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CATCHALL POLICING AND THE FOURTH AMENDMENT

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ABSTRACT

American police do a bit of everything. They direct traffic, resolve private disputes, help the sick and injured, and do animal control. Far less frequently than one might think, they make arrests. Americans reflexively call the police for troubles, big and small. The "catchall tradition" is shorthand for this melding of non-adversarial, public assistance with adversarial, crime-control functions. The catchall tradition means that civilians are exposed to the police's coercive power as a condition of receiving police help. This Article contends that the catchall tradition is antithetical to constitutional police regulation. The Supreme Court has distinguished adversarial from non-adversarial state action, often imposing less Fourth Amendment constraint on the latter. The Court recently reaffirmed this distinction in Caniglia v. Strom*. But the catchall tradition makes it impossible for the police themselves let alone courts to distinguish between the police's non-adversarial and adversarial functions. This is a problem without a doctrinal solution. The Article thus concludes that meaningful constitutional regulation of police requires remaking police agencies in a more decisively adversarial mold.*

INTRODUCTION

An entry door left open might lead a police officer at the scene to wonder about the occupant's wellbeing.[1] If no one responds when the officer calls, it could be that an occupant is hurt or otherwise needs help. But what if, upon entering to investigate, the officer discovers evidence of a crime? What if the officer had planned on searching for

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1. *See* MacDonald v. Eastham, 745 F.3d 8, 11 (1st Cir. 2014) (noting that the officer discovered evidence of crime after entering the opened entry door to check on the occupant's welfare); United States v. Quezada, 448 F.3d 1005, 1006 (8th Cir. 2006) (same).

criminal evidence all along? The Fourth Amendment is more permissive of the police entering a home to help someone who is injured than it is of the police entering to conduct a criminal search.[2] The police might thus cry crocodile tears of worry when they really hope to search for evidence of a crime but do not have sufficient suspicion to satisfy the more demanding standard for a criminal search. Fourth Amendment scholars have noted the problem of "pretext,"[3] but they often overlook how the structure and tradition of American policing make pretextual behavior inevitable and virtually undetectable.

The "catchall tradition" has long defined American policing.[4] Police direct traffic, resolve private disputes, help the sick and injured, do animal control, and far less frequently than one might think, they make arrests.[5] Melding non-adversarial, public assistance with adversarial, crime-control functions means that police assistance inevitably comes with the possibility of harsh treatment associated with their latter function. The consequences can be tragic: a 911 call for help with a friend's or family member's mental health crisis could end with police using lethal force.[6]

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2. Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (holding that the Fourth Amendment does not require a finding of probable cause when it is reasonable to think someone is injured or about to be injured).

3. *See, e.g.*, Christopher Slobogin, *Police as Community Caretakers*: Caniglia v. Strom, CATO SUP. CT. REV. 191, 207–08 (2020–21) (summarizing legal approaches to pretext); Gabriel J. Chin & Charles Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 916–17, 918–23 (2015) (arguing that *United States v. Whren* was incorrectly decided and summarizing the literature on the same).

4. *See* ROBERT FOGELSON, BIG-CITY POLICE 108 (1978) (describing the catchall tradition's persistence in the United States).

5. Criminologists have long recognized this point. *See* DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY 14 (2000) (noting the time study showing that patrol officers spent less than 15% of their shifts engaged in traditional crime control activities)*;* PETER K. MANNING, POLICE WORK 26 (2d ed. 1997) (noting that the police work, in the main, is not "criminal law relevant, but represents various kinds of public and private troubles . . . ."); John Van Maanen, *Working the Street: A Developmental View of Police Behavior* 42–43 (Mass. Inst. of Tech., Working Paper No. 681-73, 1973) (stating that patrol officers devote "little of [their] time on the street" to traditional crime control activities). Law scholars are increasingly paying attention to this fact and its legal implications. *See* Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 950–54 (2021) (noting how little time patrol officers devote to crime control).

6. *See, e.g.*, Slobogin, *supra* note 3, at 195–96 (noting cases of people killed by police during mental-health-related calls for service); Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1415–16 (2021) (describing a case where a husband requested help with his spouse); Justin Garcia, *Las Cruces Police Shoot and Kill Dog During Welfare Check*, LAS CRUCES SUN-

This Article contends that the catchall tradition is antithetical to constitutional police regulation. The catchall tradition makes it impossible for officers themselves, let alone courts to readily and consistently distinguish between non-adversarial and adversarial tasks. The Supreme Court has nonetheless distinguished adversarial from non-adversarial state action, often imposing less Fourth Amendment constraints on the latter.[7] This recognizes that, in theory, individuals need more protection against the State when it is trying to harm rather than help them. The Court developed this intuition in Fourth Amendment cases involving non-adversarial state institutions like firefighters, public schools, and welfare caseworkers.[8] The police are no less significant purveyors of non-adversarial services than these institutions, but they do so in the shadow of their coercive and adversarial power.

Accommodating the police's non-adversarial roles is more of an afterthought in Fourth Amendment jurisprudence,[9] but a recurring one that highlights courts' limited ability to decipher the sometimes inscrutable ambiguities of the police's motivations. The Fourth Amendment canon has developed primarily in cases of adversarial policing: searches and seizures that support criminal charges.[10] There are fewer opinions addressing the police's non-adversarial functions. But in the cases that do exist, the Court often relaxes Fourth Amendment standards for ostensibly non-adversarial police

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NEWS (June 29, 2021), https://www.lcsun-news.com/story/news/crime/2021/06/29/las-cruces-police-shoot-kill-dog-during-welfare-check/7791184002 [https://perma.cc/8YYC-9GSV] (noting that police shot a pet while responding to the mental health call); Jonathan Levinson, *Man Killed by Portland Police Called 911 Himself, Seeking Mental Health Care*, OREGON PUB. BROAD. (June 28, 2021), https://www.opb.org/article/2021/06/28/man-killed-by-portland-police-called-911-himself-seeking-mental-health-care [https://perma.cc/T8G9-GY8B] (reporting that the police shot an individual during a welfare check); Minyvonne Burke, *Policing mental health: Recent deaths highlight concerns over officer response*, NBC NEWS (May 16, 2021), https://www.nbcnews.com/news/us-news/policing-mental-health-recent-deaths-highlight-concerns-over-officer-response-n1266935 [https://perma.cc/LZ2B-NRMM] (same); Madeline McGee & Alaa Elasar, *Police Mental Health Training Under Scrutiny in Fatal North Fulton Shooting*, ATLANTA J.-CONST. (Apr. 30, 2018), https://www.ajc.com/news/crime—law/family-somali-refugee-killed-police-suffered-from-mental-illness/wANMDpfDATXvVqqI75JdaI [https://perma.cc/G93Q-XEWW] (same).

7. *See, e.g.*, *Brigham City*, 547 U.S. at 403; Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (noting the role of the police in implementing "the extensive regulation of motor vehicles and traffic").

8. *See infra* Part I.B.

9. *See infra* Part II.

10. *See infra* Part I.A.

functions.[11] For example, the Court permits police to forcibly enter a home "to render emergency assistance to an injured occupant" on a lesser showing than required to enter in search of criminal evidence.[12] In theory, it makes sense that the police would have a greater constitutional berth to help someone out of a jam than to lock them up. But the distinction between non-adversarial and adversarial roles is often less clearly etched in practice than in theory. The facts in the recent Supreme Court case of *Caniglia v. Strom* are illustrative.

Caniglia arose from a police welfare check prompted by Caniglia's wife's 911 call. She reported that Caniglia had threatened to harm himself during an argument with her the previous evening and that he was presently armed.[13] In the course of the police's welfare check on Caniglia, he agreed to submit to psychiatric evaluation at a local hospital. After his departure, however, the police searched Caniglia's home and seized his firearms.[14] The police did not have a warrant to enter Caniglia's home let alone to seize his firearms.[15] The search and seizure were carried out in the name of helping Caniglia but were clearly adversarial acts to which he did not consent.

The First Circuit upheld the police search and seizure under the rubric of "community caretaking," reasoning that police have "wide latitude" to perform non-adversarial functions and "need only act 'within the realm of reason.'"[16]

The Supreme Court reversed the First Circuit,[17] but did so in a way that underscored the constitutional awkwardness of reconciling the police's adversarial and non-adversarial roles. The Court announced that there is no "freestanding community caretaking" exception that relieves the police of having to obtain a search warrant to enter a home as ordinarily required in criminal cases.[18] But the Court also reaffirmed its earlier decision in *Brigham City v. Stuart* which permitted police to

11. *See infra* notes 41–65 and accompanying discussion.

12. *Brigham City*, 547 U.S. at 403.

13. Caniglia v. Strom, 396 F. Supp. 3d 227, 231 (D.R.I. 2019).

14. *Id.* at 231–32.

15. *Id.* at 231.

16. Caniglia v. Strom, 953 F.3d 112, 123 (1st Cir. 2020) (quoting United States v. Rodriguez-Morales, 929 F.2d 780, 786 (1991)).

17. Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021).

18. *Id*. at 3.

enter a home without a warrant or probable cause to offer emergency assistance to someone inside.[19]

Four justices concurred separately in *Caniglia* to underscore that even if the First Circuit had gotten carried away in giving the police wide latitude to help the sick and injured, *Caniglia* should not be read as an overcorrection.[20] The concurring Justices seemed to offer assurance that the Court would continue to look upon the police differently depending on whether they are performing ostensibly adversarial or non-adversarial acts.[21]

Distinguishing between the police's adversarial and non-adversarial functions might make sense as a theory under the Fourth Amendment, but the catchall tradition frustrates its practical application. The unsystematic intermingling of adversarial and non-adversarial functions in American policing defies post hoc judicial analysis. The catchall traditional makes it difficult, if not impossible, for the police themselves to contemporaneously distinguish between adversarial and non-adversarial action. It should be no surprise then that courts are unable to readily do so after the fact.[22] Civilians parceling adversarial and non-adversarial functions between institutions is a prerequisite for meaningful judicial enforcement of the distinction. The catchall tradition ensures that civilians are exposed to

19. During the oral argument, there was confusion about the nomenclature — namely whether "community caretaking" was more permissive than the so-called "emergency assistance" exception. Transcript of Oral Argument at 66–67, 76–79, Caniglia v. Strom, 141 S. Ct. 1596 (2021). Both pertain to the police's authority to perform non-criminal functions, but the former was announced in the context of a vehicle search, while the latter was announced in the context of a home entry. *See id.*

20. Justices Roberts and Breyer emphasized that *Brigham City* remained good law. *Caniglia,* 141 S. Ct. at 1600 (Roberts, J. concurring). Justice Alito emphasized that *Caniglia* should not be read to mean searches and seizures conducted for non-crime control purposes are subjected to the same limitations as those conducted for crime control purposes. *Id.* at 1600–02 (Alito, J. concurring). Justice Kavanaugh made a similar point by noting that forcible police entries are critical for suicide prevention and rescuing injured seniors. *Id.* at 1602–05 (Kavanaugh, J. concurring).

21. *But see* Slobogin, *supra* note 3, at 194. Professor Slobogin expresses hope that *Caniglia* might lead the Court to "rethink[ ]" the Fourth Amendment's carve-out for the so-called "special needs" and other non-criminal police functions. *Id.* This hope seems unlikely to be realized given the narrowness of the Court's holding in *Caniglia*, *id.* at 193, and in light of the views expressed by the concurring Justices. *See supra* note 20. In addition, the "special needs" cases are embedded in a broader, entrenched set of jurisprudential intuitions about non-adversarial police functions. *See infra* Part II.B.

22. The Supreme Court has noted the difficulty of parsing officers' subjective motivations after the fact. *See* Whren v. United States, 517 U.S. 806, 814–15 (1996) (identifying as a difficulty that "police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time").

the State's coercive power as a condition of receiving its help. This is inconsistent with the Fourth Amendment's spirit that a citizen enjoys the right to be "let alone."[23] Indiscriminately bundling adversarial and non-adversarial functions is not just bad policy,[24] this Article argues that it offends constitutional principle.

The Article proceeds in three parts. First, it shows how the Fourth Amendment canon arose in the context of adversarial state action — namely, the police investigating crime. Next, this Article describes how cases involving non-adversarial institutions inspired exceptions to the Fourth Amendment that were also applied to the police. It then explains how the catchall tradition makes it difficult to distinguish between the police's adversarial and non-adversarial functions. The Article concludes by identifying the implications of the analysis for policymakers.

I. THE FOURTH AMENDMENT CANON

The Fourth Amendment applies to all state actors, but the canon casts the police as first among equals.[25] This illustrates the unique dangers of the police's adversarial posture when enforcing criminal laws. Cases involving non-adversarial institutions arise less frequently, skittering around the canon's rim. One will hear little of anything of firefighters, welfare caseworkers, schools, or building inspectors in a constitutional criminal procedure class where the Fourth Amendment makes its most significant law school appearance. But those cases exist and have often impelled the Court to modify Fourth Amendment principles to accommodate non-adversarial state action.

A. Crime Control and the Canon

The police are the quintessential example of an adversarial public institution because they enforce criminal law. That prerogative contemplates coercive power, including the authority to kill extrajudicially.[26] With that unique power comes unique dangers.

23. Olmstead v. United States, 277 U.S. 438, 440 (1928).

24. Professor Friedman recently made this point. *See* Friedman, *supra* note 5, at 980–81.

25. *See* Michigan v. Tyler, 436 U.S. 499, 504–06 (1978) (noting that the Fourth Amendment applies to state actors other than police, but the "paradigmatic" cases involve "entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime").

26. *See* Tennessee v. Garner, 471 U.S. 1, 9 (1985) (recognizing the police's authority to kill though still subject to the limitation imposed by the Fourth Amendment).

Justice Jackson offered the following iconic caption of the constitutional dilemma:

> The point of the Fourth Amendment . . . often is not grasped by zealous officers . . . . Its protection consists in requiring that inferences [regarding a crime's occurrence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . .[27]

The Fourth Amendment canon has congealed around the tension between crime control and civil rights.[28] Opinions addressing that tension fill case reporters: who should strike the Fourth Amendment balance and what should the substantive balance be?

Justice Jackson purported to answer the first question: the Fourth Amendment prefers that judges make decisions about whether to search or seize in advance of police doing so. This illustrates the Fourth Amendment's preference for warrants.[29] But obtaining a warrant is often impractical. The Court has thus created many exceptions to the warrant requirement.[30] These exceptions often require a threshold of individualized suspicion — "reasonable suspicion" — before an officer may detain or forcibly search individuals or their property.[31]

The Fourth Amendment further limits the outer bounds of appropriate police conduct during seizures and searches. Individualized suspicion does not, for example, authorize the police to use excessive force against suspects,[32] perform unduly invasive searches,[33] or enter a dwelling without warning.[34]

The point here is not to summarize the Fourth Amendment canon, but just to underscore its focus on the police's adversarial role.[35] Considerably less attention is paid to non-adversarial institutions of which the police are an ironically salient example.

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27. Johnson v. United States, 333 U.S. 10, 13–14 (1948).

28. *See* RONALD ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 322 (4th ed. 2016) (noting that "Fourth Amendment litigation overwhelmingly involves" challenges to police criminal investigations).

29. Katz v. United States, 389 U.S. 347, 357 (1967).

30. California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring).

31. United States v. Place, 462 U.S. 696, 698 (1983).

32. Graham v. Connor, 490 U.S. 386, 396 (1989).

33. Winston v. Lee, 470 U.S. 753, 766 (1985) (holding that the government cannot force a defendant to have surgery to extract evidence of crime despite the existence of individualized suspicion).

34. Hudson v. Michigan, 547 U.S. 586, 590 (2006).

35. *See* ALLEN ET AL., *supra* note 28, at 322.

B. Non-Adversarial Institutions

The Fourth Amendment applies to all state agents, not just the police.[36] But unlike the police enforcing criminal laws, welfare caseworkers, firefighters, building code agents, and school officials do not strike a starkly adversarial pose, at least not in the first instance. An early example involved a Fourth Amendment challenge of welfare case workers' mandatory home visits for welfare recipients.[37] The Supreme Court rejected the challenge. The Court questioned whether the case workers' conduct was a search at all. Even if it were, the Court stated it was "reasonable" despite the absence of probable cause or a warrant.[38] The case worker's job was to help aid recipients, not arrest them, unlike what a police officer would do to a crime suspect.[39] The Court echoed the State's gloss on the home visits as creating an opportunity for caseworkers to better support recipients.[40]

Firefighters are even more clearly non-adversarial, at least during a fire. They forcibly enter a house to save the residents and their property, not to harm them.[41] The Court accommodated a warrantless entry into a home for firefighting purposes with a slight modification to the existing Fourth Amendment exception of "exigency."[42] Developed in the context of police investigations, exigency permits warrantless entries into homes when there is probable cause that a crime has occurred (or is about to occur) and harm to the public or destruction of evidence likely to occur in the time it takes to obtain a warrant.[43] By eliminating the probable cause requirement, the Court adopted the exception to serve firefighters' emergency function: "A burning building clearly presents an exigency" that threatens to harm the public in the time it would take to obtain a warrant.[44]

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36. Michigan v. Tyler, 436 U.S. 499, 504–06 (1978).

37. Wyman v. James, 400 U.S. 309, 317–18 (1971).

38. *Id*. at 318.

39. *Id*. at 322–23. There was a debate as to how decidedly non-adversarial welfare case workers were given their role in identifying welfare frauds. *Id*. (Marshall, J., dissenting). This discussion is illuminating to the extent that the dissent likens the case worker to the police.

40. *Id.* at 314 (majority op.).

41. Michigan v. Clifford, 464 U.S. 287, 294 (1988). This is not to say that relationship between these institutions and civilians is unitarily non-adversarial. Fire department officials sometimes investigate the causes of fire with a view toward bringing criminal charges. *Id.* at 290–91. But in the main, this would seem incidental to their primary role of extinguishing fires.

42. *Id.* at 293.

43. Michigan v. Tyler, 436 U.S. 499, 509 (1978).

44. *Id.*

Once the emergency passes, things get more complicated. Fire department officials may seek to inspect the fire-damaged property to ascertain the causes of the fire. Their aim might be to help prevent future fires in nearby or otherwise similar structures. But their aim might also be to find evidence of criminal arson. Where the latter is the driving motivation, the Supreme Court held that the fire inspector must obtain a warrant based on probable cause just as the police would.[45] This makes sense given that fire officials are performing a crime control function. But where the fire department only seeks to understand a blaze's causes to prevent reoccurrence, it may do so with a lesser form of constraint: a so-called "administrative warrant" will suffice.[46]

An "administrative warrant" is a judicial authorization to enter buildings for non-criminal inspections. Such a warrant may be obtained upon a lesser showing than what is required for a criminal warrant.[47] In *Camara v. San Francisco*,[48] the Court justified the relaxed standard for administrative warrants because building inspectors' primary purpose is non-adversarial.[49] Before *Camara*, the Court had read the Fourth Amendment not to impose restrictions on building inspectors because of their non-adversarial function.[50] In *Maryland v. Frank*,[51] the Supreme Court held that city building inspectors were not subject to the Fourth Amendment's constraint because "[n]o evidence for criminal prosecution [was] sought."[52] Rather, city inspectors only sought that defendant keeps his property "in a manner consistent with the maintenance of minimum community standards of health and well-being, including his own."[53]

In *Camara*, the Court changed course somewhat by applying the Fourth Amendment to building inspectors, but not as stringently as to the police.[54] The *Camara* Court continued to embrace the *Frank* Court's gloss on building inspections as being non-adversarial.[55] But

45. *Id.*

46. *Id.*

47. Camara v. San Francisco, 387 U.S. 523, 537 (1967).

48. Camara v. San Francisco, 387 U.S. 523 (1967).

49. *Id.* at 535 ("The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.").

50. *See* Maryland v. Frank, 359 U.S. 360, 366–67 (1959).

51. Maryland v. Frank, 359 U.S. 360 (1959).

52. *Id.* at 366.

53. *Id.*

54. *Camara*, 387 U.S. at 530–31.

55. *Id.*

the Court also recognized that such inspections could become adversarial if a citizen resisted the inspection and that such intransigence could sometimes lead to a criminal sanction. [56] Accordingly, the *Camara* Court held that to enter a dwelling without consent, building inspectors must possess a warrant based on probable cause.[57] But the Court significantly diluted the definition of probable cause for an administrative warrant. No individualized suspicion of a violation is required. [58] Rather, "probable cause" exists where inspectors' "[e]xperience [] show[s] the need for periodic inspections of certain facilities." without anything more.[59] The lax redefinition of probable cause in administrative search contexts reflected the Court's sense that building inspectors are generally non-adversarial.[60]

The Court's doctrinal accommodation of non-adversarial institutions continued with its "special needs" jurisprudence which permits searches without individualized suspicion when conducted to advance non-criminal state interests.[61] The special needs search is an extension of the administrative search.[62] This exception to the Fourth Amendment's individualized suspicion and warrant requirements arose in response to public schools' suspicionless searches of students.[63] Schools conducted such searches to, for example, detect drug use among students. In upholding such suspicionless drug testing as a special need, the Court took a careful note of schools' non-adversarial relationship with their students and the community. [64] Schools' ostensible purpose in identifying drug use was not to initiate criminal proceedings.[65] As with administrative searches, the Court imposed less Fourth Amendment constraint on schools' because of their non-adversarial orientation toward the group targeted for search.

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56. *Id*.

57. *Id.* at 535.

58. *Id*. at 537.

59. *Id*.

60. *Id*. ("[B]ecause the inspections are neither personal . . . nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.").

61. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

62. *Id.* at 337 (citing *Camara* for the balancing of interest test in special needs cases); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 275–76 (2011).

63. *T.L.O.*, 469 U.S. at 337.

64. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 658 (1995) (noting that the reason for suspicionless drug testing of student athletes was not to bring criminal cases against them); *see also* Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 621 n.5 (1989) (finding no evidence to suggest that the reason for drug testing of the employees was to prosecute them).

65. *Acton*, 515 U.S. at 658; *T.L.O.*, 469 U.S. at 337.

II. AMBIGUOUSLY ADVERSARIAL

Despite being cast as quintessentially adversarial in the Fourth Amendment canon,[66] a substantial portion of the police's work is non-adversarial.[67] As described in section A below, these two sets of functions are melded together. The Court has thus extended the reach of the relaxed Fourth Amendment standards developed in cases involving non-adversarial institutions to the police. Examples of this are described in section B. Finally, section C addresses the intractable problems that arise when these more relaxed standards are applied to the police.

A. The Catchall Tradition

The "catchall tradition" defines American policing and traces its origins to the inception of policing in the United States.[68] In the nineteenth century, big-city police were more likely to house itinerants than to solve crimes.[69] Crime control is a more salient feature of police's responsibility and identity now than in the past.[70] Police wield coercive power of the last resort.[71] Ironically though, the police are more often called upon to serve as the first responders for non-criminal problems that do not require coercive power.[72] This is in part because there are few other public agencies available for health emergencies, traffic and vehicle incidents, public and private nuisances, and a host of other small exigencies that arise on city streets.[73] In the face of trouble, Americans tend to "call the police."[74]

Caniglia illustrates the police's catchall role. Caniglia's spouse called 911 following an argument in which Caniglia threatened to harm himself with a firearm.[75] The call was made after she left the house so there was no imminent danger to her safety.[76] She asked the police to

66. *See* Tennessee v. Garner, 471 U.S. 1, 9 (1985) (recognizing the police's authority to kill though still subject to the limitation imposed by the Fourth Amendment).

67. *See infra* Part II.A.

68. FOGELSON, *supra* note 4, at 108.

69. *Id*.

70. SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM 135 (1977).

71. The police possess the power to use lethal force. *See Garner*, 471 U.S. at 1, 9.

72. MANNING, *supra* note 5, at 26.

73. *See Supra* note 5 and accompanying text.

74. EGON BITTNER, THE FUNCTIONS OF POLICE IN MODERN SOCIETY 43 (1970).

75. Caniglia v. Strom, 141 S. Ct. 1596, 1596 (2021).

76. *Id.*

perform a "welfare check" and accompanied them.[77] Commentators have asked whether the police are the best first responders for such mental health crises.[78] However, the call in *Caniglia* involved both a mental health crisis and firearms, the combination of which raises the possibility of criminal violence. There is often no public agency other than the police available to respond to such possibility.[79]

This is not just true for mental health. Often, no one other than the police is available to follow up on the welfare of those vulnerable to illness or injury.[80] This can morph into a broad public-health mandate that the police are ill-equipped to execute. For example, Forrest Stuart's recent work critiques therapeutic policing on Skid Row, a poor Los Angeles neighborhood with a concentration of rehabilitation and other social service providers.[81] "Therapeutic policing" harnesses' the police's coercive power to effect "a paternalistic brand of spatial, behavioral, and moral discipline designed to 'cure' those at the bottom of the social hierarchy" through what appear to be benevolent interventions.[82] By design, the police leverage their coercive power to compel individuals in Skid Row to seek such services.[83] But, Stuart showed, the police also misread cues of destitution and marginality as intransigence and personal failure.[84]

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77. *Id.*

78. Friedman, *supra* note 5, at 980–81 (arguing that policymakers and the public should ask whether police are appropriately tasked with various non-crime control tasks such as mental health interventions); Stuart M. Butler & Nehath Sheriff, *Innovative Solutions to Address the Mental Health Crisis: Shifting away from Police as First Responders*, BROOKINGS REP. (Nov. 23, 2020), https://www.brookings.edu/research/innovative-solutions-to-address-the-mental-health-crisis-shifting-away-from-police-as-first-responders [https://perma.cc/97JB-U7Y5] (identifying the harmful consequences of relying on police to handle mental health interventions).

79. *See* Butler & Sheriff, *supra* note 78.

80. *Id.*

81. FORREST STUART, DOWN OUT & UNDER ARREST 70–71 (2016).

82. *Id.* at 6, 14-15, 31.

83. *Id.* at 97.

84. *See id.* at 104, 108, 109–11, 122. Skid Row's population is extremely poor with nearly a third living on the streets and many beset with mental health, addiction, and other issues. *Id.* at 2, 24. Those on Skid Row are typically there for lack of economic and social opportunities anywhere else. *See id.* Ironically, those social facts, as suggested by long-term residence on Skid Row and the attendant social connections made there, often served as salient suspicion cues. *See id.* 98-110. Stuart describes how officers in Skid Row developed questionable heuristics for distinguishing those present in the neighborhood for legitimate reasons and those that were not. For example, those who were enrolled in residential programs at large institutional shelters were often given passes on minor misconduct because police perceived them as trying to rehabilitate themselves and leave Skid Row. *Id.* at 104, 108. Long-term residents of Skid Row who were not enrolled in such programs were treated most harshly – the police viewed these individuals as having failed to

The catchall tradition's open-endedness is well illustrated by the police's regulation of motor vehicles. Police have enforced traffic laws despite longstanding concerns about whether the enforcement is sufficiently connected to the police's crime control mission.[85] The police are typically responsible for enforcing traffic codes, facilitating traffic flow, responding to (and documenting) vehicle accidents, and identifying vehicle safety issues among other issues.[86] The Supreme Court has repeatedly noted the breadth of the police's authority when it comes to vehicles.[87] Legislatures have piled on by heaping onto the police the responsibility of managing non-criminal administrative schemes on commercial vehicles and vehicle sale/salvage businesses.[88]

B. The Possibility of Purely Non-Adversarial Policing

The Supreme Court has correctly recognized that the police wear adversarial and non-adversarial hats. But it has incorrectly conceived of the police as self-consciously doffing and donning these hats in precise response to different kinds of problems. The line between adversarial and non-adversarial policing is murky.

The Court has accommodated the police's non-adversarial function by applying a more relaxed Fourth Amendment standard to those functions. For example, the police may enter private homes on a showing less than probable cause if the purpose is "tono render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[89] The police may search unattended and impounded vehicles upon an even lesser showing. In *South Dakota v. Opperman*,[90] the Court concluded that the Fourth Amendment

rehabilitate themselves and thus choosing to indulge in the degenerate lifestyle that police associated with the neighborhood. *Id.* at 106–07, 109–10, 122.

85. FOGELSON, *supra* note 4, at 185; Friedman, *supra* note 5, at 954.

86. FOGELSON, *supra* note 4, at 185; Friedman, *supra* note 5, at 954.

87. *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation . . . . A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view."); Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (noting the police's role in implementing "the extensive regulation of motor vehicles and traffic").

88. *See* New York v. Burger, 482 U.S. 691, 694–95 & n.1 (1987) (describing the New York statute that required junkyards to maintain records for vehicles coming into their possession and to make those records available to police officers); United States v. Orozco, 858 F.3d 1204, 1206 (9th Cir. 2017) (describing Nevada statute authorizing inspection of commercial vehicles).

89. Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

90. South Dakota v. Opperman, 428 U.S. 364 (1976).

permitted suspicionless "inventory searches" of impounded vehicles.[91] This was, in part, because the search's purpose was to protect the car owner's property and promote community safety, not to investigate crimes.[92] Three years earlier in *Cady v. Dombrowski*,[93] the Court permitted the police to search an unattended vehicle without a warrant or probable cause pursuant to the police's "community caretaking" responsibilities.[94] The State in *Caniglia* sought to import this seemingly broad exception to home searches.

The *Caniglia* Court declined to import this seemingly more expansive "community caretaking exception" into the home search context.[95] It was not entirely clear whether the "community caretaking" standard was more permissive than the "emergency aid" standard announced in *Brigham City v. Stuart*.[96] Both emphasize reasonableness in lieu of the canonical requirements of a warrant or individualized suspicion.[97] In *Caniglia*, concurring Justices took pains to emphasize the police's unimpeded authority to forcibly enter homes to provide emergency aid.[98]

The facts in *Stuart* illustrate why the catchall tradition muddies the distinction between the police's adversarial and non-adversarial roles. In *Stuart*, the police sought to provide emergency aid to teenagers the police observed to be in a fight.[99] Their observation also constituted evidence of crime and the police accordingly arrested Stuart, illustrating how the police's adversarial and non-adversarial motivations were mixed all along. But even if the police are completely non-adversarial at the onset of an encounter, things can change quickly. The police are not expected to avert their eyes from evidence of a crime after having entered a space to provide emergency aid.[100]

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91. *Id.* at 370.

92. *Id.* at 369.

93. Cady v. Dombrowski, 413 U.S. 433 (1973).

94. *Id.* at 441.

95. *See* Caniglia v. Strom, 141 S. Ct. 1596, 1600 (2021).

96. *See supra* note 19 and accompanying text.

97. *See Caniglia*, 141 S. Ct. at 1600 (holding that although the "community caretaking" rule may allow warrantless searching, "[w]hat is reasonable for vehicles is different from what is reasonable for homes"); *Brigham*, 547 U.S. at 403 ("Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.").

98. *See supra* note 20 (summarizing concurring opinions).

99. Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

100. The "plain view" doctrine allows the police to seize evidence of crime that they observe while being lawfully present. Horton v. California, 496 U.S. 128, 134–35 (1990). The police's

The muddling of adversarial and non-adversarial functions can also be seen in special needs and administrative cases involving the police. The Supreme Court has authorized the police to conduct suspicionless traffic enforcement at fixed checkpoints under the rubric of special needs — an exception developed in the context of non-adversarial institutions.[101] For example, in *Sitz v. Michigan*,[102] the Supreme Court concluded that a suspicionless DUI checkpoint is permissible under the Fourth Amendment.[103] The Court reasoned that such a checkpoint is designed to keep roadways safe for all motorists by reducing drunk driving.[104] Of course, the Michigan State Patrol advanced this interest by enforcing the criminal prohibition on drunk driving.[105] There was no way to disentangle the State Patrol's adversarial and non-adversarial functions.

Legislatures have contributed to the mess: heaping onto the police's to-do list is easier than creating a new regulatory capacity.[106] Police thus find themselves responsible for implementing regulatory schemes that are not *per se* criminal. For example, in *New York v. Burger*,[107] the Court considered a legislative scheme authorizing the police to conduct warrantless checks on junkyards to deter auto thefts.[108] The Court concluded that the search in *Burger* was administrative, not criminal.[109] But distinguishing criminal from administrative purposes seems quixotic, since the criminal law's ostensible purpose was also to deter auto thefts.[110] Just as in *Stuart*, the police were free to use evidence seized in the administrative search in the criminal case against Burger.[111]

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discovery of the evidence need not be inadvertent for the plain view doctrine to apply, so long as they have a lawful basis for entering the home (whether to provide the "emergency aid" or otherwise). *Id.*

101. *Supra* notes 60–65 and accompanying text.

102. Sitz v. Michigan, 496 U.S. 444 (1990).

103. *Id.* at 447.

104. *Id.* at 449–51.

105. *Id.*

106. *Cf.* SEAN FARHANG, THE LITIGATION STATE 43–44 (2010) (suggesting that Congress creates rights for private litigation to vindicate public harms because of political hurdles that frustrate creation of new regulatory authorities).

107. New York v. Burger, 482 U.S. 691 (1987).

108. *See id.* at 698.

109. *Id.*

110. *See id.* at 724 (Brennan, J., dissenting).

111. *Id.* at 712 (majority op.).

Burger rightly argued that the police would inevitably flex their adversarial crime-control muscle under the cover of New York's administrative scheme.[112] The legislation authorized the police to do exactly that.[113] But the Court rejected the objection, noting that the only way of solving the problem would be to require the State to use an institution other than the police to enforce administrative schemes.[114] The Court shuddered at the prospect of constitutionally compelling New York to do that.[115]

C. Pretext and Pathology

The Supreme Court has noted that the intermingling of adversarial and non-adversarial functions creates constitutionally worrisome opportunities for pretextual police behavior.[116] The Court has however, offered little to check such behaviors, and likely cannot do more given how deeply entrenched the catchall tradition is. The tradition makes it impossible for the police officers to set aside their adversarial orientation when pursuing non-adversarial ends. The police derive their status and authority from the idea that their core mission of enforcing criminal law. That status and authority undergird the police's occupational common sense and enable them to "non-negotiably" resolve problems on the streets, whether criminal or not.[117] The police's coercive power is, in other words, structurally over-leveraged. This structural feature of American policing is not readily susceptible to judicial reform.

The Court has recognized that relaxing the Fourth Amendment requirements for non-adversarial police functions creates the risk that the police will invoke those functions as a cover for doing criminal investigations without sufficient justification. [118] The Court has thus

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112. *Id*. at 718.

113. Brief for Respondent, *Burger*, 482 U.S. 691, 1987 WL 881368, at *15-17.

114. *Burger*, 482 U.S. at 717.

115. *Id.* at 718.

116. *See, e.g.*, *id*. at 716 & n.27 ("[T]he New York Legislature had proper regulatory purposes for enacting the administrative scheme and was not using it as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations."); South Dakota v. Opperman, 428 U.S. 364, 376 (1976); *see also* Colorado v. Bertine, 479 U.S. 367, 376–77 (1987) (Blackmun, J., concurring). In the context of its "special needs" jurisprudence, the Supreme Court has stated that courts must ensure that a program or policy's actual programmatic purpose is something other than advancing crime control objectives. City of Indianapolis v. Edmond, 531 U.S. 32, 45–47 (2000). This implies that the pretextual analysis may be permissible in such cases.

117. *See* BITTNER, *supra* note 74, at 42 and accompanying text.

118. S*upra* note 116.

hinted that a pretextual search or seizure may sometimes raise a Fourth Amendment issue.[119] But how are courts supposed to ascertain whether the police's proffered justifications are indeed pretextual?

There may be rare instances where a police department's modus operandi makes it obvious that the administrative, special needs, or other non-adversarial rationales for the search/seizure were pretextual. For example, dispatching a SWAT team to conduct an administrative search tends to suggest that the rationale was a pretext.[120] Perhaps using a specialized narcotics interdiction unit to conduct welfare checks would similarly suggest that the latter rationale was a ruse. More commonly, claims of pretextual policing will involve individual officers' choices in specific situations. Yet, the Court has forbidden a judicial inquiry into an officer's underlying motivations.[121]

The Court has held that Fourth Amendment analysis must focus on the "objective" bases for an officers' search or seizure.[122] This means that so long as the police can retrospectively point to some objective facts justifying police's conduct under the Fourth Amendment, the conduct is justified with little regard for the police's actual motivations.[123] The more rationales available to the police, the easier it becomes to strategically recast past conduct in constitutionally permissible terms. The objective approach enables pretextual police behavior.[124] Even if the police readily admit to a pretextual stop or search, there might not be a Fourth Amendment violation provided the police can point to other facts that justified it.[125] But there will usually be no practical utility for the police to admit pretext. Their incentive will be to articulate only those facts (and legal rationales) that justify their behavior in the field.

The Supreme Court's refusal to authorize more robust review of police pretext is driven by practical concerns. More robust review

119. *See id*. (listing cases in which the Supreme Court permitted pretextual analysis).

120. *See* WBY, Inc. v. Dekalb Cnty., 766 F. App'x 852, 855 (11th Cir. 2019) (finding that the use of the SWAT team creates a factual issue as to whether police's investigation of the adult entertainment club was "criminal" or "administrative"); Bruce v. Beary, 498 F.3d 1232, 1243 (11th Cir. 2007) (concluding the same for the SWAT team's search of the auto body shop).

121. *See* Whren v. United States, 517 U.S. 806, 814–15 (1996) (holding that the court should make objective analysis).

122. *Id.*

123. *Id*.

124. *See* WAYNE R. LAFAVE, SEARCH & SEIZURE §§ 1.4(f), 3.2(b) (6th ed. 2021).

125. *See* United States v. Orozco, 858 F.3d 1204, 1213 (9th Cir. 2017) (holding that where there are dual motives, one permissible and one impermissible, for a stop, the stop is constitutional so long as the stop would not have occurred absent the impermissible motive).

would require courts to spend time and energy probing officers' subjective motivations during suppression hearings.[126] There would likely be little payoff for this effort because the catchall tradition provides such broad cover for police pretext. Absent a mistake or guilelessness, police officers need not admit that they behaved pretextually. Enabling robust judicial inquiries into police pretext is likely to do little more than underscore courts' limited supervisory power over the police.

Related, the idea of "pretext" understates the catchall tradition's biggest problem. Pretext presupposes that officers are impelled by tidily unitary legal impulses. They *either* seek to investigate a crime *or* perform an administrative search. This framing focuses attention on officers' veracity, which assumes that they have contemporaneous awareness of whether their motivation is adversarial or not. That is not always true.

The catchall tradition thrusts patrol officers into the "fluid whole of peoples' lives."[127] Patrol officers do not consciously switch between their adversarial and non-adversarial hats in response to an unfolding situation. The police's job is to resolve whatever situational dilemmas they confront. Sometimes an arrest emerges as the answer, but that may not be obvious at the onset of the encounter. The precise contours of a resolution will typically develop as the encounter unfolds. Egon Bittner noted that it is officers' situational intuitions that are most important here, not law or any other formal rules.[128]

For example, we might return to the *Caniglia* facts and speculate on what the officers might have done under various counterfactuals. The officers resolved that call by sending Caniglia off for a psychiatric evaluation and seizing his guns.[129] One can imagine slightly different scenarios in which the police might have arrested Caniglia for a crime. If Caniglia had been obstreperous or challenged the police's authority, he might have been arrested for an obstruction of justice type crime. Had it emerged that Caniglia's firearms were illegally possessed or that

126. *See Whren*, 517 U.S. at 815 (questioning whether police's motives can be practically assessed by a judge after the fact).

127. EDWARD CONLON, BLUE BLOOD 158 (2004).

128. Bittner's iconic formulation of the patrol officer's function is as follows: "[T]he role of the police is best understood as a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies." BITTNER, *supra* note 74, at 46.

129. Caniglia v. Strom, 141 S. Ct. 1596, 1598 (2021) (noting that Caniglia went to hospital voluntarily).

he had some other contraband in plain sight when the police arrived, Caniglia might also have been arrested.

There is also a deeper and structural level at which distinguishing between adversarial and non-adversarial policing is untenable. Even though the police's response to most problems is not in the form of an arrest or physical force, the police are always symbolically (if not materially) leveraging that adversarial capacity when solving problems.[130] Bittner thus described the police as wielding coercive power to deal with "situational exigencies," not necessarily to solve a crime as conventionally thought.[131] The police's status and authority are denominated in terms of the adversarial power associated with the enforcement of criminal law. The police do not set aside this power when they are performing functions that do not call for its immediate exercise. They do not set aside their badges, uniforms, and firearms – all of which are supposed to communicate adversarial power – when called upon to perform non-adversarial tasks.

Police's occupational norms cultivate suspiciousness and an adversarial orientation toward the world.[132] Criminologists suggest that this trait is inculcated through police training and practice,[133] and over time, becomes a reflex akin to a "sixth sense."[134] This orientation may lead police officers to respond more aggressively to, for example, those experiencing mental health crises, than professionals with a therapeutic orientation. Disability rights advocates have, for example, urged building a greater capacity for non-police responses for mental health calls.[135] Forest Stuart has detailed the unintended consequences of relying on the police to advance therapeutic goals.[136] He found that the police's deeply entrenched adversarial norms shot through their ostensibly non-adversarial mission in Skid Row.[137] Officers directed the harshest treatment to those whom officers perceived (often incorrectly) to lack self-improvement gusto.[138]

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130. *See* STUART, *supra* note 81, at 109–11.

131. BITTNER, *supra* note 74, at 46.

132. JOHN P. CRANK, UNDERSTANDING POLICE CULTURE 145 (2d ed. 2004) (summarizing literature on suspicion as an occupational trait among the police).

133. *Id.* at 147–48.

134. *Id.* at 150–52.

135. Morgan, *supra* note 6, at 1464.

136. STUART, *supra* note 81 at 70–71 and accompanying text.

137. *See id.* at 89, 92, 254.

138. *Id.* at 104, 109–11.

The catchall tradition fuses the adversarial power with non-adversarial functions in ways that cannot be teased apart for street policing.

IV. ADVERSARIAL POLICING REDUX

The discussion above describes how the catchall tradition leverages the police's coercive power to provide a broad range of services that do not call for that power's use. The catchall tradition means that civilians are exposed to that coercive power as a condition for receiving the benefit of the police's non-adversarial work. Civilians are, in other words, overexposed to the police's coercive power. This would be problematic even if that overexposure was distributed evenly. But it is not. The poor and people of color are relatively more exposed to it and the negative consequences of policing generally. The constitutional critique of the catchall tradition offered above thus intersects with ongoing criticism of policing's racial harshness.[139]

The messy and indiscriminate melding of adversarial power with non-adversarial functions adds to the list of reasons policymakers should rethink and remake American policing. Our constitutional ideal of judicially supervised policing is inconsistent with the catchall tradition. It makes intuitive sense that constitutional scrutiny's intensity would vary in relation to the coercive power a state institution wields. But a scheme of graduated review can only work if state institutions have focused ends and limited means of accomplishing those ends. The catchall tradition means that the police's ends are undefined and that their means are left to officers' street wiles and practical intuitions.[140] Courts cannot be expected to distinguish between adversarial and non-adversarial police functions after-the-fact when patrol officers cannot do so contemporaneously.

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139. The critical literature on race and policing has become significant richer and more nuanced in recent years. *See, e.g.*, Stewart Chang, Frank Rudy Cooper, Addie C. Rohlik, *Race And Gender And Policing*, 21 NEV. L. J. 885, 888 (2021) (linking individual police killings to broader critique of how race and gender categories are constituted); Eric Miller, *Knowing Your Place, The Police Role In Reproduction Of Racial Hierarchy,* 89 G.W. L. REV. 1607, 1614–15 (2021) (arguing that police harshness reflects civility norms that both underwrite and are underwritten by racial hierarchy); Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 G.W. L. REV. 1452, 1452 (2021) (arguing that race and class interact to produce harsh policing); Eldar Haber, *Racial Recognition*, 43 CARDOZO L. REV. 71, 94–102 (2021) (identifying how police's use of recognition technology inures to disadvantage of Black people).

140. *See supra* note 116 and accompanying text.

Calling for the dismantling of the catchall tradition is tantamount to calling for a dramatic remaking of municipal police. This is an ambitious reform trajectory but should not be understood in radical abolitionist terms.[141] Rather, remaking the police in a more decisively adversarial mold would help realize the vision of police that has been at the center of Fourth Amendment jurisprudence. That vision of a crime-control focused institution is also consistent with how both the police officers themselves and the public view policing.[142]

The Court's accommodation of catchall policing is not simply an ideological maneuver. It reflects the limits of judicial power to supervise catchall policing. This is a structural problem not amenable to a neat doctrinal refinement and implicates the serious practical challenges that confront municipal and state governments in remaking the police.

Remaking the police in the mold of an adversarial institution requires more than just remaking the police. It requires remaking municipal government. The catchall tradition allowslegislatures to avoid thinking systematically about the range of exigencies that call for non-adversarial responses and those that do not. The catchall tradition makes the police a rump institution, responsible for addressing all unhappy problems that the body politic would rather close its eyes to.

Some jurisdictions have begun to make reforms in the direction suggested here. The most notable reforms have involved some jurisdictions substituting or pairing trained mental health professionals with the police for some calls.[143] More ambitious proposals have included creating new, non-adversarial institutions for handling traffic, mental health, and other public welfare functions while leaving the core criminal law enforcement functions in the hands of the police department. Reconfiguring municipal services in this way confronts any number of practical state law challenges.[144] Police would likely oppose such reforms if they entail a diminution in the operating budget or political influence. Whether sufficient political will exists within communities to sustain a meaningful revamping of municipal services

141. *See* Jessica M. Eaglin, *To "Defund" The Police*, 73 STAN. L. REV. ONLINE 120, 133–34 (2021) (noting that the "defund" rhetoric may be consistent with "managerialist" cost reducing reforms).

142. *See* Van Maanen, *supra* note 5, at 42–43; BITTNER, *supra* note 74, at 2, 42.

143. *See* Stuart M. Butler & Nehath Sheriff, *supra* note 78.

144. These challenges are hardly trivial and have been documented by Anthony O'Rourke et al., *Disbanding Police Agencies*, 121 COLUM. L. REV 1327, 1359–86 (describing state and local law terrain that militates against limiting or eliminating police and sheriff's departments as they currently exist).

remains to be seen. But such revamping is a prerequisite for meaningful constitutional restraint upon the police.

CONCLUSION

The Fourth Amendment distinguishes between adversarial and non-adversarial State functions. Individuals need greater protection from the State when it seems to harm rather than help. The catchall tradition in American policing is inconsistent with this basic premise. Because of the haphazard fusing of non-adversarial and adversarial functions, American police are invested with a level of coercion not required for many of the tasks that they perform. The catchall tradition makes it difficult if not impossible to distinguish between police officers' adversarial and non-adversarial acts. There is no judicially crafted doctrinal solution for this problem. Policymakers and legislatures should therefore rethink and reform police departments' structure and mandate.