whren*'s weakness is not only tied to pretext claims in searches and seizures under the Fourth Amendment, but also—and perhaps most importantly—to removing from scrutiny any meaningful evaluation of why the police do what they do.[75]

B. Defining Pretext in Policing

Because the Court never explained what it meant by the term "pretext,"[76] scholars have suggested a variety of definitions to make sense of the concept. A simple definition of pretext is misrepresenting one's purpose for engaging in action.[77] Black's Law Dictionary defines it as a "false or weak reason or motive advanced to hide the actual or strong reason or motive."[78] Labeling the explanation for an action as a "pretext" is a way of identifying that a motive behind this action is

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73. *See, e.g.*, *State v. Arreola-Botello*, 451 P.3d 939, 949 (Or. 2019) (holding that the Oregon Constitution requires officers conducting traffic stops to only ask questions reasonably related to the purpose of the stop); VA. CODE ANN. §§ 46.2-1013(b), -1052(p), -1054(b) (2023) (prohibiting Virginia officers from conducting stops for minor traffic violations); Kevin Rector, *New Limits on 'Pretextual Stops' by LAPD Officers Approved, Riling Police Union*, L.A. TIMES (Mar. 1, 2022, 7:32 PM), https://www.latimes.com/california/story/2022-03-01/new-limits-on-pretextual-stops-by-lapd-to-take-effect-this-summer-after-training [https://perma.cc/3HDL-SF2K] (highlighting Los Angeles's new policy banning pretextual traffic stops unless an officer has "articulable information . . . regarding a serious crime . . . ."); Eleni Balakrishnan, *New SFPD Traffic Policy Would Ban Nine 'Pretext' Stops*, MISSION LOC. (Dec. 2, 2022), https://missionlocal.org/2022/12/sfpd-traffic-policy-to-ban-nine-stops/ [https://perma.cc/CMN2-SCWB] (describing San Francisco's proposed policy to limit officers' ability to conduct traffic stops for certain violations); Letter from Adrian Z. Diaz, Chief of Police, Seattle Police Dep't, to Lisa Judge, Inspector Gen. (Jan. 14, 2022), https://www.seattle.gov/Documents/Departments/OIG/Other/Letter%20to%20Inspector%20General%20Lisa%20Judge%20-%20Traffic.pdf [https://perma.cc/Y5XR-ZA4U] (explaining how Seattle police will no longer treat minor traffic violations as reasons to engage in a traffic stop); Julia Felton, *Pittsburgh Bans Traffic Stops for Minor Violations*, TRIB. LIVE (Dec. 28, 2021, 8:01 PM), https://triblive.com/local/pittsburgh-bans-traffic-stops-for-minor-violations/ [https://perma.cc/TM3J-QQSG] (describing legislation from Pittsburgh's city council prohibiting officers from initiating traffic stops for minor violations).

74. *See* Woods, *supra* note 4, at 704.

75. *See* Yeager, *supra* note 12, at 628. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 292–93.

76. *See Whren v. United States*, 517 U.S. 806, 812–16 (1996).

77. *See* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 782 (1997).

78. *Pretext*, BLACK'S LAW DICTIONARY (11th ed. 2019).

incompatible with the ordinary or conventional reasons for that action.[79] For example, if a person takes on a caretaking role for their elderly parent to get their siblings written out of the will, we might call this caretaking role a pretext for moneymaking. The reason the sibling cared for their elderly parent (money) is not the conventional reason for doing so (care/love/familial obligation).

Building on these fundamental conceptions of pretext, Edwin Butterfoss argues that the Court's decisions on pretext can be explained by distinguishing "fabricated pretext" from "legal pretext."[80] A fabricated pretext occurs when the government justifies an action with an untrue, legally insufficient reason.[81] Legal pretext, in contrast, occurs when the government justifies an action with an explanation that is not the true reason motivating police activity, but is legally sufficient to justify that action.[82] Legal pretext describes what most scholars and courts mean when they use the term pretext in policing.[83]

Scholars have continued to develop definitions of pretext as it relates to the constitutionality of police action. Some definitions focus explicitly on the constitutionality of the officer's motive, characterizing officer behavior as pretextual when an officer acts on unconstitutional motives but offers a different, constitutional reason to justify their conduct.[84] Others focus more specifically on the discrepancy between the reason the officer provides for their conduct and the actual reason that motivated their conduct.[85] Synthesizing these definitions for the purposes of this Article, pretext in the post-*Whren* context generally means that the police

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79. *See* Yeager, *supra* note 12, at 616; Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 MISS. L.J. 553, 587 (2004); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 74 (1991).

80. Butterfoss, *supra* note 35, at 5–6.

81. *Id.* at 6.

82. *Id.* at 5–6. *See People v. Dickson*, 690 N.Y.S.2d 390, 394 n.2 (Sup. Ct. N.Y. Cnty. 1998) ("In the majority of cases . . . 'pretext' is used when the traffic violation is credited, but was not the primary motive for the stop.").

83. *See* Yeager, *supra* note 12, at 617 ("[The police] perform a lawful act with an improper motive."); Slobogin, *supra* note 77, at 783 ("In all of these situations, the police have the technical legal authority to engage in the act . . . but are dissembling their purpose."); Gamrath & Johnston, *supra* note 3, at 488 ("A pretext stop . . . is an objectively valid stop for an improper reason.").

84. *See* Sekhon, *supra* note 55, at 70 (defining pretextual behavior as "act[ing] on the basis of unconstitutional motives, but later claim[ing] some objective rationale for their conduct").

85. Jeff D. May, Rob Duke & Sean Gueco, *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151, 153 (2013) ("[T]he purported reason for the stop is not the real reason for which the officers are acting.").

in fact act on unconstitutional or otherwise impermissible motives but provide objectively legal reasons to justify their actions.[86]

C. Criticizing Police Pretext

The Court's decision in *Whren* to condone pretextual policing has been met with vigorous and ongoing criticism. One of the main criticisms of the decision is that the Court framed the issue so it could avoid dealing with constitutional questions of pretext by rendering pretext irrelevant to the constitutional inquiry.[87] By asking whether officers can stop someone when they have probable cause to believe that person has violated a traffic law, the Court was able to skirt the issue of pretextual or arbitrary policing in providing its answer.[88] Based on existing precedent, that answer was clearly yes.[89]

Critics contend that the Court should have instead compared the officers' conduct to existing police practice by using a test that asks whether a reasonable officer, given the circumstances, would have made the traffic stop absent the pretext.[90] Some advocate for an exclusionary rule that excludes any evidence collected that is unrelated to the actual reason for a search.[91] Others recognize the merits of the Court's approach and argue instead that rooting out pretext means the police should instead have limited the authority to enforce traffic laws.[92] Finally, a significant

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86. *See* Gamrath & Johnston, *supra* note 3, at 488.

87. *See* Jonathan Witmer-Rich, *Arbitrary Law Enforcement Is Unreasonable:* Whren*'s Failure to Hold Police Accountable for Traffic Enforcement Policies*, 66 CASE W. RSRV. L. REV. 1059, 1062–63 (2016).

88. *Id.*

89. *Id.*

90. *See, e.g.*, *id.* at 1063. Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in* Whren v. United States, 34 AM. CRIM. L. REV. 1193, 1202–04 (1997) (advocating for the application of the "would have" test to *Whren*); David O. Markus, Whren v. United States*: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 102 (1998) (arguing that under the "would have" test, a court could have found pretext because the officers violated policy).

91. *See* Brian J. Foley, *Contraband Immunity: Updating Amsterdam, LaFave, and White's "Use-Exclusion" Proposal to Limit Police Pretext*, 17 BERKELEY J. CRIM. L. 195, 215–17 (2012).

92. *See generally* Salken, *supra* note 3 (arguing the best way to address pretext is to prohibit officers from arresting for ordinary traffic offenses); Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471 (2021) (sketching a framework for enforcing traffic laws that does not involve police); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199 (2007) (arguing that automated technology will make police enforcement of traffic laws unnecessary); Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. 1023, 1030–49 (2023) (describing the modern police abolitionist movement).

concern with *Whren* stems largely from empirical evidence showing that permitting pretextual stops disproportionately leads to more stops of people of color.[93] In turn, several scholars have argued that racially discriminatory policing inflicts severe harm that should be included in the Court's assessment of reasonable government action.[94] Others highlight that condoning pretexts encourages police to lie about the real reasons for their actions which, in turn, builds distrust among communities of color and undermines the rule of law.[95]

Several justices of the *Whren* Court have since expressed their concern with the effects of declaring pretexts constitutionally irrelevant. Dissenting in *Maryland v. Wilson*,[96] Justice Anthony Kennedy was concerned that allowing the police to order a driver and a passenger of a lawfully stopped car to exit when combined with *Whren*'s permission for pretextual investigations would put "tens of millions of passengers at risk of arbitrary control by the police."[97] When the Court expanded *Whren* to permit warrantless arrests for minor offenses—such as seatbelt violations—in *Atwater v. City of Lago Vista*,[98] Justice Sandra Day O'Connor emphasized the great potential for abuse of police's "unbounded discretion," particularly in the context of pretextual racial policing.[99] This risk illustrated how "a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."[100]

Later, in *United States v. Knights*,[101] Justice David Souter, concurring with the finding of the constitutionality of a search, wrote separately that he would "reserve the question whether *Whren*'s holding, that '[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis,' should extend to searches based only upon

93. Rushin & Edwards, *supra* note 5, at 644–45 (explaining that findings are consistent with the hypothesis that *Whren* leads to racial discrimination).

94. *See, e.g.*, Chin & Vernon, *supra* note 5, at 894, 898–99, 919, 941; Abramovsky & Edelstein, *supra* note 5; Harris, *supra* note 5; Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2010–11 (1998); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1065–73 (2010); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 376–79 (1998); Oliver, *supra* note 4, at 1413–14; David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 J. CONST. L. 296, 320–22 (2001).

95. *See* Blanks, *supra* note 7.

96. 519 U.S. 408 (1997).

97. *Id.* at 423 (Kennedy, J., dissenting).

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

99. *Id.* at 372 (O'Connor, J., dissenting).

100. *Id.*

101. 534 U.S. 112 (2001).

reasonable suspicion."[102] Most recently, Justice Ruth Bader Ginsburg, concurring in part with the Court in *D.C. v. Wesby*,[103] doubted whether the Court should continue to "ignore why the police in fact acted" in its assessments of requisite cause.[104] Justice Ginsburg was concerned that the Court has set "the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection."[105] So, she wrote separately to emphasize that she "would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry."[106]

Overall, since a unanimous Court decided *Whren*, numerous scholars and at least six *Whren* Court justices have voiced concern with *Whren*'s directive to ignore police officers' intentions in assessing the constitutionality of police searches and seizures.

II. THE PRETEXT SPILLOVER

The Court's decision in *Whren* is the single decision in which the Court directly addressed the constitutionality of police pretexts.[107] The effects of *Whren* were most prominent in the context of Fourth Amendment searches and seizures.[108] However, ignoring pretext in Fourth Amendment law has had a much broader impact on policing that has not yet been identified. Although subtler and less apparent, this Article argues that the Court's decision in *Whren* has had ramifications in policing practices beyond searches and seizures. By making considerations of pretext constitutionally irrelevant, the police were given the freedom to act pretextually upon illegitimate motives so long as they could identify *any* legal justification for those actions.[109] This permission granted to officers has since been institutionalized in police policy and has undercut other constitutional and statutory rights beyond the Fourth Amendment. This Part identifies this phenomenon first analytically and then as it manifests in three indicative illustrations of unconstitutional police pretexts: first, in relation to victim rights laws; second, in the

102. *Id.* at 122–23 (Souter, J., concurring) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

103. 583 U.S. 48 (2018).

104. *Id.* at 69 (Ginsburg, J., concurring).

105. *Id.* at 70.

106. *Id.*

107. *See Whren v. United States*, 517 U.S. 806, 813 (1996).

108. *See* Rushin & Edwards, *supra* note 5, at 664; Harris, *supra* note 5, at 582.

109. *See* Witmer-Rich, *supra* note 87, at 1062–63.

context of juvenile privacy laws; and third, in enforcing criminal statutes against pregnant people.

A. The Structural Spillover of Police Pretexts

The concept of a structural spillover reflects the interconnectivity of the legal system. It refers to how biases from one legal sphere or structure incidentally influence other areas and structures, setting off a chain of unintended reactions.[110] Anna Lvovsky introduced this concept to encapsulate how courts came to view police as experts and the subsequent effects of this perception on other areas of the judicial process.[111] Lvovsky identifies the beginning of this phenomenon in the structural and procedural changes in police departments during the mid-twentieth century police professionalization movement.[112] The movement specifically targeted the way courts perceived the police. Departments trained officers in courtroom presentations, published scholarship about policing work, and built connections with local legal communities.[113] Courts, in turn, increasingly viewed police officers as experts on policing during judicial hearings evaluating probable cause, reasonable suspicion, or the constitutionality of vague criminal statutes.[114] Courts were receptive to police expertise because of their exposure to police reformers and the ideas driving the professionalization movement in their professional circles and during court proceedings.[115] Thus, the structure of the judicial system and socialization of the judiciary biased judges towards deference to police as experts. This bias, in turn, enabled spillover effects with unforeseen consequences in different and inapposite contexts.[116]

The aftermath of the Court's decision in *Whren* and its unintended effects on disparate parts of the legal system likewise illustrate how the structure and phenomena existing in one legal context can spill over into others.[117] In the context of police pretexts, this Article uses the concept

110. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2066, 2075–76 (2017).

111. *See id.* at 1999–2000.

112. *Id.*

113. *Id.* at 2008–12.

114. *Id.* at 2026–28, 2032–34, 2037–52.

115. *Id.* at 2058–65.

116. *Id.* at 2075–78.

117. Note that this process is distinct to, but overlaps in part with, a similar process described by scholars as "doctrinal borrowing." *See, e.g.*, Jennifer E. Laurin, Essay, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 672–74, 744 (2011). *See also* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

of structural spillover to describe how we arrived at a place where police departments and officers pretextually use certain legal justifications to further illegitimate and unconstitutional ends. Unlike the related phenomenon of police acting deceptively to further their investigative goals,[118] this Article identifies instances where the police use the letter of the law as a means to further an otherwise illegitimate end to illustrate the true extent of the phenomenon of pretextual officer action and its unconstitutionality.

In Lvovsky's paradigm of a structural spillover, the relevant structure was the courts, and the police departments were the external source that set the courts' attitudinal changes into motion.[119] In the phenomenon described in this Article, the roles are flipped. The Court is the external source that enables certain biases and action patterns to flourish inside police departments by signaling that they are neither unconstitutional nor worthy of deterrence. Typically, when the Court finds a police practice unconstitutional and worthy of deterring, it has established a remedy that deters the police from engaging in that action.[120] As a result, police departments can be responsive to the Court's decisions about what behavior is constitutionally permissible.[121] After the Court's decision in *Whren,* police departments received a signal that courts were interested only in officers' adherence to the letter of the law rather than

118. *See, e.g.*, Slobogin, *supra* note 77, at 778–800 (highlighting that many police see fabrication and deception as part of the "art" of policing); Julia Simon-Kerr, *Public Trust and Police Deception*, 11 NE. U. L. REV. 625 (2019) (criticizing the practice of institutionalized dishonesty by police); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994) (arguing that judges accept perjured police testimony because they rely on the facts underlying the officer's finding of probable cause, which officers can fabricate to justify their actions); Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1178–83 (2013) (noting how police frequently lie about obtaining a person's consent for a search or seizure, about the grounds for their probable cause to search or seize, and about their compliance with *Miranda*); Margareth Etienne & Richard McAdams, *Police Deception in Interrogation as a Problem of Procedural Legitimacy*, 51 TEX. TECH L. REV. 21, 25–32 (2021) (detailing the ubiquity of officer deception during interrogations).

119. *See* Lvovsky, *supra* note 110, at 2066.

120. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding the exclusionary rule applies in state court); *United States v. Leon*, 468 U.S. 897, 906 (1984) (holding the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

121. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (arguing the extension of the exclusionary rule would not serve its purpose of deterrence because the professionalism of modern police departments ensures officers are trained to respect citizens' constitutional rights); *Herring v. United States*, 555 U.S. 135, 156 n.6 (2009) (Ginsburg, J., dissenting) ("It has been asserted that police departments have become sufficiently 'professional' that they do not need external deterrence to avoid Fourth Amendment violations.").

why police interpreted and enforced that law.[122] By making clear that officer pretext is not relevant to assessing the constitutionality of police conduct, nor worthy of deterrence, police could act pretextually without fear of consequences.[123]

The signal from *Whren* affirmed an existing structure within police departments where the only standard for permissible action is whether officers can identify any law to which their conduct conforms among the many legal provisions available to them.[124] As the *Whren* petitioners noted, finding a legal provision that any given person has violated is incredibly easy, especially in the context of traffic laws.[125] And courts' increased deference to police and reliance on police expertise in how they interpret and apply these laws further contributed to enabling pretext to abound. Thus, pretextual action, usually in the form of traffic stops, was not only permitted but became standard practice amongst officers and departments.[126] Institutionalizing this permission to deceive, much like institutionalizing police expertise in courts, caused pretextual policing to spill over from the context of searches and seizures into other areas of police department policy and practice.

The effects of the Court's decision in *Whren* were not only limited to individual officers. Police departments also began to act pretextually as a matter of policy.[127] Condoning individual officers' use of pretext in one area, such as searches and seizures, spread into how entire departments conceived of and represented officers to the public. Thus, the pretext morphed from one individual officer misrepresenting their purpose to the larger system of entire departments misrepresenting the purpose of theirs and their officers' actions.

The concept of pretext also requires an underlying motive.[128] When an action is pretextual, a person's motive for acting does not correspond to the conventional motive associated with the action.[129] For example, when an individual officer decides to stop a car because of its occupants' race, but masquerades this reason by saying he stopped the car because he believed it was speeding, the officer's true motive fails to correspond with the proffered justification for the traffic stop. If police departments and officers now act pretextually in other areas beyond searches and seizures, then it follows that the officer and department's actions must be

122. *See Whren v. United States*, 517 U.S. 806, 813 (1996).
123. *See id.*
124. *See id.* at 817–19.
125. *Id.* at 810.
126. *See* REMSBERG, *supra* note 10.
127. *Id.*
128. *See supra* Section I.B.
129. *See* sources cited *supra* note 79.

motivated, at least in part, by unconventional and potentially illegitimate motives. The examples of individual and systemic motives identified in this Article include the goal of shielding officers from accountability, classifying officers as lay people rather than as state agents with attendant responsibilities, and increasing the state's carceral power.

The first motive involves the police's pretextual use of substantive laws to shield themselves from accountability. The example discussed below exemplifies this motive and pretext spillover. In it, officers and departments have claimed victim status pretextually to shield on-duty officers from accountability under laws meant to protect victims' rights.[130] By invoking these victims' rights laws, the police can withhold information about an involved officer, including their identity and conduct, when civilians claim that officers engaged in misconduct.[131] Some departments automatically apply these laws to officers while others allow individual officers to decide whether to invoke them.[132] In both instances, officers and departments can block efforts at accountability that would otherwise come from public and individual awareness of police misconduct.

The second motive this Article identifies involves the police evading constrains on state power by treating officers as individual subjects of the law as opposed to arms of the state. Traditionally, the law treats police as state actors.[133] As a result, officers receive certain privileges that lay people do not, but are also limited by certain restrictions on the state's power.[134] However, because police are increasingly motivated to receive the benefits lay people receive as subjects of the law, departments have devised policies that inadvertently classify officers as subjects of the law in several instances. For example, officers and departments have successfully argued in courts that on-duty police officers qualify as

130. Kenny Jacoby & Ryan Gabrielson, *Marsy's Law Was Meant to Protect Crime Victims. It Now Hides the Identities of Cops Who Use Force.*, USA TODAY, https://www.usatoday.com/in-depth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001/ [https://perma.cc/4KGW-57TV] (Oct. 29, 2020, 11:29 AM).

131. *Id.*

132. Florida Survey of Police Department's Officer Privacy Practices (2020) (unpublished table) (on file with author).

133. *See* Sekhon, *supra* note 55, at 98–101 ("[I]ndividuals are acting in their capacities as state officials, not as natural individuals."). *See also, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that police officers are not considered persons when sued in their official capacity); *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (arguing that state officials take on the identity of the government when acting in their official capacity); *Chamberlain v. Lishansky*, 899 F. Supp. 108, 110 (N.D.N.Y. 1995) ("[P]rotection is extended to 'governmental entities that are considered "arms of the State."'" (quoting *Will*, 491 U.S. at 70)).

134. *See* Sekhon, *supra* note 55, at 101.

individuals who can use "stand your ground" laws to defend against allegations that they used excessive force while conducting an arrest.[135] By pretextually invoking a set of rights afforded to lay people, officers can thus act in ways that would be impermissible for state actors, such as using excessive force, without consequence.

Lastly, another motive for police pretexts is to increase the state's carceral power. Police officers work closely with prosecutors to report crimes, arrest suspects, and discover evidence.[136] This close relationship binds prosecutors' outcomes to officer behavior[137] and as a result, officers have a particular interest in ensuring that prosecutors can prosecute the people they arrest.[138] Because of this mutually enforcing incentive system, officers often act to further the goals of prosecution by pretextually enforcing certain criminal statutes.[139] This Article demonstrates this claim by shedding light on how law enforcement has used statutes criminalizing fetal homicide, child neglect and abuse, and delivering controlled substances to minors—laws originally enacted to protect pregnant people and children—to assist in the prosecution of pregnant people engaging in conduct while pregnant.[140]

The following three Sections address each of these manifestations of police pretexts in more detail, starting first with the spillover of police pretexts into victims' rights laws.

B. The Spillover into Marsy's Laws

A recent wave of state constitutional amendments, informally known as Marsy's laws, are intended to enhance already-existing victims' rights in the criminal legal process. The first state to adopt Marsy's law was

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135. *State v. Peraza*, 259 So. 3d 728, 730–31 (Fla. 2018).

136. Nadia Banteka, *Police Brutality as Torture*, 70 UCLA L. REV. 470, 490–91 (2023).

137. *See id.*; Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 466 (2017); David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How This Affects Police Reform Effects*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 54 (Erik Luna & Marianne L. Wade eds., 2012).

138. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 539 (2001).

139. *See id.*

140. *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013); Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1167 (2017).

California.[141] Since then, eleven more states have approved and enacted similar constitutional amendments.[142] These amendments add various provisions that go beyond existing victims' rights statutes, including the right of crime victims to be heard at proceedings, the right to refuse an interview, and, most notably for this Article, the right to prevent the disclosure of information that could be used to locate or harass the victim.[143]

While these constitutional amendments state that these protections are intended for "victims of crime," they are nevertheless generally open-ended as to *who* can qualify as a "victim."[144] Typically, Marsy's laws define "victims of crime" to include people who suffer "direct or threatened physical, psychological, or financial harm" as a result of a crime.[145] Any explicit exclusions are rare, with the most common exclusion from the definition of a victim being a person who is the accused.[146] The law enforcement uses of pretext identified in this context relate to both the definition of victimhood as well as the application of these victims' rights to on-duty police officers.

1. THE PRETEXTUAL VICTIM STATUS

Law enforcement agencies have been claiming "victim" status for individual officers after these officers have had actual or threatened confrontations with members of the public while on duty.[147] In states with a version of Marsy's law, officers who have sustained any form of physical injury, however minor, or who claim to perceive a threat of physical harm, have asserted their status as victims of crime and have received corresponding rights afforded to victims of crime.[148] Invoking these rights allows departments to withhold from public scrutiny the

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141. *See* Deanna K. Shullman & Giselle M. Girones, *Overbroad Victims' Rights Laws Impede Access to Public Records*, COMMC'NS LAW., Summer 2019, at 12, 12.

142. *See* CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16; GA. CONST. art. I, § 1, para. XXX; ILL. CONST. art. I, § 8.1; KY. CONST. § 26A; NEV. CONST. art. I, § 8A; N.C. CONST. art. I, § 37; N.D. CONST. art. I, § 25; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; S.D. CONST. art. VI, § 29; WIS. CONST. art. I, § 9m.

143. *See, e.g.*, CAL. CONST. art. I, § 28(b)(4); FLA. CONST. art. I, § 16(b)(5); NEV. CONST. art. I, § 8A(1)(d); N.D. CONST. art. I, § 25(1)(e); S.D. CONST. art. VI, § 29(5); WIS. CONST. art. I, § 9m(2)(b).

144. *See, e.g.*, CAL. CONST. art. I, § 28(e).

145. *E.g.*, FLA. CONST. art. I, § 16(e).

146. *See, e.g.*, OKLA. CONST. art. II, § 34(C).

147. *See* Jacoby & Gabrielson, *supra* note 130.

148. *Id.* (describing how one Florida officer claimed victim status when the wire attached to a hospitalized patient hit him in the shoulder, another invoked victim status when he developed a bone bruise on his finger, and others used injuries like scrapes and twisted wrists to claim victim status).

names of officers who have claimed victim status, even if those officers are implicated in or directly accused of constitutional misconduct, under the guise of preventing victim harassment. In line with the definitions of pretext, the officers claim to be the victims of crime not necessarily because they identify as victims of crime but to shield themselves from accountability for police misconduct through the pretextual application of rights otherwise afforded to civilian victims of crime under Marsy's laws.

This practice of pretextual policing in this context is already quite extensive. In Florida, less than two years after voters approved a Marsy's law amendment to their state constitution, a statewide survey of the thirty largest law enforcement agencies shows half of the departments support police officers being classified as victims and thus shield officer's names from public access.[149] About half of those departments willing to classify police officers as victims have done so before.[150] In fact, across all incidents where police officers used force against civilians resulting in injury against Florida's Collier and Charlotte County sheriffs, these departments have withheld the officers' identities about sixteen percent of the time, citing the victim status of the officer.[151] In Hernando County, that rate doubles to nearly thirty-three percent.[152] One of these instances in Hernando County involved a sheriff's deputy who documented a "minor, blunt-force injury to [his] left index finger" as the basis for seeking victim of crime status.[153] In Brevard County, the sheriff's office redacted the name of a deputy who "fired her gun at a drunken driver who tried to flee".[154] The driver allegedly drove in the direction of the deputy who feared for her life.[155] The sheriff's office withheld the officer's name, citing to the officer's victim status under Marsy's law.[156] Similar incidents have occurred in police interactions with individuals suffering mental health emergencies.[157] In many of these cases, the officers invoke victim status based on perceived threats, without even suffering any physical injury.[158]

149. *Id.*
150. Banteka, *supra* note 132.
151. *See* Jacoby & Gabrielson, *supra* note 130.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *See id.* (describing Charlotte County Sheriff's deputies who invoked victim status after tasering a suicidal man who punched back).
158. *Id.*

Most notably, the Tallahassee Police Department recently withheld the names of officers who killed Tony McDade and Wilbon Woodard.[159] The police, through their union, sued the City of Tallahassee as the city was preparing to release the officers' names.[160] Various news media outlets joined the city in the lawsuit, asserting that the police unconstitutionally failed to respond to public records requests.[161] The trial court found that on-duty police officers cannot be victims under Marsy's law.[162] However, the First District Court reversed on appeal and held that a police officer can satisfy the definition of "crime victim."[163] The appellate court also recognized an officer's right to keep identifying information and records secret, reasoning that such records could be used to infringe on the "right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family" under Marsy's law.[164] The Florida Supreme Court most recently reversed the appellate decision without directly addressing the unique use of Marsy's law by police officers.[165] The Florida Supreme Court held that the Marsy's law constitutional amendment "does not guarantee to a victim the categorical right to withhold his or her name from disclosure."[166] This is because the constitutional language as ordinarily understood does not protect any victim's identity, including that of police officers using lethal force.[167]

In North Dakota, officers in at least eight recent police uses of deadly force have claimed victim status.[168] In the city of Mandan, an officer invoked Marsy's law to keep his name confidential after shooting a man the officer was attempting to arrest.[169] Similarly, the police departments in Devils Lake and Bismarck have both refused to release the names of officers involved in the shootings, again citing Marsy's law

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159. *Fla. Police Benevolent Ass'n v. City of Tallahassee*, 314 So. 3d 796, 797–99 (Fla. Dist. Ct. App. 2021).

160. *Id.* at 797.

161. *Id.* at 798.

162. *Id.* at 799.

163. *Id.* at 801.

164. *Id.* at 804 (quoting FLA. CONST. art. I, § 16(b)(5)) (emphasis omitted).

165. *City of Tallahassee v. Fla. Police Benevolent Ass'n*, No. SC21-651, 2023 WL 6014966 (Fla. Nov. 21, 2023).

166. *Id.* at 9.

167. *Id.*

168. April Baumgarten, *Marsy's Law Often Invoked to Withhold Officers' Names*, GRAND PEAKS HERALD (July 22, 2018), https://www.grandforksherald.com/newsmd/marsys-law-often-invoked-to-withhold-officers-names [https://perma.cc/X8B3-HJ5V].

169. *Mandan Police Won't Identify Man, Officer in Shooting*, AP (Oct. 16, 2018, 2:20 PM), https://apnews.com/article/d5fc1c4e2de5447fb85d587a509134ff [https://perma.cc/N7VK-7KW5].

privacy protections.[170] In South Dakota, a highway patrolman conducted a traffic stop on twenty-one-year-old Kuong Gatluak, who allegedly threw a beer can at the officer, tackled the officer, and tried to take the officer's gun.[171] The officer shot Gatluak twice during the struggle.[172] Then, citing Marsy's law, the North Dakota Attorney General declined to release the officer's name, arguing that the officer had become a victim of crime because Gatluak attacked him.[173]

The gateway issue is whether a police officer while on duty can be a victim under Marsy's law or whether these new constitutional amendments are being used pretextually and impermissibly to shield officers from accountability. There is no dispute that police officers, while off duty, are eligible for the protections and rights of Marsy's law just as any other civilian crime victim would be. However, law enforcement carries inherent risks as police officers are compelled to respond to crime incidents, and a corresponding authorization to use force when necessary.[174] This means that on-duty officers are uniquely expected to operate in spaces that inherently present a threat of harm, and officers are fully aware of the risks and dangers facing them regularly as part of their profession.[175] Because of this reality, victim status for on-duty police officers could be invoked pretextually (not unlike pretextual traffic stops) by almost every policing interaction that entails some actual or threatened injury due to the inherent characteristics of policing. And, under Marsy's laws, the officer's subjective perception of victimhood would be sufficient and, just as with searches and seizures, not subject to judicial scrutiny. Such an outcome would severely restrict, and at times eliminate, judicial review of the constitutionality of police actions.[176]

The pretextual nature of this policy becomes evident considering that on-duty officers claiming Marsy's laws rights is currently superfluous. Many of the rights afforded to victims of crime through Marsy's law are facially inapplicable to law enforcement officers because of officers' already extant role in the criminal legal system, leading to absurd results

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170. *See* Baumgarten, *supra* note 168.

171. Arielle Zoints, *Citing Marsy's Law, State Won't Release Name of Trooper Who Shot Man*, RAPID CITY J. (Oct. 20, 2018), https://rapidcityjournal.com/news/local/crime-and-courts/citing-marsys-law-state-wont-release-name-of-trooper-who-shot-man/article_910cf964-28f6-5328-bae7-554d67e1e999.html [https://perma.cc/W8UC-TFYM].

172. *Id.*

173. *See* Shullman & Girones, *supra* note 141, at 12–13.

174. *See* NICK BREUL & DESIREE LUONGO, MAKING IT SAFER: A STUDY OF LAW ENFORCEMENT FATALITIES BETWEEN 2010–2016, at 7–9 (2017) (describing the officer fatality rate associated with each kind of call to which law enforcement responds).

175. *See id.*

176. *See infra* Part III; JACK MCELROY, UNCOVERING THE POLICE 17–20 (2019).

if the laws apply to them. The generally stated purpose of Marsy's laws is to "ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims."[177] Police officers have had a "meaningful role" in the criminal legal system since long before the passage of Marsy's laws. Police investigate suspected instances of crime, make arrests, and collaborate with prosecutors to obtain convictions. A victim's right to be protected by the police or the right to confer with a prosecutor are redundant when considering the position police already have in the criminal legal process. The fact that many important crime victim protections are rendered meaningless when applied to police officers highlights how the pretextual use of victim status by the police is incompatible with the common reasons underlying Marsy's law protections.[178]

2. THE PRETEXTUAL APPLICATION OF VICTIM STATUS IRRESPECTIVE OF CRIMINAL PROCEEDINGS

The increasing public desire for more police accountability has led to more expansive disclosure laws, but many law enforcement agencies have resisted these efforts towards more secrecy.[179] The pretextual application of Marsy's laws serves as another tool in this effort.[180] Many departments automatically classify officers as crime victims under Marsy's law.[181] That is, the protections and rights under Marsy's laws are treated as absolute and do not require initiation of criminal proceedings, or even a request from the victim to apply.[182] Such departmental policies reveal an inconsistency with the purpose of Marsy's law, while also further exposing the pretextual motivations behind applying Marsy's law to on-duty officers.

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177. *E.g.*, FLA. CONST. art. I, § 16(b). *See also* CAL. CONST. art. I, § 28(a); KY. CONST. § 26A.

178. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))).

179. *See* MCELROY, *supra* note 176, at 6 (detailing a survey that noted an increased amount of public records requests being denied at the local level throughout the country); Christina Koningisor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1815 (2021) (explaining how local law enforcement agencies use national-level security tools without public transparency because of federal secrecy protections for such technology).

180. For an analysis on how this pretextual application undermines constitutional and statutory rights, see *infra* Part III.

181. *See* Banteka, *supra* note 132.

182. *See, e.g.*, Petitioner's Initial Brief on the Merits at 36, *City of Tallahassee v. Fla. Police Benevolent Ass'n*, No. SC21-651, 2021 WL 6014966 (Fla. Mar. 10, 2022).

The stated purposes and enumerated guarantees of Marsy's laws illustrate how the provisions are intended to apply to criminal proceedings. The generally stated purposes include a meaningful role for crime victims throughout the criminal legal system and protections akin to the protections afforded to criminal defendants.[183] These goals can only be achieved within the criminal legal process, as they are rendered moot if there is no prosecution, no defendant, and thus no meaningful role or protections that can be given to the victim. Indeed, many jurisdictions have already held victims' rights apply exclusively within criminal proceedings.[184] While the moment of victimization can act as a baseline for certain Marsy's laws rights, other rights are rendered meaningless without the commencement of criminal proceedings. Attaching Marsy's laws' rights to individuals in a vacuum, regardless of context and purpose, creates a status where "victims" can assert protections indefinitely.

Granting automatic victim status to officers for claims of injury that are often either based on threats alone or are not severe also highlights how officers are not principally concerned with furthering the purpose of Marsy's laws: guaranteeing victims a meaningful role throughout the criminal legal process. Instead, these automatic policies show how police pretextually use Marsy's laws to shield officer identities and other basic information about their on-duty conduct from public scrutiny. In cases where there is no accused or defendant, one might wonder what the purpose of the victim status is other than a pretextual justification for shielding police misconduct from public scrutiny and consequent departmental accountability. Consider the case in Tallahassee where the "accused" is deceased and no criminal proceeding will ever be initiated.[185] With no defendant and no criminal proceeding, there is little, if any, need for Marsy's laws' protections. The rights of victims under Marsy's laws to appear, be heard, or confer with prosecutors in court or be notified about proceedings, releases, and sentencing involving the

183. *See, e.g.*, CAL. CONST. art. I, § 28(b); FLA. CONST. art. I, § 16(b); ILL. CONST. art. I, § 8.1(a)(1); NEV. CONST. art. I, § 8a(1); N.C. CONST. art. I, § 37(1a); N.D. CONST. art. I, § 25(1); OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34(a); WIS. CONST. art. I, § 9m(2).

184. *See, e.g.*, CAL. CONST. art. I, § 28(e); *Ex parte Littlefield*, 540 S.E.2d 81, 85 (S.C. 2000) (finding victims' rights protections ended upon the resolution of a criminal case); *Ross Yordy Constr. Co. v. Naylor*, 55 F.3d 285, 288 (7th Cir. 1995) (finding an individual lost status as a "victim" when the state's attorney dropped the charges against the defendant).

185. *Fla. Police Benevolent Ass'n v. City of Tallahassee*, 314 So. 3d 796, 797 (Fla. Dist. Ct. App. 2021).

defendant are irrelevant.[186] So, too, the right to prevent disclosure of information that a defendant could use to locate or harass the victim during criminal proceedings, since there is no defendant.[187]

In cases where an accused is present, police departments have further interpreted the right to prevent the disclosure of information that could be used to locate or harass the victim to provide officers with a right of anonymity towards the designated accused and the public.[188] This right to anonymity manifests in the form of redacted police reports and vague press releases that hinder media reporting. In responding to requests for information, police departments have claimed an officer's name constitutes "information . . . that could be used to locate or harass the victim . . . ."[189] Historically, efforts to protect officers and crime victims from harassment provide for redaction of home addresses, phone numbers, and dates of birth.[190] Extending this list to include names under the pretext of victimization frustrates the public's constitutional and statutory rights to hold public officials accountable while disincentivizing law enforcement agencies from taking corrective action.[191] This policy results in police departments providing no information to individuals designated as "accused" as well as their families, including when they allege the on-duty officers violated their constitutional rights and seek legal redress.[192] Using Marsy's laws as a pretext for police to withhold officer identities thus contributes to a broader backlash against public accountability for the police.

C. The Spillover into Juvenile Privacy Laws to Shield Accountability and Intensify Prosecutions

Similarly to Marsy's laws, police departments pretextually invoke certain juvenile privacy laws to delay or escape accountability for officers

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186. *See, e.g.*, CAL. CONST. art. I, § 28(b); FLA. CONST. art. I, § 16(b); ILL. CONST. art. I, § 8.1(a)(1); NEV. CONST. art. I, § 8a(1); N.C. CONST. art. I, § 37(1a); N.D. CONST. art. I, § 25(1); OHIO CONST. art. I, § 10(a); OKLA. CONST. art. II, § 34(a); WIS. CONST. art. I, § 9m(2).

187. *See* state constitutions cited *supra* note 186.

188. *See* Respondents' Answer Brief on the Merits at 35, *City of Tallahassee v. Fla. Police Benevolent Ass'n*, No. SC21-651, 2021 WL 6014966 (Fla. May 11, 2022).

189. *E.g.*, *id.* at 35 (quoting FLA. CONST. art. I, § 16(b)(5)). *See also* CAL. CONST. art. I, § 28(b)(4); NEV. CONST. art. I, § 8A(1)(d); N.D. CONST. art. I, § 25(1)(e); S.D. CONST. art. VI, § 29(5); WIS. CONST. art. I, § 9m(2)(b).

190. *See* Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 179–80 (2019).

191. *See infra* Part III.

192. *See* Shullman & Girones, *supra* note 141, at 12–13.

and intensify prosecutions against individuals.[193] A police officer's status as a public official implies that public on-duty work is, in fact, public.[194] Historically, courts have afforded police officers fewer privacy rights than civilians in order to protect the public's right to access information regarding conduct by state actors.[195] Courts have emphasized that the public's legitimate concerns outweigh the personal privacy concerns often claimed by on-duty police officers.[196] This balancing is due in no small part to the police's unique capacity to exert power over civilians, inflict harm in the name of the state, and the resulting need for heightened transparency and attendant checks on abuses of power.[197]

In contrast, courts have long recognized that juveniles should be treated differently from adults in the criminal legal system, with an eye toward privacy and rehabilitation.[198] Thus, juveniles, in their interactions with the criminal legal system, are entitled to heightened privacy rights in most states.[199] Whether a minor is an alleged perpetrator or a victim of a criminal offense, the minor's identity and personal information are often shielded from the public through privacy laws.[200]

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193. *See, e.g.*, 705 ILL. COMP. STAT. 405/1-7 (2022); LA. CHILD. CODE ANN. art. 412(A) (2020); N.J. STAT. ANN. § 2A:4A-60 (West 2023); 48 OHIO JUR. 3D FAMILY LAW § 1734 (2023).

194. *See Cassidy v. Am. Broad. Cos.*, 377 N.E.2d 126, 131–32 (Ill. App. Ct. 1978).

195. *See, e.g.*, *City of Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 821 (La. Ct. App. 2008); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988); *State Org. of Police Officers v. Soc'y of Pro. Journalists-Univ. of Haw. Chapter*, 927 P.2d 386, 405 (Haw. 1996); *Int'l Fed'n of Pro. & Tech. Eng'rs Local 21 v. Super. Ct.*, 165 P.3d 488, 493 (Cal. 2007); *Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990); *Md. Dep't of State Police v. Md. State Conf. of NAACP Branches*, 988 A.2d 1075, 1080 (Md. Ct. Spec. App. 2010).

196. Steve Zansberg & Dana Green, *The Myth of Police Officer Privacy*, COMMC'NS LAW., Summer 2017, at 8, 8.

197. *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1117–18 (2000); Moran, *supra* note 190, at 198. *See generally* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020–36 (1995); Rebecca G. Van Tassell, Comment, *Walking a Thin Blue Line: Balancing the Citizen's Right to Record Police Officers Against Officer Privacy*, 2013 BYU L. REV. 183, 196.

198. *See* Stephan E. Oestreicher, Jr., *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751, 1767–68 (2001).

199. RIYA SAHA SHAH, LAUREN FINE & JAMIE GULLEN, JUV. L. CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 8, 13 (2014).

200. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-349 (2022); COLO. REV. STAT. § 19-1-304(1)(b.5) (2022); CONN. GEN. STAT. § 46b-124(b) (2022); FLA. STAT. § 985.04 (2023); GA. CODE ANN. § 15-11-704 (2023); HAW. REV. STAT. § 571-84.6 (2022); IDAHO CODE § 20-525(2) (2023); IOWA CODE § 232.147 (2023); KAN. STAT. ANN. § 38-2309(b) (2022); KY. REV. STAT. § 610.340(1)(a) (West 2023); LA. CHILD. CODE ANN. art. 412(A)

While these laws aim to protect the privacy of minors in the criminal legal system, police have used these laws pretextually to extend privacy protections to officers in their interactions with minors.[201] Police departments have increasingly cited juvenile privacy laws to redact their own officers' names and identities after police use of force incidents against minors.[202] Pretextual application of these laws has barred the public and press from obtaining details about these incidents. They have also barred minors and their families from accessing basic details about involved officers and information regarding the officers' conduct.[203] For instance, two years after Chicago police officers shot and killed sixteen-year-old W.R., the police department was still denying media requests for case and incident reports relating to the officers' conduct.[204] Media groups sued the department under the federal Freedom of Information Act (FOIA) for disclosure of the report concerning the officers' conduct.[205] In *NBC Subsidiary LLC v. Chicago Police Department*,[206] the appellate court affirmed that the investigation into the officers was not exempt and must be disclosed.[207] The court reasoned that finding otherwise would produce the absurd result of the juvenile privacy law—intended to serve the best interests of minors—shielding alleged police misconduct against minors.[208]

Despite the clear articulation of the disclosure requirements of police conduct involving juveniles, police have remained steadfast in

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(2020); MASS. GEN. LAWS. ch. 119, § 60A (2023); MICH. COMP. LAWS § 712A.18e (2023); MINN. STAT. § 260B.171(4)(b) (2022); NEV. REV. STAT. § 62H.025(1) (2022); TENN. CODE ANN. § 37-1-153(a) (2023); TEX FAM. CODE § 58.106(a) (West 2022); W. VA. CODE § 49-5-103(b) (2023). Note that even though most states have long had basic protections to keep juvenile proceedings and records out of the public eye, recently many states have adopted harsher legislation regarding juveniles, blurring the historical differences between prosecuting an adult and a juvenile.

201. *See* Zansberg & Green, *supra* note 196, at 1.

202. *See* Zak Koeske, *State Law That Keeps Juvenile Records Private Also Shields Police from Scrutiny, Advocates Say*, CHI. TRIB., https://www.chicagotribune.com/suburbs/daily-southtown/ct-sta-juvenile-court-act-amendement-20180515-story.html [https://perma.cc/T2GR-XTR7] (May 26, 2018, 6:30 PM); Mike McDaniel, *Family Demands Answers After JPSO Allegedly Shoots 14-Year-Old in the Back*, WWL-TV NEWS (June 22, 2020, 10:25 PM), https://www.wwltv.com/article/news/crime/family-demands-answers-after-jpso-allegedly-shoots-14-year-old-in-the-back/289-dedaaa00-d0bd-4734-9d0b-94b1e7961cb2 [https://perma.cc/4S3K-XHEG].

203. *See* McDaniel, *supra* note 202.

204. *See NBC Subsidiary LLC v. Chi. Police Dep't*, 145 N.E.3d 70, 72–73 (Ill. App. Ct. 2019).

205. *Id.* at 72.

206. 145 N.E.3d 70 (Ill. App. Ct. 2019).

207. *Id.* at 73.

208. *Id.* at 79.

pretextually reciting the interests of juvenile suspects or defendants—at times even deceased—to shield officer misconduct from public scrutiny. When fifteen-year-old Ryan Thomas died after a police chase led to the crash of a car in which he was a passenger, the department refused to release the details of the pursuit to the public, claiming the case involved minors.[209] When thirteen-year-old Adam Toledo was shot and killed during a foot pursuit with Chicago police officers, the bodycam footage of the incident was not released to the public for several months because he was a minor.[210] What is more, officer Eric Stillman, who shot Toledo, was listed as a victim on the department's incident report, consistent with the policy this Article identifies about police pretextual use of Marsy's laws.[211]

Despite legislators expressing that "none of the [police accountability concerns] were contemplated when trying to protect the kids" in drafting these juvenile privacy laws,[212] some departments continue to hold out on releasing details as long as possible, or until they are sued, to limit their accountability to the public—all the while falsely claiming they are acting in the interests of the minor. In 2020, a local New Jersey newspaper's request for a Use of Force Report (UFR) about the arrest of a sixteen-year-old was denied.[213] The police department and local records custodian claimed the denial was necessary to preserve the minor's anonymity under New Jersey's juvenile privacy laws.[214] However, the newspaper sued and, in *Digital First Media v. Ewing Township*,[215] the appellate court reviewing the matter de novo held that the minor's anonymity could be preserved simply by redacting the minor's name.[216] The court reasoned that, because a UFR is based on police conduct rather than the conduct of the minor, both the public right

209. *See* Koeske, *supra* note 202.

210. Rachel Treisman, Vanessa Romo & Barbara Campbell, *Chicago Releases Video Showing Fatal Police Shooting of 13-Year-Old Adam Toledo*, NPR, https://www.npr.org/2021/04/15/987718420/chicago-releases-video-showing-fatal-police-shooting-of-13-yearold-adam-toledo [https://perma.cc/V9T7-WFFU] (Apr. 15, 2021, 8:30 PM).

211. Lauren Frias, *The Police Officer Who Fatally Shot 13-Year-Old Adam Toledo Was Listed as a Victim on an Incident Report. One Law-Enforcement Expert Said It's 'an Old Cop Trick Meant to Muddy the Murky Waters.,'* INSIDER (Apr. 19, 2021, 10:18 PM), https://www.insider.com/cpd-officer-adam-toledo-victim-report-old-cop-trick-expert-2021-4.

212. *See* Koeske, *supra* note 202.

213. *Digital First Media v. Ewing Township*, 226 A.3d 1214, 1216 (N.J. Super. Ct. App. Div. 2020).

214. *Id.*

214. 226 A.3d 1214 (N.J. Super. Ct. App. Div. 2020).

216. *Id.* at 1216.

to access and the minor's privacy interests could be served by disclosing the UFR with the minor's name redacted.[217]

In Louisiana, officers of the Jefferson Parish Sheriff's Office (JPSO) shot fourteen-year-old Tre'mall McGee while he was face down on the ground.[218] After McGee was transported to a local hospital, no one told him or his mother what had happened to him.[219] It took more than three months before JPSO even admitted to McGee's family that they had shot McGee, and they still refused to release further details about the incident to the family or the public.[220] The McGee family's lawsuit against JPSO was dismissed on procedural grounds.[221] JPSO was involved in another incident just before when a different officer shot another fourteen-year-old, that time in the head.[222] Initially, JPSO denied that one of their officers was involved in the shooting.[223] Ultimately, the officer's name was released, but very few additional details were disclosed and no charges were filed against the officer involved.[224]

These instances illustrate the pretextual motivations for police withholding details of juvenile cases. Police departments continue to claim reverence for juvenile privacy laws while subverting their purpose of serving the juvenile's best interests.[225] No interest of the minor is served, and several individual rights may be violated, by keeping information from minors and their families in incidents of police misconduct.[226] When minors, their families and their attorneys ask for increased transparency—at least for the details and names of the officers

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217. *Id.*

218. *See* McDaniel, *supra* note 202.

219. Matt Agorist, *Body Cam Shows Cop Shoot Defenseless 14yo Boy in Back, Lying Facedown on the Ground-Lawsuit*, FREE THOUGHT PROJECT (Mar. 23, 2021), https://thefreethoughtproject.com/police-brutality-cop-watch/body-camera-boy-facedown-ground-shot.

220. *Id.*

221. Order of Dismissal, *McGee v. Lopinto*, No. 21-571 (E.D. La. filed Oct. 20, 2023).

222. *See* Michelle Hunter, *14-Year-Old Boy Shot in Head by Off-Duty Police Officer in Metairie Early Friday Morning: JPSO*, NOLA NEWS (Apr. 17, 2020), https://www.nola.com/news/crime_police/article_dae8757c-80e7-11ea-b420-5f6423d4ea55.Html [https://perma.cc/PMQ7-NGYG].

223. *Id.*

224. Mike McDaniel, *With Car Alarm Blaring, Shooter Mistook 14-Year-Old's Phone Light for a Muzzle Flash, JPSO Says*, WWL-TV NEWS (Apr. 22, 2020, 10:17 PM), https://www.wwltv.com/article/news/local/jefferson/14-year-old-shot-in-metairie-was-out-on-joyride-with-friends-police-say/289-9b04081d-0082-471e-8336-07f4918b6123 [https://perma.cc/WCD9-PB7G].

225. *See* Leila R. Siddiky, Note, *Keep the Court Room Doors Closed so the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Juvenile Justice System*, 55 HOW. L.J. 205, 243 (2011).

226. *See infra* Part III.

involved—neither the purpose of the juvenile privacy laws nor their plain text prevent such transparency.[227] For example, protecting the privacy of minors in criminal proceedings can be accomplished merely by redacting the minor's name in the disclosures. It does not require withholding all details and records of the implicated officers.[228] In contrast, using juvenile privacy laws as a legal justification for withholding critical information puts minors at a severe disadvantage in efforts to hold police accountable for misconduct. When offending officers' names and records of their conduct are kept secret, minors and their families are constrained in pursuing civil action for constitutional violations, and the public cannot scrutinize the policies of departments serving their communities.

The repeated instances in which police have invoked juvenile privacy laws to withhold officer information from public access, despite relevant court decisions finding no such invocation is justified, indicate that this pretextual policy remains active. That some departments continue to avoid or delay accountability for on-duty officer conduct until public pressure is too significant or a court requires disclosure shows that some departments consider pretextually citing juvenile privacy as a net-positive course of action. Not only does this choice decrease public confidence in the police and reduce meaningful civilian oversight, but it also contributes to increased prosecutions of minors. When police use juvenile privacy rights to obscure all details of arresting incidents and subsequent investigations, this information imbalance causes a domino effect that results in diminished due process rights for minors and increased risk of abuse of process.[229] Insistence that no member of the public, including the press and the juvenile's family, can receive *any* information about potential police misconduct undermines the legitimacy of any argument a department could raise for restricted access and highlights the pretext used by police.[230]

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227. Most courts follow some variation of a balancing test to address this issue. *See, e.g.*, *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 109 n.2 (1979) (citing the First and Fourteenth Amendments in reversing a newspaper's convictions for publishing the names of juvenile offenders); *In re Gault*, 387 U.S. 1, 4 (1967) (holding juveniles had the right to due process rights under the Fourteenth Amendment). *Cf. Davis v. Alaska*, 415 U.S. 308, 319–20 (1974) (finding the constitutional right to confrontation overcame the juvenile's right to confidentiality of proceedings); *State ex rel. Plain Dealer Publ'g Co. v. Floyd*, 855 N.E.2d 35, 43 (Ohio 2006) (listing reasons juvenile privacy is outweighed by public access interests).

228. *See, e.g.*, *Daily Mail Publ'g Co.*, 443 U.S. at 103–06; *Davis*, 415 U.S. at 319–21; *In re Gault*, 387 U.S. at 33.

229. *See* Ostereicher, *supra* note 198, at 1767–70.

230. For an analysis on how this pretextual application undermines constitutional and statutory rights, see *infra* Part III.

D. The Spillover into Criminal Statutes to Arrest Pregnant People

In the same way law enforcement has used laws intended for other purposes to shield police officers from accountability for misconduct, they have also pretextually enforced laws in order to police the conduct of pregnant people. Prior to the Supreme Court's recent *Dobbs*[231] decision, police could not investigate pregnancy loss or abortion under a criminal statute that directly addressed that conduct.[232] Instead, law enforcement found ways to arrest and prosecute people for their actions while pregnant, particularly in communities where people of color predominately live, through the pretextual enforcement of other criminal statutes.[233] This *sui generis* criminalization of pregnancy has occurred through the pretextual interpretation and enforcement of statutes not intended to apply per se to pregnant people facing pregnancy loss.[234]

At the center of this policy is the issue of fetal personhood, the argument that the fetus deserves full rights and protections as a legal person.[235] The increasing treatment of a fetus as a separate legal person has expanded the reach of arrests and prosecutions against pregnant

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231. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

232. *Id.* at 2243 (overruling prior cases, holding states have the power to regulate abortion).

233. *See* Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537, 556 (2006) (discussing the issue of selective prosecution against "poor, women of color"). *See generally* LAURA HUSS, FARA DIAZ-TELLO & GOLEEN SAMARI, IF/WHEN/HOW: LAWYERING FOR REPRO. JUST., SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS (2022) (explaining people marginalized due to race, poverty, or immigration status are less likely to have health care and more likely to resort to self-managing unwanted pregnancies, and therefore more likely to be arrested for doing so); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421–22 (1991) (explaining poor women of color are most likely to be subject to government punishment for actions during pregnancy).

234. *See* Grace Elizabeth Howard, The Criminalization of Pregnancy: Rights, Discretion, and the Law 57–58 (Oct. 2017) (Ph.D. dissertation, Rutgers University) (on file with Rutgers University); Meghan Boone & Benjamin J. McMichael, *State Created Fetal Harm*, 109 GEO. L.J. 475, 481–84 (2021).

235. *See, e.g.*, TENN. CODE ANN. § 39-13-107 (2023) (defining the term "another person," as it relates to "crimes against another person," to "include a human embryo or fetus at any stage of gestation in utero"); TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2023) (defining an "Individual" within the penal code as a "human being who is alive, including an unborn child at every stage of gestation"). *Cf. Whitner v. State*, 492 S.E.2d 777, 779–80 (S.C. 1997) (holding that a mother who ingested cocaine could be convicted because unborn fetuses are persons); *State v. Green*, 474 P.3d 886, 891 (Okla. Crim. App. 2020) (holding that Oklahoma's child abuse statute includes fetuses because state law is intended "to protect children, born and unborn, from potential harm").

people in two significant ways.[236] First, law enforcement have used the condition of one's pregnancy to create an offense, and thus a basis to arrest, detain, and investigate, where one did not otherwise exist. When police want to arrest a pregnant person for certain conduct but are unable to, they invoke other criminal statutes in contexts that are inconsistent with legislative history or ordinary meaning of those statutes. For example, if law enforcement suspect a pregnant person of drug use, but cannot establish possession, they can arrest the pregnant individual for child abuse, neglect, or distributing drugs to a minor, as a way of justifying arrests and enhancing prosecutions by proxy.[237] Second, law enforcement has interpreted criminal statutes—meant to protect children from harm—to give rise to new or additional charges against pregnant people.[238] For instance, when police arrest a pregnant person for a drug offense, prosecutors have charged that individual under a fetal homicide statute or a child abuse statute, yielding longer sentences than the direct drug-related offense statute.[239]

Fetal homicide laws are one category of criminal statutes law enforcement has consistently used to pretextually arrest and prosecute

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236. *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 300, 322 (2013) (explaining that most prosecutions of people for pregnancy-related crimes are based on fetal personhood claims).

237. *See, e.g.*, *State v. Louk*, 786 S.E.2d 219, 200 (W.Va. 2016) (reversing defendant's conviction for one felony count of child neglect resulting in death for use of methamphetamine during pregnancy); Paltrow & Flavin, *supra* note 140, at 330–31; *Johnson v. State*, 602 So. 2d 1288, 1297 (Fla. 1992) (reversing a mother's conviction for delivery of a controlled substance to a minor which was based on the flow of cocaine to her newborn through umbilical cord after birth but before cutting).

238. Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene (reporting that a district attorney in Marshall County said, "We have clearly used [the chemical-endangerment statute] a little bit different than it was designed . . . . That, in and of itself, doesn't mean it's wrong"); Howard, *supra* note 234, at 109 (quoting a prosecutor who said, "All you do is, you add a count of 'attempt,' which lowers the case one level. We're back to the Class A Misdemeanor, which has all the leverage you need. . . . And this is a little cynical, so get ready, but, talk about a way to avoid ever having to be held accountable on appeal! Because you're pleading every case out on a far less, uh, serious level").

239. *See* Ocen, *supra* note 140, at 1174–76 (discussing studies suggesting that more than 1,000 women have been affected by these policies with more than half of these cases happening in the last decade). *See also, e.g.*, LYNN M. PALTROW, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW 32 (1992) (describing an eighteen-year-old pregnant woman who went to the hospital when she got kicked in the stomach, tested positive for cocaine, and was charged not only with cocaine possession, but also distribution to a minor); *id.* at 12 (describing a woman who was charged not only with possession, but also distribution and child endangerment, after her child was born with cocaine in their bloodstream).

pregnant people. First introduced in the 1980s, these statutes were professed to protect pregnant people from third-party harm, such as domestic abuse and violence.[240] Currently, at least thirty-eight states have fetal homicide laws, with twenty-nine covering even the earliest stages of pregnancy.[241] On the federal level, the Unborn Victims of Violence Act[242] is intended to protect fetuses from violence committed against them by third parties—not the pregnant person—by including a "maternal exception."[243] However, over time, the enforcement of these statutes has shifted from protecting pregnant persons to criminalizing their conduct.[244] Police invoke these statutes to justify investigating and prosecuting pregnancy loss, including miscarriages, stillbirths, and self-induced abortions.[245]

In Indiana, Purvi Patel took abortion pills to end an unexpected pregnancy and gave birth to a stillborn.[246] Patel was arrested for and later charged with fetal homicide.[247] After serving over a year of her twenty-year sentence, the Indiana Court of Appeals vacated Patel's conviction.[248] The court held that the fetal homicide statute was not intended to be enforced against persons for their own abortions.[249] Also in Indiana, Bei Bei Shuai attempted suicide by ingesting rat poisoning and was taken to the hospital for treatment.[250] Doctors performed an emergency cesarean section, but Shuai's newborn died days later from the rat poison.[251] Shuai was arrested for fetal homicide for intentionally taking poison and

240. *See, e.g.*, Press Release, Tex. House of Reps., Prenatal Protection Act Passes Both Houses, (June 1, 2003), [https://web.archive.org/web/20030608215009/http:/www.house.state.tx.us/news/release.php?id=359]. *See also* Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 853 (2014); SIA LEGAL TEAM, ROE'S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL 14 (2018); Paltrow & Flavin, *supra* note 140, at 322–23.

241. *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NCSL (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx [https://perma.cc/ZS38-S755].

242. Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2004).

243. 18 U.S.C. § 1841(c) ("Nothing in [the act] shall be construed to permit the prosecution . . . of any woman with respect to her unborn child.").

244. *See* Murphy, *supra* note 240, at 853, 871.

245. NAT'L ADVOCS. FOR PREGNANT WOMEN, CONFRONTING PREGNANCY CRIMINALIZATION 9 (2022).

246. *Patel v. State*, 60 N.E.3d 1041, 1043 (Ind. Ct. App. 2016).

247. *Id.* at 1044. *See generally* IND. CODE § 35-42-1-6 (2022).

248. *Patel*, 60 N.E.3d at 1043–44.

249. *Id.* at 1044.

250. *Bei Bei Shuai. v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

251. *Id.* at 622–23.

therefore causing harm to her fetus.[252] Other pregnant people have also been arrested for attempted fetal homicide. Christine Taylor had accidentally fallen down the stairs while pregnant.[253] When she sought medical care, she admitted to nurses that she was not sure she wanted to continue her pregnancy.[254] Police questioned and detained Taylor for two days on suspicion that she had attempted fetal homicide.[255]

In addition to fetal homicide statutes, law enforcement has also pretextually enforced other criminal statutes against pregnant people that were originally intended to criminalize conduct against children.[256] State legislatures passed many of these statutes in response to growing methamphetamine manufacturing and use during the 1990s and early 2000s.[257] These statutes were originally used to prosecute people who manufactured methamphetamines in their homes, but law enforcement extended their application to people who kept children in areas with any drugs or drug paraphernalia.[258] States have increasingly considered substance use during pregnancy to constitute child abuse or endangerment based on fetal-personhood legislation and judicial decisions.[259] But even absent such legislation or doctrine, law enforcement has arrested and prosecuted pregnant people under various child endangerment statutes with the pretext of helping those struggling with addiction.

For example, in Alabama, prosecutors have stated publicly that they brought chemical endangerment charges against pregnant substance users to scare them into treatment.[260] The Marshall County District Attorney openly admitted, "We have clearly used it [the chemical endangerment

252. *Id.* at 629.

253. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy…Seriously.*, ACLU MAINE (Feb. 11, 2010, 5:04 PM), https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously [https://perma.cc/ZFL4-F565].

254. *Id.*

255. *Id.*

256. *See, e.g.*, ALA. CODE § 26-15-3.2 (2022) (child chemical endangerment); S.C. CODE ANN. § 63-5-70 (2023) (unlawful conduct to a child); S.C. CODE ANN. § 16-3-85 (homicide by child abuse) (2023).

257. *See* Martin, *supra* note 238; Howard, *supra* note 234, at 100–05.

258. Martin, *supra* note 238.

259. *See, e.g.*, MO. REV. STAT. § 1.205 (2022); TENN. CODE ANN. § 39-13-107 (2021); *Ankrom v. State*, 152 So. 3d 373, 382 (Ala. Crim. App. 2011) (upholding conviction for child endangerment due to cocaine use during pregnancy based on defining fetus as child); *Whitner v. State*, 492 S.E.2d 777, 779–80 (S.C. 1997) (upholding child neglect conviction for cocaine use during pregnancy based on defining fetus as child).

260. Howard, *supra* note 234, at 106–07. *See generally* ALA. CODE § 26-15-3.2.

statute] a little bit different than it was designed."[261] Also, law enforcement began to increasingly interpret the uterus as one of the environments in which a person could expose a child to drugs, leading to arrests and prosecutions of pregnant people under these statutes.[262] Law enforcement in North Dakota arrested and charged Martina Greywind with reckless endangerment for inhaling paint fumes when pregnant, alleging that inhalation of paint posed a "substantial risk of serious bodily injury or death to her unborn child."[263] In South Carolina, law enforcement has arrested and charged pregnant people with child endangerment and homicide by child abuse for drug use.[264] In one case, the pregnant person gave birth to a child with cocaine metabolites in their blood.[265] She admitted to using cocaine while pregnant, and was convicted of violating the state's child endangerment statute.[266] The South Carolina Supreme Court, reviewing her conviction, interpreted the word "child" in the statute to mean "fetus."[267] Because of this holding, in a similar case involving a pregnant person who gave birth to a stillborn child with evidence of cocaine in her body, the court held that she should have known "child abuse" included substance use while pregnant.[268]

In other states, law enforcement has extended the fetal personhood rationale to delivery of controlled substances statutes, using them to arrest pregnant people. In Texas, law enforcement has arrested and prosecuted pregnant people whose fetuses showed the presence of cocaine under statutes criminalizing the delivery of a controlled substance

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261. Martin, *supra* note 238. Note that in 2014 the Alabama Supreme Court affirmed this "different" interpretation of Alabama's chemical endangerment law and held pregnant people could be charged with chemical endangerment for exposing their fetuses to substances they used while pregnant. *Ex parte Hicks*, 153 So. 3d 53, 66 (Ala. 2014) (holding a woman who ingested cocaine while pregnant and gave birth to a child that tested positive for cocaine violated Alabama's chemical endangerment statute).

262. Martin, *supra* note 238.

263. *NAPW Documentation State v. Greywind*, NAT'L ADVOCS. FOR PREGNANT WOMEN (Apr. 14, 2012), [https://web.archive.org/web/20220702082455/https://www.nationaladvocatesforpregnantwomen.org/napw-documentation-state-v-greywind/].

264. Cary Aspinwall, Brianna Bailey & Amy Yurkanin, *They Lost Pregnancies for Unclear Reasons. Then They Were Prosecuted.*, WASH. POST (Sept. 12, 2022, 6:22 PM), https://www.washingtonpost.com/national-security/2022/09/01/prosecutions-drugs-miscarriages-meth-stillbirths/. *See generally* S.C. CODE ANN. § 63-5-70 (2023); S.C. CODE ANN. § 16-3-85 (2023).

265. *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997).

266. *Id.* at 782–84. S.C. CODE ANN. § 63-5-70.

267. *Whitner*, 492 S.E.2d at 780–81 (holding, for the first time, that "child" means fetus in South Carolina's child endangerment statute).

268. *State v. McKnight*, 576 S.E.2d 168, 174 (S.C. 2003) (upholding defendant's conviction under state homicide by child abuse statute).

to a child.[269] In two cases, the Texas Court of Appeals reversed the conviction of these individuals because it found that the presence of a controlled substance in a fetus's body did not constitute the element of possession required to violate the delivery of a controlled substance statute.[270] In Florida, Jennifer Clarise Johnson was arrested, charged, and convicted under Florida's delivery of a controlled substance to a minor statute for admitting to cocaine use during pregnancy.[271] Prosecutors argued—and the trial court and appellate court agreed—that Johnson "delivered" cocaine to her two children via blood flowing through the umbilical cords in the sixty-to-ninety seconds after birth, prior to the umbilical cords being severed.[272] The Florida Supreme Court disagreed, holding that the legislature did not intend the word "delivery" to be used to "criminally prosecut[e] mothers for delivery of a controlled substance to a minor by way of the umbilical cord,"[273] and remanded for an acquittal.[274]

Many of these appellate decisions relied on *Roe*[275] in holding that enforcement of these criminal statutes was overbroad and unconstitutional.[276] After the Court's decision in *Dobbs*, there is a heightened need to address law enforcement's pretextual application of criminal laws against the conduct of pregnant people.

III. THE UNCONSTITUTIONALITY OF POLICE PRETEXTS

Recognizing the phenomenon of law enforcement's use of pretexts beyond searches and seizures challenges us to rethink the constitutionality of these police tactics beyond the Fourth Amendment. Judicial disregard for the subjective motivations of the police after the Court's decision in *Whren* has undermined constitutional protections in ways that have not

269. *See Ward v. State*, 188 S.W.3d 874, 874–75 (Tex. Ct. App. 2006); *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. Ct. App. Mar. 29, 2006); *Ex parte Perales*, 215 S.W.3d 418, 419–20 (Tex. Crim. App. 2007); TEX. HEALTH & SAFETY CODE ANN. § 481.122 (West 2023).

270. *Ward*, 188 S.W.3d at 876; *Ex parte Perales*, 215 S.W.3d at 419–20. *See also Smith*, 2006 WL 798069.

271. *Johnson v. State*, 602 So. 2d 1288, 1291 (Fla. 1992). *See also* FLA. STAT. § 893.13(1)(c) (2023).

272. *Johnson*, 602 So. 2d at 1291.

273. *Id.* at 1290.

274. *Id.* at 1289.

275. 410 U.S. 113.

276. *Id.*; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (modifying the holding of *Roe* by determining that states cannot place an undue burden on abortion rights before fetal viability). For an analysis on how this pretextual application raises issues of statutory unconstitutional vagueness and separation of powers, see *infra* Part III.

been previously identified. This Part argues that the use of police pretexts enables police conduct that contravenes the First Amendment, common law, comparable state constitutional and statutory rights, due process rights, and separation of powers doctrine—ultimately revealing a larger problem for democratic legitimacy.

A. Police Use Pretexts to Withhold Information from the General Public and Press in Violation of Constitutional, Common Law, and Statutory Rights

Disclosure of information on police action enables the public to identify instances and patterns of police misconduct. When police use Marsy's laws and juvenile privacy laws pretextually to withhold information, they impair the ability of the public, the press, and individuals to access the information necessary to scrutinize their actions, hold them accountable for misconduct, or establish a claim for relief. The public, the press, and individuals possess constitutional, common law, and statutory rights to access this information. Police pretextual misuse of Marsy's laws and juvenile privacy laws can cause irreconcilable conflicts that severely diminish these rights.

1. THE IMPACT ON CONSTITUTIONAL AND COMMON LAW ACCESS TO INFORMATION RIGHTS

Our democratic system is premised upon government being accountable to the people.[277] For people to check government action outside the bounds of the public will, they must first know what the government is doing. They also must be able to challenge its actions in the courts.[278] When considering the public's right to access information regarding governmental functioning, the Court has rejected a claim of unfettered access, holding that the First Amendment right to speak and publish "does not carry with it an unrestrained right to gather information."[279] In line with this reasoning, the Court developed a related doctrine against special First Amendment privileges for the press,

277. *See* Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 19 (2013) (explaining that democracy works best when people have all information); Charles N. Davis, Milagros Rivera-Sanchez & Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 43 (1996) (describing access to information as essential to democracy and public trust).

278. U.S. CONST. amend. I (establishing the people's right to petition the government for a redress of grievances through the court system).

279. *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

holding that the press did not have a constitutionally mandated right to access information.[280]

However, the Court was inadvertently made to reconsider this doctrine when lower courts began restricting press access in criminal courtrooms. In *Richmond Newspapers, Inc. v. Virginia*,[281] the Court recognized the right of the public and press to access criminal trials as implicit in the guarantees of the First Amendment.[282] Even though the Court did not recognize a general "right of access" to court records or other government information,[283] it acknowledged that the right to freedom of the press necessitates some protection of information gathering.[284]

In recent years, the right of the press to access information under the First Amendment has often been litigated in lower courts in the context of police interaction with the press at protests. For instance, in *Goyette v. City of Minneapolis*,[285] members of the press filed a Section 1983 claim on First Amendment retaliation grounds because police allegedly targeted them at Minneapolis protests following the death of George Floyd.[286] The district court determined that the press had a First Amendment right to access the protests because they occurred on public sidewalks, historically open to the press and public, and because people benefit from the press's reporting of such events.[287] Similarly, many circuit courts have also recognized a First Amendment right to record

280. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) ("There is no discernible basis . . . for standards governing disclosure of or access to information."); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (reiterating that the press has the same rights and obligations regarding information access as the public); *Pell v. Procunier*, 417 U.S. 817, 835 (1974) (upholding a law that prohibited press from interviewing imprisoned individuals because the press does not have greater access rights than the public); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (upholding a regulation prohibiting face-to-face interviews between press and imprisoned individuals because it did not deny press access to information available to public).

281. 448 U.S. 555 (1980).

282. *Id.* at 578 (explaining that the public and media "have a right to be present" based on history, and that presence enhances the integrity of the process).

283. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing, for the first time, a First Amendment "right to receive information and ideas"); David C. Vladeck, *Freedom of Information Overview*, FREEDOM F. INST., [https://web.archive.org/web/20210417204245/https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/freedom-of-information-overview/] (Feb. 2009).

284. *Branzburg*, 408 U.S. at 681 (acknowledging that freedom of the press would be obsolete without some protection for the act of news gathering).

285. 338 F.R.D. 109 (D. Minn. 2021).

286. *Id.* at 114.

287. *Id.* at 116–17.

police activity in public[288] and a common law right to access public records and civil proceedings "by force of tradition."[289]

Because constitutional and common law rights to access information ensure the rights of the public and press to access criminal proceedings and relevant court records, the pretextual police action this Article identifies prevents access to such information and infringes on these rights. For instance, police departments have used juvenile privacy laws to redact information about officers in juvenile cases, even where officers used lethal force.[290] Because departments pretextually applied juvenile privacy laws to require the redaction of identifying information about *all* parties involved—and not just the juvenile—the public and press cannot access information about the officer and their misconduct. Moreover, despite proceeding under the guise of protecting the juvenile's privacy interests, efforts to withhold officer information also impair individuals' ability to mount a legal claim for unconstitutional officer misconduct.

The diminution of constitutional rights through the pretextual police use of Marsy's laws is similar but more subtle. It can go unnoticed, particularly in cases where the accused is deceased, often due to the alleged police misconduct at issue.[291] When the accused is deceased, there

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288. The First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have all officially recognized this right. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing plaintiff's right to record the police in their official duties); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (recognizing bystander's right to record police); *Sharpe v. Winterville Police Dep't*, 480 F. Supp. 3d 689, 696–97 (E.D.N.C. 2020), *aff'd*, 59 F.4th 674 (4th Cir. 2023); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (recognizing a First Amendment right to record police); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (granting a preliminary injunction on a statute because it would prevent an organization from recording the police in violation of First Amendment rights); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (determining officers assaulting plaintiff and destroying his camera while recording in public would constitute a First Amendment violation); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 & n.10 (10th Cir. 2022) (recognizing the right to record police officers during a traffic stop and search); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding plaintiff had a First Amendment right to record police making traffic stops on public property); *Bowens v. Superintendent of Mia. S. Beach Police Dep't*, 557 F. App'x 857, 863 (11th Cir. 2014) (holding that freelance photographer had a First Amendment right to photograph alleged police misconduct).

289. *In re Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992). *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (explaining that courts have recognized "a general right to inspect and copy public records and documents, including judicial records and documents"); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984) (reaffirming the common law right to access and inspect judicial records).

290. *See* Koeske, *supra* note 202; McDaniel, *supra* note 202.

291. *See* Jacoby & Gabrielson, *supra* note 130; *Fla. Police Benevolent Ass'n v. City of Tallahassee*, 314 So. 3d 796, 798–99 (Fla. Dist. Ct. App. 2021) (describing how the Tallahassee police department withheld the names of officers who killed two men on separate occasions).

will be no criminal proceedings for the public and press to access. So, police officers who have invoked Marsy's laws to prevent disclosure of information about misconduct maintain perpetual anonymity, even though the deceased poses no threat that such nondisclosure would otherwise minimize. This leads to an absurd outcome, with officers who claimed victim status under Marsy's laws maintaining protections in perpetuity against deceased individuals.[292]

2. THE IMPACT ON SUNSHINE LAWS

The right to access information is statutorily protected by the Freedom of Information Act, which gives the public access to federal agency records, absent a specified exemption.[293] While FOIA only applies to federal records, every state has similar statutes or constitutional amendments governing access to public information and records.[294] These laws, often called "sunshine laws," exist to open the inner workings of government to the public and promote the transparency necessary for a democratic society.[295] Many states have enacted such laws as statutes,[296] but several have made access to government records part of their state constitutions.[297] These amendments provide a constitutional right to the public to review the government actions.[298]

a. The Impact on State Constitutional Rights

In the policing context, access to law enforcement and other government records allows the press and public to hold officers accountable for wrongdoing. It also enables law enforcement agencies to take corrective action. For example, complete and timely disclosure of information about police use of force incidents enables the public to

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292. Victim protections become moot once potential defendants are deceased. *See, e.g.*, FLA. CONST. art. I, § 16(b)(3) (describing the victim's "right, within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused"); CAL. CONST. art. I, §§ 28(b)(2)–(4) (stating that victims have the right to be "reasonably protected from the defendant and persons acting on behalf of the defendant"); N.D. CONST. art. I, § 25(1)(c) (establishing the victim's right to be "reasonably protected from the accused and any person acting on behalf of the accused").

293. 5 U.S.C. § 552. *See* Vladeck, *supra* note 283.

294. Davis, Rivera-Sanchez & Chamberlin, *supra* note 277, at 42; Capeloto, *supra* note 277, at 19.

295. Capeloto, *supra* note 277.

296. *See* Davis, Rivera-Sanchez & Chamberlin, *supra* note 277, at 42.

297. *See, e.g.*, FLA. CONST. art. I, § 24(a); CAL. CONST. art. I, § 3(b); N.D. CONST. art. XI, § 6; LA. CONST. art. XII, § 3.

298. *See, e.g.*, FLA. CONST. art. I, § 24(a); LA. CONST. art. XII, § 3; CAL. CONST. art. I, § 3(b); N.D. CONST. art. XI, § 6.

identify patterns of police misconduct, and may incentivize departments to adopt trainings or to amend policies to address systemic issues.[299] However, in states where both public records or sunshine laws and Marsy's laws are enumerated in state constitutional amendments, the police's pretextual enforcement of the latter can cause an irreconcilable conflict between the two constitutional rights. While on their face these two constitutional rights serve different purposes and courts can construe them as "harmonious,"[300] officers' broad, pretextual application of Marsy's laws is causing a clash that frustrates transparency and corresponding efforts to increase accountability.[301]

Police officers' pretextual use of victim status forecloses the ability of the public to evaluate officer conduct, the past records of implicated officers, and any decisions of the relevant government actors regarding sanctions.[302] This result aligns neither with Marsy's laws' nor with sunshine laws' purposes.[303] The purpose of Marsy's law is to provide crime victims with elevated protections in the criminal legal process, comparable with those enjoyed by the accused—not to anonymize

299. *See, e.g.*, *Hearing on SB 1421 Before the Assemb. Comm. on Pub. Safety*, 2018 Leg., 2017–18 Sess. 12 (Cal. 2018) (explaining that this California bill favors disclosure of peace officer records because "[g]iving the public, journalists, and elected officials access to information about actions by law enforcement will promote better policies and procedures that protect everyone" by ensuring "good officers and the public have the information they need to address and prevent abuses and to weed out the bad actors").

300. *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959)).

301. *Compare* CAL. CONST. art. I, § 28, FLA. CONST. art. I, § 16, *and* N.D. CONST. art. I, § 25 (privacy rights for victims of crime), *with* CAL. CONST. art. I, § 3, FLA. CONST. art. I, § 24, *and* N.D. CONST. art. XI, § 6 (government sunshine duties).

302. *See, e.g.*, Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 188–89 (2019) (discussing one instance where providing public access to officer records allowed the public to evaluate officer conduct).

303. *See, e.g.*, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION 3, 81 (2004), https://repository.uclawsf.edu/ca_ballot_props/1237/ (explaining that supporters of Proposition 59, which amended Article I, Section 3(b) of the California Constitution, argued it promoted government transparency and accountability). *See also* Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1482 (2020) (detailing how the transparency fostered by public records laws allows individuals to hold elected officials accountable); Capeloto, *supra* note 277, at 19–20 (explaining that sunshine laws were passed to increase transparency); Davis, Rivera-Sanchez & Chamberlin, *supra* note 277, at 41–42 (stating that sunshine laws enable citizens to know how the government makes decisions).

government misconduct.[304] Sunshine laws grant the public broad rights to access public records to promote governmental transparency.[305] Moreover, public employees, including law enforcement officers, generally lack privacy rights in records about their public actions, absent a specific exemption.[306] Given that Marsy's laws were never intended to limit the public transparency of sunshine laws, pretextually granting victim status and victim's protections to on-duty police officers unconstitutionally restricts public access to records of incidents of alleged police misconduct.

b. The Impact on State Statutory Rights

States with statutory sunshine laws face no potential conflict between state constitutional rights. However, there is a conflict between how state courts have consistently interpreted government transparency statutes and how officers pretextually interpret Marsy's laws and juvenile privacy laws to exempt records from disclosure. Generally, laws that foster government transparency are liberally construed in favor of public

304. *See, e.g.*, 725 ILL. COMP. STAT. 120/2 (2023) (explaining the purpose of Illinois's Rights of Crime Victims and Witnesses Act is to ensure that victims are treated fairly); GA. CODE ANN. § 17-17-1 (2023) (explaining the legislature's intention to ensure crime victims are "accorded certain basic rights just as the accused are accorded certain basic rights"); CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION 58–63 (2008), https://repository.uclawsf.edu/ca_ballot_props/1266/ (explaining Marsy's Law "levels the playing field, guaranteeing crime victims the right to justice and due process"); FLA. CONST. art. I, § 16(b) (explaining the victim's rights amendment "ensure[s] that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants").

305. *See, e.g.*, Koningisor, *supra* note 303; Capeloto, *supra* note 277, at 19–20; Davis, Rivera-Sanchez & Chamberlin, *supra* note 277, at 41–42.

306. *See, e.g.*, *Alterra Healthcare Corp. v. Est. of Shelley*, 827 So. 2d 936, 940 n.4 (Fla. 2002) ("Absent an applicable statutory exception . . . public employees (as a general rule) do not have privacy rights in such records."); *Michel v. Douglas*, 464 So. 2d 545, 546–47 (Fla. 1985) (requiring disclosure of public hospital personnel records because public employees do not have a right to privacy in public records); *Burton v. York Cnty. Sheriff's Dep't*, 594 S.E.2d 888, 895–96 (S.C. Ct. App. 2004) (holding that police officers do not have a right to privacy for on-duty conduct); *City of Baton Rouge v. Cap. City Press, L.L.C.*, 4 So. 3d 807, 821 n.19 (La. Ct. App. 2008) (stating police officers do not have a privacy interest in records regarding on-duty conduct), *modified on reh'g*, 7 So. 3d 21 (La. Ct. App. 2009). *See also* Moran, *supra* note 190, at 175–81 (discussing the range of approaches states take with regard to treating police misconduct records as public).

access,[307] exemptions to these laws are narrowly construed,[308] and in cases of doubt about the application of the law to a particular case, doubt is resolved in favor of disclosure.[309] As discussed above, in the context of policing, police officers do not retain full privacy rights for on-duty actions.[310] For instance, many states require police officers to display their names or unique badge numbers on their uniforms[311] and make their images public through body camera and dash camera footage.[312] Because

307. *See, e.g.*, *State ex rel. Upper Republican Nat. Res. Dist. v. Dist. Judges*, 728 N.W.2d 275, 279 (Neb. 2007) (citing *Grein v. Bd. of Educ.*, 343 N.W.2d 718 (1984)) (determining that freedom of information acts relating to public meetings should be "broadly interpreted and liberally construed to obtain the objective of openness in favor of the public"); *Int'l Fed'n of Pro. & Tech. Eng'rs, Local 21 v. Super. Ct.*, 165 P.3d 488, 496 (Cal. 2007) (reasoning that laws relating to information access must be broadly construed); MO. REV. STAT. § 610.011 (2022) (explaining that the state's sunshine law shall "be liberally construed"). *See also* Moran, *supra* note 190, at 171–73 (describing circuit courts' liberal approach to balancing privacy to information against public interest to favor disclosure).

308. *See, e.g.*, *Allen v. Barksdale*, 32 So. 3d 1264, 1271 (Ala. 2009) (holding that the statute in question should be narrowly construed because it was an exception to the state's open records act, which favors disclosure).

309. *See, e.g.*, *Morris Publ'g Grp., LLC v. Fla. Dep't of Educ.*, 133 So. 3d 957, 960 (Fla. Dist. Ct. App. 2013) (stating that doubt about whether a public record is subject to disclosure is to be resolved in favor of disclosure); *Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservation Dist.*, 88 P.3d 1188, 1195 (Colo. 2004) (en banc) (holding an access-to-information law should be construed as broadly as possible); *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999) (explaining that FOIA exemptions are "narrowly construed with doubts resolved in favor of disclosure" (quoting *FLRA v. U.S. Dep't of Veterans Affs.*, 958 F.2d 503, 508 (2d Cir. 1992))).

310. *See, e.g.*, *Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (explaining that police officers' privacy interests are "virtually irrelevant" when they are recorded searching a private home); *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 633 (1989) (holding no violation of privacy rights when the Federal Railroad Commission required drug tests for public employees because the state interest in information outweighed employee privacy rights); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 657 (1989) (allowing drug testing of public employees when applying for a promotion because the "governmental interests outweigh the privacy interests of those seeking promotion . . . who have a diminished expectation of privacy"); *Nat'l Fed'n of Fed. Emps. v. Cheney*, 884 F.2d 603, 613 (D.C. Cir. 1989) (holding that "civilian guards' expectations of privacy are severely reduced as a condition of employment in a high-security, military context").

311. *See, e.g.*, *Doornbos v. City of Chicago*, 868 F.3d 572, 583 (7th Cir. 2017) (holding it unreasonable for a plainclothes officer to fail to self-identify during a stop); CAL. PENAL CODE § 830.10 (West 2023) (requiring a uniformed police officer to clearly display a badge with their name or identification number); MASS. GEN. LAWS ch. 41, § 98C (2022) (requiring officers to wear a badge with either their name or identifying number); OR. REV. STAT. § 810.400 (2021) (requiring police officers to be in uniform or displaying an identifying badge).

312. *See, e.g.*, Van Tassell, *supra* note 197, at 195 (arguing for a rebuttable presumption protecting free speech rights over the privacy interests of on-duty officers). *See also* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 432–33 (2016)

sunshine statutes are to be construed in favor of disclosure and officers already enjoy reduced privacy rights while on duty, the police should not be allowed to interpret and apply victim protection laws as additional exemptions to statutory sunshine and public records laws.

In most police misconduct incidents, the first and, at times most important, piece of information that officers and departments seek to conceal is the name of the implicated officers.[313] Neither Marsy's laws nor juvenile privacy laws should be construed to provide a privacy right for police officers regarding public disclosure of their names. Marsy's laws do not necessarily require keeping victims' names confidential or exempt them from disclosure.[314] For instance, in interpreting their states' Marsy's laws provisions, the Attorneys General of North and South Dakota have determined that victim names are not protected.[315] The California Supreme Court has held police departments cannot withhold names of officers based on general speculations of harm.[316]

Concerning police officers' names, no significant statutory exemptions exist to prohibit their release, as they do for other officer information aimed at protecting officer safety, including home addresses,

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(explaining that, even if third-party recording of officers raises privacy concerns, officers' actions may always appear on video as a result of the world we live in); Zansberg & Green, *supra* note 196, at 1 (arguing that officers have no right to privacy in their on-duty work, which includes the footage shot on their body cameras); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that the public has a First Amendment right to record police); *N.Y. Laws. for Pub. Int. v. N.Y.C. Police Dep't*, 103 N.Y.S.3d 275, 284 (Sup. Ct. N.Y. Cnty. 2019) (holding police department violated freedom of information law by failing to release body-worn camera footage because the safety and privacy concerns raised by the New York Police Department failed to outweigh the public's interest in disclosure).

313. *See, e.g.*, Moran, *supra* note 190, at 196; Arielle Zionts, *Citing Marsy's Law, State Won't Release Name of Trooper Who Shot Man*, RAPID CITY J., https://rapidcityjournal.com/news/local/crime-and-courts/citing-marsys-law-state-wont-release-name-of-trooper-who-shot-man/article_910cf964-28f6-5328-bae7-554d67e1e999.html [https://perma.cc/3ZRR-VHDH] (Nov. 25, 2018); Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers' Names.*, WASH. POST (Feb. 24, 2016, 12:29 PM), https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names/.

314. CAL. CONST. art. I, § 28(b); FLA. CONST. art. I, § 16(b); KY. CONST. art. I, § 26A; LA. CONST. art. I, § 25; N.D. CONST. art. I, § 25.

315. N.D. OFF. OF ATT'Y GEN., GUIDANCE ON MARSY'S LAW 4 (2017), https://attorneygeneral.nd.gov/marsyslaw-guideance/ (stating that names cannot be withheld under North Dakota's open records law unless the victim falls into an enumerated category of crime, such as human trafficking or domestic violence); S.D. Att'y Gen. Op., No. 16-02 (Dec. 5, 2016) (stating the release of victims' names does not violate Marsy's law).

316. *Long Beach Police Officers Ass'n v. City of Long Beach*, 325 P.3d 460, 469 (Cal. 2014) (finding actual evidence of threats or harassment was needed to prove officers' lives were in danger, outweighing public's right to access).

telephone numbers, dates of birth, and phone numbers.[317] Arguably, uniformed officers waive their anonymity while on duty by voluntarily disclosing their names on the name plates they wear.[318] The names of officers are also critical for the public's ability to evaluate officer conduct, officers' past records, and the department's and state attorney's treatment of police misconduct incidents.[319]

Barring disclosure of such information stymies important newsgathering that would otherwise uncover important information for governmental scrutiny. For instance, following the murder of George Floyd, access to the name of officer Derek Chauvin enabled journalists to investigate his lengthy history of misconduct, finding at least eighteen prior misconduct complaints against him, only two of which had resulted in documented disciplinary action.[320] Similarly, after the public and press learned the identity of Timothy Loehmann, the officer who killed Tamir Rice, they discovered the officer had been forced to resign from his last police job on the grounds of immaturity and "inability to perform basic functions as instructed."[321] None of this investigative reporting would have been possible without disclosure of the officers' identities, which led to identifying patterns of misconduct and the absence of disciplinary action. Because police officers are also routinely not criminally prosecuted, the rights of the press and public to review their conduct are

317. *See, e.g.*, CAL. GOV'T CODE § 7927.700 (West 2023) (exempting personal information of government employees from disclosure); FLA. STAT. § 119.071 (2023) (exempting identifying information from disclosure of public records); LA. STAT. ANN. § 44:11 (2022) (exempting from disclosure the telephone numbers, home addresses, and financial records of public employees, upon employee request); N.D. CENT. CODE § 44-04-18.1 (2023) (exempting the personal and medical information of public employees from disclosure); OR. REV. STAT. § 192.368 (2021) (exempting home addresses, telephone numbers, and email addresses from disclosure). *Cf. Long Beach Police Officers Ass'n*, 325 P.3d at 469 (providing that officers' names can be withheld if there is a specific safety threat to the individual officer or if disclosure would undermine the performance of the officer's duties); N.D. CENT. CODE § 44-04-18.3.2 (making confidential information that could threaten the safety of undercover officers).

318. *See* Letter from Christy E. Lopez, Deputy Chief, Special Litig. Section, C.R. Div., U.S. Dep't of Just., to Thomas Jackson, Police Chief, City of Ferguson (Sept. 23, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/11/04/ferguson_ltr_nameplates_9-23-14.pdf [https://perma.cc/L27W-AEQR].

319. *See* Conti-Cook*, supra* note 302.

320. Scottie Andrew, *Derek Chauvin: What We Know About the Former Officer Convicted in George Floyd's Death*, CNN, https://www.cnn.com/2020/06/01/us/derek-chauvin-what-we-know-trnd/index.html [https://perma.cc/M2MN-C7NJ] (Apr. 20, 2021, 10:52 PM).

321. Christine Mai-Duc, *Cleveland Officer Who Killed Tamir Rice Had Been Deemed Unfit for Duty*, L.A. TIMES (Dec. 3, 2014, 5:48 PM), https://www.latimes.com/nation/nationnow/la-na-nn-cleveland-tamir-rice-timothy-loehmann-20141203-story.html [https://perma.cc/U8RY-ZSNR].

even more critical.[322] Without access to this information, the public's right to hold the government accountable for its actions cannot be given its full effect.

B. Police Use Pretexts to Withhold Information from Defendants and Litigants

In addition to interfering with the constitutional and statutory rights of the press and public to access information, the pretextual police conduct this Article identifies infringes on individual defendants' rights of access to courts and due process.

1. THE IMPACT ON FIRST AMENDMENT ACCESS TO COURTS RIGHTS

Police pretextual use of Marsy's laws and juvenile privacy laws infringes on individuals' constitutional rights to seek redress from the courts in cases of alleged police misconduct. The Court has established a fundamental individual constitutional right of access to the courts rooted in the First and Fourteenth Amendments.[323] In *Christopher v. Harbury*,[324] the Court observed two types of access-to-court claims: forward-looking claims that turn on whether the litigation opportunity is yet to be gained due to barriers between the plaintiff and the court;[325] and backward-looking claims that focus on litigation opportunities that plaintiffs already lost because the government prevented them from accessing necessary evidence to obtain a remedy.[326] Regardless of the type of claim, plaintiffs must establish a legitimate "underlying cause of action, whether anticipated or lost,"[327] and show that "official acts frustrat[ed]"

322. *See* Banteka, *supra* note 136, at 472–73.

323. *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (explaining that respondent's claim would be unsuccessful unless they could "show widespread actual injury"); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding prisoners have constitutional right to access courts under the Fourteenth Amendment). *See generally Ex parte Hull*, 312 U.S. 546, 549 (1941) (holding that state officials cannot abridge a petitioner's right to apply for a writ of habeas corpus); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (reinforcing that prisoners' access to courts through habeas corpus petitions cannot be obstructed).

324. 536 U.S. 403 (2002).

325. *Id.* at 413–15. *See also Lewis*, 518 U.S. at 351–52 (establishing injury requirement for access to courts claims).

326. *Christopher*, 536 U.S. at 413–15. *See also Wolff v. McDonnell*, 418 U.S. 539, 574–77 (1974) (recognizing guards violated prisoners' right of access to courts by intercepting letters to court and counsel).

327. *Christopher*, 536 U.S. at 415 (explaining that plaintiff must "identify a 'nonfrivolous,' 'arguable' underlying claim," to have suffered an access to courts injury (quoting *Lewis*, 518 U.S. at 353 & n.3)).

litigation.[328] In backward-looking claims, plaintiffs must also show that the claim provides a remedy they cannot obtain through another claim, and all other existing claims have been foreclosed.[329]

Courts have specifically recognized police officers' role in actions that give rise to backward-looking claims. For example, the Seventh Circuit recently decided a case in which a police officer allegedly shot his life partner.[330] Despite apparent inconsistencies in the defendant's story, investigating officers never questioned him about these facts.[331] Officers also failed to share evidence with the victim's family, even lying about witness statements and a gunshot residue test.[332] The family filed a Section 1983 lawsuit against the police department.[333] However, the department refused to give them access to the investigative materials until they dropped their lawsuit.[334] The family dropped the lawsuit, but upon learning of the fabricated forensic results, they moved to vacate the previous judgment and refiled an access to court claim.[335] Although the court ultimately held that the access to courts claim was not ripe, the court recognized that the "corollary of the right of judicial access to courts is the freedom from police interference with access to court, such that an officer's intentional concealment of the true facts about a crime may be actionable as a deprivation of constitutional rights under . . . §1983."[336] The Fifth Circuit has similarly held that the silence of prosecutors can unconstitutionally bar access to courts when they fail to disclose relevant information to individuals or families.[337]

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328. *Id.* at 413.

329. *Broudy v. Mather*, 460 F.3d 106, 120 (D.C. Cir. 2006) (explaining that plaintiffs must show underlying claim has been "completely foreclosed" (quoting *Harbury v. Deutch*, 233 F.3d 596, 609 (D.C. Cir. 2000), *rev'd sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), *vacated per curiam*, No. 99-5307, 2022 WL 1905342 (D.C. Cir. Aug. 19, 2002))). *See also Christopher*, 536 U.S. at 421 (requiring plaintiff to prove the backwards-looking denial-of-access claim would "provide a remedy that could not be obtained on an existing claim").

330. *See Harer v. Casey*, 962 F.3d 299, 303–04 (7th Cir. 2020).

331. *Id.* at 303.

332. *Id.*

333. *Id.* at 304.

334. *Id.*

335. *Id.* at 304–05.

336. *Id.* at 306 (quoting *Rossi v. City of Chicago*, 790 F.3d 729, 734 (7th Cir. 2015)). *See also Jutrowski v. Township of Riverdale*, 904 F.3d 280, 294 (3d Cir. 2018) (holding officers' participation in "conspiracy of silence" blocked plaintiff's access to courts (quoting *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995)); *Vasquez v. Hernandez*, 60 F.3d 325, 332–33 (7th Cir. 1995) (allowing a plaintiff's claim that a "conspiracy of silence" among police blocked his access to courts).

337. *Ryland v. Shapiro*, 708 F.2d 967, 972–73 (5th Cir. 1983) (holding petitioners could bring an access to courts claim against local prosecutor).

The pretextual use of Marsy's laws and juvenile privacy laws by police officers and departments can bar individuals' access to courts. For instance, in the context of juvenile privacy laws, it took more than three months for Louisiana's Jefferson Parish Sheriff Department to admit to Tre'mall McGee's family that officers shot the fourteen-year-old child, and the department still refused to release further details because McGee was a minor.[338] Because the department pretextually used juvenile privacy laws to prevent the release of relevant records, the family lacked important information to file a potential claim under Section 1983 against the officer and department for misconduct.[339] Likewise, officers' pretextual use of Marsy's laws has prevented disclosure of information that defendants would need to access the courts. In North Dakota, the police have refused to disclose the names of the officers involved in shooting civilians on several occasions.[340] The barriers in obtaining alternative remedies are also particularly high where a family member is deceased. In Florida, the Tallahassee Police Department withheld the names of officers who killed a civilian in two different instances.[341] Without this information, it may be impossible for the families of the deceased to establish what happened and turn to the courts for judicial redress.

2. THE IMPACT ON DUE PROCESS AND ACCESS TO COURTS RIGHTS

Another basis for an individual's right to access courts lies in the Due Process Clause of the Fourteenth Amendment.[342] In order to file a due process claim, plaintiffs must show that they possess an interest protected by the Due Process Clause—life, liberty, or property.[343] In *Boddie v. Connecticut*,[344] the Court held that a Connecticut statute requiring payment to file for divorce violated due process.[345] The Court recognized the importance of access to the courts and determined that the statute blocked the only available redress in Connecticut for individuals

338. *See* Agorist, *supra* note 219.

339. *Id.*

340. *See* AP, *supra* note 169; Baumgarten, *supra* note 168.

341. *Fla. Police Benevolent Ass'n v. City of Tallahassee*, 314 So. 3d 796, 798–99 (Fla. Dist. Ct. App. 2021).

342. *See Wolff v. McDonnell*, 418 U.S. 539 (1974) (grounding the right of access to courts within the Fourteenth Amendment's Due Process Clause).

343. *See, e.g.*, *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) (explaining that a basis for an access to courts claim is found in Fourteenth Amendment's Due Process clause).

344. 401 U.S. 371 (1971).

345. *Id.* at 382–83.

by barring those who could not pay the filing fee.[346] However, the Court has since narrowed the scope of this doctrine, emphasizing the essential nature of rights like marriage and divorce holding: "we go no further than necessary to dispose of the case before us . . . ."[347]

It is currently unclear whether courts would find the interests harmed by the police pretextual action this Article identifies similarly essential. But in *United States v. Kras*,[348] the Court stated, while discussing whether bankruptcy claims could be analogized to the claim for divorce at issue in *Boddie*, "[b]ankruptcy is hardly akin to free speech or marriage or to those other rights . . . that the Court has come to regard as fundamental."[349] Since the pretextual police conduct this Article addresses infringes upon fundamental First Amendment free speech rights, it may be possible for plaintiffs to successfully claim lack of access to courts on due process grounds. Such claims are one way to seek redress for pretextual police action that inappropriately shields officers' actual motivations.

C. Pretextual Enforcement of Criminal Statutes Reveals Unconstitutional Vagueness

Pregnant people have been arrested and detained under vague state criminal statutes that have been pretextually enforced against them. This includes states with no criminal offenses against fetuses and states that explicitly exclude the pregnant person's conduct from the elements of relevant criminal offenses.[350] In these instances, and particularly when the legislature has explicitly provided a maternal exception, law enforcement's application of these statutes runs afoul of due process and its requirement of fair notice of law.

The Court has construed the Due Process Clauses of the Fifth and Fourteenth Amendments to prohibit vague criminal laws.[351] The "void-for-vagueness" doctrine requires criminal statutes to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage

346. *Id.* at 374. For a similar rationale, see *Little v. Streater*, 452 U.S. 1, 16–17 (1981), holding that the state's refusal to pay for a paternity test denied the defendant his due process rights. *Id.*

347. *Boddie*, 401 U.S. at 382.

348. 409 U.S. 434 (1973).

349. *Id.* at 446.

350. *See supra* Section II.D.

351. U.S. CONST. amends. V, XIV. *See Bouie v. City of Columbia*, 378 U.S. 347, 350–52 (1964) (listing the Court's prior opinions on the void-for-vagueness doctrine).

arbitrary and discriminatory enforcement."[352] Several of the statutes that law enforcement pretextually enforce against pregnant people could be found unconstitutionally vague because they fail to provide adequate notice of what conduct is prohibited, the extent to which it is prohibited, and what exceptions may be permitted.[353]

Fair notice requires that a statute be definite enough to provide a standard of conduct for those whose activities it covers.[354] A criminal statute fails to give adequate notice if a person of ordinary intelligence, reading the plain wording of the statute, would be surprised that the statute prohibits the relevant conduct.[355] Applying this standard, there is likely a lack of fair notice in the pretextual enforcement of these criminal statutes against pregnant people.[356] Neither the legislative intent nor the statute's plain language make apparent that the laws criminalize the conduct of pregnant people.[357] In fact, in *State v. Louk*,[358] the court concluded that the plain language of the state's child-neglect-leading-to-death statute did not include prenatal acts that result in harm to a subsequently born child and should not have been applied to pregnant people.[359] Otherwise, the statute would be impermissibly vague and violate due process rights.[360]

Criminal statutes may also be unconstitutionally vague because they fail to provide sufficient guidelines or safeguards to protect against arbitrary enforcement by prosecutors and courts charged with ascertaining guilt.[361] In many cases, pregnant people have been charged with offenses carrying significantly higher sentences than their conduct would typically warrant and compared to the most severe punishment for such conduct in the relevant jurisdiction.[362] For instance, pregnant persons arrested for possession of controlled substances have been

352. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

353. *See* Brian Slocum & Nadia Banteka, *Fair Notice and Criminalizing Abortions*, 113 J. CRIM. L. & CRIMINOLOGY (forthcoming 2023).

354. *See Palmer v. City of Euclid*, 402 U.S. 544, 545–46 (1971) (per curiam).

355. *E.g.*, *United States v. Jahagirdar*, 466 F.3d 149, 154 (1st Cir. 2006) (finding the defendant had notice his conduct met the statutory definition of sexual abuse); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *United States v. Harriss*, 347 U.S. 612, 617 (1954).

356. *See supra* Section II.D.

357. *See supra* Section II.D. *See also Harriss*, 347 U.S. at 617 (requiring that statutorily prohibited conduct be apparent).

358. 786 S.E.2d 219 (W. Va. 2016).

359. *Id.* at 225.

360. *Id.*

361. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

362. *See supra* Section II.D.

charged with unlawful abuse or neglect of a child, child endangerment, or delivery of drugs to a minor instead of simple drug possession.[363] Yet there are no clear standards to guide decisionmakers in determining whether such higher sentences should be imposed. As argued above, law enforcement has capitalized on these statutory uncertainties to engage in pretextual arrests and prosecutions.[364] This conduct contravenes due process protections, including the principles of fair notice and non-arbitrary enforcement of criminal statutes.[365]

D. Police Pretextual Lawmaking Violates the Separation of Powers

The Court has affirmed that the separation of powers into three coordinate branches is essential to the preservation of liberty and democratic governance.[366] Separation of powers limits non-legislative lawmaking through the nondelegation doctrine.[367] In recent cases, the Court has applied the nondelegation doctrine only as a check to ensure that when the legislature delegates responsibilities to agencies, it provides sufficient standards for agencies to follow in applying the law.[368] While courts have generally refused to recognize that police exercise any quasi-legislative authority—and thus have not applied the same constraints as with other executive agencies[369]—scholars have argued that police do

363. *See State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003) (affirming conviction of a pregnant woman for homicide by child abuse of a stillborn fetus after she used illegal drugs); *id.* at 179–80 (Moore, J., dissenting) (condemning the majority for its pretextual reading of that statute); *Bei Bei Shuai v. State*, 966 N.E.2d 619, 621–24 (Ind. Ct. App. 2012) (charging a mother who ingested rat poison with statutory murder and feticide for intentionally killing a fetus in any stage of development). *See also supra* Section II.D.

364. *See supra* Section II.D.

365. *See, e.g.*, *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (finding tax-related penal statutes should be strictly construed so as to provide fair notice); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) (finding lottery-related criminal statutes should be strictly construed to promote fair notice); *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 362 (1905) (finding bankruptcy-related criminal statutes should be strictly construed to promote fair notice). However, note both the vagueness doctrine and the rule of lenity are applied rarely by courts. *See* Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 163–64 (critiquing the traditional vagueness doctrine as an "illusory effort to constrain police"); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 901–06 (2004) (noting most jurisdictions have either abolished or narrowed the application of the rule of lenity).

366. *Mistretta v. United States*, 488 U.S. 361, 380–84 (1989) (holding the United States Sentencing Commission constitutional because Congress legally delegated some of its power to experts to develop statutory sentencing guidelines).

367. *Id.* at 371–72.

368. *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218–19 (1989).

369. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 122 (2016) (discussing how police agencies have mostly remained immune from formal

engage in inadvertent lawmaking, and this lawmaking fails to meet even the minimal non-delegation standard.[370] Wayne Logan has observed the phenomenon of police not only enforcing but also interpreting and expanding on criminal statutes in the context of police mistakes of law, and argued it violates the separation of powers.[371] Brandon Hasbrouck recently argued that police have abused their authority by establishing standards subjecting Black people to brutality and prosecutions, fueling mass incarceration and violating the separation of powers.[372] Hasbrouck refers to police rulemaking that limits suspect rights in searches and seizures through deference to officer reasonableness.[373]

Police have been engaging in a similar type of rulemaking in several instances described above, likewise violating the constitutional separation of powers. By assigning victim status to on-duty officers under Marsy's laws, police departments effectively redefine the word "victim" to include officers who suffer any harm or threat of harm while on duty to prevent disclosure of officer-related information in cases of misconduct.[374] Police departments have also been granting officers rights intended to put victims on equal footing with defendants—something that can be achieved only as part of criminal proceedings[375]—outside of the criminal process where no defendant is involved. Similarly, law enforcement has reinterpreted legislation, initially enacted to protect

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administrative structures). *See generally* 5 U.S.C. § 552(b)(7)(E) (exempting police agencies from the same disclosures about guidelines and procedures that are required by other agencies).

370. *See e.g.*, Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 239–42 (2021) (explaining that the standards police regularly adopt and interpret effectively become law, yet are shielded from democratic processes and constitutional standards); Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 427, 434 (2019) (explaining that federal courts often defer to police policies when defining excessive force and other terms, effectively allowing "police to make constitutional rules for themselves"); Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1286–89 (2019) (explaining how courts often defer to and affirm police department's self-understanding of the law in excessive force cases).

371. *See* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 95–96 (2011) (explaining how courts' deference to police statutory interpretations, especially where officers may be mistaken, allows the executive branch to take on legislative and judicial roles, violating the separation of powers).

372. Hasbrouck, *supra* note 370, at 256.

373. *Id.* at 257–58.

374. *See* Jacoby & Gabrielson, *supra* note 130.

375. *See supra* Sections II.B.1–2; *Ross Yordy Constr. Co. v. Naylor*, 55 F.3d 285, 286, 288 (7th Cir. 1995) (finding an individual lost status as a "victim" when the state's attorney dropped the charges against the defendant).

pregnant people, in order to arrest and prosecute them. For example, law enforcement has either included pregnant people as the potential assailants under these statutes,[376] or interpreted the words "person" or "child" in these statutes to encompass fetuses, in the absence of explicit definitions.[377] As argued above,[378] this raises constitutional issues, running afoul of nondelegation canons, such as the requirement that agencies do not interpret statutes in a way that raises serious constitutional doubts.[379]

The police have also interfered with the judiciary's ability to carry out its constitutionally assigned function of hearing cases and remedying constitutional or statutory conflicts. Police have interfered with the courts' exclusive authority to interpret statutes and determine "what the law is."[380] Police have also effectively prevented the public from accessing information necessary to bring a lawsuit, thus deciding which cases can even be reviewed by the courts.[381] Finally, the police department policies this Article identifies also prevent the federal government from exercising its statutory authority to bring suit against local law enforcement agencies in instances where a "pattern or practice" of constitutional violations exists.[382] The Special Litigation Section of the Civil Rights Division is responsible for conducting preliminary investigations to determine the existence of a "pattern or practice" of

376. *See, e.g.*, *Bei Bei Shuai v. State*, 966 N.E.2d 619, 632–36 (Ind. Ct. App. 2012) (Riley, J., concurring in part and dissenting in part) (condemning charging a mother with feticide under statutes intended to prosecute deaths of fetuses caused by third parties); *Whitner v. State*, 492 S.E.2d 777, 786–87 (S.C. 1997) (Finney, J., dissenting) (condemning charging the mother of an unborn fetus with child neglect); *State v. McKnight*, 576 S.E.2d 168, 179–80 (S.C. 2003) (Moore, J., dissenting) (condemning the conviction of a previously-pregnant woman of homicide by child abuse of a stillborn fetus).

377. *E.g.*, *Whitner*, 492 S.E.2d at 786–77 (Finney, J., dissenting); *McKnight*, 576 S.E.2d at 179–80 (Moore, J., dissenting).

378. *See supra* Section III.D.

379. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 339 (2000).

380. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

381. *See supra* Section III.B.

382. *See* 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141). *Cf.* George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (as received in the Senate, Mar. 9, 2021) (which, if passed, would strengthen the United States Department of Justice's oversight over local police departments and require annual use-of-force reporting by local police departments). For a more elaborate discussion on concepts of new federalism and police reform, see Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737 (2021); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351 (2011).

unconstitutional violations before the Department of Justice conducts a formal investigation to determine whether to file a lawsuit against the law enforcement agency.[383] Police department policies that apply Marsy's laws and juvenile privacy laws to prevent disclosure of information regarding potentially unconstitutional police behavior inhibit the ability of the federal government to investigate and take action to address systemic constitutional violations.

CONCLUSION

The Fourth Amendment pretext doctrine has permeated policing more widely than previously considered. The Court gave officers discretion to act pretextually on illegitimate motives when it held that considerations of pretext in policing are constitutionally irrelevant. Lower courts have since evaluated police conduct formalistically without considering police motivations or policy. This Article contends that the judicial disregard for the subjective motivations of the police has undermined constitutional, statutory, and common law rights in ways that had not been identified before. The unbounded police authority engendered in the context of pretextual searches and seizures has spilled over into other policing practices, as departments have institutionalized pretext into policy. This Article identifies and elaborates on three instances of this pretext spillover into victims' rights, juvenile privacy rights, and the policing of pregnancy. It demonstrates how the police use available laws pretextually to escape accountability for misconduct and expand the state's carceral power. This broader account of police pretexts raises the stakes of an already controversial doctrine, challenges the assumption that pretextual policing is unique to searches and seizures, and cautions that its continued expansion will further erode civil rights and police accountability.

383. *See Oversight of the Department of Justice—Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 18–20 (2002) (statement of Ralph F. Boyd, Jr., Assistant Att'y Gen., C.R. Div., Dep't of Just.).