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### Police Secrecy Exceptionalism

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## ARTICLES

### POLICE SECRECY EXCEPTIONALISM

*Christina Koningsor\**

*Every state has a set of transparency statutes that bind state and local governments. In theory, these statutes apply with equal force to every agency. Yet, in practice, law enforcement agencies enjoy a wide variety of unique secrecy protections denied to other government entities. Legislators write police-specific exemptions into public records laws. Judges develop procedural approaches that they apply exclusively to police and prosecutorial records. Police departments claim special secrecy protections from the bottom up.*

*This Article maps the legal infrastructure of police-records secrecy. It draws upon the text of the public records statutes in all fifty states, along with case law and public records datasets, to illuminate the ways that judges, legislators, and police officers use transparency statutes to shield law enforcement agencies from public view. It argues that this robust web of police secrecy protections operates as a kind of police secrecy exceptionalism, analogous in some ways to the exceptional protections granted to national security secrets in the federal context.*

*The Article then examines the doctrinal and policy-oriented underpinnings of this exceptional treatment, finding that these arguments generally fall into one of three buckets: protection against circumvention of the law, protection of citizen or police officer privacy, and preservation of the effectiveness or efficiency of policing. It concludes*

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\* Associate Professor, S.J. Quinney College of Law, University of Utah. Many thanks to Jonathan Abel, RonNell Andersen Jones, Shima Baradaran Baughman, Hannah Bloch-Wehba, Albert Fox Cahn, Cynthia Conti-Cook, Yan Fang, Maily Fidler, Mark Goldberg, Kristin Hickman, James Hicks, Margaret Kwoka, John Langford, Ngozi Okidegbe, Maria Ponomarenko, Alan Rozenshtein, Miriam Seifter, Christopher Slobogin, Jacob Victor, Kate Weisburd, and Rebecca Wexler, as well as to participants in the 2022 Freedom of Expression Scholars Conference, the 2022 Privacy Law Scholars Conference, the 2022 Administrative Law New Scholarship Roundtable, and the 2022 Media Law and Policy Scholars' Conference. A special thanks to Julia Ivory and Alexander McFarlin for providing excellent assistance with legal research, as well as Venkata Achalla, Emily Le, Tilak Misner, Cheng Ren, and Steven Yuan for their invaluable help obtaining and analyzing public records data. Thank you as well to the Berkeley Center for Law and Technology for supporting this research.

*that none of these defenses justify the extraordinary informational protections currently extended to law enforcement agencies. Moreover, these secrecy protections impose substantial harms. By excavating these overlooked mechanisms of police secrecy, the Article illuminates new avenues of legal reform.*

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## INTRODUCTION

In May of 2019, a transparency activist named Emma Best submitted freedom of information requests to sixty-eight state and local police departments for records relating to the hacker group Anonymous and the broader “hacktivist” movement.<sup>1</sup> She submitted these requests to agencies across three dozen states, mostly targeting state-level agencies or police departments in larger or mid-size cities like Houston, Denver, and Cleveland.<sup>2</sup> Although the requests were virtually identical,<sup>3</sup> they generated very different responses. One law enforcement agency charged \$1.25 for the records, for example, while another asked for more than \$130,000.<sup>4</sup> Only around ten percent of the agencies turned over any records, and these productions mostly contained the same, six-page DHS memo about

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1. MuckRock Data Spreadsheet, Emma Best Public Records Requests (2019) (on file with the *Columbia Law Review*) [hereinafter Best Public Records Requests 2019]. Best is the founder of a collective called Distributed Denial of Secrets, which posts government records obtained through leaks, hacks, and public records requests. Sam Thielman, A New Group Devoted to Transparency Is Exposing Secrets Wikileaks Chose to Keep, *Colum. Journalism Rev.* (Feb. 6, 2019), [https://www.cjr.org/tow\\_center/emma-best-ddosecrets.php](https://www.cjr.org/tow_center/emma-best-ddosecrets.php) [<https://perma.cc/V8VF-EWBZ>].

2. Best Public Records Requests 2019, *supra* note 1.

3. The requester used substantially the same form template for each request. For an example, see Letter from Emma Best to the L.A. Police Dep’t (Nov. 5, 2019), <https://www.muckrock.com/foi/los-angeles-91/anonymous-general-hacktivist-2009-2018-los-angeles-police-department-74433/> [<https://perma.cc/C2A9-F7AL>].

4. Compare Miami-Dade Police Department Invoice Summary (Aug. 1, 2019), [https://cdn.muckrock.com/foia\\_files/2019/11/26/Invoice\\_INV19-P357425-1.pdf](https://cdn.muckrock.com/foia_files/2019/11/26/Invoice_INV19-P357425-1.pdf) [<https://perma.cc/625W-62VE>] (charging \$131,585 to the requester), with Seattle Police Department Invoice Summary (July 12, 2019), <https://www.muckrock.com/foi/seattle-69/anonymous-general-hacktivist-2009-2018-seattle-police-department-74432/#file-826558> [<https://perma.cc/7ZVV-7Y93>] (charging \$1.25 to the requester).

Anonymous and other associated hacker groups.<sup>5</sup> Roughly a third never responded at all.<sup>6</sup>

These requests also generated a substantial number of rejections. Roughly a quarter of the police departments—15 out of 68—told Best that the records were protected from disclosure by the state’s public records law.<sup>7</sup> In doing so, they relied on a wide array of statutory protections. They claimed that the records were part of a criminal investigative file,<sup>8</sup> contained critical security infrastructure information,<sup>9</sup> revealed nonroutine law enforcement procedures or techniques,<sup>10</sup> related to network security,<sup>11</sup> exposed vulnerabilities to a terrorist attack,<sup>12</sup> could only be produced to a citizen of the state,<sup>13</sup> contained interagency deliberative material,<sup>14</sup> contained personal information from an individual “exercising rights secured by the Constitution,”<sup>15</sup> and would, if disclosed, constitute an unwarranted invasion of privacy;<sup>16</sup> and that the records themselves interfered with an ongoing law enforcement investigation,<sup>17</sup> failed to describe the records clearly enough,<sup>18</sup> and imposed an unreasonable burden on the agency.<sup>19</sup> One agency even invoked the notorious “Glomar” response, claiming that the requested material was so sensitive that the department could not reveal whether it had any responsive records at all.<sup>20</sup>

Every state has a set of transparency statutes that bind state and local agencies.<sup>21</sup> State public records laws require that agencies turn over all

5. Eight agencies turned over records. Best Public Records Requests 2019, *supra* note 1. For a copy of the Homeland Security memo, see DHS, Nat’l Cybersecurity & Commc’ns Integration Ctr., Bulletin A-0010-NCCIC-160020110719, “Anonymous” and Associated Hacker Groups Continue to Be Successful Using Rudimentary Exploits to Attack Public and Private Organizations, <https://www.muckrock.com/foi/oklahoma-city-341/anonymous-general-hacktivists-2009-2018-oklahoma-city-police-department-74486/#file-789705> [<https://perma.cc/M4HP-AB44>] (last visited Jan. 18, 2023).

6. Twenty-two agencies either never responded at all or sent an acknowledgment but never filled the request. Best Public Records Requests 2019, *supra* note 1. Eleven agencies had no responsive records. *Id.*

7. *Id.*

8. *Id.* (citing Va. Code Ann. § 2.2-3706(B)(1) (2022)).

9. *Id.* (citing Va. Code Ann. § 2.2-3705.2(14)).

10. *Id.* (citing N.Y. Pub. Off. Law § 87(2)(e)(iv) (McKinney 2022)).

11. *Id.* (citing Tex. Gov’t Code Ann. § 552.139 (West 2021)).

12. *Id.* (citing Ind. Code Ann. § 5-14-3-4(b)(19) (West 2022)).

13. *Id.* (citing Tenn. Code Ann. § 10-7-503(a)(2)(A) (2022)).

14. *Id.* (citing N.Y. Pub. Off. Law § 87(2)(g)(iii)).

15. *Id.* (citing Okla. Stat. tit. 51, § 24A.14 (2022)).

16. *Id.* (citing N.Y. Pub. Off. Law § 87(2)(b)).

17. *Id.* (citing Cal. Gov’t Code § 6254(f) (repealed 2023)).

18. *Id.* (citing D.C. Code Mun. Regs. tit. 1, § 1-402.4 (LexisNexis 2022)).

19. *Id.* (citing 5 Ill. Comp. Stat. Ann. 140/3(g) (West 2022)).

20. *Id.* (citing Me. Rev. Stat. Ann. tit. 16, § 807 (repealed 2021)).

21. Christina Koningisor, Comparison of State Public Records Statutes Spreadsheet (last updated Sept. 1, 2022) (on file with the *Columbia Law Review*) [hereinafter Koningisor, Comparison of State Public Records Statutes].

requested records except those protected by an enumerated exemption.<sup>22</sup> State open-meeting laws require that agencies permit the public to attend certain meetings.<sup>23</sup> And state open-data laws require that state and local agencies make certain types of data public.<sup>24</sup> These are just some of the many legal requirements that compose the state and local statutory transparency law regime.<sup>25</sup>

State and local police departments are, in theory, bound by the same transparency law obligations that apply to every other agency. In reality, in spite of these laws, police departments maintain extraordinary levels of secrecy, as the example of Best’s public records requests helps to illustrate.<sup>26</sup> The example of Best’s public records requests helps to illustrate how this occurs. Through a web of informational protections extended by all three branches of government—statutory carve-outs crafted by legislators, favorable interpretations of those statutes extended by judges, and agency-level resistance to transparency obligations—police departments systematically evade meaningful public oversight through transparency law mechanisms. This web of protection gives rise to a kind of law enforcement “exceptionalism”—one that is comparable in some ways to the secrecy exceptionalism extended to national security agencies in the federal context.<sup>27</sup>

The problem of police secrecy has received significant public attention in recent years. In the wake of George Floyd’s murder and the nationwide protests that followed, city councils and state legislatures around the country passed a wave of police reform bills, many of which involved changes to the transparency statutes that govern police.<sup>28</sup> And high-profile legal battles over the disclosure of police body camera videos have received national attention,

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22. See, e.g., Ark. Code Ann. § 25-19-105(a)(1)(A) (2022) (“Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying . . .”).

23. See, e.g., N.Y. Pub. Off. Law § 103(a) (McKinney 2022) (“Every meeting of a public body shall be open to the general public . . .”).

24. See, e.g., Colo. Rev. Stat. § 24-21-116 (2022) (creating “a business intelligence center program in state law to streamline access to public data”).

25. For a summary, see Open Government Guide, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-guide/> [<https://perma.cc/77YG-PMKE>] (last visited Oct. 11, 2022).

26. For the purposes of this Article, I use the term “police” to encompass both state and local law enforcement agencies, including sheriffs’ departments, which often control county prisons. For this reason, I sometimes discuss access to prison records as well.

27. See *infra* section II.B.2.

28. For a list of proposed state laws relating to data and transparency in policing, see Legislative Responses for Policing—State Bill Tracking Database, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> [<https://perma.cc/ATB3-TMNY>] (last updated Dec. 10, 2022).

leading to a growing public awareness of the complex body of laws that govern police recordings and other materials.<sup>29</sup>

Transparency law reforms around policing have also garnered increased scholarly attention. Many policing and criminal justice scholars have pointed to improved transparency as an initial step toward broader reform.<sup>30</sup> Others have examined secrecy in policing as part of a larger exploration of the ways that administrative law processes apply to police.<sup>31</sup> And an important subset of policing and criminal law scholars have engaged with the transparency law regime directly, often by exploring the application of transparency law statutes to specific categories of police records, especially police disciplinary records and body camera recordings.<sup>32</sup>

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29. See, e.g., Ginia Bellafante, *Why Secrecy Laws Protecting Bad Officers Are Falling*, N.Y. Times (June 5, 2020), <https://www.nytimes.com/2020/06/05/nyregion/police-records-50a.html> (on file with the *Columbia Law Review*) (last updated June 9, 2020) (highlighting the push to repeal a New York law that “shield[s] the personnel and disciplinary records of police officers from public view”).

30. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2144 (2017) [hereinafter *Bell, Police Reform*] (arguing that enhanced transparency may “contribute to the overall democratization of policing in a way that could begin to root out legal estrangement”); Bennett Capers, *Policing, Technology, and Doctrinal Assists*, 69 Fla. L. Rev. 723, 738–50 (2018) (examining how new technologies might facilitate enhanced transparency in policing); Erik Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107, 1166–70 (2000) (arguing in favor of enhanced police transparency). There is also an extensive body of case law and legal scholarship that seeks to remedy how police and prosecutorial secrecy disadvantages individual defendants within the broader criminal justice system. See, e.g., David Alan Sklansky, *Democracy and the Police* 91 (2008) (noting that key criminal procedural rulings of the Warren Court were intended “to get information to the defense, in order to improve the fairness of the adversarial process, not to expose the police to general public scrutiny” (emphasis omitted)).

31. See Mailyn Fidler, *Local Police Surveillance and the Administrative Fourth Amendment*, 36 Santa Clara High Tech. L.J. 481, 520–26 (2020) (arguing for local administrative governance of police investigative technology); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1831 (2015) (“Compared to the sprawling administrative codes that detail every aspect of agency practice, laws governing the police are notably sparse—if they exist at all.”); Barry Friedman, *Secret Policing*, 2016 U. Chi. Legal F. 99, 105–09 (“Policing agencies are exactly that: agencies in the executive branch of government. Yet, we govern them differently than the other agencies of executive government.”); Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 Marq. L. Rev. 1119, 1128 (2013) [hereinafter *Harmon, Data on Policing*] (arguing that state and federal legislators and agencies require data on policing to regulate these law enforcement agencies effectively). And a previous generation of scholars also touched upon secrecy in policing as part of a broader examination of how administrative law might be used to better regulate police. See, e.g., Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 Tex. L. Rev. 703, 703–04 (1974) (noting that an “astonishing” fact about police policy is that “[m]ost of it is kept secret from those who are affected by it”).

32. For articles discussing access to body camera footage under state public records laws, see, for example, Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 Wake Forest L. Rev. 985, 997–1000 (2016); Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 Ala. L. Rev. 395, 413–19 (2016)

Yet the legal provisions governing these individual categories of records constitute only a small slice of the complex transparency law regime that governs access to police information. Missing from the current scholarship is a more sustained examination of the relationship between generally applicable transparency law statutes and police secrecy writ large.<sup>33</sup> Even when a specific exemption to a privacy law is tightened, law enforcement agencies can and often do continue to withhold records by invoking an array of other exemptions.<sup>34</sup> The effectiveness of record-specific reforms is blunted by the sheer number and variety of secrecy tools at police departments' disposal. These narrow provisions are embedded within a broader legal and normative regime that permits police departments extraordinary secrecy. This regime itself warrants a closer look.

While the transparency law scholarship could help fill this void, this work has historically focused on federal transparency statutes, rather than the complex web of statutes that operate at the state and local level.<sup>35</sup> This is not uniformly true: Transparency law scholars have questioned the

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[hereinafter Fan, Policy Splits]; Jocelyn Simonson, Beyond Body Cameras: Defending a Robust Right to Record the Police, 104 *Geo. L.J.* 1559, 1567–69 (2016) [hereinafter Simonson, Beyond Body Cameras]. For articles discussing access to police disciplinary records under state public records laws, see, for example, Cynthia H. Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information From the Public, 22 *CUNY L. Rev.* 148, 150–51 (2019); Kate Levine, Discipline and Policing, 68 *Duke L.J.* 839, 868–69 (2019) [hereinafter Levine, Discipline and Policing]; Rachel Moran & Jessica Hodge, Law Enforcement Perspectives on Public Access to Misconduct Records, 42 *Cardozo L. Rev.* 1237, 1243–52 (2021); Rachel Moran, Police Privacy, 10 *U.C. Irvine L. Rev.* 153, 157–65 (2019). For articles discussing access to other categories of police and criminal justice records under public records statutes, see, for example, Hannah Bloch-Wehba, Access to Algorithms, 88 *Fordham L. Rev.* 1265, 1298–303 (2020) [hereinafter Bloch-Wehba, Algorithms] (discussing access to policing algorithms); Sarah Geraghty & Melanie Velez, Bringing Transparency and Accountability to Criminal Justice Institutions in the South, 22 *Stan. L. & Pol'y Rev.* 455, 458–63, 470 (2011) (discussing access to prison records); Lauren Fash, Comment, Automated License Plate Readers: The Difficult Balance of Solving Crime and Protecting Individual Privacy, 78 *Md. L. Rev. Online* 63, 72–73 (2019) (discussing access to automated license plate reader information).

33. See Rachel A. Harmon, The Problem of Policing, 110 *Mich. L. Rev.* 761, 808 (2012) (“The full legal landscape concerning information about policing, and the questions of law enforcement transparency and privacy which it raises, remain largely unexplored.”). Scholars have explored the exceptional treatment of law enforcement agencies in related fields. See, e.g., Erin Murphy, The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions, 111 *Mich. L. Rev.* 485, 503–07 (2013) (chronicling the exceptional treatment granted to law enforcement agencies under federal privacy statutes).

34. See *infra* section II.A for discussion of the exemptions used by police to avoid disclosing records.

35. There is a rich body of work exploring the operation of federal transparency statutes and questioning their ongoing efficacy and value. For some examples, see Seth F. Kreimer, The Freedom of Information Act and the Ecology of Transparency, 10 *U. Pa. J. Const. L.* 1011, 1012–16 (2008); Margaret B. Kwoka, First-Person FOIA, 127 *Yale L.J.* 2204, 2243–54 (2018) [hereinafter Kwoka, First-Person FOIA]; David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 *U. Pa. L. Rev.* 1097, 1111–36 (2017).



specific policy justifications that undergird certain law enforcement exemptions,<sup>36</sup> for example, and argued that public records litigation can and should be used to fill accountability deficits created by deficiencies in more traditional mechanisms of police oversight like constitutional criminal procedure.<sup>37</sup> Further, communications and journalism scholars, along with scholar-practitioners, have explored the application of individual state statutes to the policing context and the disclosure requirements of specific categories of police records.<sup>38</sup>

But much of this transparency-focused scholarship is concerned more narrowly with police secrecy around new and emerging technologies—especially surveillance technologies and predictive algorithms.<sup>39</sup> And, overall, the transparency law scholarship could do more to flesh out the many ways that transparency statutes at the state and local level privilege law enforcement agencies and ultimately facilitate, rather than impede, police secrecy. Increased access to information and data is often proposed

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36. See, e.g., Jonathan Manes, *Secrecy & Evasion in Police Surveillance Technology*, 34 *Berkeley Tech. L.J.* 503, 538–45 (2019) (critiquing anti-circumvention logic); Moran, *supra* note 32, at 174–83 (critiquing certain police privacy claims).

37. Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 *Calif. L. Rev.* 917, 929–30 (2021) [hereinafter Bloch-Wehba, *Visible Policing*].

38. For examples drawn from the communication and journalism scholarship, see Erin K. Coyle & Stephanie L. Whitenack, *Access to 911 Recordings: Balancing Privacy Interests and the Public's Right to Know About Deaths*, 24 *Comm'n L. & Pol'y* 307, 320–27 (2019) (surveying the different state statutes governing access to 911 calls); Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 *Comm'n L. & Pol'y* 313, 318–22 (2003) (describing how Florida is the only state with a constitutional guarantee of access to government information, as well as this guarantee's effect on criminal information); A. Jay Wagner, *Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response*, 21 *Comm'n L. & Pol'y* 539, 551–56 (2016) [hereinafter Wagner, *Controlling Discourse*] (“In recent years, the Glomar response has encountered expanded use, broadening . . . horizontally across the exemption spectrum and vertically into state and local use.”); A. Jay Wagner, *A Secret Police: The Lasting Impact of the 1986 FOIA Amendments*, 23 *Comm'n L. & Pol'y* 387, 398–404 (2018) (considering how the 1986 amendments to the Freedom of Information Act (FOIA) placed intelligence organizations outside of public oversight). For examples from legal practitioners, see Nicholas T. Davis, *Illuminating the Dark Corners: The New Mexico Inspection of Public Records Act's Law Enforcement Exception*, 50 *N.M. L. Rev.* 59, 61–65 (2020) (discussing how New Mexico's transparency statute is interpreted independently of and more broadly than FOIA); Josh Moore, *Out From the Curtains of Secrecy: Private University Police and State Open Records Laws*, *J. Civic Info.*, Oct. 2020, at 1, 9–14 (canvassing the varied treatment of private university police records among states). Legal practitioners have also developed excellent guides to navigating requests to law enforcement agencies in the various states. E.g., *State Freedom of Information Laws*, Nat'l Freedom of Info. Coal., <https://www.nfoic.org/state-freedom-of-information-laws/> [https://perma.cc/HNS9-S3WS] (last visited Nov. 2, 2022); *Open Government Guide*, *supra* note 25.

39. See, e.g., Bloch-Wehba, *Algorithms*, *supra* note 32, at 1295–302; Fan, *Policy Splits*, *supra* note 32, at 413–19; Manes, *supra* note 36, at 504–11; Simonson, *Beyond Body Cameras*, *supra* note 32, at 1565–69.

as a partial solution to the problems of policing.<sup>40</sup> Conversely, the value of transparency in policing has also come under increased scrutiny, criticized as an insufficient instrument for securing meaningful change.<sup>41</sup> And yet we know surprisingly little about the actual mechanics of police-records secrecy.

This Article aims to illuminate the less visible parts of the legal architecture of police secrecy—those parts that scholars and policymakers often overlook. In doing so, it offers three contributions. First, it provides a descriptive account of the ways that these transparency laws apply to police departments. It focuses on public records laws in particular, exploring both the fifty states’ public records statutes and the much larger web of exceptions and provisions relating to police secrecy that are scattered throughout each state’s legal code.

Further, it focuses on the law not just as it is written by legislatures and interpreted by judges but also as it is applied by police officers and other bureaucrats on the ground. Transparency law scholars have done excellent work in recent years examining the ways that federal transparency laws like the Freedom of Information Act (FOIA) are utilized by requesters.<sup>42</sup> Yet the equivalent state-level statutes are exceptionally difficult to study. There are fifty separate public records laws across the states, and hundreds of thousands—if not more—of state and local agencies that must comply with these laws.<sup>43</sup> The complexity and scale of this regulatory regime poses a research challenge.

This Article explores how these statutes operate in practice by drawing on public records datasets containing tens of thousands of requests to

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40. See *supra* note 30.

41. See, e.g., Kate Levine, Introduction, 42 *Cardozo L. Rev.* 1165, 1168 (2021) [hereinafter Levine, Introduction] (arguing that transparency reforms can be “a distraction from radical change” in policing); Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 *Conn. L. Rev.* 739, 746 (2022) (arguing that “transparency on its own is inattentive to the ‘layers of democratic exclusion’ that reinforce the political powerlessness experienced by those most harmed by the system” (quoting Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 *Nw. U. L. Rev.* 1609, 1610 (2017))).

42. See Kwoka, *First-Person FOIA*, *supra* note 35, at 2243–54 (discussing the four categories of first-person FOIA requests: (1) those made as stand-ins for administrative discovery, (2) those for government benefit applications, (3) those for private benefit applications, and (4) those for historical files for personal use); Margaret B. Kwoka, *FOIA, Inc.*, 65 *Duke L.J.* 1361, 1379–414 (2016) [hereinafter Kwoka, *FOIA, Inc.*] (describing commercial FOIA use at a selection of government agencies).

43. See, e.g., Press Release, U.S. Census Bureau, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (Aug. 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> [https://perma.cc/AG2T-43N7]. Each local government generally houses multiple agencies. There are also thousands of state-level agencies.

police departments around the country.<sup>44</sup> It analyzes these requests to better understand whether and how police departments either comply with or evade the strictures of the law. And it concludes that the data—while limited in scope—help to illuminate how these transparency law obligations too often work to foster police secrecy, rather than scale it back. Further, this Article shows that much of this police secrecy power is concentrated at the administrative level, at the moment when police officers and other policing bureaucrats first receive and respond to requests.

Second, the Article offers a normative account of police secrecy exceptionalism. It identifies three of the central claims used to justify these extraordinary protections: that secrecy prevents criminals from circumventing the law, protects civilians' and police officers' privacy, and ensures the continued effectiveness and efficiency of law enforcement agencies. It argues that these claims are deeply flawed and do not justify the exceptional levels of secrecy currently enjoyed by police. Further, it contends that one-off reforms of specific statutory provisions will be insufficient and that broader structural changes are needed.

Third, the Article has implications for ongoing debates about the structure, scope, and value of transparency in policing. Some policing scholars have pointed to improved public access to police information as an initial step toward broader reform.<sup>45</sup> Others have critiqued this approach, arguing that scholars and policymakers have pursued transparency in policing at the expense of more substantive and radical changes and that improved access to police information is not the "panacea" that it's often claimed to be.<sup>46</sup> This Article lends support to many of these critiques. It explores the failings of the current transparency law regime and acknowledges that transparency alone will not bring about the structural changes needed to curb centuries of police abuse, especially against Black communities and poor communities of color.

Yet by mapping out the infrastructure of police-records secrecy, the Article also highlights the ways that improved transparency in policing may serve as a useful antecedent for more radical transformation—a preliminary step that can be used to guide and inform advocates going forward.<sup>47</sup> The

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44. MuckRock Data Spreadsheet, *Law Enforcement Requests 2010–2021* (2021) (on file with the *Columbia Law Review*) [hereinafter *MuckRock Law Enforcement Requests 2010–2021*].

45. See *supra* note 30.

46. See Levine, *Discipline and Policing*, *supra* note 32, at 845 ("While transparency may well play a role in some solutions to policing issues, it is not the panacea—the transparency cure—its advocates claim it to be."); see also Levine, *Introduction*, *supra* note 41, at 1170 ("[T]ransparency has rarely led to any actual changes in the way overpoliced communities experience law enforcement or the rate at which racial disparities continue to infect stops, searches, and arrests.").

47. See Bloch-Wehba, *Visible Policing*, *supra* note 37, at 969 (describing how litigants "deploy transparency law to establish a foundation for further reform or accountability").

current scholarship mostly focuses on narrow categories of records like body camera footage and police disciplinary records.<sup>48</sup> But these statutes in fact cover all manner of police records: financial documents, emails, text messages, prison logs, vendor contracts, and internal policies. And these records can be put to use in myriad ways. Take the example of the campaign to eliminate criminal justice fees. Recent efforts have demonstrated how fragmented and diffuse these various sources of financial penalties can be, and advocates have drawn on public records statutes to map out this financial infrastructure in order to then abolish it.<sup>49</sup>

Separately, this Article has implications for the transparency law scholarship. Scholars have explored the many ways that national security agencies are granted exclusive secrecy tools, and they have questioned whether such extraordinary protections are warranted.<sup>50</sup> Yet there has been little equivalent effort to map out the unique treatment extended to law enforcement agencies in the state and local transparency law regime across the fifty states.<sup>51</sup> This literature could benefit from more sustained attention to state-level statutes as a whole. But additional scrutiny of these statutes as they apply to key government functions like policing is especially critical.<sup>52</sup> By exploring administrative-level policing responses, in particular, the Article helps to deepen our understanding of how these laws operate on the ground and round out the scholarship's current focus on federal-level transparency law issues.

The Article proceeds in three parts. Part I explores the text, structure, and application of state transparency laws' policing provisions. Part II chronicles the ways that these laws privilege police departments. It explores statutory carve-outs extended by the legislative branch, favorable interpretations handed down by the judiciary, and efforts to expand the scope of these protections from below by the police departments themselves. Part III examines the doctrinal and policy-oriented bases for secrecy exceptionalism, concluding that these justifications do not support

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48. See *supra* note 32.

49. See, e.g., Stephanie Campos-Bui & Jeffrey Selbin, U.C. Berkeley Sch. of L. Pol'y Advoc. Clinic, *Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California* 4 (2017), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf> [<https://perma.cc/4VH5-E9GG>] (describing the report's reliance on public records requests); *id.* at 6–8 (describing different juvenile fee practices across the state); *Juvenile Fee Abolition in California*, Berkeley L., <https://www.law.berkeley.edu/experiential/clinics/policy-advocacy-clinic/juvenile-fee-collection-in-california/> [<https://perma.cc/A3B9-9MTY>] (last visited Nov. 3, 2022) (describing the abolishment of juvenile fees in California).

50. See, e.g., Ashley Deeks, *Secrecy Surrogates*, 106 *Va. L. Rev.* 1395, 1407–11 (2020); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 *Iowa L. Rev.* 489, 493–94 (2007); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 *Calif. L. Rev.* 991, 999–1006 (2018).

51. Again, there are important exceptions. See *supra* note 32 and accompanying text.

52. See *supra* note 38 (describing scholar–practitioner work in this realm).

the extraordinary levels of secrecy currently extended to police. It concludes with a discussion of possible remedies.

### I. TRANSPARENCY LAWS AND POLICING

The U.S. transparency law regime is made up of various federal and state constitutional provisions, federal and state statutes, judicially imposed disclosure requirements, agency regulations, city ordinances, and so on.<sup>53</sup> But the laws that govern access to government records—the federal Freedom of Information Act and the fifty state public records laws—sit at the center of this sprawling regime. Not only are these statutes widely utilized by the public, but they have also come to represent good governance and citizen power over elected officials more broadly.<sup>54</sup> For these reasons, this Article largely focuses on state public records statutes rather than on these other transparency law mechanisms.

This Article also focuses on subfederal protections for state and local police, rather than on federal law protections for federal agencies. FOIA provides its own set of unique carve-outs for the records of federal law enforcement agencies.<sup>55</sup> Yet these exemptions—and FOIA in general—have already generated ample scholarly attention.<sup>56</sup> How public records statutes apply to subfederal law enforcement agencies, in contrast, warrants further scrutiny. This Part explores these laws. It surveys the structure and substance of these statutes and examines how they operate in practice—who makes requests, how often, and for what purpose. It then analyzes various public records datasets to better understand how well police departments manage their transparency obligations.

#### A. *The Structure of Transparency Laws*

All fifty states and the District of Columbia have public records statutes—laws that require state and local government agencies and entities to provide access to government records. Unlike FOIA, which applies only to federal agencies, these state statutes tend to sweep more broadly. Nearly all states extend access to the administrative functions of the judiciary, the office of the governor, the records of the legislative

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53. For a summary of subfederal secrecy laws and structures, see generally Christina Koningisor, *Secrecy Creep*, 169 U. Pa. L. Rev. 1751, 1766–72 (2021) [hereinafter Koningisor, *Secrecy Creep*].

54. See David E. Pozen, *Deep Secrecy*, 62 Stan. L. Rev. 257, 314 n.204 (2010) [hereinafter Pozen, *Deep Secrecy*] (noting that FOIA has “introduced a norm of open access to government documents that has commanded deep public loyalty” and even “taken on a quasi-constitutional valence”).

55. 5 U.S.C. § 552(b)(7) (2018).

56. See, e.g., John C. Brinkerhoff, Jr., *FOIA’s Common Law*, 36 Yale J. on Regul. 575, 587–89 (2019); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. Rev. 185, 216–19 (2013) [hereinafter Kwoka, *Deferring to Secrecy*]; David E. McCraw, *The “Freedom From Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 Yale L.J. Forum 232, 239–40 (2016).

branch, or some combination of the three.<sup>57</sup> Every state also extends transparency law obligations to police.<sup>58</sup> For the most part, law enforcement agencies are bound, at least in theory, by the same statutory transparency requirements that apply to other government agencies and entities that are subject to the law.<sup>59</sup>

These individual state laws are broadly similar in structure. Each creates a presumption of openness for public records, and each exempts certain categories of records from disclosure.<sup>60</sup> Yet the number, scope, and substance of these exemptions vary. Some state statutes shield only a few broad categories of records and then allow judges and agencies to fill in the blanks.<sup>61</sup> Others offer detailed catalogues of protected materials. Florida's public records law, for example, contains over 1,000 enumerated exceptions scattered throughout the state code.<sup>62</sup>

Across these different statutes, however, one feature remains broadly consistent: Every state offers some protection for law enforcement records. The specifics of these police secrecy provisions are explored in further detail below.<sup>63</sup> But in broad strokes, states generally take one of three approaches to structuring these exemptions. First, the majority of states offer a detailed and centralized law enforcement exemption. This approach is taken at the federal level: Exemption 7 of FOIA outlines six subcategories of exceptions for law enforcement agency records, including those that would reveal a confidential source, disclose law enforcement procedures or techniques, and invade an individual's privacy.<sup>64</sup> A little more than a dozen states have followed FOIA's lead and

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57. Massachusetts is the only exception. Todd Wallack, *State Lawmakers Fail to Reach Consensus on Whether to Expand Public Record Law*, *Bos. Globe* (Jan. 10, 2019), <https://www.bostonglobe.com/metro/2019/01/10/state-lawmakers-fail-reach-consensus-whether-expand-public-record-law/XwvfD04o2TtQ4HWqmxioBO/story.html> (on file with the *Columbia Law Review*).

58. Most states' statutes contain specific exemptions for law enforcement records, but there are exceptions. See, e.g., *Haw. Rev. Stat. Ann.* § 92F-13 (West 2022) (setting forth no centralized law enforcement exemption).

59. In practice, the many statutory carve-outs available to police mean that police departments are able to withhold broad swaths of records despite these general transparency law obligations. See *infra* section II.A.

60. Nearly all of these statutes enumerate specific exemptions. But again, there are exceptions. See, e.g., *Carlson v. Pima County*, 687 P.2d 1242, 1244 (Ariz. 1984) (carving out judge-made exceptions because the statute itself contains few exemptions).

61. See, e.g., *Ala. Code* § 36-12-40 (2022); *Haw. Rev. Stat. Ann.* § 92F-13; *Mont. Code Ann.* § 2-6-1002 (West 2021).

62. Elizabeth Koh & Emily L. Mahoney, *Lawmakers, in Whittling Down Public Records, Add Exemptions They Say Are Necessary After Parkland*, *Tampa Bay Times* (Mar. 11, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/03/11/lawmakers-in-whittling-down-public-records-add-exemptions-they-say-are-necessary-after-parkland/> (on file with the *Columbia Law Review*).

63. See *infra* Part II.

64. 5 U.S.C. § 556(b)(7) (2018).

enacted a similar set of provisions.<sup>65</sup> Another two dozen or so have enacted a centralized and detailed exemption that enumerates different subcategories of protection from the federal version.<sup>66</sup>

A second, smaller group of states have enacted a specific carve-out for law enforcement records but left the details of this exemption vague, to be clarified elsewhere in the public records statute or in other parts of the state code.<sup>67</sup> Indiana's law offers an example. The enumerated list of statutory exemptions provides only that the "investigatory records" of law enforcement agencies are protected from disclosure.<sup>68</sup> The contours of this carve-out are then fleshed out piecemeal elsewhere. There are separate statutory provisions that address the disclosure of body camera footage,<sup>69</sup> accident reports,<sup>70</sup> arrest records,<sup>71</sup> police blotters,<sup>72</sup> and use of the Glomar response.<sup>73</sup>

A final group offers little statutory guidance on law enforcement secrecy at all. These public records statutes contain no explicit law enforcement exemption.<sup>74</sup> Instead, state legislatures have either enumerated narrow categories of protection elsewhere or left it up to the

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65. See, e.g., Alaska Stat. § 40.25.120(a)(6) (2022); D.C. Code § 2-534(a)(3) (2022); Idaho Code § 74-124(1) (2022); 5 Ill. Comp. Stat. Ann. 140/7(1)(d) (West 2022); Kan. Stat. Ann. § 45-221(a)(10) (West 2022); Me. Rev. Stat. Ann. tit. 16, § 804 (West 2022); Md. Code Ann., Gen. Provis. § 4-351(b) (West 2022); Mich. Comp. Laws Ann. § 15.243(1)(b) (West 2022); Miss. Code Ann. § 25-61-3(f) (2022); N.Y. Pub. Off. Law § 87(2)(e)-(f) (McKinney 2022); 38 R.I. Gen. Laws § 38-2-2(4)(D) (2022); S.C. Code Ann. § 30-4-40(a)(3) (2022); Utah Code § 63G-2-305(10)-(11) (2022); Vt. Stat. Ann. tit. 1, § 317(c)(5)(a) (2021).

66. See, e.g., Colo. Rev. Stat. § 24-72-304 (2022); Conn. Gen. Stat. Ann. § 1-210(b)(3) (West 2022); Del. Code tit. 29, § 10002(o)(3)-(5) (2022); Fla. Stat. Ann. § 119.071(2) (West 2022); Ga. Code Ann. § 50-18-72(a)(3)-(4) (2022); Iowa Code § 22.7(5), (9) (2022); Ky. Rev. Stat. Ann. § 61.878(1)(h) (West 2022); La. Stat. Ann. § 44:3 (2022); Minn. Stat. § 13.82 (2022); Mo. Ann. Stat. § 610.100, .120, .150, .200, .205, .210 (West 2022); N.M. Stat. Ann. § 14-2-1 (2022); N.C. Gen. Stat. § 132-1.4 (2022); N.D. Cent. Code § 44-04-18.7 (2021); Ohio Rev. Code Ann. § 149.43(A)(1)(h), (A)(2) (2022); Okla. Stat. tit. 51, § 24A.8 (2022); Or. Rev. Stat. § 192.345(3) (West 2022); 65 Pa. Stat. and Cons. Stat. Ann. § 67.708(b)(16) (West 2022); S.D. Codified Laws § 1-27-1.5(5) (2022); Tex. Gov't Code Ann. § 552.108 (West 2021); Va. Code Ann. § 2.2-3706 (2022); Wash. Rev. Code Ann. § 42.56.240 (West 2022); Wis. Stat. & Ann. § 19.35(a) (2022).

67. See, e.g., Ark. Code Ann. § 25-19-105(b)(6) (2022); Ind. Code Ann. § 5-14-3-4(b)(1) (West 2022); Mass. Gen. Laws Ann. ch. 4, § 7(26)(f) (West 2022); Neb. Rev. Stat. § 84-712.05(5) (2022); N.J. Stat. Ann. § 47:1A-1.1 (West 2022); W. Va. Code Ann. § 29B-1-4(4) (LexisNexis 2022); Wyo. Stat. Ann. § 16-4-203(b)(i) (2022).

68. Ind. Code Ann. § 5-14-3-4(b)(1).

69. Id. § 5-14-3-5.2.

70. Ind. Code Ann. § 9-26-2-3 (West 2022).

71. Ind. Code Ann. § 5-14-3-5(a).

72. Id. § 5-14-3-5(c).

73. Id. § 5-14-3-4.4.

74. See, e.g., Ariz. Rev. Stat. Ann. §§ 39-121 to -128 (2022); Haw. Rev. Stat. Ann. § 92F-13 (West 2022); Mont. Code Ann. § 2-6-1002 (West 2021); Nev. Rev. Stat. Ann. § 239.010 (West 2021); Tenn. Code Ann. § 10-7-504 (2022). However, there may be more specific law enforcement-related exemptions contained elsewhere in the states' statutory codes.

courts to fill in the blanks. In Arizona, for instance, the courts have outlined three broad categories of exemptions: records made confidential by some other statute or law, records that implicate privacy concerns, and records for which disclosure would be “detrimental to the best interests of the state.”<sup>75</sup> Police departments and judges then determine on a case-by-case basis whether the requested records fall into one of these three general buckets.<sup>76</sup>

These three approaches describe structural differences in law enforcement secrecy provisions across the fifty states. But the underlying substance of these protections also varies. There are some narrow points of agreement. Records that would reveal the identity of confidential police informants, for example, are almost always shielded from public view in every state, either by statute or judicial decision.<sup>77</sup> Nearly every state also makes at least some arrest records public.<sup>78</sup> But for most categories of records, the states have diverged. They have split on whether to provide public access to accident reports, 911 call recordings, mug shots, body camera videos, police disciplinary records, and more.<sup>79</sup>

There is also variation in how these statutes are administered. Some states impose a cap on how much an agency may charge for records, for example, while others allow agencies virtually unlimited discretion to pass

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75. *Carlson v. Pima County*, 687 P.2d 1242, 1245 (Ariz. 1984).

76. *Id.* at 1246. Other states take slightly different approaches. For example, in Tennessee, police investigatory records are instead shielded under the state’s rules of criminal procedure. See Tenn. R. Crim. P. 16(a)(2); Douglas R. Pierce, Tennessee: Open Government Guide, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-guide/tennessee/> [<https://perma.cc/B8BH-EQ2T>] (last visited Oct. 11, 2022) (citing the state rules of criminal procedure for guidance on access to investigatory records).

77. Koningisor, Comparison of State Public Records Statutes, *supra* note 21.

78. *Id.*

79. *Id.* It is difficult to provide exact breakdowns across each category: In many states and across many categories, the law is unsettled. *Id.* But in general terms, the majority of states provide public access to accident reports, 911 call recordings, and mug shots. *Id.* As of April 2021, twenty-three states and the District of Columbia had specifically addressed public access to police body-worn cameras in their public records law. Body-Worn Camera Database, Nat’l Conf. of State Legislatures (Apr. 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/> [<https://perma.cc/5APJ-K9E8>]. Some treat videos as public and specify when police may redact or withhold them; some exclude footage from public records statutes but provide access to individuals who fall within specific categories, like the subject of the recording; and some place restrictions on how much video a requester is permitted to obtain. *Id.* Access to police body-worn cameras can also be difficult to assess more broadly because so many police departments have generated their own policies. See Access to Police Body-Worn Camera Video, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/resources/bodycams/> [<https://perma.cc/A2AN-VZCV>] (last visited Oct. 11, 2022) (surveying police department policies on public access to body-worn camera footage). For a summary of public access to police disciplinary records, see Kallie Cox & William Freivogel, Police Misconduct Records Secret, Difficult to Access, Pulitzer Ctr. (Jan. 24, 2022), <https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access> [<https://perma.cc/U453-6ZTW>].



costs along to the requester.<sup>80</sup> Some also provide easier and cheaper routes to appeal a denial from an agency—an administrative appeals process, for instance, or a binding determination from the state attorney general’s office—while others force requesters to proceed directly to court.<sup>81</sup> These types of structural and textual distinctions, too, can have important downstream implications for police secrecy.

B. *The Application of Transparency Laws*

The text and structure of these laws tell us only so much. Their operation in practice is just as important to how effective they are as a mechanism of meaningful accountability and oversight. Yet the operation of these public records statutes is difficult to study. There are 18,000 law enforcement agencies in the United States,<sup>82</sup> and each is bound by one of fifty-two different public records statutes.<sup>83</sup> In addition, there are university police, hospital police, state capitol police, departments of corrections, and various other state and local entities that exercise police-like powers. Even if the government were to maintain meticulous public records data, the number, size, and sprawl of police agencies in the United States would create a research challenge.<sup>84</sup>

Further, many state and local governments do not maintain these data.<sup>85</sup> Only a handful of states gather public records data at the state-agency level, and no state tracks requests to local governments.<sup>86</sup> To understand how the public uses these laws and how well police departments comply with them—to know how many requests police departments receive, how long they take to respond, and which exemptions they invoke—researchers must instead approach each agency individually. Even then, many state and local agencies do not maintain this

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80. Koningisor, Comparison of State Public Records Statutes, *supra* note 21.

81. Roughly one-third of states allow for an administrative appeals process. *Id.* Under Texas state law, agencies that seek to withhold records under an enumerated exemption must first ask for a determination from the Attorney General’s office confirming that the records are properly exempt. Tex. Gov’t Code Ann. § 552.301(a) (West 2021).

82. Duren Banks, Joshua Hendrix, Matthew Hickman & Tracey Kyckelhahn, DOJ, NCJ 249681, National Sources of Law Enforcement Employment Data 1 (2016), <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/U6PW-RQZZ>].

83. These statutes include FOIA and the public records statutes of the fifty states and the District of Columbia.

84. For a general description of some of the impediments to data collection at the state level, see Miriam Seifter, Further From the People? The Puzzle of State Administration, 93 N.Y.U. L. Rev. 107, 131–34 (2018).

85. For a description of the difficulties of gathering and analyzing police records across multiple jurisdictions, see P. Leila Barghouty, The Police Avoid Requests for Their Records by Simply Not Keeping Any, Outline (Sept. 3, 2019), <https://theoutline.com/post/7901/the-police-avoid-requests-for-their-records-by-simply-not-keeping-any> [<https://perma.cc/TQ98-5TRQ>].

86. Christina Koningisor, Transparency Deserts, 114 Nw. U. L. Rev. 1461, 1469 (2020) [hereinafter Koningisor, Transparency Deserts].

information at all, even for internal use.<sup>87</sup> For these reasons, the data that do exist tend to be scattered and anecdotal.

Despite these limitations, a few patterns emerge. Law enforcement agencies routinely receive some of the highest numbers of requests. Massachusetts, Texas, and Vermont are the only states in the country that gather comprehensive statewide data on the number of requests submitted to state agencies.<sup>88</sup> And in all three states, the state police department receives a large percentage of the requests filed each year. In 2017, for example, the state policing agency received the highest number of requests in Texas and the second highest in Massachusetts; in Vermont, the Department of Public Safety, which houses the state policing agency, also received the highest number of requests.<sup>89</sup>

Although statewide databases are unavailable for local agencies, some specific examples suggest that requests to municipal police departments tend to be substantial as well. In 2020, for example, the Portland Police Bureau received nearly 35,000 public records requests<sup>90</sup>—more than double the number of requests received by the FBI that same year.<sup>91</sup> Other large, urban police departments report high volumes of requests as well.<sup>92</sup>

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87. See, e.g., Katherine Fink, *State FOI Laws: More Journalist-Friendly, or Less?*, in *Troubling Transparency: The History and Future of Misinformation* 91, 109–11 (David E. Pozen & Michael Schudson eds., 2018) (describing the difficulty of collecting state-level public records logs).

88. Koningisor, *Transparency Deserts*, supra note 86, at 1480–81.

89. See Sec’y of the Commonwealth of Mass., *2017 Agency Public Records Requests Data* (Jan. 29, 2018) (on file with the *Columbia Law Review*) [hereinafter *Mass. 2017 Records Requests Data*]; Agency of Admin., State of Vt., *2017 Statewide Public Records Requests Data* (Sept. 13, 2018) (on file with the *Columbia Law Review*) [hereinafter *Vt. 2017 Records Requests Data*]; Open Records Reports, Att’y Gen. of Tex., [https://www2.texasattorneygeneral.gov/open/pia/reports/requests\\_tally.php?fy=2017&ag=all](https://www2.texasattorneygeneral.gov/open/pia/reports/requests_tally.php?fy=2017&ag=all) [<https://perma.cc/KY7T-SP62>] (last visited Oct. 11, 2022); see also Wash. State Auditor’s Off., *Performance Audit: The Effect of Public Records Requests on State and Local Governments 20 exh.7* (2016), <https://mrsc.org/getmedia/d3dbec02-f6f2-4aa7-b1dd-94cd71a5fb4a/w3saoPRA.aspx> [<https://perma.cc/A3AS-H2HF>] (conducting an audit of state and local public records requests and finding that state and local law enforcement agencies receive roughly twice as many requests as other state and local agencies).

90. Portland Police Bureau, *2020 Public Records Requests Data* (2022) (on file with the *Columbia Law Review*) [hereinafter *Portland 2020 Records Requests Data*]. Note that a substantial percentage of these were commercial requests. LexisNexis alone filed nearly 11,000 requests that year. *Id.*

91. DOJ, *United States Department of Justice Annual Freedom of Information Act Report 20* (2020), <https://www.justice.gov/oip/page/file/1371846/download> [<https://perma.cc/BN4C-RV5J>] (noting that the FBI received 15,828 FOIA requests in fiscal year 2020).

92. For example, the Los Angeles Police Department received more than 12,000 requests between 2019 and September 2022. See City of L.A., *Next Request*, [https://lacity.nextrequest.com/requests?page\\_number=100](https://lacity.nextrequest.com/requests?page_number=100) [<https://perma.cc/D5UJ-S9W7>] (last visited Oct. 11, 2022).

Certain patterns also emerge when it comes to the requesters themselves. The legal scholarship on access to police records is largely focused on a few narrow categories, especially body camera footage, police disciplinary records, and records relating to police surveillance technologies.<sup>93</sup> Yet the full ecosystem of police-records access—who makes requests and for what information—is richer and more complex.<sup>94</sup>

Commercial requests seem to make up a large proportion of state and local police-records requests, at least based on the limited data available. Specifically, two types of commercial requesters seem to account for a large percentage of the total: insurance agencies and law firms. These entities tend to utilize public records statutes to secure access to accident reports, fire reports, theft reports, and other similar types of police records needed to verify insurance claims filed by customers.<sup>95</sup> In Massachusetts, for instance, roughly two-thirds of requests submitted to the state police in 2017 were for police reports.<sup>96</sup> Similar patterns can be found at the local level. Eighty-five percent of the requests that the Los Angeles Police Department receives annually, for example, are for traffic accident reports.<sup>97</sup>

These agencies also receive a high number of first-person requests, especially if we widen the lens to encompass sheriffs' departments, which manage many county jails. In some states, restrictive discovery rules limit the ability of incarcerated individuals to obtain records relating to their cases. For instance, in states that limit discovery rights for those seeking post-conviction relief, public records statutes offer the only route available

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93. See *supra* note 32 (listing sources discussing access to body camera footage under state public records laws).

94. Here, this Article builds on the work of Professor Margaret Kwoka, who has explored FOIA requesters' identities and motivations at length. See Kwoka, *First-Person FOIA*, *supra* note 35, at 2243–54 (describing the use of FOIA by private individuals seeking information about themselves, including those attempting to “arm themselves when they are subject to governmental enforcement actions”); Kwoka, *FOIA, Inc.*, *supra* note 42, at 1379–414 (discussing the prevalence of FOIA use by commercial actors, some of whom use FOIA as a means to profit).

95. See Konigisor, *Transparency Deserts*, *supra* note 86, at 1498–504 (explaining how, in Vermont, insurance companies account for a majority of the requests submitted to public safety agencies and are typically seeking to verify reports of burglaries, traffic, and other accidents).

96. Mass. 2017 Records Requests Data, *supra* note 89; see also Vt. 2017 Records Requests Data, *supra* note 89 (showing that approximately thirty percent of statewide requests were submitted by a single company—LexisNexis—for copies of police reports).

97. Miguel A. Santana, L.A. City Admin. Officer, CAO File No. 0150-10463-0000, Agreement With Lexis/Nexis Claims Solutions, Inc. to Provide a Community Online Reporting Service and a Report Distribution Service 1–2 (2015), [https://clkrep.lacity.org/onlinedocs/2015/15-1140\\_rpt\\_CAO\\_09-24-2015.pdf](https://clkrep.lacity.org/onlinedocs/2015/15-1140_rpt_CAO_09-24-2015.pdf) [https://perma.cc/7MME-JQBD]; see also Portland 2020 Records Requests Data, *supra* note 90 (showing that nearly 11,000 out of 34,776 requests—around thirty percent—came from LexisNexis).

to secure this material.<sup>98</sup> Further, when states make police disciplinary records available through public records laws, prosecutors are relieved of their obligation to affirmatively disclose them under *Brady v. Maryland*.<sup>99</sup> Defendants in many of these states must instead obtain these documents through a freedom of information request.<sup>100</sup> In this way, systemic failures in the public records regime can operate as a significant barrier to individual defendants' ability to mount a defense.<sup>101</sup>

The requesters who many assume are the primary users of these statutes—journalists, academics, activists, nonprofit organizations, and so on—in fact make up only a small percentage of police-records dockets.<sup>102</sup> Professor Margaret Kwoka has done extensive work documenting the low numbers of media requesters at the federal level.<sup>103</sup> Although data are difficult to obtain at the subfederal level, the data that are available suggest that state and local police departments receive only a fraction of their requests from media and academic requesters.<sup>104</sup> For example, Vermont is the only state that makes a comprehensive state-level dataset publicly available. And in 2017, only three requests out of the more than 2,500 submitted to the Vermont Department of Public Safety originated from identifiable media or nonprofit requesters.<sup>105</sup>

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98. See, e.g., Mass. R. Crim. P. § 30(c)(4) (providing that discovery is available for those seeking post-conviction relief only upon establishment of a prima facie case and authorization by the judge).

99. Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 *Stan. L. Rev.* 743, 770–73 (2015).

100. *Id.* Prosecutors in these states sometimes still review police personnel files for *Brady* material even when the records are available under public records statutes. *Id.* at 771–72.

101. For a critique of this approach, see Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 *UCLA L. Rev.* 138, 142 (2012).

102. See Kwoka, *FOIA, Inc.*, supra note 42, at 1366–78 (demonstrating that the drafters of FOIA envisioned journalists as the primary users of the law); see also infra note 104 (providing examples of low percentages of media requesters).

103. See Kwoka, *FOIA, Inc.*, supra note 42, at 1379–414.

104. See Va. Dep't of State Police, 2019 Public Records Request Data (Aug. 9, 2022) (on file with the *Columbia Law Review*) (showing that 65 out of 3,170, or around 2% of requests, were submitted by identifiable media requesters); Indianapolis Metro. Police Dep't, January–June 2020 Public Records Request Data (Aug. 12, 2022) (on file with the *Columbia Law Review*) (showing that 39 out of 909, or around 4.3% of requests, were submitted by identifiable media requesters); Niles, Ill. Police Dep't, 2018–2021 Public Records Requests Data (May 5, 2021) (on file with the *Columbia Law Review*) (showing that 57 out of 1,012, or around 5.6% of requests, were submitted by identifiable media requesters); cf. Fink, supra note 87, at 103 (finding that the percentage of media requests submitted to twenty-one state environmental agencies ranged from 0 to roughly 6%). Of course, there are exceptions. In some instances, the percentage of media requests to police departments will be substantially higher. See, e.g., L.A. Cnty. Sheriff's Dep't, 2018 Public Records Requests Data (last updated Sept. 28, 2022) (on file with the *Columbia Law Review*) (showing that roughly 297 out of 962, or around 30% of requests, were submitted by identifiable media requesters).

105. Vt. 2017 Records Requests Data, supra note 89. The Department of Public Safety is the umbrella organization that houses the Vermont State Police. Dep't of Pub. Safety, State

As difficult as it is to gather data about the identity of requesters, it is even more difficult to evaluate the quality of law enforcement agencies' responses—how quickly these agencies respond, how often they ignore requests, how often they require payment, and so on. In an effort to learn more, I looked to the website MuckRock, a nonprofit news site that streamlines the public records requesting process and makes every request available to the public.<sup>106</sup>

This dataset is valuable for a number of reasons. It allows for a rare look at the underlying requests themselves—what records were requested and how the agency responded. It also includes a high percentage of public-interest requests—or those submitted by journalists, academics, and nonprofit organizations.<sup>107</sup> Although these requesters often represent only a small percentage of the total, their efforts tend to have an outsized policy impact. Such media and advocacy requesters often utilize these laws to hold the police accountable and convey important information about policing to the public.<sup>108</sup> The dataset also includes an unusual cross section of agencies. Requests have been submitted through the site to roughly 3,500 law enforcement agencies across all fifty states and the District of Columbia, including many smaller and more rural police departments often overlooked by researchers conducting comparative surveys.<sup>109</sup>

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of Vt., <https://dps.vermont.gov/> [<https://perma.cc/W83X-U2W5>] (last visited Oct. 11, 2022). Roughly a quarter of the requests were submitted by requesters who provided no institutional affiliation, however, so the true number is likely higher. Vt. 2017 Records Requests Data, *supra* note 89.

106. MuckRock, <https://www.muckrock.com/> [<https://perma.cc/P8CA-XFUA>] (last visited Oct. 11, 2022).

107. For example, of the roughly 2,800 requests submitted through the website in 2019 to state and local law enforcement agencies, nearly 85% were submitted by an academic, media, or nonprofit requester. MuckRock Data Spreadsheet, Law Enforcement Requests 2019 (July 8, 2021) (on file with the *Columbia Law Review*). The specific breakdown of this 85% was: MuckRock journalists (31%); nonprofit (29%); non-MuckRock journalists (22%); academic (3%). The rest of the requests were: unknown affiliation (13%); individuals requesting their own records (1%); commercial (0.7%); government (0.2%). *Id.*

108. There are countless examples of media and nonprofit requesters using public records statutes to gather and publicize information about law enforcement agencies. One clear illustration is these organizations' efforts to fill the gaps in data on police killings and police use of force. See, e.g., Julie Tate, Jennifer Jenkins, Steven Rich, John Muyskens, Kennedy Elliott, Ted Mellnik & Aaron Williams, How the *Washington Post* Is Examining Police Shootings in the United States, *Wash. Post* (July 7, 2016), [https://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-shootings-in-the-united-states/2016/07/07/d9c52238-43ad-11e6-8856-f26de2537a9d\\_story.html](https://www.washingtonpost.com/national/how-the-washington-post-is-examining-police-shootings-in-the-united-states/2016/07/07/d9c52238-43ad-11e6-8856-f26de2537a9d_story.html) (on file with the *Columbia Law Review*) (describing how reporters use public records laws and other sources to gather police use of force data nationwide); see also An Introduction to the Citizens Police Data Project, Invisible Inst., <https://invisible.institute/police-data> [<https://perma.cc/Y5TZ-DRNY>] (last visited Oct. 11, 2022) (using public records requests to build a database of Chicago Police Department records).

109. MuckRock Law Enforcement Requests 2010–2021, *supra* note 44. Yet this dataset is also limited in certain ways. It represents a fraction of the total requests submitted to state and local police across the country in this time frame. At the same time, it is too large to

Roughly 45,000 requests to state and local entities have been filed through the site since 2010, a little less than half of which have been submitted to state and local law enforcement agencies.<sup>110</sup> Comparing this set of around 21,000 law enforcement requests to the roughly 24,000 non-law-enforcement requests filed through the site revealed that police departments performed worse on nearly every metric, including completion rate, rejection rate, response rate, and withholdings for failure to pay:

TABLE 1: RECORD REQUEST OUTCOMES<sup>111</sup>

	Completed	Rejected	Awaiting Response	Total
Law Enforcement	73.3%	16.6%	10.0%	
	8,398	1,903	1,150	11,451
Non-Law-Enforcement	78.7%	14.8%	6.5%	
	9,930	1,861	825	12,616

Further analysis of certain subcategories yielded additional findings. For example, law enforcement agencies took an average of 21 days longer

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easily code. Many categories of data require looking up each request individually—for example, which exemptions the department invoked. Even then, the information can be difficult to isolate. Some responses contain multiple or even dozens of exchanges between the requester and agency, each of which discuss different statutory provisions. And for many requests, the agency fails to cite a specific exemption at all, leaving the requester in the dark as to whether responsive records were withheld, and if so, under what legal authority.

110. *Id.* The New York City Police Department received the highest number of requests, followed by the Chicago Police Department, the Boston Police Department, the Seattle Police Department, and the Massachusetts State Police. Around 40% of agencies received only a single request. *Id.* To separate out law enforcement and non-law-enforcement agencies, the requests were filtered for the keywords “police,” “sheriff,” “safety,” and “patrol” in the name of the targeted agency.

111. *Id.* The chi-square statistic is 126, showing that the difference in distributions between law enforcement and non-law-enforcement requests is statistically significant. A random sample of 300 requests found that the rate at which the requests’ statuses were misclassified was consistent across both police and non-police requests: Around 7% of police and 8% of non-police requests from the random sample were found to have been misclassified. *Id.* This table represents only those requests categorized as “completed,” “rejected,” or “awaiting response.” An additional 22,233 state and local requests fell into additional categories. Those included “awaiting acknowledgement,” “awaiting appeal,” “fix required,” “in litigation,” “no responsive documents,” “partially completed,” “payment required,” “processing,” or “withdrawn.”

to respond than non-law-enforcement agencies.<sup>112</sup> But response times were slow overall. Police departments took an average of 96 days to respond, versus 75 days for non-police.<sup>113</sup> And there was also substantial variation among the states. Furthermore, in twenty states, law enforcement agencies responded more quickly than non-law-enforcement agencies.<sup>114</sup>

The dataset, although limited in scope, seems consistent with more targeted public records studies conducted elsewhere. A 2013 study of thirty-eight New York City agencies by then-Public Advocate Bill de Blasio, for example, rated the New York City Police Department (NYPD) among the worst responders in the city: The NYPD failed to respond to nearly a third of submitted requests during the three-month period under study, and it had the third-slowest response time overall.<sup>115</sup> Similarly, in Chicago, 90% of the 119 payouts the city has made since 2010 under the freedom of information law's fee-shifting provision have stemmed from Chicago Police Department denials.<sup>116</sup>

One should not overgeneralize based on these limited studies. And there are also counterexamples—data suggesting that police are equal or better responders.<sup>117</sup> That said, two insights emerge. First, legal scholars' focus on a handful of categories of records obscures the much larger and more complex ecosystem of police-records requests that exists at the state and local levels. These laws support a broader range of uses and users than tends to appear in the literature. Second, while there are too many agencies and insufficient data to make any definitive claims about how well police comply with their transparency law obligations compared to other agencies, much of the data that does exist—including the nationwide dataset available through MuckRock—suggests that they make especially poor responders.

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112. *Id.* This is the average of all fifty states, including the states in which police responded more quickly than non-police.

113. *Id.*

114. *Id.*

115. See Office of Bill de Blasio, Pub. Advoc. for the City of N.Y., *Breaking Through Bureaucracy: Evaluating Government Responsiveness to Information Requests in New York City* 8–13, 26 (2013), [https://a860-gpp.nyc.gov/concern/parent/gq67js21s/file\\_sets/s1784m755](https://a860-gpp.nyc.gov/concern/parent/gq67js21s/file_sets/s1784m755) [<https://perma.cc/QZ6W-GCPV>] (noting that, of the 1,883 requests the NYPD received during the relevant period, 31% went unanswered and 28% took more than 60 days to process).

116. Alexander Shur & David Jackson, *City Spends Millions Defending Secrecy Practices*, Better Gov't Ass'n (May 6, 2021), <https://www.bettergov.org/news/city-spends-millions-defending-secrecy-practices/> [<https://perma.cc/DX52-F79X>].

117. For example, I scraped the NextRequest data for the city of San Diego, which showed the opposite. Of the roughly 77,000 requests submitted to the city between December 2015 and October 2021, the police department took an average of around 12 days to respond (12,331 requests), while non-police agencies required an average of around 21 days (65,415 requests). City of San Diego, *Next Request Data (2021)* (on file with the *Columbia Law Review*).

## II. POLICE SECRECY EXCEPTIONALISM

Part I's descriptive account of the structure and content of public records statutes gestures at some of the ways that law enforcement agencies are treated differently when it comes to transparency law obligations. This Part explores these distinctions further. It surveys the unique protections extended to police by state legislatures, judges, and police departments, focusing on the various ways that different government actors work together to facilitate and amplify law enforcement secrecy across different substantive realms.

### A. *Legislative Exceptionalism*

Legislatures in nearly every state extend special secrecy protections to law enforcement agencies.<sup>118</sup> This treatment is not necessarily unique to policing—other agencies receive targeted exemptions as well.<sup>119</sup> Yet law enforcement agencies enjoy unusually pervasive secrecy protections. In some states, this tangle of exemptions is so robust that it virtually carves police departments out of the law's oversight obligations altogether. In the wake of September 11, especially, legislatures launched a wave of new government secrecy protections, many of which provided specific carve-outs for law enforcement agencies. States enacted a profusion of laws to shield police antiterrorism programs, police intelligence data, and more.<sup>120</sup>

More recently, state legislatures across the country have begun to roll back some of their more aggressive police secrecy statutes.<sup>121</sup> Yet these reforms have still only touched the surface of the much deeper and more entrenched web of statutory protections that remains in place. At a moment in which law- and policymakers are revisiting how these statutes apply to policing, it is critical that we understand the full ecosystem of police secrecy protections extended under this statutory regime.

This section begins that work. It explores various law enforcement-specific exemptions, including investigatory, privacy, and disciplinary exemptions, and so on. It also examines statutory carve-outs that are facially neutral but in practice substantially expand police secrecy, such as carve-outs for terrorism-related information and specific surveillance technologies like automated license plate readers.

#### 1. *Law Enforcement-Specific Exemptions*

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118. See Koningsor, Comparison of State Public Records Statutes, *supra* note 21.

119. See, e.g., 5 U.S.C. § 552(b)(8) (2018) (extending protections to agencies that supervise and regulate financial institutions).

120. See *infra* sections II.A.1.d, .2.a.

121. See, e.g., 2020 N.Y. Laws 780 (repealing § 50-a of New York's Civil Rights Law, which conditioned release of officer records on officer permission). See generally Legislative Responses for Policing—State Bill Tracking Database, *supra* note 28 (database tracking law enforcement legislation, including legislation specifically regulating data and transparency).



a. *Investigatory Exemptions.* — Arguably the most powerful secrecy tools extended to law enforcement agencies are statutory shields for police investigatory records.<sup>122</sup> A substantial amount of police secrecy is concentrated within these provisions, which tend to be both flexible and broad. Yet again, these protections differ across the fifty states, both in substance and structure. In general, these investigatory exemptions fit the same patterns outlined above: While some carefully enumerate the specific categories of investigatory records that may be kept secret, others adopt a vague exemption for police investigations and leave it to the courts or the agencies to fill in the details.<sup>123</sup>

These statutory choices can dramatically expand police secrecy. A few types of divergences help illustrate the point. First, a number of state legislatures have failed to address whether the investigatory exemption is time limited. Some statutes explicitly state that these protections apply only to active investigations.<sup>124</sup> Others make no such distinction, opening the door for judges and agencies to argue that even closed investigations are still shielded by statute.<sup>125</sup> The latter regime can lead to odd results, allowing police departments to withhold investigatory records that are decades old or that will almost certainly never be used in a prosecution.<sup>126</sup> In California, the courts have even held that records created after an investigation has closed can be withheld as protected investigatory material.<sup>127</sup> And to offer a more recent example, the City of Uvalde, Texas,

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122. For example, 17% of all requests submitted to the NYPD through MuckRock were rejected on investigatory exemption grounds. MuckRock Data Spreadsheet, New York City Police Department Requests 2010–2021 (July 8, 2021) (on file with the *Columbia Law Review*).

123. A number of states have also adopted law enforcement exemptions modeled on FOIA. See Alaska Stat. § 40.25.120(6) (2022); D.C. Code § 2-534(a)(2A)–(3) (2022); Idaho Code § 74-124 (2022); Kan. Stat. Ann. § 45-221(a)(10) (West 2022); Md. Code Ann., Gen. Provis. § 4-351 (West 2022); Mich. Comp. Laws Ann. § 15.243(b) (West 2022); N.Y. Pub. Off. Law § 87(2)(e), (f) (McKinney 2022); 38 R.I. Gen. Laws § 38-2-2(4)(D) (2022); S.C. Code Ann. § 30-4-40(a)(3) (2022); Utah Code § 63G-2-305 (2022); Vt. Stat. Ann. tit. 1, § 317(c)(5)(a) (2021).

124. See, e.g., Ark. Code Ann. § 25-19-105(b)(6) (2022); Fla. Stat. Ann. § 119.071(2)(c) (West 2022); La. Stat. Ann. § 44:3(A)(l) (2022); Minn. Stat. § 13.82 (2022); Mo. Ann. Stat. § 610.100.2 (West 2022).

125. Compare Cal. Gov't Code § 6254(f) (repealed 2023) (making no distinction between active and inactive investigations), with *Williams v. Superior Court*, 852 P.2d 377, 384, 393 (Cal. 1993) (protecting closed criminal files). Compare Tex. Gov't Code Ann. § 552.108 (West 2021) (making no distinction between active and inactive investigations), with *Holmes v. Morales*, 924 S.W.2d 920, 925 (Tex. 1996) (protecting closed criminal files).

126. See, e.g., Jason Clayworth, *Iowa's Open-Records Law Is Being Used to Hide Unflattering Police Video*, Open Records Advocates Say, *Des Moines Reg.* (Sept. 12, 2018), <https://www.desmoinesregister.com/story/news/investigations/2018/09/12/how-iowas-open-records-law-being-used-hide-police-video/1278686002/> [<https://perma.cc/FLG8-9CLR>] (describing how state police departments routinely invoke the investigatory exemption “regardless of whether the case was closed, remained under investigation or had gone cold decades ago”).

127. *Rackauckas v. Superior Court*, 128 Cal. Rptr. 2d 234, 241 (Ct. App. 2002).

responded to requests about the massacre of nineteen school children by invoking the “dead suspect loophole”—arguing that because the suspect is dead, there will never be a conviction, and the investigation therefore remains permanently ongoing.<sup>128</sup>

Second, state legislatures often vest police departments with discretion to withhold a record under the investigatory exemption.<sup>129</sup> In some states, this decisional authority is directly encoded into the text of the statute.<sup>130</sup> In others, state legislatures have enacted a catchall provision that permits police to withhold requested records so long as they determine that the disclosure of investigatory materials would “prejudice the possibility of effective law enforcement.”<sup>131</sup> Such legislative decisions have significant downstream implications for police secrecy. When decisional authority is vested in police departments themselves, agencies can and do categorize broad swaths of records as investigatory to shield their activities from public view.<sup>132</sup>

Finally, state legislatures carve out certain law enforcement agencies or certain categories of records from the statute altogether, overriding any sunset clauses or balancing tests contained elsewhere in the law. Arguably the most powerful example is the prophylactic classification of all police body camera recordings as investigative material, regardless of what the recordings actually contain. The Kansas legislature, for example, has deemed “[e]very audio or video recording made and retained by law enforcement using a body camera or vehicle camera” to be a “criminal investigation record[]” under the state public records law.<sup>133</sup>

Similarly, state legislatures have enacted blanket protections for specific law enforcement agencies. In Oklahoma, for instance, all investigatory records of the state Bureau of Investigation—the state-level equivalent to the FBI—are permanently shielded from public view.<sup>134</sup> The investigatory records of the Tennessee Bureau of Investigation and the

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128. Emma Bowman, Uvalde Officials Are Using a Legal Loophole to Block the Release of Shooting Records, NPR (June 18, 2022), <https://www.npr.org/2022/06/18/1106017340/uvalde-legal-loophole-mass-shooting-records> [<https://perma.cc/6NGQ-KZ43>].

129. See, e.g., Ala. Code § 12-21-3.1(b) (2022) (setting forth a broad investigatory exemption); Wyo. Stat. Ann. § 16-4-203(b)(i) (2022) (same).

130. See, e.g., Ind. Code Ann. § 5-14-3-4(b)(1) (West 2022); Miss. Code Ann. § 25-61-12(2)(a) (2022); Wyo. Stat. Ann. § 16-4-203(b)(i).

131. See, e.g., Mass. Gen. Laws Ann. ch. 4, § 7 (West 2022).

132. See, e.g., Va. Code Ann. § 2.2-3706(B)(9)(ii) (2022) (permitting law enforcement agencies discretion to withhold police disciplinary records); Jonathan Edwards, Norfolk Has Long Kept Secret How Police Use Force. Now Some Council Members Want That to Change., *Virginian-Pilot* (June 19, 2020), <https://www.pilotonline.com/government/local/vp-nw-npd-use-of-force-reports-20200619-c26jaqvwirbbvhsh4oedavb3da-story.html> [<https://perma.cc/EV7N-S2U5>] (describing how the Virginia state police used this discretion to withhold a decade of disciplinary records).

133. Kan. Stat. Ann. § 45-217(e) (West 2022).

134. Okla. Stat. tit. 74, § 150.5(D)(1) (2022).

Internal Affairs Division of the Tennessee Department of Correction are likewise wholly excluded.<sup>135</sup> Such provisions shield the records of some of the most powerful law enforcement actors in the state almost entirely from public view.

State legislatures may also facilitate police secrecy by imposing very detailed and burdensome disclosure requirements on certain investigatory records. For example, a handful of states have crafted statutory disclosure requirements for body camera footage that are so extensive they render the transparency provision nearly useless.<sup>136</sup> Under the Pennsylvania public records law, for instance, body camera footage is ostensibly open to the public. But in order to secure the video, the public must issue a public records request within 60 days of the incident, submit the request either in person or via certified mail, explain why they are seeking the footage, identify each individual present if the video was captured inside of a residence, and provide the date, time, and location of the incident.<sup>137</sup> Few requesters are able to comply with such onerous requirements.<sup>138</sup>

b. *Privacy Exemptions.* — The second major category of police-specific protections are privacy exemptions. Virtually every public records statute contains a general privacy provision that applies to every government agency.<sup>139</sup> But many states also recognize a separate privacy exemption that applies exclusively to law enforcement records. Specifically, a number of states have adopted the language of FOIA, which recognizes a distinct exemption for law enforcement records whose production “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>140</sup> For all other government documents, agencies must meet a higher threshold for withholding—they must show that disclosure “would” constitute a “clearly unwarranted” invasion of personal privacy.<sup>141</sup> But for law enforcement records, agencies must only show that disclosure “could reasonably be expected” to do so.<sup>142</sup> A number of state statutes have

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135. Tenn. Code Ann. § 10-7-504(a)(1)–(8) (2022).

136. See, e.g., Wash. Rev. Code Ann. § 42.56.240(14) (West 2022) (requiring that a request for body camera footage identify the name of the individuals involved in the incident, the case number, the law enforcement officers involved in the incident, and the time, date, and location of the incident).

137. 42 Pa. Stat. and Cons. Stat. Ann. § 67A03 (West 2022).

138. See Ryan Briggs, *Why Is It Still So Hard to See Police Bodycam Footage in Pennsylvania?*, WHY (May 28, 2021), <https://why.org/articles/why-is-it-still-so-hard-to-see-police-bodycam-footage-in-pennsylvania/> [<https://perma.cc/M3BY-DFG9>] (arguing that these procedural requirements have meant that few body camera and dash cam videos have been disclosed to the public).

139. See, e.g., 5 U.S.C. § 552(b)(6) (2018); N.Y. Pub. Off. Law § 87(2)(b) (McKinney 2022); Cal. Gov't Code § 6254(c) (repealed 2023).

140. 5 U.S.C. § 552(b)(7)(C).

141. *Id.* § 552(b)(6).

142. *Id.* § 552(b)(7)(C).

adopted this same approach, applying the watered-down version of the privacy threshold to police records.<sup>143</sup>

Other states have declined to pattern their exemptions on FOIA, and yet they still extend special statutory protections for law enforcement records that contain private information. These types of exemptions fall into two broad categories. The first are statutory provisions intended to protect the privacy of citizens. Some shield private information about specific actors in the criminal justice process, including victims, witnesses, or certain categories of offenders.<sup>144</sup> For example, many states extend special privacy protections to the criminal records of juveniles, reasoning that an offense committed when someone is a child should not follow them throughout their life.<sup>145</sup> Other citizen-focused privacy provisions protect the public at large. A number of states, for instance, have enacted statutory provisions that exempt body camera footage that contains private information from public view.<sup>146</sup>

The second category of police-specific privacy protections are those that shield law enforcement officers. Some of these protections are straightforward. Many statutes, for example, exclude the names, addresses, and phone numbers of law enforcement officers and their spouses and children from public disclosure.<sup>147</sup> A more contentious category of privacy provisions, however, protect the personnel or disciplinary records of police officers. These are discussed separately below.

c. *Disciplinary Exemptions.* — The laws governing police disciplinary records have garnered substantial public attention in recent years, and a number of states have recently revised or amended their laws to provide enhanced public access to the disciplinary records of police.<sup>148</sup> Even with these recent changes, however, the statutory provisions governing access

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143. See, e.g., Alaska Stat. § 40.25.120(a)(6) (2022); 38 R.I. Gen. Laws § 38-2-2(4)(D) (2022); S.C. Code Ann. § 30-4-40(a)(3)(C) (2022); Vt. Stat. Ann. tit. 1, § 317(c)(5)(A)(iii) (2021).

144. See, e.g., Fla. Const. art. I, § 16(b)(5) (shielding information about victims of a crime); Conn. Gen. Stat. Ann. § 1-210(b)(3)(B) (West 2022) (shielding records identifying “minor witnesses”); Kan. Stat. Ann. § 45-221(a)(10)(F) (West 2022) (shielding victim information); N.Y. Crim. Proc. Law § 160.59 (McKinney 2022) (providing for the sealing of certain offenses).

145. See Anne Teigen, *Automatically Sealing or Expunging Juvenile Records*, Nat’l Conf. of State Legislatures (July 2016), <https://www.ncsl.org/civil-and-criminal-justice/automatically-sealing-or-expunging-juvenile-records> [https://perma.cc/PSG2-M5YY] (“Lawmakers are mindful of both the immediate and long-term collateral consequences that juvenile records can impose on future education, employment and other transitions to adulthood.”).

146. See, e.g., Fla. Stat. Ann. § 119.071(2)(1)(2)(a) (West 2022); Mich. Comp. Laws Ann. § 780.313(2) (West 2022).

147. See, e.g., La. Stat. Ann. § 40:2532 (2022); Mich. Comp. Laws Ann. § 15.243(1)(s) (West 2022); Miss. Code Ann. § 25-61-12(1) (2022); N.D. Cent. Code § 44-04-18.3(1) (2021); 65 Pa. Stat. and Cons. Stat. Ann. § 67.708(b)(6)(C) (West 2022).

148. See, e.g., Cal. Penal Code § 832.7 (2022); N.Y. Civ. Rights Law § 50-a (repealed June 12, 2020).

to government records still contain widespread protections for police personnel files.

States take one of three general approaches to police disciplinary records. The majority adopt a single, centralized rule that governs access to police and non-police disciplinary records alike.<sup>149</sup> Some of these default rules provide for the release of disciplinary records.<sup>150</sup> Others require that the disciplinary records of all government employees remain secret—some through a generalized privacy exemption<sup>151</sup> and others through a specific provision that prohibits the release of personnel files.<sup>152</sup> These states may also provide greater or lesser protection depending upon the severity of the infraction.<sup>153</sup> Even when the statutory text itself does not distinguish between law enforcement and other agencies, however, these generally applicable statutes are often interpreted and applied in ways that nonetheless privilege the police.<sup>154</sup>

Other states require greater disclosure of police disciplinary information than they do for other government employees. We might think of this as a kind of “transparency exceptionalism” for policing—an example of law enforcement agencies being subjected to heightened transparency requirements. Maryland, for example, recently amended its statutory access regime to require the disclosure of certain categories of police personnel records relating to misconduct investigations even though the statute shields the personnel files of other government employees.<sup>155</sup>

A small number of states take the inverse approach.<sup>156</sup> They extend greater secrecy protections for police disciplinary records than they do for

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149. Christina Konigisor, *State Public Records Laws’ Disciplinary Exemptions Spreadsheet* (last updated Oct. 2, 2022) (on file with the *Columbia Law Review*).

150. See, e.g., Ala. Code § 36-12-40 (2022); Ga. Code Ann. § 50-18-72 (2022); Me. Rev. Stat. Ann. tit. 30-A, § 503(1)(B)(5) (West 2022); Minn. Stat. § 13.43 (2022).

151. See, e.g., Ky. Rev. Stat. Ann. § 61.878(1)(a) (West 2022); Or. Rev. Stat. § 192.355(2) (West 2022); 38 R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) (2022); Wash. Rev. Code Ann. § 42.56.230(3) (West 2022).

152. See, e.g., Ark. Code Ann. § 25-19-105(c)(1) (2022); Idaho Code § 74-106(1) (2022); Kan. Stat. Ann. § 45-221(a)(4) (West 2022); Miss. Code Ann. § 25-1-100; Neb. Rev. Stat. § 84-712.05(7) (2022); N.H. Rev. Stat. Ann. § 91-A:5 (2022); 38 R.I. Gen. Laws § 38-2-2(4)(A)(I)(b); S.D. Codified Laws § 1-27-1.5(7) (2022); Wyo. Stat. Ann. § 16-4-203(d)(3) (2022).

153. See, e.g., Cal. Penal Code § 832.7 (making public more serious incidents of police use of force).

154. See *infra* section II.C.

155. See, e.g., Md. Code Ann., Gen. Provis. § 4-311 (West 2022) (exempting most personnel records but requiring that police disciplinary records be disclosed).

156. It is difficult to determine exactly how many states provide heightened protections for police as compared to other government employees, because these provisions are often scattered throughout the state code and different courts may interpret general protections for privacy or personnel records in different ways. But there are examples of distinct and seemingly more protective statutory language for police as compared to other, non-police government employees. Compare Del. Code tit. 11, § 9200(c)(12) (2022) (shielding “[a]ll

the records of other government employees. This pool is shrinking. In recent years, states that previously offered powerful protections for police disciplinary records—most notably, California and New York—have amended their laws to roll back some of these secrecy provisions.<sup>157</sup> But heightened police disciplinary protections still remain in some states. Tennessee, for instance, provides that the personnel files of government employees are open to the public but specifies that law enforcement officers' personal information must be redacted when the "chief law enforcement officers" decide it is necessary.<sup>158</sup> In other words, police departments themselves are empowered to decide when to release these materials. In other states, these heightened disciplinary protections may flow from other police-specific exemptions, such as privacy shields that protect only law enforcement records.<sup>159</sup>

Delaware's law is arguably the most protective.<sup>160</sup> It shields the files of any police officer questioned or under investigation "for any reason which could lead to disciplinary action, demotion, or dismissal."<sup>161</sup> This provision

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[police] records compiled as a result of any investigation subject to the provisions of this chapter"), with Del. Code tit. 29, § 10002(o)(1) (2022) (shielding "personnel [records] . . . the disclosure of which would constitute an invasion of personal privacy"). Compare D.C. Code § 2-534(a)(3)(A) (2022) (shielding investigatory records when production would "interfere with . . . Office of Police Complaints ongoing investigations"), with D.C. Code § 2-534(a)(2) (shielding "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy"). Compare Mich. Comp. Laws Ann. § 15.243(1)(s)(ix) (West 2022) (shielding the "personnel records of law enforcement agencies" unless "the public interest in disclosure outweighs the public interest in nondisclosure"), with Mich. Comp. Laws Ann. § 15.243(1)(a) (shielding "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy").

157. See *supra* note 148.

158. Tenn. Code Ann. § 10-7-504(g)(1)(A)(1) (2022) (providing that law enforcement personnel information shall be open "except personal information shall be redacted where there is a reason not to disclose as determined by the chief law enforcement officer or the chief law enforcement officer's designee"); Tenn. Code Ann. § 10-7-504 (f)(4) (providing that "[n]othing in this subsection (f) shall be construed to close any personnel records of public officers which are currently open under state law").

159. See, e.g., Alaska Stat. § 40.25.120(a)(6)(C) (2022) (shielding law enforcement records under a privacy rationale); Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/> [<https://perma.cc/47EC-L6UP>] (noting that police officers often invoke law enforcement privacy exemptions to shield disciplinary materials).

160. These protections are part of Delaware's Law Enforcement Officer Bill of Rights. Del. Code tit. 11, §§ 9200–09. Roughly a dozen states extend a similar set of statutory protections to police officers. See Katharine Bohrs, *Maryland Becomes First State to Repeal Its Police Bill of Rights*, Harv. C.R.-C.L. L. Rev. Amicus Blog (Apr. 22, 2021), <https://harvardcrcl.org/maryland-becomes-first-state-to-repeal-its-police-bill-of-rights/> [<https://perma.cc/M3N6-W2E4>] (noting that "14 states have statutory [Law Enforcement Officer Bills of Rights]").

161. Del. Code tit. 11, § 9200(d)(2).

applies to most civil litigation contexts.<sup>162</sup> The statute is so protective that the Delaware Attorney General's Office has concluded that it prohibits the disclosure of even statistical summaries of completed internal affairs investigations.<sup>163</sup> Delaware is also the only state that makes internal disciplinary investigatory records confidential indefinitely.<sup>164</sup>

Apart from these explicit protections for police disciplinary records, states also shield police disciplinary materials in less direct ways. For example, a number of states have adopted provisions requiring the destruction of disciplinary records within a specified timeframe, sometimes as little as 3 years.<sup>165</sup> Other provisions make it less likely that a complaint will be filed in the first instance. For example, some states have required that a written complaint must be accompanied by a sworn affidavit or that the name of the complaining witness be provided to the accused police officer prior to any investigative interview.<sup>166</sup> Still others limit the amount of time allowed for police to investigate and substantiate citizen allegations.<sup>167</sup> Such upstream obstacles to opening and substantiating complaints, too, have a powerful impact on police secrecy.

d. *Surveillance Technologies and Database Exemptions.* — State legislatures have also enacted exemptions that shield the acquisition or use of certain police surveillance technologies. A few states have expressly shielded license plate data captured by a law enforcement agency from

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162. *Id.* § 9200(d).

163. Op. Att'y Gen. No. 16-IB02, at 1 (Del. Jan. 14, 2016), 2016 WL 1072888 (concluding that the town of Bethany Beach's "refus[al] to produce 'the completed internal affairs investigations statistical summaries for the years 2011 through 2014'" did not violate FOIA (quoting Letter from Michael Dworiak, Ed. in Chief, Del. Police News, to Del. Dep't of Just. (June 10, 2015))).

164. Police Accountability & Transparency Through LEOBOR & FOIA Reform, ACLU of Del. Blog (Apr. 7, 2021), <https://www.aclu-de.org/en/news/police-accountability-transparency-through-leobor-foia-reform> [<https://perma.cc/GQG6-YCCC>].

165. See, e.g., Ariz. Rev. Stat. Ann. § 41-151.12(A)(3) (2022) (granting authority to Arizona State Library, Archives and Public Records to set retention schedules); Ariz. State Libr., Archives & Pub. Recs., GS 1031 Rev. 5, General Records Retention Schedule Issued to: All Public Bodies: Law Enforcement Records 8–9 (2022), [https://apps.azlibrary.gov/records/general\\_rs/GS-1031\\_Rev5.pdf](https://apps.azlibrary.gov/records/general_rs/GS-1031_Rev5.pdf) [<https://perma.cc/LH6N-RHGG>] (setting a retention schedule of 5 years for internal affairs records documenting findings resulting in discipline and 3 years for other internal affairs records); see also La. Stat. Ann. § 40:2533(C)(1) (2022) (allowing for the expungement of certain anonymous complaints not substantiated within 12 months). Other states place strict time limits for when an investigation must be completed. See, e.g., Ariz. Rev. Stat. Ann. § 38-1110(A)–(C) (2022) (requiring 180 days); Fla. Stat. Ann. § 112.532(6)(a) (West 2022) (180 days); Ky. Rev. Stat. Ann. § 15.520(7)(h) (West 2022) (requiring 75 days to convene hearing).

166. See, e.g., Fla. Stat. Ann. § 112.532(1)(d) (requiring the name of the complainant be provided to the officer); cf. 2020 Ill. Legis. Serv. 21 (West) (amending the State Police Act to no longer require a sworn affidavit to file a complaint against a state police officer).

167. See, e.g., Ariz. Rev. Stat. Ann. § 38-1110(A)–(C) (requiring 180 days); Fla. Stat. Ann. § 112.532(6)(a) (180 days); Ky. Rev. Stat. Ann. § 15.520(7)(h) (requiring 75 days to convene hearing).

public view, for example.<sup>168</sup> Others have protected data collected by police from private alarm system programs.<sup>169</sup> And a handful of surveillance-related provisions offer more generalized protections. New Jersey's public records statute, for instance, exempts "surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software."<sup>170</sup> Other states have enacted similar surveillance-related disclosure prohibitions.<sup>171</sup>

State legislatures have enacted carve-outs for certain law enforcement information databases too. In the wake of September 11, for example, federal and state governments collaborated to establish a series of information-sharing sites known as fusion centers.<sup>172</sup> These centers aggregate data from both public and private sources—including records from banks, hospitals, and motor vehicle registration agencies—and make that data available both to federal and subfederal law enforcement agencies.<sup>173</sup> Every state has at least one of these data and analysis sites, and some, like Texas, have multiple centers scattered throughout the state.<sup>174</sup> After establishing these sites, a number of state legislatures then enacted new exemptions to the public records statutes to shield fusion center records from public view.<sup>175</sup>

In certain states, specific law enforcement databases receive special protection as well. A handful of states shield records contained in criminal gang databases, for example.<sup>176</sup> And the majority of states now protect gun permit applications or licenses, which are generally maintained by police and sheriffs' departments.<sup>177</sup> Considered individually, such exemptions

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168. See, e.g., Ga. Code Ann. § 35-1-22(f) (2022); Utah Code § 63G-2-305(63) (2022).

169. See, e.g., Wash. Rev. Code Ann. § 42.56.240(9) (West 2022).

170. N.J. Stat. Ann. § 47:1A-1.1 (West 2022).

171. See, e.g., Fla. Stat. Ann. § 119.071(2)(d) (West 2022) ("Any information revealing surveillance techniques . . . is exempt from [public disclosure]."); Va. Code Ann. § 2.2-3705.2(14)(c) (2022) (excluding surveillance techniques from mandatory disclosure provisions); Wyo. Stat. Ann. § 16-4-203(b) (2022) (denying the "right of inspection" of "surveillance techniques" for government buildings if denial is in "the public interest").

172. See Fusion Center Locations and Contact Information, DHS, <https://www.dhs.gov/fusion-center-locations-and-contact-information> [<https://perma.cc/4WVM-RAWJ>] (last visited Oct. 12, 2022).

173. Sarah Brayne, Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment, 79 Am. Socio. Rev. 367, 368 (2014) (describing categories of records gathered by fusion centers).

174. See Fusion Center Locations and Contact Information, *supra* note 172 (listing fusion centers in all fifty states).

175. See Kan. Stat. Ann. § 48-3709 (West 2022); La. Stat. Ann. § 44:4.1(D) (2022); Nev. Rev. Stat. Ann. § 239C.210(1)(a), (5)(b) (West 2021); Va. Code Ann. § 52-48(A) (2023); W. Va. Code Ann. § 15A-12-5(a) (LexisNexis 2022).

176. See, e.g., Wash. Rev. Code Ann. § 42.56.240(6) (West 2022); Cal. Code Regs. tit. 11, § 750.2(b) (2023).

177. See, e.g., Ala. Code § 13A-11-75(k) (2022); Alaska Stat. § 18.65.770 (2022); Ariz. Rev. Stat. Ann. § 13-3112(J) (2022); Ark. Code Ann. § 25-19-105(b)(19) (2022); Conn. Gen. Stat. Ann. § 29-28(d) (West 2022); Del. Code tit. 29, § 10002(o)(11) (2022); Fla. Stat. Ann.



may seem narrow and limited. Yet these carve-outs tend to add up. A surprising number of these surveillance and database exemptions are scattered throughout and across the various state codes. Taken together, they have the effect of substantially amplifying police secrecy power.

e. *The Glomar Response*. — When government agencies receive a public records request, they will generally either grant it and turn over records or deny it under a specific statutory exemption. In the mid-1970s, however, the CIA invented a third response.<sup>178</sup> Seeking to shield a covert operation to recover a sunken Soviet nuclear submarine, the agency refused to either “confirm or deny” whether it had records relating to the operation at all.<sup>179</sup> It argued that this response was needed because whether the program even existed was a classified secret.<sup>180</sup> Ever since, the denial has been referred to as a “Glomar response,” in reference to this Cold War era operation.<sup>181</sup> Yet while the Glomar operates as a powerful secrecy tool today, it remains a judicial creation. Congress has never explicitly either permitted or prohibited use of the Glomar.<sup>182</sup>

By contrast, two state legislatures—Indiana’s and Maine’s—went further than Congress and directly encoded the Glomar into the text of their public records statutes.<sup>183</sup> These provisions specifically reference Glomar in the context of “law enforcement” and “criminal justice.”<sup>184</sup> Maine recently repealed its Glomar provision.<sup>185</sup> Yet Indiana’s statutory provision still stands.<sup>186</sup> And by extending this powerful secrecy tool to police, state legislators further expand law enforcement secrecy powers.

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§ 790.0601 (West 2022); Ga. Code Ann. § 50-18-72(a)(40) (2022); 5 Ill. Comp. Stat. Ann. 140/7.5(v) (West 2022); Ind. Code Ann. § 35-47-2-3(n) (West 2022); Kan. Stat. Ann. § 45-221(a)(52) (West 2022); Ky. Rev. Stat. Ann. § 237.110(10) (West 2022); Me. Rev. Stat. Ann. tit. 25, § 2006(1) (West 2022); Md. Code Ann., Gen. Provis. § 4-325(a) (West 2022); Mass. Gen. Laws Ann. ch. 66, § 10B (West 2022); Minn. Stat. § 13.87, subdiv. 2 (2022); Mo. Ann. Stat. § 571.093 (West 2022); Neb. Rev. Stat. § 69-2444 (2022); N.M. Stat. Ann. § 29-19-6(B) (2022); N.C. Gen. Stat. § 14-415.17(c) (2022); N.D. Cent. Code § 62.1-04-03(9) (2021); Ohio Rev. Code Ann. § 2923.129(B) (2022); Okla. Stat. tit. 21, § 1290.13 (2022); Or. Rev. Stat. § 192.374 (West 2022); S.C. Code Ann. § 23-31-215(I) (2022); S.D. Codified Laws § 23-7-8.10 (2022); Tenn. Code Ann. § 10-7-504(o) (2022); Utah Code § 53-5-708(1)(b) (2022); Va. Code Ann. § 18.2-308.07(C) (2022); Wash. Rev. Code Ann. § 42.56.240(4); W. Va. Code Ann. § 29B-1-4(a)(20) (LexisNexis 2022); Wis. Stat. & Ann. § 175.60(c)(12) (2022); Wyo. Stat. Ann. § 6-8-104(bb) (2022); N.J. Admin. Code § 13:54-1.15 (2022).

178. *Phillippi v. Cent. Intel. Agency*, 546 F.2d 1009, 1012 (D.C. Cir. 1976).

179. *Id.*; see also Wagner, *Controlling Discourse*, *supra* note 38, at 539–41 (recounting the story behind the CIA’s response).

180. *Phillippi*, 546 F.2d at 1011–12.

181. The ship constructed for the operation was named the “Hughes Glomar Explorer.” *Id.* at 1011.

182. Cf. 5 U.S.C. § 552 (2018) (FOIA exemptions).

183. Ind. Code Ann. § 5-14-3-4.4(a)(2) (West 2022); Me. Rev. Stat. Ann. tit. 16, § 807 (repealed 2021).

184. Ind. Code Ann. § 5-14-3-4.4(a)(2); Me. Rev. Stat. Ann. tit. 16, § 807.

185. Me. Rev. Stat. Ann. tit. 16, § 807.

186. Ind. Code Ann. § 5-14-3-4.4(a)(2).

2. *Generally Applicable Exemptions.* — Legislatures extend powerful secrecy protections to law enforcement agencies through generally applicable exemptions as well. These provisions are not explicitly reserved for law enforcement use. Yet in practice they tend to have an outsized impact on police secrecy by vesting law enforcement actors with ample authority and discretion to withhold information.

a. *Public Safety Exemptions.* — The first category of generally applicable provisions that disproportionately advance police secrecy are public safety–related exemptions. These provisions tend to be vague and expansive, allowing the government to withhold broad swaths of records.<sup>187</sup> In Connecticut, for example, the public records statute was amended in 2002 to exempt “[r]ecords when there are reasonable grounds to believe disclosure may result in a safety risk.”<sup>188</sup> In Michigan, government actors may withhold records “designed to protect the security or safety of persons or property.”<sup>189</sup> And in Wyoming, agencies may shield any record that “would jeopardize the security of any structure owned, leased or operated by a governmental entity.”<sup>190</sup> The breadth of this statutory language allows these provisions to serve as a kind of catchall exemption for police, permitting law enforcement agencies to push a vast amount of material under the umbrella of public safety or safety to property.<sup>191</sup>

Many public records statutes also contain more specific public safety–oriented exemptions that end up being heavily utilized by police. In the wake of September 11, for instance, a number of state legislatures enacted new statutory exemptions for records that could be used to perpetrate a terrorist attack.<sup>192</sup> These exemptions, too, often contained broad and

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187. See, e.g., Ala. Code § 36-12-40 (2022) (shielding “records . . . relating to, or having an impact upon, the security or safety of persons”); Alaska Stat. § 40.25.120(a)(6)(G) (2022) (permitting the withholding of records that “could reasonably be expected to endanger the life or physical safety of an individual”).

188. Conn. Gen. Stat. Ann. § 1-210(b)(19) (West 2022); William S. Fish, Jr., Connecticut: Open Government Guide, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-guide/connecticut/> [https://perma.cc/4N2J-LHW6] (last visited Oct. 10, 2022).

189. Mich. Comp. Laws Ann. § 15.243(1)(y) (West 2022).

190. Wyo. Stat. Ann. § 16-4-203(b)(vi) (2022).

191. See, e.g., *Bellamy v. N.Y.C. Police Dep’t*, 930 N.Y.S.2d 178, 179 (App. Div. 2011) (holding that to invoke the public safety exemption, the NYPD “need only demonstrate ‘a possibility of endanger[ment]’” (quoting *Connolly v. N.Y. Guard*, 572 N.Y.S.2d 443, 445 (App. Div. 1991))), *aff’d*, 984 N.E.2d 317 (N.Y. 2013).

192. See e.g., Margaret Christensen & Jessica O. Laurin, Indiana: Open Government Guide, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-guide/indiana/#l-homeland-security-and-anti-terrorism-measures> [https://perma.cc/4A7E-VL6A] (last visited Mar. 23, 2023) (discussing the Indiana legislature’s 2003 amendment to exempt information that would expose vulnerability to a terrorist attack from its Access to Public Records Act); Emily Dowd, Open Government Laws and Critical Energy Infrastructure, Nat’l Conf. of State Legislatures (Jan. 30, 2018), <https://www.ncsl.org/research/energy/open-government-laws-and-critical-energy->

sweeping language, allowing police departments ample discretion to push a wide variety of records under the umbrella of terrorism prevention.<sup>193</sup> In Indiana, for example, records that “would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack” may be kept secret.<sup>194</sup> And in Oklahoma, agencies may withhold any record that “includ[es] details for deterrence or prevention of or protection from an act or threat of an act of terrorism.”<sup>195</sup> Although these types of exemptions are not law enforcement specific on their face, they tend to facilitate police secrecy in practice by granting law enforcement actors a set of statutory secrecy tools that are both easy to invoke and difficult to contest.

b. *Requester Restrictions.* — Statutory provisions limiting requester access likewise facilitate police secrecy. Most significantly, at least eight states restrict public records access by incarcerated individuals. In Arkansas, incarcerated individuals convicted of a felony are barred from securing government records via a public records requests.<sup>196</sup> In both Michigan and South Carolina, incarcerated individuals at any local, state, or federal correctional facility are prohibited from obtaining records.<sup>197</sup> In Wisconsin, individuals who are either incarcerated or committed are prohibited from accessing records.<sup>198</sup> And in Delaware, Louisiana, and South Dakota, access is restricted for certain types of prison records or for certain categories of incarcerated individuals.<sup>199</sup>

These restrictions, too, tend to have an outsized impact on police and prison secrecy. Incarcerated individuals often submit requests that have some connection with their own criminal cases—generally prison or police

infrastructure.aspx [https://perma.cc/J25N-G8CG] (describing how legislatures enacted new terrorism-related exemptions to public records statutes in the wake of September 11).

193. See, e.g., Del. Code tit. 29, § 10002(o)(17) (2022); Ga. Code Ann. § 50-18-72(a)(25) (2022); Ind. Code Ann. § 5-14-3-4(b)(19) (West 2022); Ky. Rev. Stat. Ann. § 61.878(1)(m) (West 2022); La. Stat. Ann. § 44:3.1(A) (2022); Me. Rev. Stat. Ann. tit. 1, § 402(3)(L) (West 2022); Mo. Ann. Stat. § 610.021(18) (West 2022); Nev. Rev. Stat. Ann. § 239C.210 (West 2021); N.M. Stat. Ann. § 14-2-1(G) (2022); N.C. Gen. Stat. § 132-1.7(b) (2022); Okla. Stat. tit. 51, § 24A.28 (2022); S.C. Code Ann. § 30-4-45(B) (2022); Tenn. Code Ann. § 10-7-504(a)(21) (2022); Va. Code Ann. § 2.2-3705.2(14) (2022); Wash. Rev. Code Ann. § 42.56.420(1) (West 2022); W. Va. Code Ann. § 29B-1-4(a)(9) (LexisNexis 2022); Wyo. Stat. Ann. § 16-4-203(b)(vi); Cal. Gov’t Code § 6254(aa) (2022) (repealed 2023).

194. Ind. Code Ann. § 5-14-3-4(b)(19).

195. Okla. Stat. tit. 51, § 24A.28(A)(3); see also W. Va. Code Ann. § 29B-1-4(a)(9) (shielding “records assembled, prepared, or maintained to prevent, mitigate, or respond to terrorist acts or the threat of terrorist acts”).

196. Ark. Code Ann. § 25-19-105(a)(1)(B) (2022).

197. Mich. Comp. Laws Ann. § 15.231(2) (West 2022); S.C. Code Ann. § 30-4-30(A)(1).

198. Wis. Stat. & Ann. § 19.32(3) (2022) (prohibiting “committed or incarcerated person[s]” from accessing records).

199. See, e.g., Del. Code tit. 29, § 10002(o)(13) (2022) (prohibiting incarcerated individuals from obtaining Department of Corrections records); La. Stat. Ann. § 44:31.1 (2022) (limiting public records access for incarcerated individuals convicted of a felony); S.D. Codified Laws § 1-27-1.13 (2022) (limiting the release of certain categories of Department of Corrections records to incarcerated individuals).

records related to their underlying convictions or their conditions of confinement.<sup>200</sup> These records can then be utilized to support a further legal challenge.<sup>201</sup> By restricting public access rights for this entire set of potential requesters, state legislatures are both curtailing individual legal rights and limiting public oversight of police and prisons more broadly.<sup>202</sup>

Public oversight of police departments is further limited by state law provisions restricting public records access to in-state citizens.<sup>203</sup> Again, these provisions are broadly applicable. They may be invoked by any government agency. But nationwide policing data is both especially critical and especially difficult to obtain. Federal agencies like the FBI do not collect accurate and comprehensive nationwide law enforcement statistics.<sup>204</sup> The federal government is in the dark when it comes to even such basic questions as how many people are killed each year by police.<sup>205</sup>

As a consequence, nonprofit groups and news organizations have largely filled this data void, relying on media accounts and extensive public records requests to gather nationwide statistics on police-inflicted deaths and police uses of force.<sup>206</sup> These types of grassroots, activist-led data collection efforts play an outsized role in holding the police accountable. By restricting access to in-state requesters, state legislatures hinder these efforts. They make it more difficult for researchers and activists conducting nationwide surveys to gather policing data.<sup>207</sup>

The MuckRock data helps illustrate the point. Out of the 123 requests Alabama law enforcement agencies responded to in 2019, for example, nearly 30% were rejected because they were submitted by out-of-state researchers.<sup>208</sup> And of those rejected requests, roughly three-quarters were submitted by researchers or activists collecting broader sets of policing

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200. See Koningisor, *Transparency Deserts*, *supra* note 86, at 1487 (describing how inmate requests constitute a substantial percentage of state departments of corrections' public records dockets).

201. *Id.*

202. These restrictions are most likely constitutional. See *McBurney v. Young*, 569 U.S. 221, 237 (2013) (rejecting various constitutional challenges to Virginia's public records statute, which permits only in-state residents to submit public records requests).

203. Six states currently restrict public records access to state citizens. See Ala. Code § 36-12-40 (2022); Ark. Code Ann. § 25-19-105(a)(1)(A) (2022); Del. Code tit. 29, § 10003(a); N.J. Stat. Ann. § 47:1A-1 (West 2022); Tenn. Code Ann. § 10-7-503(a)(2)(A) (2022); Va. Code Ann. § 2.2-3704(A) (2022).

204. See Tom Jackman, *For a Second Year, Most U.S. Police Departments Decline to Share Information on Their Use of Force*, *Wash. Post* (June 9, 2021), <https://www.washingtonpost.com/nation/2021/06/09/police-use-of-force-data/> (on file with the *Columbia Law Review*) (“[F]or the second straight year only about 27 percent of police departments have supplied data to the National Use-of-Force Data Collection program launched in 2019.”).

205. See *id.*

206. See *supra* note 108 and accompanying text.

207. See, e.g., Cox & Freivogel, *supra* note 79 (describing these barriers).

208. MuckRock Data Spreadsheet, *Alabama Law Enforcement Requests 2019* (July 8, 2021) (on file with the *Columbia Law Review*).

data across multiple states.<sup>209</sup> In this way, citizenship restrictions operate as tools of police secrecy by preventing key members of the public from accessing the records needed to understand broader trends in policing nationwide.

c. *Trade Secrecy Exemptions.* — Nearly every state public records statute contains protections for trade secrets.<sup>210</sup> Again, these exemptions are routinely invoked by non-law-enforcement agencies, and I could find no empirical data showing whether police invoke trade secrecy claims more or less often. Yet because these protections play an increasingly central role in the police statutory regime, they bear mentioning here.

Police departments rely on the private sector to assist with a growing array of policing functions. They purchase sophisticated surveillance technologies like Stingrays and biometric recognition tools from private manufacturers,<sup>211</sup> utilize proprietary algorithms developed by the private sector to predict where crimes will be committed,<sup>212</sup> and depend on probabilistic genotyping software developed by private actors to analyze minute traces of DNA evidence.<sup>213</sup> As police departments rely more heavily on these private tools and products, trade secrecy exemptions play a growing role in the police secrecy regime. Law enforcement agencies increasingly withhold records relating to their use of these various surveillance technologies on the grounds that their disclosure would reveal proprietary information of the companies that manufacture and operate them.<sup>214</sup>

Scholars have explored the nexus between trade secrecy protections and police and prosecutorial secrecy at length in previous works, with a particular focus on the ways that these protections disadvantage defendants in the criminal justice process.<sup>215</sup> Yet these trade secrecy tools also prevent public oversight of police more broadly by blunting the force of public records laws. Law enforcement agencies routinely invoke these exemptions to withhold records relating to the acquisition of new police

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209. *Id.* I defined this category as any requester who had filed at least three requests for the same or very similar information in other jurisdictions.

210. See Open Government Guide: Business Records, Financial Data, Trade Secrets, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-sections/e-business-records-financial-data-trade-secrets/> [https://perma.cc/N4AB-3ZDJ] (last visited Oct. 13, 2022) (listing how each state protects trade secrets).

211. See Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 *Stan. L. Rev.* 1343, 1366–68 (2018) (recounting examples of police department use of “stingrays” and facial recognition tools).

212. *Id.* at 1346–47.

213. *Id.*

214. For a general discussion of police use of trade secrecy exemptions, see Manes, *supra* note 36, at 507 n.12.

215. See, e.g., *id.*; Natalie Ram, *Innovating Criminal Justice*, 112 *Nw. U. L. Rev.* 659, 686–99 (2018); Andrea Roth, *Machine Testimony*, 126 *Yale L.J.* 1972, 2027–30 (2017).

surveillance technologies.<sup>216</sup> And these statutory carve-outs can be used to shield not only the fact of the police department's use of a new surveillance technology in a criminal case but also the costs imposed on taxpayers, the terms of the police department's agreement with the company, any safety issues that might be involved with the technology's use, and so on.<sup>217</sup>

In some instances, these companies even insert themselves into the public records process to prevent their records and communications from being disclosed to the public.<sup>218</sup> ShotSpotter, for example, manufactures gunshot detection devices and technologies. And as part of its customer training materials, the company offers detailed instructions for responding to public records requests.<sup>219</sup> Citing trade secrecy concerns, the company asks police to release only imprecise geographic data in printed format so that it is more difficult to manipulate.<sup>220</sup> It also provides direct assistance with crafting responses to requests from the public.<sup>221</sup>

In these ways, trade secrecy exemptions intended to protect the proprietary information of private companies end up being co-opted to shield law enforcement activities instead. Although these exemptions do not function exclusively as a tool of police secrecy, they are increasingly utilized by law enforcement agencies to circumvent public records obligations and protect police surveillance and other policing activity from public scrutiny.

#### B. *Judicial Exceptionalism*

While state legislators construct transparency statutes that privilege police secrecy, judges often further expand these protections through their interpretations of these provisions. This section highlights two examples: the adoption of special procedural tools that apply exclusively

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216. See, e.g., Ram, *supra* note 215, at 667–71 (discussing how the Harris Corporation protected the sale to law enforcement of its stingray devices, which can be used to “pinpoint a [suspect’s cell phone location] in real time,” by filing nondisclosure requests with the FCC).

217. See, e.g., Letter from Ivy M. Tsai, Deputy City Att’y, City of Fullerton, to Beryl Lipton (Mar. 20, 2019), <https://www.muckrock.com/foi/fullerton-3223/axon-agreements-and-equipment-fullerton-police-department-69266/> [<https://perma.cc/47XD-B5LS>] (denying request for pricing information from the company that manufactures tasers because the company claimed it was “confidential and competition sensitive”).

218. For background on how digital transparency and corporate behavior intersect, see generally David E. Pozen, *Transparency’s Ideological Drift*, 128 *Yale L.J.* 100, 147–53 (2018) [hereinafter Pozen, *Transparency’s Ideological Drift*] (“By helping to reorient economic activity away from industrial production . . . [the digital age] has . . . augmented the incentives of . . . commercial actors to minimize exposure of their own proprietary data . . .”).

219. ShotSpotter, *Customer Success Training Bulletin* 1–2 (2015), <https://www.documentcloud.org/documents/3221020-ShotSpotter-nationwide-memo-July-2015> [<https://perma.cc/3CEF-DUHQ>].

220. *Id.*

221. *Id.*

to law enforcement secrecy claims; and the steady widening of these statutory exemptions over time.

1. *Interpreting Law Enforcement Exemptions Broadly.* — While state public records statutes were drafted to create a broad right of public access to government records, the exemptions written into these statutes in some ways conflict with this overarching goal by codifying various carve-outs and exceptions into the statutory regime. Acknowledging this tension, courts often emphasize that these statutory carve-outs are meant to be “narrowly construed.”<sup>222</sup> Even so, the courts themselves have also played a central role in expanding these exemptions outward, beyond even what the statutory drafters had envisioned.<sup>223</sup> While this expansion took place across a range of statutory carve-outs, judicial expansion of law enforcement exemptions is especially pronounced.<sup>224</sup>

The investigatory exemption offers an illustration. State courts have consistently interpreted this exemption in ways that amplify police power and privilege police secrets over those of other government entities. To begin, some have read the exemption’s threshold requirement to create a different and lower standard for law enforcement agencies.<sup>225</sup> Roughly a dozen states have adopted FOIA’s requirement that certain categories of records must be “compiled for law enforcement purposes” to be withheld.<sup>226</sup> This exemption is not limited to police departments. It may be invoked by non-law-enforcement agencies that engage in administrative investigations as well. Yet in a handful of states, the courts have read this provision to create two distinct standards. Non-law-enforcement agencies must demonstrate that a record was compiled for law enforcement or prosecution purposes, while law enforcement agencies are “presumed” to have met this burden.<sup>227</sup> Such a per

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222. See, e.g., *Chambers v. Birmingham News Co.*, 552 So. 2d 854, 856 (Ala. 1989); *Sierra Club v. Superior Ct.*, 302 P.3d 1026, 1038 (Cal. 2013); *Newman v. King County*, 947 P.2d 712, 714 (Wash. 1997).

223. This is not uniformly true. Courts also narrow exemptions or enhance public oversight of police through their interpretations of these exemptions. But as a policy matter, these decisions arguably raise fewer concerns given the many varied protections that are already extended to police by legislators.

224. It is difficult to demonstrate empirically that judicial expansion for law enforcement exemptions is more aggressive than for non-law-enforcement exemptions, given the sheer number of statutory exemptions and relevant case law involved. That said, scholars of FOIA have often documented that judges are especially sympathetic to or deferential toward agency interpretations of FOIA’s law enforcement exemptions. E.g., Kwoka, *Deferring to Secrecy*, *supra* note 56, at 216–19; Manes, *supra* note 36, at 558–59; McCraw, *supra* note 56, at 239–40. We might reasonably assume that many of these same patterns and motivations exist at the state level as well.

225. In doing so, they have largely followed the federal courts’ lead. See Kwoka, *Deferring to Secrecy*, *supra* note 56, at 216–19.

226. See *supra* note 65.

227. *Off. of the State Prosecutor v. Jud. Watch, Inc.*, 737 A.2d 592, 604 (Md. 1999). This presumption appears to be irrebuttable. *Id.* (“[T]here need not be an actual showing that the records were compiled for law enforcement or prosecution purposes for the exception to be applicable . . .”).

se rule allows police departments to skirt this threshold requirement without demonstrating any nexus between the requested records and a proper law enforcement purpose.<sup>228</sup> It essentially reads this limiting language out of the statute when it comes to police records.

The courts have also defined “investigatory” to encompass virtually all policing activity.<sup>229</sup> For example, they have held that even short, pretextual stops may be classified as a police “investigation” for the purposes of the statute.<sup>230</sup> This allows a wide range of low-level police activity to be pushed under the umbrella of the investigatory exemption. Body camera footage of traffic stops, stop-and-frisks, and other routine police activities may be withheld as records of an “investigation” even if no further action is taken.<sup>231</sup>

In addition, courts have exploited ambiguities in these investigatory exemptions to shield police department records almost entirely. The Alabama investigatory exemption offers an example. The statute itself is vague: It shields from disclosure “law enforcement investigative reports and related investigative material.”<sup>232</sup> Yet the Alabama Supreme Court has read this language expansively, to protect not only law enforcement work product related to an investigation but also any “items of substantive evidence that existed before the investigation began”—including body camera video, 911 calls, and even videos taken by bystanders.<sup>233</sup> Such a broad interpretation of the investigatory exemption essentially carves police departments out of the statute’s reach. As one dissenting justice put it, the court’s approach shrinks the right of access to police records “to the vanishing point.”<sup>234</sup>

Finally, even when legislators do impose more stringent statutory limitations, the courts do not always enforce them. In Louisiana, for

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228. FOIA contains a similar exemption, and the circuits are split over whether the *per se* rule or some higher threshold applies. DOJ, Dep’t of Justice Guide to the Freedom of Information Act: Exemption 7, at 17–20 (2019), [https://www.justice.gov/oip/foia-guide/exemption\\_7/download](https://www.justice.gov/oip/foia-guide/exemption_7/download) [<https://perma.cc/99B9-DJXE>] (explaining that the D.C., Third, and Ninth Circuits apply a less exacting standard, the rational basis test, while the First, Second, and Eighth Circuits use the *per se* rule).

229. See, e.g., *Tennessean v. Metro. Gov’t of Nashville*, 485 S.W.3d 857, 880 (Tenn. 2016) (reading the investigatory exemption broadly to shield all records contained in an open investigatory file).

230. Order Denying Petition for Writ of Mandamus at 5, *Ward v. County of Chesterfield*, No. GV18004126-00 (Va. Gen. Dist. Ct. Apr. 27, 2018), <https://s3.documentcloud.org/documents/4451039/Ward-v-Chesterfield-County-GDC-Opinion.pdf> [<https://perma.cc/SZ3F-4QVT>].

231. See, e.g., *Bougas v. Chief of Police of Lexington*, 354 N.E.2d 872, 877 (Mass. 1976); *Holmes v. Morales*, 924 S.W.2d 920, 925 (Tex. 1996); *Fitzgerald v. Loudoun Cnty. Sheriff’s Off.*, 771 S.E.2d 858, 861 (Va. 2015).

232. Ala. Code § 12-21-3.1(b) (2022).

233. *Something Extra Publ’g, Inc. v. Mack*, No. 1190106, 2021 WL 4344346, at \*4 (Ala. Sept. 24, 2021).

234. *Id.* at \*15 (Parker, C.J., dissenting).



instance, agencies may only withhold records when criminal litigation is “pending” or “reasonably anticipated.”<sup>235</sup> In the wake of Hurricane Katrina, a number of reporters sought records relating to the deaths of forty-three patients who died at a New Orleans hospital during the storm.<sup>236</sup> It had been years since the patients’ deaths, and a grand jury had declined to indict the one individual whom prosecutors had sought to charge.<sup>237</sup> Even so, the court concluded that the threshold for “reasonably anticipated” criminal litigation had been met, and the records were permitted to remain shielded from public view.<sup>238</sup>

2. *The Procedural Exceptionalism of Police Secrecy.* — At the federal level, courts have adopted a variety of unique procedural tools and doctrines used exclusively in the context of national security secrecy claims. Professor Kwoka has described this as a form of “procedural exceptionalism” for national security secrecy.<sup>239</sup> Law enforcement secrecy arises against a distinct legal and policy-oriented backdrop. And yet these exceptional national security procedural tools are increasingly being adopted by judges to shield police secrets as well.

One example is the Glomar response. A number of state courts have followed the federal courts’ lead and permitted use of the Glomar even absent adoption by the legislature.<sup>240</sup> While these courts have not expressly limited this tool to the law enforcement context, they have cabined its use in ways that privilege police secrecy. New York’s highest court, for example, held in 2018 that the NYPD could issue a Glomar response to shield certain investigatory material. But it was careful to limit its holding to “the unique situation presented here where a targeted request seeks records concerning a specific individual’s involvement in a pending NYPD investigation.”<sup>241</sup> With this and other language, the court strongly suggested that it envisioned the Glomar as a tool that would be used largely, if not exclusively, by law enforcement agencies.

A second example is the exceptional deference granted to national security and law enforcement claims of potential harm. In the FOIA context, federal judges have expressly held that government claims of

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235. La. Stat. Ann. § 44:3(A)(1) (2022).

236. *Does v. Foti*, 81 So. 3d 101, 104 (La. App. 2011).

237. *Id.* at 108–09.

238. *Id.* at 112; see also Mary Ellen Roy, Dan Zimmerman & Ashley Heilprin, Louisiana: Open Government Guide, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-guide/louisiana/> [https://perma.cc/Z7RA-XDBQ] (last updated July 2021) (noting that the court applied the exemption even though “as a practical matter, it is clear that no one will ever be charged over the deaths”).

239. Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. Rev. 103, 108 (2017) [hereinafter Kwoka, *Procedural Exceptionalism*].

240. Koningisor, *Secrecy Creep*, *supra* note 53, at 1782–85 (discussing the use of Glomar responses by state agencies in Florida, Kansas, Maine, Minnesota, New Jersey, New York, Ohio, and Pennsylvania).

241. *Abdur-Rashid v. N.Y.C. Police Dep’t*, 100 N.E.3d 799, 807 (N.Y. 2018).

national security harm must be accorded substantial weight: They must be accepted so long as they are “logical,” “plausible,” and made in good faith.<sup>242</sup> At least one state supreme court has since adopted this extremely deferential standard in the law enforcement context. The Virginia Supreme Court held in 2015 that claims by the state department of corrections about prison security should likewise be accorded “substantial weight,” reasoning that maintaining prison safety is an “extraordinarily difficult undertaking” that merits extraordinary protections.<sup>243</sup> By applying these and other procedural tools and doctrines exclusively to law enforcement records, the courts further amplify police secrecy powers.

### C. *Policing Exceptionalism*

While legislators and judges extend informational tools to police from the top down, law enforcement agencies also expand police secrecy from the bottom up. These secrecy-enhancing efforts by law enforcement agencies can take a variety of forms, including construing these exemptions broadly at the administrative level, inserting information-protective provisions in police contracts, refusing to gather information and create records, and ignoring the requirements of the law altogether.

1. *Expanding Secrecy From Below.* — Police departments push broad interpretations of public records exemptions from the bottom up. Again, these efforts are not exclusive to law enforcement agencies. All government entities tend to interpret these exemptions in ways that permit them greater latitude to withhold information. Yet certain assertions are more common to law enforcement agencies.

These agencies are more likely to impose certain types of favorable readings of the statute, for example. Nearly every administrative-level use of the Glomar that I have been able to find has been issued by a law enforcement agency.<sup>244</sup> Across a wide variety of states where courts have not yet officially sanctioned the use of this response, police departments have routinely refused to confirm or deny the existence of records.<sup>245</sup> In Pennsylvania, the state police department has even incorporated Glomar into its public records policy.<sup>246</sup> Non-law-enforcement agencies have not unilaterally laid claim to this secrecy tool in this same way.

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242. *Wolf v. Cent. Intel. Agency*, 473 F.3d 370, 375 (D.C. Cir. 2007).

243. *Va. Dep’t of Corr. v. Surovell*, 776 S.E.2d 579, 585 (Va. 2015) (citing *Wolf*, 473 F.3d at 374; *Hudson v. Palmer*, 468 U.S. 517, 527 (1984)). The state legislature overrode this decision the following year with an amendment to the state public records law. Va. Code Ann. § 2.2-3713(E) (2022).

244. Koningisor, *Secrecy Creep*, supra note 53, at 1782–85.

245. This includes agencies in Florida, Kansas, Minnesota, and Pennsylvania. *Id.* at 1784–85.

246. See *Right to Know Request*, Pa. State Police, <https://www.psp.pa.gov/contact/Pages/Right-to-Know-Request.aspx> [<https://perma.cc/ZU5P-U57K>] (last visited Oct. 12, 2022).

Some police departments have also co-opted privacy exemptions intended to protect the public at large. Take the example of a statutory exemption shielding information about crime victims. Known as “Marsy’s Law,” the provision was initially adopted in California to honor the memory of a university student murdered in 1982.<sup>247</sup> Although the original statutory language shielded the victim’s information from being disclosed to the alleged perpetrators of the crime, a handful of states have dropped this limiting language and prohibited the release of crime victim information to anyone at all.<sup>248</sup> Increasingly, police officers in these states are using this provision to shield their own actions. They argue that the police officer is a victim of a crime committed against them by a civilian. They then use this provision to prevent the names of police officers involved in fatal shootings or other acts of violence from being disclosed to the public.<sup>249</sup>

Police officers invoke exemptions intended for one purpose to shield their own misconduct in other ways as well. The MuckRock dataset offers some examples. For instance, law enforcement agencies have construed personnel file exemptions to shield records like domestic violence charges against officers or police use-of-force data.<sup>250</sup> They have also invoked trade secrecy exemptions to withhold instructional and training material for privately developed police surveillance technologies.<sup>251</sup> While such examples are anecdotal, they nonetheless illustrate how police departments can stretch the bounds of this statutory language to shield their own actions from public view.

2. *Contracting for Secrecy.* — Among the most effective ways that police departments assert secrecy protections are through police contracts. Scholars have documented how police unions enhance law enforcement

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247. About Marsy’s Law, Marsy’s Law, [https://www.marsyslaw.us/about\\_marsys\\_law](https://www.marsyslaw.us/about_marsys_law) [<https://perma.cc/84N7-65WE>] (last visited Oct. 12, 2022).

248. 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 (Oct. 29, 2020), <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/8N42-DLLW>].

249. See, e.g., Fla. Police Benevolent Ass’n, Inc. v. City of Tallahassee, 314 So. 3d 796, 797–98 (Fla. Dist. Ct. App. 2021) (permitting police officers who fatally shot civilians to shield their identities under Marsy’s Law).

250. See, e.g., Letter from Oakland Cnty. Sheriff’s Off. to Beryl Lipton, Internal Police Policies on Domestic Violence Committed by Employees (Aug. 10, 2020) (on file with the *Columbia Law Review*) (denying request for records of domestic violence incidents involving police under exemption for personnel files); Letter from Oakland Cnty. Sheriff’s Off. to Beryl Lipton, Use of Force (Response to Resistance) Guidance, Policies, and Data (Aug. 10, 2020) (on file with the *Columbia Law Review*) (denying request for police use-of-force data under exemption for personnel files).

251. See, e.g., Letter from Olivia Larson, Deputy Auditor, Minnehaha Cnty. Clerk of Cts., to Beryl Lipton (Jan. 27, 2020) (on file with the *Columbia Law Review*) (denying the information request because of regulation that exempts from disclosure proprietary data, trade secrets, and other similarly unique data).

secrecy by inserting protective terms into state and municipal employment agreements.<sup>252</sup> While such provisions are not unique to the law enforcement context, police unions have been uniquely successful in these efforts. The protections contained in police contracts tend to exceed those extended to other agencies.<sup>253</sup>

These protective contracts can include provisions requiring the destruction of police disciplinary records within a short time frame, sometimes as little as six months.<sup>254</sup> They also include requirements that an officer must consent to the release of a disciplinary file before it is made available, as well as prohibitions against certain disciplinary sanctions being entered into an officer's file at all.<sup>255</sup> And they may further include protections that impede the filing of complaints in the first instance.<sup>256</sup> Some police contracts prohibit anonymous complaints from being investigated, for example, or impose strict time limitations on how quickly a complaint must be filed—sometimes as little as thirty days after the incident occurred.<sup>257</sup> The secrecy effects of such provisions are clear: If no disciplinary records are created, there will be nothing to publicly disclose.

Further, even when states do provide public access to disciplinary records, this access is often limited to substantiated complaints, as unsubstantiated accusations remain shielded from public view.<sup>258</sup> Yet few complaints ultimately meet this burden. Of the nearly 30,000 complaints filed against Chicago police officers between 2011 and 2015, for example, less than 2% resulted in any disciplinary sanctions.<sup>259</sup> The various contractual provisions that privilege the police officer throughout the process likely contribute to these low rates.<sup>260</sup> By diminishing the chances that a complaint will be substantiated and therefore disclosed to the

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252. See, e.g., Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 *Geo. Wash. L. Rev.* 712, 749–55 (2017); Stephen Rushin, *Police Union Contracts*, 66 *Duke L.J.* 1191, 1222–39 (2017); Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 *Stan. L. & Pol'y Rev.* 109, 120–25 (2017).

253. Fisk & Richardson, *supra* note 252, at 737.

254. Reade Levinson, *Across the U.S., Police Contracts Shield Officers From Scrutiny and Discipline*, *Reuters* (Jan. 13, 2017), <https://www.reuters.com/investigates/special-report/usa-police-unions/> [<https://perma.cc/9AC8-HH3G>].

255. *Id.*

256. *Id.*

257. *Id.*

258. See, e.g., *Tex. Loc. Gov't Code Ann.* § 143.089 (West 2021); *Utah Code* § 63G-2-301(3)(o) (2022); see also Lewis et al., *supra* note 159 (noting that many states provide access to only substantiated complaints against police officers).

259. Rushin, *supra* note 252, at 1232.

260. See, e.g., *id.*; Levinson, *supra* note 254 (providing examples of contractual provisions that privilege police officers).

public, these contractual provisions further magnify police secrecy powers.<sup>261</sup>

3. *Refusing to Create Records.* — Police departments further evade transparency law obligations by creating incomplete records or refusing to create records at all.<sup>262</sup> Public records statutes only enable access to records that already exist.<sup>263</sup> No state law permits the public to compel an agency to create new records or gather new data.<sup>264</sup> This creates a loophole in the transparency law regime. Agencies can shield themselves from public scrutiny by declining to gather data on police officer use of force, stop and frisks, and other controversial police tactics.<sup>265</sup> Similarly, police can evade public oversight by failing to maintain data that they are required to gather. The problem of police officers failing to turn on their body cameras, for example, is widespread.<sup>266</sup>

The law disincentivizes records creation in other ways as well. As noted above, many states limit public access to only substantiated complaints, reasoning that police officers' reputations should not be tarnished by claims that are ultimately unprovable or false.<sup>267</sup> But this limitation also incentivizes police departments to conduct incomplete or deficient investigations as a way to avoid public embarrassment or scandal.<sup>268</sup> Police officers may try and dissuade civilians from filing a complaint in the first place or may fail to interview witnesses or collect evidence.<sup>269</sup> And some

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261. NDAs written into contracts with the private companies that manufacture police surveillance technologies can also facilitate police secrecy. See Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. Rev. Online 19, 23–26 (2017) (“These nondisclosure agreements impose strict conditions of secrecy on law enforcement agencies that intend to use stingrays.”).

262. For a general discussion of obstacles to gathering police data, see Harmon, *Data on Policing*, *supra* note 31, at 1128–32.

263. *Id.* at 1132. (“[S]tate and federal efforts to collect information about policing have been surprisingly limited.”).

264. See *id.* at 1139. (“Without such information, local governments cannot easily choose effective and harm-efficient policing strategies, and states and federal legislatures cannot incentivize them to do so.”).

265. See *id.* at 1130–32 (describing disincentives for police to gather data).

266. See Mary D. Fan, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 Ga. L. Rev. 57, 67–74 (2017).

267. See *supra* note 258 and accompanying text (describing states that limit disciplinary records access to substantiated complaints); see also Levine, *Discipline and Policing*, *supra* note 32, at 882–86 (describing arguments for withholding unsubstantiated complaints from the public).

268. See *supra* notes 257–260 and accompanying text; see also Rodrigo A. Castro-Silva, *Cnty. of L.A., Off. of Inspector Gen., Report-Back on LASD Internal Administrative Investigations and Dispositions of Disciplinary Actions 3* (2019), <https://file.lacounty.gov/SDSInter/bos/supdocs/OIGRptBackLASDInternalAdminInvDisposDiscpActions4-11-19.pdf> [https://perma.cc/5JJN-DEY8] (describing how the Los Angeles County Sheriff's Department terminated a high percentage of administrative investigations into serious complaints without giving any justification).

269. See *supra* notes 257–260 and accompanying text; see also Rachel A. Harmon, *Legal Remedies for Police Misconduct*, *in* 2 *Reforming Criminal Justice: Policing* 27, 45–46 (Erik

police departments encourage abusive officers to resign rather than engaging in a protracted employment investigation that could end up casting the department in an unfavorable light.<sup>270</sup> These practices, too, have the effect of eliminating paper trails.

Police departments further evade public oversight by writing disciplinary reports in such a way that makes it impossible to know exactly what occurred or what punishment was imposed. A joint investigation by two local newspapers in Maine, for example, reviewed the records of all Maine state police officers punished for misconduct between 2015 and 2020.<sup>271</sup> More than half of the files that the journalists obtained contained almost no information about the police officer's misconduct.<sup>272</sup> The descriptions were so vague that they were essentially meaningless. For example, one report stated only that the officer had engaged in "conduct unbecoming" of a state police sergeant.<sup>273</sup>

This failure to create records has various consequences. By refusing to track certain information—for example, stop and frisk data—police departments can avoid being sanctioned for racial bias.<sup>274</sup> And by failing to maintain adequate disciplinary records, police departments are unable to create early warning systems that would flag problem officers before they engage in more serious misconduct. Further, these failures contribute to the problem of the "wandering officer"—a police officer who is fired or resigns under the threat of being fired and is then rehired elsewhere.<sup>275</sup> A recent study found that these officers are more than twice as likely to be fired for misconduct from their next position and receive nearly twice as many complaints.<sup>276</sup> They are also more likely to be rehired in poorer communities with a higher proportion of residents of color.<sup>277</sup> By refusing

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Luna ed., 2017) ("[O]fficers often resist complaint intake, discouraging citizens from revealing misconduct to the department. Once someone does complain, departments may fail to conduct thorough and fair investigations.").

270. See Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 *Yale L.J.* 1676, 1695 (2020) (describing anecdotal evidence that officers who commit misconduct are allowed to resign with a guaranteed positive work reference in exchange for forgoing legal action).

271. Callie Ferguson, Matt Byrne & Erin Rhoda, *Inside the Maine State Police, Officer Misdeeds Are Kept Secret*, *Bangor Daily News* (Apr. 18, 2021), <https://www.bangordailynews.com/2021/04/18/mainefocus/inside-the-maine-state-police-officer-misdeeds-are-kept-secret/> (on file with the *Columbia Law Review*).

272. See *id.* ("Of the 19 officers punished for misbehavior from 2015 through half of 2020 for whom there are public records, it was not possible to discern with any certainty what 12 of them got in trouble for.").

273. *Id.*

274. See, e.g., *Black Lives Matter D.C. v. Bowser*, No. 2018 CA 003168 B, 2019 WL 4050218, at \*10 (D.C. Super. Ct. June 27, 2019) (ordering the Metropolitan Police to gather information about the race of individuals stopped so that the public may know whether police are "targeting or profiling members of certain racial groups").

275. Grunwald & Rappaport, *supra* note 270, at 1682.

276. *Id.* at 1734, 1742.

277. *Id.* at 1727.

to create meaningful records in the first place, police departments both evade public scrutiny and allow abusive officers to cycle back through the system.

4. *Ignoring the Requirements of the Law.* — Finally, law enforcement agencies ignore the requirements of the law altogether. This noncompliance can take different forms. Police departments may fail to respond to requests,<sup>278</sup> take an excessive amount of time to respond,<sup>279</sup> charge extraordinarily high fees,<sup>280</sup> or require overly specific descriptions of the records sought.<sup>281</sup> They may also lie, falsely claiming that a request would require the creation of new records or that responsive records don't exist.<sup>282</sup> Or they may simply refuse to comply. They may destroy responsive

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278. See, e.g., Bridget DuPey, Margaret B. Kwoka & Christopher McMichael, *Access Denied: Colorado Law Enforcement Refuses Public Access to Records of Police Misconduct* 4 (2018), <https://www.law.du.edu/documents/news/Access-Denied-Kwoka.pdf> [<https://perma.cc/YVB8-XHYV>] (reporting that 7 out of 17 agencies failed to respond to requests for specific police disciplinary files); Office of Bill de Blasio, *supra* note 115, at 13 (evaluating requests over a three-month period to thirty-eight city agencies and finding that the NYPD had the lowest rate of responding to requests).

279. See, e.g., Office of Bill de Blasio, *supra* note 115, at 13 (finding that the NYPD had the third-slowest rate of response to requests among agencies in New York City, receiving more than 1,000 total requests).

280. See, e.g., DuPey et al., *supra* note 278, at 4 (reporting that 2 out of 17 police departments responded to requests for disciplinary records with “four-figure cost prohibitive” charges); Jack Gillum, *Ferguson Demands High Fees to Turn Over City Files*, Associated Press (Sept. 29, 2014), <https://www.ap.org/ap-in-the-news/2014/ferguson-demands-high-fees-to-turn-over-city-files> [<https://perma.cc/E73H-MH4P>] (arguing that officials in Ferguson, MO, were charging excessively high fees to media requesters as a way to avoid disclosing potentially damaging records).

281. See *supra* notes 136–138 and accompanying text.

282. See, e.g., Andrew Wolfson, *Louisville Police, County Attorney's Office Hide 738,000 Records in Explorer Sex Abuse Case*, *Louisville Courier J.* (Nov. 11, 2020), <https://www.courier-journal.com/story/news/crime/2020/11/11/lmpd-explorer-scandal-lawyers-say-police-lied-conceal-records/6224382002/> [<https://perma.cc/NHD2-LDHE>] (last updated Nov. 13, 2020) (describing how the police department concealed hundreds of thousands of records); Memorandum from Olan Carayannis, Dir. of Quality Assurance & Improvement, Civilian Complaint Rev. Bd., to the Members of the Civilian Complaint Rev. Bd. (July 5, 2019), <https://rb.gy/z5bgf4> [<https://perma.cc/7JST-B2QN>] [hereinafter *Civilian Review Board Memorandum*] (describing numerous cases in which the NYPD falsely claimed to the civilian oversight board that it did not have body camera footage).

records,<sup>283</sup> decline to redact records,<sup>284</sup> or outright defy court orders to turn over materials.<sup>285</sup>

Law enforcement agencies can also rely on practical barriers to public disclosure—such as refusing to make disciplinary hearing summaries publicly available,<sup>286</sup> creating logistical barriers like requiring in-person pickup of materials,<sup>287</sup> or obscuring their names or identifying insignia when they are out in public. During the 2020 protests in Portland, Oregon, for instance, the Portland Police Bureau changed its policies to allow police officers to tape over their name tags and write identifying numbers instead. The agency then denied public records requests about individual officers on the grounds that the requesters had failed to identify officers with enough specificity.<sup>288</sup> Requesters were caught in a catch-22: They could not obtain records about the officers whose names had been taped over because the requesters did not know the officers' names.<sup>289</sup>

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283. See, e.g., Darwin BondGraham, *California Cities Have Shredded Decades of Police Misconduct Records*, Appeal (Apr. 17, 2019), <https://theappeal.org/california-cities-have-shredded-decades-of-police-misconduct-records/> [https://perma.cc/T2R8-8TV6] (describing the destruction of disciplinary records); P.R. Lockhart, *A California City Plans to Shred Years of Police Records Before a New Law Makes Them Public*, Vox (Dec. 27, 2018), <https://www.vox.com/2018/12/27/18157941/inglewood-police-records-misconduct-california> [https://perma.cc/B9K9-PU9F] (same).

284. See, e.g., Reporters Committee Appeals FOIA Denial for Video From D.C. Police Body Cams, Reps. Comm. for Freedom of the Press (Nov. 20, 2014), <https://www.rcfp.org/reporters-committee-appeals-foia-denial-video-dc-police-body-cams/> [https://perma.cc/2Z7K-7CBL] (describing police department's refusal to redact and release body camera footage).

285. See, e.g., Leila Miller, *Sheriff's Department Defied Court Orders to Name Deputies With Histories of Misconduct. It Was a Costly Decision*, L.A. Times (Oct. 17, 2020), <https://www.latimes.com/california/story/2020-10-17/court-orders-sheriff-refuses-to-name-deputies-misconduct> [https://perma.cc/Q3UC-DK5B] (“On three occasions, a judge ordered the Los Angeles County Sheriff's Department to produce a roster of deputies with histories of misconduct. Court deadlines came and went. Tens of thousands of dollars in sanctions piled up. But the list was never disclosed.”).

286. See, e.g., Conti-Cook, *supra* note 32, at 167–68 (describing NYPD's removal of officer misconduct and disciplinary records from a public location, as well as its policy of withholding written decisions from its administrative law judges).

287. See, e.g., Email from Jamie Nance, Admin. Assistant, Varnell Police Dep't, Ga., to Dave Maass (Nov. 18, 2019) (on file with the *Columbia Law Review*) (requiring in-person pickup of requested records).

288. See Nigel Jaquiss, *Portland Police Officers Are Hiding Their Names. The Only Way to Find Out Who They Are: Tell the City Their Names.*, Willamette Week (July 22, 2020), <https://www.wweek.com/news/2020/07/22/portland-police-officers-are-hiding-their-names-the-only-way-to-find-out-who-they-are-tell-the-city-their-names/> [https://perma.cc/9PNY-YV4U].

289. After a nine-month legal battle a judge ordered the Portland Police Bureau to release the names and corresponding ID numbers of police officers. Jack Forrest, *Portland Releases Names, ID Numbers of Protest Cops After Judge's Scathing Court Decision*, Oregonian (Oct. 21, 2021), <https://www.oregonlive.com/politics/2021/10/portland-releases-names-id-numbers-of-protest-cops-after-judges-scathing-court-decision.html> (on file with the *Columbia Law Review*).



Again, these behaviors are not necessarily exclusive to policing. Noncompliance with public records requirements is widespread.<sup>290</sup> And limitations in the available public records data make it difficult to demonstrate empirically that police departments are substantially worse offenders than other government agencies. That said, repeat requesters who utilize these statutes for the purpose of holding government actors accountable—journalists, activists, and academics—often observe that police departments are especially difficult to deal with and prone to engaging in bad faith efforts to evade public oversight.<sup>291</sup> And although limited in number and scope, the few empirical studies that exist seem to provide support for these claims.<sup>292</sup>

At any rate, it is important to emphasize just how powerful these commonplace tactics for avoiding compliance can be. It is often costly, complex, and time-consuming to appeal agency-level denials, especially in the more than a dozen states that require requesters to proceed directly to court.<sup>293</sup> Law enforcement agencies do not necessarily need to invoke special statutory protections involving terrorist threats or cutting-edge surveillance devices to shield records. They can do so just as effectively by utilizing more routine, even mundane, tactics—by failing to respond, lying about the existence of records, or claiming that a request is too burdensome to fulfill.

### III. THE IMPLICATIONS OF POLICE SECRECY EXCEPTIONALISM

This descriptive account of the ways that police departments are treated differently from other agencies raises a series of related normative questions. Should police departments enjoy such broad secrecy authority? Why have courts and legislators extended these tools to law enforcement agencies? And do their reasons hold up to scrutiny?

This Part explores three of the most common justifications for permitting law enforcement agencies exceptional secrecy tools. It offers a brief overview of the doctrinal and policy-oriented arguments that underpin these rationales, and it argues that these claims do not support

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290. For a general discussion of the various barriers to public records compliance, and some of the reasons for that noncompliance, see Koningisor, *Transparency Deserts*, *supra* note 86, at 1505–26.

291. See, e.g., *N.Y. Times Co. v. City of N.Y. Police Dep't*, No. 116449/10, 2011 WL 5295044, at \*6 (N.Y. Sup. Ct. Oct. 3, 2011) (summarizing the New York Times's claims that the NYPD has a pattern or practice of failing to comply with the statutory obligations set forth in New York's Freedom of Information Law).

292. See *supra* notes 106–116 and accompanying text.

293. Koningisor, *Comparison of State Public Records Statutes*, *supra* note 21. In this sense, police departments can utilize what public policy scholars Pamela Herd and Donald Moynihan describe as “administrative burdens” as a mechanism for avoiding disclosures. Pamela Herd & Donald Moynihan, *Administrative Burdens in Health Policy*, 43 *J. Health & Hum. Servs. Admin.* 3, 3 (2020) (“Administrative burdens are the frictions of interacting with government, the experience of policy implementation as onerous . . .”).

the exceptional informational protections currently extended to police. Further, it contends that not only do the primary justifications for police secrecy exceptionalism fail to hold up to scrutiny but that these secrecy tools also impose substantial independent harms that are too often overlooked by judges and legislators.

A. *Justifications for Police Secrecy Exceptionalism*

Governments tend to offer up a host of reasons why government secrecy is needed, including the desires to preserve the effectiveness of government policies, protect open deliberations among policymakers, and reduce the financial costs associated with information disclosures.<sup>294</sup> Many of these more general arguments in favor of government secrecy apply with equal force in the policing context. Yet there are also a number of police-specific arguments frequently raised as well. These arguments can be grouped into three broad categories: Exceptional secrecy is needed to (1) prevent individuals from circumventing the law, (2) shield police officer and citizens' privacy, and (3) preserve the effectiveness or efficiency of policing.

This section briefly explores each these claims. It is not intended to be comprehensive: Each justification itself is vast and complex and merits its own full-length treatment.<sup>295</sup> Yet even a cursory review reveals flaws in the doctrinal and policy-oriented claims that undergird many of these exceptional protections.

1. *Anti-Circumvention Justifications.* — Arguably the most entrenched justification for police secrecy exceptionalism is that these extra informational protections are needed to prevent criminals from evading the law. Professor Jonathan Manes has referred to these as “anti-circumvention” claims.<sup>296</sup> These types of arguments generally take one of two forms: Information disclosures will either allow bad actors to circumvent or thwart police investigations, or they will interfere with or hinder criminal prosecutions. A wide range of exceptional secrecy tools are justified on these grounds—including investigatory exemptions, fusion center exemptions, exemptions for law enforcement tools and techniques, and protections for confidential informants.<sup>297</sup>

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294. See Pozen, *Deep Secrecy*, *supra* note 54, at 278–79.

295. See Manes, *supra* note 36, at 538–45 (exploring police anti-circumvention claims); Moran, *supra* note 32, at 174–83 (exploring police privacy claims); Wexler, *supra* note 211, at 1347 n.7 (exploring the Chicago Police Department's refusal to disclose information about its algorithm to identify individuals at risk for gun violence).

296. Manes, *supra* note 36, at 507.

297. Sometimes this anti-circumvention concern is directly enshrined in the text of the statute. See, e.g., Alaska Stat. § 40.25.120(a)(6)(F) (2022) (shielding records that “would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law”); Vt. Stat. Ann. tit. 1, § 317(c)(5)(A)(v) (2021) (shielding records that “would disclose guidelines for law enforcement investigations or prosecution if such disclosure could reasonably be expected

These claims are often persuasive on their face. If a criminal organization could request the names of undercover police officers, for instance, it could then use that information to identify officers within its ranks. It is no accident that every state statute exempts records that might be used to reveal the identity of confidential informants.<sup>298</sup> And on a practical level, of course, it would be untenable for any government entity to be fully transparent all of the time.<sup>299</sup> But on closer examination, these anti-circumvention rationales often prove deeply flawed in their application. The actual secrecy authority granted to law enforcement agencies on these grounds often far exceeds what is needed to actually prevent circumvention of the law.

There are three common flaws with many of these anti-circumvention arguments. The first is procedural. Much like the national security agencies, law enforcement agencies are often granted substantial leeway once public safety concerns are raised. When police departments assert the need for secrecy, legislators and judges often accede without interrogating the truth behind these claims—without investigating whether there is in fact a real risk of anti-circumvention, and if so, whether that risk justifies the expansive secrecy powers being sought.<sup>300</sup> Sometimes this deference is formalized—for example, in a state court’s explicit grant of deference to the security claims of law enforcement or corrections agencies.<sup>301</sup> Other times, it is left unsaid. For instance, courts are often reluctant to review police records *in camera* to determine whether the anti-circumvention claims advanced by law enforcement agencies hold up.<sup>302</sup>

It is not only the courts that adopt these watered-down procedures or standards when it comes to anti-circumvention claims; legislatures often

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to risk circumvention of the law”). Other times, these anti-circumvention concerns can be inferred from the nature of the provision—for example, that protections for confidential informants and fusion center records are intended to avoid alerting individuals or organizations that they are the target of an ongoing investigation. See *supra* notes 172–175 and accompanying text.

298. Koningisor, *Comparison of State Public Records Statutes*, *supra* note 21.

299. For a cogent summary of the arguments for and against transparency in government more generally, see Pozen, *Deep Secrecy*, *supra* note 54, at 276–323.

300. See, e.g., Manes, *supra* note 36, at 540 (questioning the factual assumptions underpinning many anti-circumvention claims).

301. See, e.g., *Va. Dep’t of Corr. v. Surovell*, 776 S.E.2d 579, 585 (Va. 2015) (“We give deference to the expert opinions of correctional officials charged with maintaining the safety and security of their employees, the inmates, and the public at large.”).

302. See, e.g., *Abdur-Rashid v. N.Y.C. Police Dep’t*, 100 N.E.3d 799, 832–33 (N.Y. 2018) (Stein, J., dissenting) (criticizing the majority for failing to review the requested records *in camera*); *Village of Butler v. Cohen*, 472 N.W.2d 579, 582 (Wis. Ct. App. 1991) (declining to review police personnel records *in camera*, reasoning that “if the policy reasons the custodian lists for nondisclosure are of sufficient specificity, and if those reasons override the presumption in favor of disclosure, an *in camera* inspection is unnecessary”); see also David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 *Harv. C.R.-C.L. L. Rev.* 473, 501 (2013) (describing federal courts’ reluctance to review documents *in camera* in FOIA disputes).

fail to scrutinize these assertions as well. For instance, the Maine legislature recently repealed the Glomar provision embedded in the state public records statute. During the hearing on the proposed amendment, state representatives tried to determine why they had adopted the provision in the first place. But “[n]o one at Friday’s hearing could say why a single line was changed at the time,” the *Portland Press Herald* reported, “and the legislative file does not suggest that section of the bill received much discussion.”<sup>303</sup> The Glomar was adopted by the state legislature in the wake of September 11 with little consideration as to whether it was needed, how it might operate, or what secondary effects it might have.

The second flaw of many anti-circumvention claims flows from the first: Because law enforcement anti-circumvention arguments are so often accepted at face value, police departments are able to exaggerate or outright lie about the existence and magnitude of the threat. This problem is well documented in the national security context. Perhaps most famously, the military report at issue in *United States v. Reynolds*, the landmark Supreme Court case that established the state secrets doctrine, turned out to contain very little national security material at all.<sup>304</sup> This fact pattern has repeated itself time and again: A federal agency will secure new and expanded secrecy powers in the course of shielding material that turns out to contain little, if any, sensitive material.<sup>305</sup>

Although difficult to prove empirically, intuitively it seems likely that a similar dynamic plays out in the law enforcement context too.<sup>306</sup> Given

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303. Megan Gray, Lawmakers Urged to Repeal Provision Allowing Secrecy in Police Use of Surveillance Tools, *Portland Press Herald* (Mar. 13, 2020), <https://www.pressherald.com/2020/03/13/lawmakers-take-up-bill-to-reduce-secrecy-about-police-use-of-surveillance-tools/#> (on file with the *Columbia Law Review*).

304. See David Rudenstine, The Irony of a Faustian Bargain: A Reconsideration of the Supreme Court’s 1953 *United States v. Reynolds* Decision, 34 *Cardozo L. Rev.* 1283, 1289 (2013). Notably, relatives of the service members killed in the crash tried to reopen the case and set aside the settlement agreement on the grounds that the Air Force had committed fraud on the court. The trial court and Third Circuit both declined to do so, arguing that the family members had failed to reach the high bar for vacating a judgment on grounds of fraud. *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005).

305. See, e.g., William G. Weaver & Robert M. Pallitto, State Secrets and Executive Power, 120 *Pol. Sci. Q.* 85, 106 (2005) (describing how the FBI retroactively classified information that had previously been released to Congress following whistleblower allegations of agency misconduct, and arguing that such efforts “seem[] to be directed more at avoiding embarrassment” than at shielding national security secrets); *id.* at 87–88 (quoting a former Solicitor General who stated that it is apparent “to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another” (internal quotations marks omitted) (quoting Erwin N. Griswold, *Secrets Not Worth Keeping*, *Wash. Post* (Feb. 15, 1989))).

306. The problem of law enforcement agencies lying has been well documented in other contexts. See, e.g., Christopher Slobogin, Testilying: Police Perjury and What to Do About It, 67 *U. Colo. L. Rev.* 1037, 1041–48 (1996) [hereinafter Slobogin, Testilying] (providing examples of police perjury and explaining the implications of this behavior). For an example of the police attempting to secure expanded secrecy powers on shaky national security grounds, see, e.g.,

the sheer number of police departments in the country, it is difficult to determine how widespread this problem is—how often police departments either lie about the contents of records or exaggerate the risks of disclosure. But we can assume that in the vast majority of cases in which police do not turn over records, such deception is never discovered.<sup>307</sup> What the public does know about this behavior comes from the relatively small number of cases in which police departments have been caught in a lie or gross exaggeration. And these tend to come to light in high-profile incidents—for instance, when reporters or outside investigators have taken the time to mount a deeper investigation into a specific act of police violence,<sup>308</sup> or when police adopt powerful new surveillance technologies that capture the attention of journalists, civil liberties groups, or community activists.<sup>309</sup>

One example is the death of Daniel Prude, a forty-one-year-old Black man with a history of mental illness. Prude died in the hospital a week after police officers in Rochester, New York, had pinned him to the ground with a hood over his head. The case received national attention, and an independent investigation eventually disclosed email exchanges from the Rochester Police Department over the release of the body camera footage of the incident. The emails showed that high-level officials in the department had repeatedly pressured the city to deny the request on the basis of an ongoing investigation even though the agency knew that it had no legal basis to do so.<sup>310</sup> The police department turned to anti-circumvention claims as a way to shield footage that they knew would cast

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Millions March NYC v. N.Y.C. Police Dep't, No. 0100690/2017, at 4 (N.Y. Sup. Ct. Jan. 14, 2019), <https://s3.documentcloud.org/documents/5684730/Nypd-Foil.pdf> [<https://perma.cc/CV8T-HBXX>] (rejecting the NYPD's Glomar response to a request for records of NYPD surveillance of protesters issued on national security grounds); Liam Knox, NYPD, Told It Can't Use "Glomar" Denial, Now Claims It Has No Records on Millions March Cell Phone Surveillance, MuckRock (Mar. 21, 2019), <https://www.muckrock.com/news/archives/2019/mar/21/css-nypd-glomar/> [<https://perma.cc/K6AV-UK9R>] (explaining that the NYPD subsequently disclosed that it had no surveillance records at all).

307. Requesters face substantial obstacles because all information is in the hands of the government. See *supra* note 293.

308. See, e.g., Meredith Deliso, Rochester Officials 'Suppressed' Information in Daniel Prude Case, Investigation Finds, ABC News (Mar. 13, 2021), <https://abcnews.go.com/US/rochester-officials-suppressed-information-daniel-prude-case-investigation/story?id=76421464> [<https://perma.cc/Q5TD-9FYY>]; Wolfson, *supra* note 282; Civilian Review Board Memorandum, *supra* note 282.

309. See Manes, *supra* note 36, at 512 (describing how information about new police technologies becomes public "slowly, in fits and starts, usually by way of investigative work of technical experts, specialist journalists, or criminal defense teams").

310. Andrew G. Celli, Jr., Katherine Rosenfeld, Scout Katovitch, Kathryn Ravey & Jocelyn Rodriguez, Special Council Investigator, Independent Investigation of the City of Rochester's Response to the Death of Daniel Prude 29 (2021), <https://www.documentcloud.org/documents/20512148-final-report-of-the-independent-investigation-of-the-city-of-rochesters-response-to-the-death-of-daniel-prude-issued-march-12-2021-00452102x9ccc2> [<https://perma.cc/96ZT-VPH6>].

the city in a bad light.<sup>311</sup> Only a fraction of requests receive this type of sustained public attention. But one might assume, based on the prevalence of law enforcement lies and exaggerations in other contexts, that this type of mischaracterization of the anti-circumvention risks posed by disclosure is not uncommon.<sup>312</sup>

Third, these protections often far exceed what is needed to keep information secret. Consider the Maine Glomar example again. The Maine State Police Department offered up a number of anti-circumvention arguments in support of this secrecy tool. At a recent legislative hearing about the statutory provision, for example, a police representative described how the agency had disrupted a network of pharmacy robbers by placing GPS trackers in opioid bottles. Had the police department been forced to reveal use of this technique, the officer argued, it would not have been able to thwart the targeted criminal activity.<sup>313</sup> Yet the Glomar wasn't actually necessary to protect that secret. GPS trackers are a known technology. The fact that GPS trackers exist and that police use them is widely understood by the public.<sup>314</sup> To issue a Glomar response to a request about police use of GPS trackers would have been overkill. The secrecy tool is broader than what would have been needed to shield this particular investigative technique from circumvention.<sup>315</sup>

2. *Privacy Justifications.* — Privacy considerations also serve as a common and powerful justification for law enforcement secrecy exceptionalism. These tend to fall into two broad categories. The first concerns the public's privacy. Under this rationale, police records often contain especially sensitive material. Some of this material is sensitive because police are often called in at especially vulnerable moments in people's lives—when an individual has had a mental health episode, for

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311. Id. at 29–30.

312. Cf. Slobogin, *Testilying*, supra note 306, at 1040 (“[L]ying intended to convict the guilty—in particular, lying to evade the consequences of the exclusionary rule—is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: ‘testilying.’”).

313. An Act to Increase Government Accountability: Hearing on L.D. 2139 Before the Jt. Standing Comm. on Crim. Just. & Pub. Safety, 129th Legis. Sess. (Me. Mar. 13, 2020) (testimony of Major Chris Grotton, Maine State Police), <https://legislature.maine.gov/bills/getTestimonyDoc.asp?id=141401> [<https://perma.cc/W8G2-UX22>].

314. See, e.g., *United States v. Jones*, 565 U.S. 400 (2012) (involving a GPS tracker placed by police). Further, anyone who submits a request for records specifically relating to police GPS trackers placed in opioid medications is presumably already aware of the potential for this technology to be used in this specific way.

315. For a discussion of the flaw of anti-circumvention arguments when it comes to regulating police through administrative processes more broadly, see Christopher Slobogin, *Policing as Administration*, 165 U. Pa. L. Rev. 91, 139–40 (2016) [hereinafter Slobogin, *Policing as Administration*].

example, or has been the victim of domestic violence.<sup>316</sup> And some of it is especially sensitive because it contains information about victims or witnesses to a crime.<sup>317</sup>

Alternatively, police material is deemed especially private because it contains information about individuals who have been accused or convicted of crimes and the mark of a criminal record can follow someone throughout their lives. Some of these arguments narrow in on the harms inflicted on certain categories of individuals: those who were never ultimately charged with a crime or who were acquitted, for example, or who committed crimes when they were children.<sup>318</sup> Others sweep more broadly, rooted in the view that everyone deserves the chance to start over and the law should provide some measure of protection to do so.<sup>319</sup>

The second major category of privacy justifications concern the privacy of police officers. Under this rationale, police are engaged in especially dangerous and high-profile work and therefore require heightened privacy shields. These arguments are often advanced along both safety and fairness lines. Proponents argue that privacy provisions diminish the risk of retaliation against police officers and their families and prevent officers' reputations from being unfairly tarnished by false claims.<sup>320</sup>

These privacy arguments are often persuasive: The harms of disclosure can be significant. As a result, these various privacy claims raise complex ethical and doctrinal questions—questions that have been also addressed in previous works.<sup>321</sup> But in brief, some distinct problems

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316. See, e.g., Fla. Stat. Ann. § 119.071(2)(1)(2)(b) (West 2022) (shielding body camera footage that “[i]s taken within the interior of a facility that offers health care, mental health care, or social services”).

317. See, e.g., Alaska Stat. § 40.25.120(a)(6)(C) (2022) (shielding certain records to protect the privacy of suspects, defendants, victims, or witnesses).

318. See, e.g., N.Y. Crim. Proc. Law § 160.59 (McKinney 2022) (providing for the automatic sealing of certain offenses); Teigen, *supra* note 145 (listing states that automatically seal or expunge juvenile records).

319. See Kristian Hernández, *More States Consider Automatic Criminal Record Expungement*, Pew Trs.: Stateline (May 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/25/more-states-consider-automatic-criminal-record-expungement> [<https://perma.cc/39Q5-HT66>] (noting a Texas law that would “automatically seal the criminal records of people who were arrested but never convicted or acquitted of a crime”).

320. See Moran & Hodge, *supra* note 32, at 1248–50 (describing concerns that “public access to misconduct records would physically endanger officers”); see also Levine, *Discipline and Policing*, *supra* note 32, at 873 (arguing that shielding police disciplinary records can incentivize officers to report others’ misconduct).

321. For a discussion of police officer privacy, see, e.g., Levine, *Discipline and Policing*, *supra* note 32, at 870–72; Moran, *supra* note 32, at 174–92; Moran & Hodge, *supra* note 32, at 1258–61. For a discussion of citizen privacy and police records, see, e.g., Amy Gajda, *Mugshots and the Press-Privacy Dilemma*, 93 *Tul. L. Rev.* 1199, 1217–26 (2019); Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 *Md. L. Rev.* 755, 768–95 (2005); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 *Minn. L. Rev.* 1137, 1173–99 (2002).

emerge in the ways that these privacy shields are applied. First, many of these privacy-oriented protections too easily permit police officers to invoke citizen privacy concerns to shield their own misconduct. While citizen privacy protections are critical, especially for individuals from historically marginalized communities, police departments are increasingly invoking the public's privacy to serve their own ends. As Marsy's Law illustrates, claims about protecting the privacy of the public at large can morph into a defense against public oversight of policing.<sup>322</sup>

Second, these privacy provisions are structured in ways that fail to adequately constrain the risks of misuse. Consider protections for unsubstantiated complaints against police officers. The rationale for shielding these claims from public view is sound on its face: False allegations should not be used to tarnish an officer's reputation. Yet this premise often collapses under the weight of reality. Officers are privileged at every turn in a misconduct investigation.<sup>323</sup> And when these files have been made public, time and again they have revealed that abusive officers are permitted to stay in their positions where they continue to harm and harass their fellow officers and the public at large, mostly without consequence.<sup>324</sup>

Once again, vulnerable and oppressed communities bear the brunt of this harm. Repeat offenders who are allowed to remain in their jobs too often target poor communities of color.<sup>325</sup> And by layering robust secrecy protections around these exercises of force, police departments further insulate themselves from public scrutiny and heighten the risk that police officers will again abuse their power. Requirements that the public can only access proven claims against police officers, for example, do not reflect the reality that members of these communities are often not believed and face additional impediments to having their complaints substantiated. As Professor Angela Onwuachi-Willig has noted, "[I]n many instances, offending police officers have specifically targeted black women, trans women, and other marginalized women, because they are less likely to be believed."<sup>326</sup> And if these individuals are not believed, their

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322. I explore this problem at greater length in a forthcoming work. Christina Koningisor, *Coopting Privacy* (on file with the *Columbia Law Review*). For a discussion of privacy pretexts in the private sector, see Rory Van Loo, *Privacy Pretexts*, 108 *Cornell L. Rev.* 1, 22–26 (2022).

323. See *supra* sections II.A.1.iii, .C.1.

324. See, e.g., Alene Tchekmedyan & Ben Poston, *What Secret Files Tell Us About Law Enforcement Misconduct*, *L.A. Times* (Mar. 19, 2021), <https://www.latimes.com/california/story/2021-03-19/sb-1421-sheriffs-department-disclosure> [<https://perma.cc/GL2H-CHYG>]. For a group of articles exploring the misconduct revealed in newly released disciplinary files, see *Unsealed: California's Secret Police Misconduct and Use-of-Force Files*, KQED, <https://www.kqed.org/policerecords> [<https://perma.cc/PT7W-P9FA>] (last visited Oct. 12, 2022).

325. Grunwald & Rappaport, *supra* note 270, at 1728–31.

326. Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 *Yale L.J. Forum* 105, 117 (2018).



complaints cannot be substantiated; if they are not substantiated, they remain hidden from view.

There are persuasive counterarguments to consider when it comes to unsubstantiated complaints, including due process and fairness concerns, as well as concerns about the selective disclosure of police records as a form of retaliation, especially against female police officers or officers of color.<sup>327</sup> Professor Kate Levine has argued that a better approach would be increased access to such records by other law enforcement agencies and within the context of judicial proceedings, rather than increased disclosure to the public at large.<sup>328</sup> Ultimately, it is difficult to demonstrate empirically that a particular approach to disciplinary-records disclosure has had or will have a causal effect on reduced levels of police violence and abuse. What is clear is that the current approach—which too often fails to alert either inter- or intragovernmental actors or the public at large to entrenched discrimination and abuse within a department—is profoundly, even irreparably, flawed.

3. *Efficiency and Effectiveness Justifications.* — Exceptional secrecy protections for police are also justified on efficiency and effectiveness grounds.<sup>329</sup> Under this rationale, the disclosure of certain records impedes law enforcement agencies' ability to perform their functions and duties. Again, these claims are not necessarily exclusive to law enforcement agencies. They often animate generally applicable exemptions—for example, protections for deliberative government materials, which aim to preserve candor and honesty in the decisionmaking process.<sup>330</sup> Yet some of these generally applicable exemptions disproportionately impact police secrecy. Although they are not explicitly reserved for law enforcement agencies, they are frequently used by police in ways that substantially amplify police power. And the underlying justifications are often flawed, both in the theory that undergirds them and in how they are applied.

Police trade secrecy claims offer a useful illustration. As mentioned, police departments have increasingly turned to these carve-outs to shield records relating to their use of surveillance technologies like drones, automated license plate readers, acoustic gunshot detection software, and

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327. For a cogent summary of these critiques, see Levine, *Discipline and Policing*, *supra* note 32, at 876–80, 882–86.

328. *Id.* at 900–05.

329. See, e.g., Mass. Gen. Laws Ann. ch. 4, § 7(26)(f) (West 2022) (shielding investigatory records when disclosure would “prejudice the possibility of effective law enforcement”); Wash. Rev. Code Ann. § 42.56.240(1) (West 2022) (shielding investigatory records that are “essential to effective law enforcement”).

330. See, e.g., *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 782 (2021) (“The [deliberative process] privilege aims to improve agency decision-making by encouraging candor and blunting the chilling effect that accompanies the prospect of disclosure.”).

social media monitoring.<sup>331</sup> Law enforcement agencies argue that if they were to reveal proprietary information about these companies through public records disclosures, the companies would stop creating new technologies or would refuse to sell to law enforcement agencies at all.<sup>332</sup> This withdrawal, in turn, would diminish the police's ability to both detect and solve crimes.

Yet the theory that undergirds these justifications is often flawed. First, such claims presuppose that the public wants more efficient or effective policing—that it would in fact benefit from greater police access to surveillance technologies. But which public? The explosive growth of police surveillance imposes costs upon all citizens.<sup>333</sup> Yet these technologies have a disproportionate impact on those communities that are already subjected to overpolicing and oversurveillance. Such efficiency arguments often fail to account for the deeply racist and discriminatory ways that the tools of police surveillance are utilized, as well as the harms that these technologies impose on communities that are already under pervasive police surveillance.<sup>334</sup>

Second, these efficiency arguments often rest on shaky factual grounds. Again, consider the trade secrecy example. In this context, it is not always clear that these protections do, in fact, spur innovation. After all, some companies operating in this space have taken the opposite approach, utilizing open-source algorithms and publishing their source code and input variables.<sup>335</sup> It is also not clear that requiring the disclosure of information about these technologies and devices would actually prompt these companies to stop selling to police departments. Many of these businesses operate in a monopsony: They contract only with government and there is no private market for their software and devices.<sup>336</sup>

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331. See Wexler, *supra* note 211, at 1365–68 (detailing the trade secrecy implications of the Florida police force's use of ShotSpotter).

332. See Ram, *supra* note 215, at 714–15 (noting that governments enjoy a monopsony for criminal justice algorithms and related tools).

333. See, e.g., *United States v. Jones*, 565 U.S. 400, 413–18 (2012) (Sotomayor, J., concurring) (“Awareness that the government may be watching chills associational and expressive freedoms.”).

334. See Simone Browne, *Dark Matters: On the Surveillance of Blackness* 10–13 (2015) (surveying the literature that has addressed the discriminatory uses of surveillance systems); Sandra G. Mayson, *Bias In, Bias Out*, 128 *Yale L.J.* 2218, 2221–27 (2019) (considering the impact of algorithmic bias on criminal justice); Alvaro M. Bedoya, *The Color of Surveillance*, *Slate* (Jan. 18, 2016), <https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html> [https://perma.cc/5BQ8-GYTF] (discussing the victims of the NSA's call records program).

335. See Wexler, *supra* note 211, at 1422–23 (noting that requiring algorithms to be open source may serve innovation in criminal justice technologies without relying on trade secrecy).

336. See Ram, *supra* note 215, at 715 (“[T]he relatively limited number of possible purchasers of criminal justice algorithms . . . creates less disjunction between payor and purchaser than typically exists.”).

These provisions are also flawed in their application. Law enforcement agencies routinely invoke them to shield every record even remotely connected to a private company, no matter how tenuous. And these claims are too often accepted at face value by unquestioning judges. Professor Rebecca Wexler has noted that specious trade secrecy claims are more difficult to overcome in the criminal justice context than in the course of civil litigation because so few criminal defendants have the resources to challenge them.<sup>337</sup> This problem may be even more pronounced when it comes to public records statutes. Virtually no requesters have the financial resources and expertise required to successfully challenge a trade secrecy claim.<sup>338</sup> And with judges so often reluctant to press the government's assertions, there are few restraints on police departments relying on this exemption as a convenient tool to shield their own activities.

Stepping back to look at these efficiency claims more broadly, several additional problems—both in theory and in practice—come into focus. The vagueness of public records exemptions often allows police departments to claim almost anything will promote more “effective” or “efficient” policing. And police departments themselves are often vested with discretion to determine whether a particular disclosure will undermine their efforts.<sup>339</sup> Together, these provisions have the effect of permitting law enforcement agencies near-boundless secrecy authority. It is virtually impossible for a requester to prove that a disclosure will *not* undermine the effectiveness of law enforcement.

Further, even when police departments do offer more concrete definitions of what constitutes “effective” policing, they often do so in highly problematic ways. As Professor Shaun Ossei-Owusu has shown, many police departments measure effectiveness by levels of compliance with either formal or informal quotas.<sup>340</sup> Effectiveness is measured by the number of stops or arrests made, tickets or citations issued, or other punitive steps taken.<sup>341</sup> Yet police departments often target Black communities and other poor communities of color to comply with these quantitative targets and fulfill their quotas.<sup>342</sup>

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337. Wexler, *supra* note 211, at 1397.

338. Even media outlets have difficulty enforcing these statutes. See Knight Media Foundation, In Defense of the First Amendment 15 (2016), [https://knightfoundation.org/wp-content/uploads/2020/03/KF-editors-survey-final\\_1.pdf](https://knightfoundation.org/wp-content/uploads/2020/03/KF-editors-survey-final_1.pdf) [<https://perma.cc/72HA-2A9X>] (“Nearly two-thirds of the news leaders . . . believe[] that the news industry is less able now than it was 10 years ago in its ability to pursue legal action involving free expression.”).

339. See, e.g., Wyo. Stat. Ann. § 16-4-203(b)(i) (2022) (permitting law enforcement agencies discretion to withhold records when disclosure is “contrary to the public interest”); *Newman v. King County*, 947 P.2d 712 (Wash. 1997) (holding that police have discretion to determine which documents are essential to effective law enforcement).

340. Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. Rev. 529, 532–33 (2021).

341. *Id.* at 537–41.

342. *Id.* at 586–87.

Efficiency and effectiveness claims are also used to undergird the deeply flawed claim that if the public were to learn about a police department decision or policy, they would be opposed to it. Protections for disciplinary records are sometimes justified on these grounds. If the public were to access these materials, this argument goes, citizens would lose faith in their police departments. This, in turn, would undermine the effective functioning of these agencies.<sup>343</sup> The fatal flaw in this line of reasoning should be obvious. The fact that the public would be outraged if it knew about police misconduct is never a valid reason for secrecy.<sup>344</sup>

Other statutory provisions—for example, those permitting police to withhold records to protect the public interest or public safety—suffer from similar flaws as well.<sup>345</sup> Again, police departments are often empowered to define these terms and determine the scope of their protection. And they tend to do so in ways that exclude the safety of those communities that are most harmed by policing.<sup>346</sup> Enhanced access to certain law enforcement records may in fact increase public safety in communities that suffer these disproportionate harms.<sup>347</sup> Yet as long as police departments have a monopoly on defining what constitutes the public interest and public safety, these considerations most likely will not be taken into account.

#### B. *The Harms of Police Secrecy Exceptionalism*

The exceptional secrecy protections extended to police are flawed in an additional way. Not only are the benefits of police secrecy exceptionalism overstated, but the harms are also minimized. Conversations about police secrecy are too often anchored by law enforcement agency claims of need. The discussion then revolves around whether a particular withholding will make police more efficient, for example, instead of what efficient policing means and whether we want

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343. For examples of these types of claims, see Conti-Cook, *supra* note 32, at 184 (“Police even extend this argument of harm to the community, arguing the community’s confidence in officers will be harmed if individual officers’ misconduct is publicized.”).

344. Friedman & Ponomarenko, *supra* note 31, at 122 (“Secrecy is never appropriate on the theory that if the people knew what the police were doing they would disagree, and stop it.”); see also Dennis F. Thompson, *Democratic Secrecy*, 114 *Pol. Sci. Q.* 181, 183 (1999) (“If one of the reasons that a policy cannot be made public is that it would be defeated in a democratic process, then the policy should be abandoned.”).

345. See *supra* section II.A.2.a.

346. See Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 *U.C. Irvine L. Rev.* 1291, 1306 (2021) (explaining “how policing may actually *decrease* safety” in some communities); Ngozi Okidegbe, *Discredited Data*, 107 *Cornell L. Rev.* 2007, 2025–26 (2022) [hereinafter *Okidegbe, Discredited Data*] (describing how definitions of public safety in the context of bail exclude the safety of the accused, their family, and their community).

347. Conti-Cook, *supra* note 32, at 153–59. But see Levine, *Discipline and Policing*, *supra* note 32, at 873–77 (arguing that the link between disciplinary record access and public safety is tenuous).

more efficient policing at all. The separate harms inflicted by secrecy in policing are too often overlooked.

This section explores some of the most entrenched of these harms. These include the democratic costs imposed by police secrecy; the disproportionate impact that police secrecy has on marginalized communities, especially Black communities; and the ways that excessive police secrecy undermines the rule of law.

1. *Democratic Harms.* — All government secrecy comes with some risk of democratic harm. It disrupts the public's ability to oversee and monitor government, dampens citizen engagement, and undermines the perceived legitimacy of the government's decisionmaking process.<sup>348</sup> It also threatens the public's ability to engage in the deliberative debate that gives rise to a functioning democracy. It can disrupt a critical feedback loop between the governors and the governed, impeding the public's access to information that it needs to make an informed decision—to know whether to vote someone out of office, join an advocacy campaign, or show up at a particular government meeting to register approval or dissent.<sup>349</sup>

But police secrecy also imposes more specific democratic harms, beyond those inflicted by government secrecy writ large. Some of these harms stem from the specific nature of the secrecy tools extended to police. For example, deep secrets—government decisions, actions, or policies whose very existence is shielded from the public—come with especially high costs. Deep secrets undermine the values of citizen autonomy and democratic representation and dampen intergovernmental deliberation.<sup>350</sup> As Professor David Pozen has argued, “[O]n utilitarian, democratic, and constitutional grounds, deep state secrecy ought to be seen as especially troubling.”<sup>351</sup> Yet police-specific secrecy tools like the Glomar response are specifically intended to foster and protect deep secrets. And even more routine police secrecy provisions often still have the effect of driving police secrecy toward greater depth. For instance, broad exemptions for surveillance-related records make it difficult for the public to know whether police are utilizing certain surveillance techniques at all.<sup>352</sup>

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348. For a summary of general arguments against government secrecy from a liberal democratic perspective, see Mark Fenster, *The Opacity of Transparency*, 91 *Iowa L. Rev.* 885, 894–902 (2006).

349. See Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 100–01 (1996) (“[M]aking reasons public contributes to the broadening of moral and political perspectives that deliberation is supposed to encourage.”); Fenster, *supra* note 348, at 897–99 (“Legislative and judicial efforts to curb government secrecy and protect informed individual choice, public debate, and state self-justification harness this liberal democratic concept of transparency’s benefit.”).

350. See Pozen, *Deep Secrecy*, *supra* note 54, at 289–90.

351. *Id.* at 275.

352. See *supra* section II.A.1.d.

Other democratic costs stem from the unique role that law enforcement agencies play in a liberal democracy. Government secrecy often exacerbates existing power imbalances between the government and its citizens. Government secrecy amplifies the risk of coercion and abuse of power by government officials, and it threatens individual rights and liberties.<sup>353</sup> Such risks exist in all government contexts, but they are heightened in the context of police secrecy. Law enforcement agencies pose a unique threat to civil liberties—they already operate as “a uniquely frightening tool of official domination.”<sup>354</sup> These exceptional secrecy powers magnify the risk of government encroachment upon individual rights and freedoms.

The use of increasingly sophisticated technologies by law enforcement agencies helps illustrate the point. Police secrecy exceptionalism makes it difficult for the public to learn about whether and how police are using new surveillance devices and techniques. The public’s lack of access to that information has important democratic implications. It allows the police to shape initial policies around the technology, before a more inclusive and adversarial public debate can set the terms of its use.<sup>355</sup> And it permits law enforcement agencies to scoop up vast amounts of data without the public’s knowledge or consent.<sup>356</sup>

Finally, there are democratic costs to police secrecy exceptionalism that stem from broader structural impediments in the law. This is true in two ways. First, there are gaping legal holes in the way that the public oversees law enforcement agencies. Deficits in alternative police oversight mechanisms—including criminal constitutional procedure, statutory remedies like § 1983, and federal oversight of local police—heighten the salience of these transparency law mechanisms.<sup>357</sup> Professor Hannah Bloch-Wehba has argued that due to these weakened constitutional and statutory mechanisms, transparency litigation around police records has come to form a criminal procedure “shadow docket” over police policies and practices.<sup>358</sup> Yet police secrecy exceptionalism blunts transparency law’s capacity to pick up the slack where alternative legal mechanisms for regulating and overseeing the police have failed.

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353. See Pozen, *Deep Secrecy*, supra note 54, at 286 (“State secrecy can deny citizens the ability to exercise their rights and liberties, to be free from the unjust and coercive exercise of power . . .”).

354. Sklansky, supra note 30, at 109.

355. Manes, supra note 36, at 535.

356. *Id.*

357. See Bloch-Wehba, *Visible Policing*, supra note 37, at 921–22 (“[E]ven as law enforcement expands the amount and types of information they collect . . . the public and other stakeholders have remained comparatively in the dark . . . [T]ransparency litigation has taken on a newly significant role in revealing investigative practices, stimulating public debate, and fostering meaningful democratic oversight.”).

358. *Id.* at 922 n.18.

Second, police secrecy exceptionalism exacerbates existing deficits in the broader information ecosystems that sustain a liberal democracy. The public has long relied upon the press to inform citizens about important workings of government. Yet local media is in a state of crisis today.<sup>359</sup> And it is no longer strictly local outlets that are affected. Increasingly, even larger and more established institutions like the *Chicago Tribune* and the *Baltimore Sun* have succumbed to the same forces that have afflicted local newspapers.<sup>360</sup> In cities and towns across the country, journalists must rely on fewer reporters to cover a wider range of issues. The barriers to media oversight of police are already substantial and these secrecy tools make them more difficult to surmount.

2. *Racial Harms.* — Exceptional police secrecy amplifies police power and gives law enforcement agencies powerful tools to shield police violence and abuse. But these harms are not distributed equally. They are disproportionately borne by those communities that are already subjected to abusive policing and overpolicing, especially Black communities, but also Latinx communities, Muslim communities, communities with large undocumented populations, poor communities, LGBTQ communities, sex workers, and disabled individuals.<sup>361</sup> These exceptional secrecy tools enhance the authority of the police, and, in doing so, they further entrench police violence and discrimination.<sup>362</sup>

These communities also disproportionately bear the burdens of pervasive police surveillance.<sup>363</sup> Scholars like Simone Browne have

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359. See, e.g., Penelope Muse Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?* 7–27 (2020), [https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020\\_News\\_Deserts\\_and\\_Ghost\\_Newspapers.pdf](https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf) [<https://perma.cc/SJ6Y-XH8C>] (discussing the loss of local news due to the loss of newspapers and loss of journalists in communities).

360. McKay Coppins, *A Secretive Hedge Fund Is Gutting Newsrooms: Inside Alden Global Capital*, *Atlantic* (Oct. 14, 2021), <https://www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171/> [<https://perma.cc/WV2H-LR6K>].

361. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1427, 1448 (2016) (explaining the disproportionate number of Black people stopped by the police compared to other racial groups); Jasmine E. Harris, *Reckoning With Race and Disability*, 130 *Yale L.J. Forum* 916, 918–19 (2021) (discussing the intersection of race and disability); Jamelia Morgan, *Policing Under Disability Law*, 73 *Stan. L. Rev.* 1401, 1404–10 (2021) (“[D]isabled people experience more ordinary forms of policing at disproportionate rates.”).

362. See, e.g., Grunwald & Rappaport, *supra* note 270, at 1727 (describing how secrecy permits abusive officers to be hired elsewhere).

363. See, e.g., Barton Gellman & Sam Adler-Bell, *The Century Found., The Disparate Impact of Surveillance* 3 (2017), <https://production-tcf.imgix.net/app/uploads/2017/12/03151009/the-disparate-impact-of-surveillance.pdf> [<https://perma.cc/3D76-J877>] (“In the lived experience of minority neighborhoods, authorities at ground level wield enormous power to peer into their lives. Privacy is not only a luxury that many residents cannot afford. In surveillance-heavy precincts, for practical purposes, privacy cannot be bought at any price.”); Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem With Privacy, Poverty and Policing*, 14 *U. Md. L.J. Race, Religion, Gender & Class* 240,

extensively chronicled the long history of police surveillance in Black communities and the continued harm that contemporary surveillance imposes today.<sup>364</sup> Other scholars have demonstrated how police are more likely to adopt powerful new surveillance technologies in communities with a high proportion of Black residents.<sup>365</sup> Cities like Baltimore, for example, have long served as sites of experimentation for emerging law enforcement surveillance approaches and technologies.<sup>366</sup> The harms that flow from this surveillance are well documented. Pervasive police monitoring violates citizens' privacy, chills speech, and increases citizens' risk of becoming embroiled in the criminal justice system.<sup>367</sup> It also "erect[s] digital borders around communities of color, fortifying the colony-in-a-nation status that defines those communities."<sup>368</sup>

Police secrecy exceptionalism magnifies these harms. This is true for specific secrecy protections. Provisions stripping the right of incarcerated individuals to submit public records requests, for example, disproportionately impact the Black community, which makes up only twelve percent of the general population but around a third of the prison

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261–62 (2014) (discussing how "[o]vert racism and implicit stereotyping on the part of police officers" is a possible explanation for the use of "aggressive law enforcement strategies"); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. Crim. L. & Criminology* 643, 646 (2009) (describing how "[l]ow-income families find their lives heavily surveilled and regulated—not only by welfare officials, but also by the criminal justice system").

364. See *supra* note 334 and accompanying text.

365. See Chaz Arnett, *Race, Surveillance, Resistance*, 81 *Ohio St. L.J.* 1103, 1104 (2020) (describing how police in Baltimore have long experimented with new technologies); Michelle Alexander, *Opinion, The Newest Jim Crow*, *N.Y. Times* (Nov. 8, 2018) <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> (on file with the *Columbia Law Review*) (describing how carceral technologies create the risk that "entire communities become trapped in digital prisons that keep them locked out of neighborhoods where jobs and opportunity can be found").

366. Arnett, *supra* note 365, at 1104 ("[F]or Baltimore, both the experimentation with advancing surveillance technology and the deep commitment to engage in policing tactics without the support of the citizenry, particularly the Black community, have been longstanding.").

367. See Sahar F. Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 *B.U. L. Rev.* 1151, 1175–76, 1179–82 (2020) (describing the chilling effect of pervasive online government surveillance); Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 *Minn. L. Rev.* 1105, 1126, 1164 (2021) (describing the limits of the Fourth Amendment to constrain government use of facial recognition technologies and the privacy harms that this causes); Laurent Sacharoff & Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 *Wash. U. L. Rev.* 269, 276 (2017) ("[B]ody camera videos are used far more often against ordinary citizens than the police."); Jeffrey L. Vagle, *The History, Means, and Effects of Structural Surveillance*, 9 *Ne. U. L. Rev.* 103, 145–47 (2017) (describing the civic disengagement and other chilling effects that result from systemic surveillance).

368. Vincent Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, *UCLA L. Rev.* (forthcoming 2023) (manuscript at 16–17, 19), <https://ssrn.com/abstract=4048371> [<https://perma.cc/6MZR-JDCA>]; see also Ferguson, *supra* note 367, at 1164–90 (describing the harms of continuous and pervasive police surveillance).



population.<sup>369</sup> It is also true more broadly. Community activists around the country are organizing to resist new forms of technological surveillance.<sup>370</sup> But these secrecy tools make it more difficult for law enforcement agencies' use of invasive surveillance technologies to come to light. And this, in turn, makes it less likely that the communities most affected by these technologies will be able to organize and advocate against their acquisition and use.<sup>371</sup>

3. *Rule of Law Harms.* — These exceptional secrecy protections also threaten the rule of law. They enact a weaker set of legal requirements for law enforcement agencies, ones that police departments often disregard anyway. This regime sends the message that the police operate outside the bounds of the law—that they are themselves engaged in “lawless conduct.”<sup>372</sup> Further, these secrecy tools amplify police authority and control. Secrecy itself operates as a form of power, granting the information-holder an advantage over outsiders and rivals.<sup>373</sup> Police secrecy exceptionalism grants already-powerful state actors an even greater advantage over other government actors and branches, as well as over the communities that these agencies serve.

It also undermines the force and effectiveness of the transparency law regime, shielding the agencies that wield state-sanctioned violence almost entirely from public view. There is an analogue here to the federal context, where national security agencies have been carved almost entirely out of FOIA's reach.<sup>374</sup> This protection gives rise to an imbalance in the law: Those agencies least in need of public scrutiny are subject to the full force of these statutes, while those most in need of public oversight are largely

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369. John Gramlich, Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006, Pew Rsch. Ctr. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [https://perma.cc/YYY4-UCK4].

370. See, e.g., Southerland, *supra* note 368 (manuscript at 5–6) (describing community-driven efforts to contest carceral technologies through an abolitionist lens); see also Mutale Nkonde, Automated Anti-Blackness: Facial Recognition in Brooklyn, New York, 2019–2020 Harv. Kennedy Sch. J. Afr. Am. Pol'y 30, 30–31 (2020) (describing community-driven efforts to resist private facial recognition surveillance by a property management company in Brownsville, Brooklyn).

371. Note that many community groups have critiqued efforts to impose procedural protections on these new forms of surveillance, including increased transparency. See Southerland, *supra* note 368 (manuscript at 5–6) (summarizing this view). This broader critique is addressed in further detail below. See *infra* section IV.A.

372. Sklansky, *supra* note 30, at 175 (quoting Lon L. Fuller, *The Morality of Law* 81 (1964)).

373. See Max Weber, *Bureaucracy*, in *From Max Weber: Essays in Sociology* 196, 233 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (“Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret.”).

374. See Pozen, *Transparency's Ideological Drift*, *supra* note 218, at 156 (discussing the “ever-expanding asymmetry between national security secrecy and other forms of secrecy”).

excluded.<sup>375</sup> A similar dynamic can be found at the state and local levels. Police departments, which wield substantial power and authority to inflict violence, are granted extraordinary protections from public scrutiny, while the vast tangle of other agencies—zoning boards, school committees, sanitation departments, and so on—are subject to these statutes in full.<sup>376</sup> Such an imbalance risks breeding cynicism and a loss of faith in the law more broadly.

C. *The Drivers of Police Secrecy Exceptionalism*

What forces motivate police secrecy exceptionalism? Before we can constrain this process, we must first understand what propels it.

One way to approach the issue is through the lens of policing—to view police secrecy exceptionalism as part of the broader failure of participatory and deliberative models of democracy to meaningfully constrain police power.<sup>377</sup> Professor David Sklansky has mapped broader currents in democratic theory onto the historical development and trajectory of law enforcement in the United States, arguing that as democratic pluralism gave way to deliberative democracy and participatory democracy in the 1970s and '80s, police departments began to embrace more participatory models like community policing.<sup>378</sup> Enthusiasm for increased transparency and public access to police information accompanied this trend.<sup>379</sup> But these community-focused reforms proved deeply flawed—along a variety of measures,<sup>380</sup> including as a mechanism for increased transparency and accountability.<sup>381</sup> Government actors at every level and in every branch have continued to insulate police from public view.

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375. *Id.*

376. This is true on paper. In practice, there are separate barriers to access that prevent full oversight of non-policing agencies at the state and especially local level. See Koningisor, *Transparency Deserts*, *supra* note 86, at 1505–26 (noting that, in addition to the excessive exemptions, requester fees, and requester restrictions that plague state and local transparency laws, state and local governments also lack resources and expertise to respond to information requests).

377. See Bell, *Police Reform*, *supra* note 30, at 2123–26 (discussing the “wide discretion” afforded to police officers and the strong incentives they face to arrest).

378. See generally Sklansky, *supra* note 30, at 172 (“[T]he Madison, Wisconsin, Police Department began experimenting with participatory management in the 1980s . . . . But by then the police reform agenda had become monopolized by community policing . . . .”).

379. *Id.* at 84, 90–91.

380. See, e.g., Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 *N.Y.U. L. Rev.* 405, 434 (2018) [hereinafter Akbar, *Radical Imagination*]; Bell, *Police Reform*, *supra* note 30, at 2126.

381. See, e.g., Jocelyn Simonson, *Copwatching*, 104 *Calif. L. Rev.* 391, 402–05 (2016) (describing the flaws of the community-policing model, including that these “efforts remain in the control of the police, driven by the police department’s terms, schedule, and outlook”).

Scholars like L. Song Richardson, Catherine Fisk, and Stephen Rushin have mapped some of the broader political forces driving these protections, especially the extraordinary power wielded by police unions.<sup>382</sup> Elected officials, too, most likely benefit from police secrecy exceptionalism. These protections can offer mayors and other civilian officials plausible deniability in the face of police brutality and abuse. Such incentive structures likely contribute to the broader failure of intergovernmental checks as a mechanism of police control.<sup>383</sup>

An alternative approach would be to examine the question through the lens of transparency law. Professor Pozen has argued that in the past few decades, the political valence of transparency has “drifted” from progressive to conservative.<sup>384</sup> The original drafters of these laws envisioned these statutes as a mechanism for constraining the most violent elements of the state.<sup>385</sup> Yet amid the rise of neoliberalism, the surge in right-wing media and watchdog groups, and advances in information technology, these statutes have instead been co-opted by anti-regulatory and pro-market forces.<sup>386</sup>

Except for national security agencies: While transparency law obligations for most government entities have proliferated in recent decades, certain silos of government have remained insulated from this trend and, in fact, propelled in the opposite direction. National security secrecy offers a clear example.<sup>387</sup> Even as most federal agencies have been subjected to ever-greater transparency obligations, agencies like the CIA have remained largely shielded from public view, protected by expansive national security–related exemptions, a virtually unchecked system of classification, and a sprawling set of criminal sanctions that can be imposed on those who reveal national security information without authorization.<sup>388</sup> The “rightward drift” in transparency law has left these

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382. Fisk & Richardson, *supra* note 252, at 749–55; Rushin, *supra* note 252, at 1222–39.

383. See, e.g., Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 *Colum. L. Rev.* 1327, 1343–55 (2021) (describing structural obstacles to police reform and the barriers to effective civilian control of police).

384. See Pozen, *Transparency’s Ideological Drift*, *supra* note 218, at 124 (explaining transparency’s rightward drift over the past few decades).

385. *Id.* at 147–53; see also Koningisor, *Transparency Deserts*, *supra* note 86, at 1542 (“Public records laws offer an alternative mechanism of accountability to these nonresidents deeply affected by the actions of government.”).

386. Pozen, *Transparency’s Ideological Drift*, *supra* note 218, at 147–53.

387. See, e.g., Oona Hathaway, *Secrecy’s End*, 106 *Minn. L. Rev.* 691, 721–30 (2022) (discussing the overclassification and excessive secrecy in the national security context) Kitrosser, *supra* note 50, at 501–02 (“The Court [in *United States v. Nixon*] . . . suggested that the need for candor in executive branch discussions justifies a presumption in favor of the privilege and that national security based privilege claims merit even greater protection.”); Sinnar, *supra* note 50, at 1001–06 (“Proponents of judicial deference in national security cases contend that judicial review will risk the exposure of sensitive information and thereby endanger US security.”).

388. See generally Stephen P. Mulligan & Jennifer K. Elsea, *Cong. Rsch. Serv.*, R41404, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information*

agencies—which are often perceived as more politically aligned with broader conservative forces and goals—largely untouched. Police secrecy exceptionalism largely fits into this broader legal and political narrative.

Another variant of this story is that as the national security state and subfederal law enforcement agencies grew more intertwined over the past two decades, federal secrecy protections began to migrate into the subfederal context. In the wake of September 11, legislators granted the national security state sweeping secrecy powers.<sup>389</sup> Judges largely deferred to agencies' broad readings of these powers, and the public has mostly tolerated this descent into secrecy.<sup>390</sup> At the same time, police departments were increasingly called upon to serve as frontline workers for the national security state.<sup>391</sup> They partnered with federal agencies through fusion centers and joint terrorism task forces and received training from military and federal law enforcement agencies.<sup>392</sup> And as the national security state amassed greater authority to shield information, these secrecy powers trickled down to subfederal law enforcement agencies.<sup>393</sup>

Each of these drivers has likely played a role in the growth of police secrecy exceptionalism. The failures of participatory models of democracy, the changing political valence of transparency, and the growth of national security federalism all likely contributed to pushing the police further out of view even as other state and local government actors were forced further into the glare of public scrutiny. At the very least, these various explanations offer a useful starting point for examining how the problem of police secrecy exceptionalism might be addressed.

#### D. *Does Police Secrecy Exceptionalism Matter?*

There are two central counterarguments to this Article's critique of police secrecy exceptionalism. The first is that there is nothing wrong with the current legal regime. Under this view, police perform uniquely dangerous and difficult jobs and therefore require heightened protections. And although these secrecy protections are robust, they are justified in light of the threats that police face and the distinctive challenges inherent to the work of policing. The previous sections offered some responses to this group of claims.

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<https://crsreports.congress.gov/product/pdf/R/R41404/32> [<https://perma.cc/Z2QN-SG7X>] (2017) (detailing the “complex and often overlapping set of statutes” that prohibit unauthorized disclosures of national security information).

389. Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, *Time* (Sept. 11, 2021), <https://time.com/6096903/september-11-legal-history/> (on file with the *Columbia Law Review*).

390. See Kwoka, *Procedural Exceptionalism*, *supra* note 239, at 116–42.

391. See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *Stan. L. Rev.* 289, 314 (2012).

392. *Id.* at 303, 308.

393. *Id.* at 314.

The second counterargument is that police secrecy exceptionalism doesn't matter. Under this reasoning, we already know that deep strands of violence, racism, and sexism that run throughout the nation's history are inextricably intertwined with policing.<sup>394</sup> And we know that these transparency statutes exist within the same broader criminal justice system that disproportionately harms oppressed communities, especially poor communities of color.<sup>395</sup> Better access to police information won't bring about the radical structural changes that are needed.<sup>396</sup>

This is a powerful and persuasive critique, one that plugs into a much larger debate among progressive advocates and scholars about the pursuit of incremental versus radical change in policing.<sup>397</sup> This Article offers only a couple of narrower points in response. As a threshold matter, these statutes serve functions beyond facilitating public oversight of government. Even if the public at large does not need any further evidence of systemic racism and violence in policing, these records can still benefit individual requesters. They can allow the victims of police violence and their families to learn the truth of what happened.<sup>398</sup> They can also serve as an important, if still deeply flawed, alternative to restrictive discovery rules that disadvantage criminal defendants.

Further, these laws are instrumental in nature, and they cover a wide variety of records—not just body camera videos and police disciplinary files, but also financial documents, emails, text messages, prison logs, contracts with private companies, police and prison policies, memoranda of understanding with the federal government, and myriad other records that could be helpful in demonstrating either individual harms or broader systemic patterns. These statutes can therefore be utilized to serve a variety

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394. See *supra* notes 361–362 and accompanying text.

395. See *supra* notes 363–370 and accompanying text.

396. See, e.g., Akbar, *Radical Imagination*, *supra* note 380, at 421 (criticizing DOJ reports on the Baltimore and Ferguson police departments for proposing “a range of standard fare criminal law reform proposals, including increasing . . . transparency”); Levine, *Introduction*, *supra* note 41, at 1173 (“[H]ow much more information do we need to know that the criminal legal system in this country is a failed experiment?”).

397. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 *Calif. L. Rev.* 1781, 1826 (2020) [hereinafter Akbar, *Abolitionist Horizon*] (distinguishing between “reformist reforms” and “abolitionist change” in policing); Southerland, *supra* note 368 (manuscript at 6–10) (exploring the tension between reformist and abolitionist efforts in policing); see also Aaron Tang, *The Radical-Incremental Change Debate, Racial Justice, and the Political Economy of Teachers' Choice*, 169 *U. Pa. L. Rev. Online* 186, 187 (2021) (exploring this tension in non-policing contexts).

398. See, e.g., Jeff Coltin & Amanda Luz Henning Santiago, *A Guide to 50-a, the Most Contentious State Law on the Books*, City & State N.Y. (Oct. 18, 2019), <https://www.cityandstateny.com/policy/2019/10/a-guide-to-50-a-the-most-contentious-state-law-on-the-books/177365/> [https://perma.cc/2G5C-7MZS] (“We should know first hand when our loved ones are killed. We should know who did it, why they did it . . . .” (internal quotation marks omitted) (quoting Gwen Carr, the mother of Eric Garner who was killed by an NYPD Police Officer in 2014)).

of ends, including more abolitionist ones.<sup>399</sup> Defunding the police, for example, will involve untangling the complexities and nuances of the varied sources of police funding, which include federal, state, and local government programs and grants, as well as private donors and semi-private organizations like private police foundations.<sup>400</sup> Public records statutes might help to bring these various funding streams to light.

Efforts to divest from policing and divert resources to social programs, too, could be aided by police records.<sup>401</sup> Implementing these changes will require knowing the shape and structure of the public need. How many additional social workers or counselors will be required in a particular jurisdiction? When will demand for services be highest? Police records might be helpful in showing when calls come in, what type of assistance is called for, and where it is most needed. These records could be used to help construct a new infrastructure of social services. Put another way, improved public access to police records alone will never be sufficient to achieve lasting and radical change. But these statutes could serve as a useful tool to harness along the way.

#### IV. REMEDYING POLICE SECRECY EXCEPTIONALISM

##### A. *Transparency Law Reforms*

If we accept that these statutes are worth preserving, the question then becomes what can be done to address police secrecy exceptionalism. In recent years, there has been a growing call to apply generally applicable laws and processes to law enforcement actors—to “treat police departments like other agencies.”<sup>402</sup> Yet the problems chronicled above—the myriad types and sources of protections afforded to police, the formidable political power of police unions, and the structural barriers to

399. See Southerland, *supra* note 368 (manuscript at 69) (describing how advocates can “infus[e]” reformist laws “with an abolitionist ethos”).

400. See, e.g., Akbar, *Abolitionist Horizon*, *supra* note 397, at 1843 (emphasizing the “material infrastructure” of law); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *Harv. L. Rev.* 1613, 1635–36 (2019) (describing budgetary diversion efforts); see also Ali Winston & Darwin Bond Graham, *Private Donors Supply Spy Gear to Cops*, *ProPublica* (Oct. 13, 2014), <https://www.propublica.org/article/private-donors-supply-spy-gear-to-cops> [<https://perma.cc/WCC6-VTJB>] (describing the role of private donors).

401. See *Invest-Divest, Movement for Black Lives*, <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/YA7Q-BLTV>] (last visited Oct. 11, 2022); see also Akbar, *Abolitionist Horizon*, *supra* note 397, at 1843–44 (“We cannot meaningfully call for [major reforms] without then thinking about what other support people may need and the larger social structures . . . .”); Bell et al., *supra* note 346, at 1295–98 (noting issues in policing are closely tied to broader social services infrastructure).

402. Monica C. Bell, *Anti-Segregation Policing*, 95 *N.Y.U. L. Rev.* 650, 737 (2020) [hereinafter Bell, *Anti-Segregation Policing*] (citing as examples Friedman & Ponomarenko, *supra* note 31; Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 *Stan. L. Rev.* 1039, 1042–43 (2016); Slobogin, *Policing as Administration*, *supra* note 315, at 95). For a discussion of the history of regulating police through administrative law, see Slobogin, *Policing as Administration*, *supra* note 315, at 123–27.

civilian oversight of police—all suggest that when it comes to police secrecy, merely eliminating these special protections will not be enough. More profound changes are needed to address the substantial harms imposed by police secrecy exceptionalism. These changes could take different forms, including creating separate statutes for police records, removing control over police records from law enforcement agencies, and repealing or narrowing police exemptions. The merits and drawbacks of these approaches are analyzed below.

1. *Separate Statutes for Police Records.* — These various strands of police secrecy do not operate in isolation but instead work together to amplify police secrecy powers. The statutory protections enacted by the legislature are then expanded by aggressive police department interpretations, which are in turn approved by the judiciary.<sup>403</sup> These broad and numerous exemptions also overlap, allowing police departments an array of options from which to choose when shielding records and information. When one statutory exemption is removed or curtailed, law enforcement agencies can shunt these records into one or many other existing carve-outs. This tactic has important implications for both remedying and constraining police secrecy exceptionalism.

The layered and overlapping nature of these exemptions make it difficult to secure meaningful reform through one-off amendments of individual provisions. Legislatures could instead remove police records from the general public records statute entirely. There is precedent for this. Certain states have already enacted a separate statute for police records to provide greater secrecy for law enforcement records than for other government agencies.<sup>404</sup> This same approach could be used for the opposite ends. Breaking out police records into a wholly separate statutory regime would allow legislators to craft a new transparency regime, one unburdened by decades of incremental changes and complex interactions between different parts of the statutory code found in every state public records statute.

This new regime could also remedy power imbalances between the police and those communities most affected by policing. The current structure of the transparency law regime places decisionmaking control over government records firmly in the hands of government actors. Public records statutes allow the public to request access to government documents, but whether and how these materials are released is ultimately a decision hammered out by agency officials, legislators, and judges. Transparency law is overdue for a more radical rethinking.<sup>405</sup> Enacting a separate statute for police records could open up space for new approaches. It could be crafted to allow the public power not just to obtain

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403. See *supra* notes 222–224 and accompanying text.

404. See, e.g., Colo. Rev. Stat. §§ 24-72-301 to -309 (2022).

405. See Christina Koningsor, Public Undersight, 106 Minn. L. Rev. 2221, 2268–80 (2022) [hereinafter Koningsor, Public Undersight].

information already gathered, but also to compel the government to gather new types and forms of information.<sup>406</sup> It could ramp up affirmative disclosure obligations, which obligate police to turn over certain records proactively.<sup>407</sup> And it could be structured to reduce police power and control over the records process, granting the individuals affected by these records greater control over how they are used and whether they are disclosed.

2. *Non-Police Control of the Public Records Process.* — Passing separate statutes for police records flows into a closely related mechanism for curtailing excessive police secrecy: removing control over police records from law enforcement agencies. Assigning request processing responsibilities to a review board outside of the police department would offer a variety of benefits. It would divert funds and resources away from police departments and into public oversight mechanisms. Processing fees could be imposed and recouped directly by the board rather than by the police department, stripping these law enforcement agencies of their ability to charge high costs as a way to avoid public scrutiny. Board member salaries could also be diverted from the police department budget, ensuring that these efforts do not end up funneling additional money and resources back into police departments.<sup>408</sup> Further, appointment powers could be structured in various ways that vest additional power with the public, especially those communities most affected by policing.

Removing decisional control from police departments would also intervene at the most important phase of the public records process. While court battles over police secrecy protections often garner the most attention, it is at the administrative stage that police secrecy flourishes. Whoever makes this initial determination to grant or deny a police request has the greatest ability to influence public access to police records.<sup>409</sup> A separate entity may be less beholden to police officer interests and more likely to release information and materials that are adverse to the interests of the police.

There is also existing precedent for this structure. Many states have already removed agency-level decisional control when it comes to administrative appeals, creating a separate umbrella agency that handles appeals from agency-level denials. Texas offers an example. Under its public records law, any agency that wants to deny a request must first seek

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406. See, e.g., *id.* at 2268–71; Okidegbe, *Discredited Data*, *supra* note 346, at 2047–48.

407. Scholars of FOIA have long advocated for more robust affirmative disclosures. See e.g., Kwoka, *FOIA, Inc.*, *supra* note 42, at 1429–32.

408. Cf. *Reformist Reforms vs. Abolitionist Steps in Policing*, *Critical Resistance*, [https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR\\_NoCops\\_reform\\_vs\\_abolition\\_CRside.pdf](https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf) [<https://perma.cc/H8BS-5J7T>] (last visited Oct. 11, 2022) (criticizing reform efforts that funnel resources back to police).

409. See *supra* note 293 and accompanying text (describing how few requesters appeal agency-level denials).



permission from the Attorney General's office.<sup>410</sup> This approach is not perfect: It often delays response times, and the process offers little easy way for requesters to oppose agency claims. Even so, it increases friction for the agencies and forces them to craft arguments that will be reviewed by an outside party.<sup>411</sup> Yet so few requesters ultimately appeal agency denials that these processes end up affecting only a fraction of requests.<sup>412</sup> Breaking out the initial response from under the control of the police would target the most critical phase of the public records process.

There would likely be downsides to this approach as well. Without simultaneous reform of the statutory regime, an independent police-records board would offer a procedural fix without addressing the underlying substantive problems. The same set of powerful statutory exemptions would still apply. Further, as a practical matter, employees of this separate police public records entity might end up requiring the cooperation and buy-in of police for certain categories of requests like searches of individual police officers' emails. This collaboration heightens the risk that the board would become co-opted over time through frequent and repeat interactions with police.<sup>413</sup> Such a relationship has surfaced before in reform efforts like civilian oversight boards.<sup>414</sup>

And if this co-optation didn't occur, and the response board remained independent, its independence would likely give rise to a host of separate problems. Police officers would likely view the appeals board as hostile to their interests and impede its efforts to respond to requests efficiently or effectively. They may also be further incentivized to create little or incomplete record trails in the first instance. Breaking out processing responsibilities and assigning them to an independent body might also raise questions about knowledge and expertise. Judges at all levels have tended to acquiesce to law enforcement demands for secrecy,<sup>415</sup> and an independent board may prove equally reluctant to overrule police department evaluations of risk.

Some of these concerns might be addressed through various technological, legal, or structural fixes. Software that makes it easier to

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410. Tex. Gov't Code Ann. § 552.301(a) (West 2021).

411. Cf. Kwoka, *Procedural Exceptionalism*, supra note 239, at 164–65 (describing the benefits of increasing the costs of secrecy to government).

412. See supra note 293 and accompanying text (describing how few requesters appeal denials).

413. See Fidler, supra note 31, at 531–32 (describing the risks of interest capture in the context of local administrative governance of police).

414. See, e.g., Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *Yale L.J.* 778, 814 (2021) (distinguishing between traditional approaches to community reform versus those that transfer actual power to communities); Ashley Southall, Ali Watkins & Blacki Migliozi, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished.*, *N.Y. Times* (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html> (on file with the *Columbia Law Review*) (describing how the NYPD routinely ignores punishment recommendations submitted by the civilian review board).

415. See supra section II.B.

conduct large-scale email searches, for example, might bypass some of the problems of police cooperation and buy-in. And imposing stricter and clearer requirements for gathering data might also cure some of the problems of disincentivizing record collection. Even so, barriers to full public access would likely remain.

3. *Repealing or Narrowing Police Exemptions.* — The narrowest approach to fixing police secrecy exceptionalism would be to target individual exemptions for amendment or repeal. Most police secrecy reforms to date have taken this shape. In recent years, especially, state legislatures have amended specific provisions that are especially favorable to police, including protections for body camera footage, police disciplinary records, and the Glomar.<sup>416</sup> Such piecemeal reform is the least likely to have a substantial impact. These amendments leave the police with ample alternative sources of secrecy authority.<sup>417</sup> And such narrow reforms risk distracting energy and attention from deeper and more meaningful changes.<sup>418</sup>

That said, these one-off provisions can help to constrain certain pockets of police secrecy. Whether these targeted amendments or repeals are ultimately successful in enhancing public access depends in part on the specific nature of the statutory change. To give an example of the risks of poorly drafted amendments, the modified disciplinary-file-access provisions in New York and California both gave rise to a substantial amount of confusion and litigation over whether they had retroactive effect.<sup>419</sup> Making these types of statutory choices clear from the outset will reduce police departments' ability to delay disclosures and drive up costs for requesters through protracted litigation.

Many of these targeted statutory reforms have also focused on the highest-profile categories of records, especially body camera footage and police disciplinary records. This Article identifies other categories that are equally protective.<sup>420</sup> Sweeping exemptions to protect any life or property,

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416. See Legislative Responses for Policing—State Bill Tracking Database, *supra* note 28.

417. See, e.g., 2017 Okla. Sess. Laws 2232 (mandating that body camera recordings be kept for seven years but allowing sheriff to dispose of recordings that meet certain criteria after one year); 2015 Okla. Sess. Laws 1037 (expanding public availability of body camera footage while still permitting numerous justifications for redactions).

418. See Levine, Introduction, *supra* note 41, at 1168.

419. See Pariss Briggs, California Courts Rule in Favor of Retroactive Release of Police Misconduct Records, Reps. Comm. for Freedom of the Press (Apr. 2, 2019), <https://www.rcfp.org/california-courts-rule-in-favor-of-retroactive-release-of-police-misconduct-records/> [<https://perma.cc/J47K-TSG3>]; John Camera, State Judge Rules 50a Repeal Not Retroactive, Spectrum News (May 27, 2021), <https://spectrumlocalnews.com/nys/udson-valley/public-safety/2021/05/27/state-judge-50a-repeal> [<https://perma.cc/8TEE-MGTN>].

420. See, e.g., *supra* note 170 and accompanying text (describing New Jersey's broad protection of surveillance technologies if disclosure would endanger the safety of "persons" or "property").

for example, can and should be repealed. They are far too broad to offer any meaningful restraints on government secrecy. Similarly, expansive protections for antiterrorism efforts should be curtailed. Such piecemeal reforms can and sometimes do have some beneficial effect, and yet they also risk constraining police secrecy only at the margins.

B. *Extralegal Data Collection and Monitoring*

There is also an important alternative mechanism for curtailing police secrecy: monitoring police directly. A growing set of civil society actors have circumvented these transparency statutes altogether, choosing instead to gather data by directly observing police and courtroom activity.<sup>421</sup> These activist groups are looking not to obtain official police or criminal justice data but to generate their own sources of information about government.<sup>422</sup> Cop-watching groups, for example, have built video databases that allow them to monitor police activity and flag abusive officers,<sup>423</sup> and they have published incident reports intended to rival the official police narratives.<sup>424</sup> Court-monitoring organizations have also gathered their own data on the criminal justice system—monitoring criminal court arraignments, for example, to gather data on the race of the accused, whether bail is set, and at what rate.<sup>425</sup> They then use this information to advocate for the abolition of cash bail.<sup>426</sup>

There are clear benefits to this approach. These activists set their own agenda, determining what information to gather and how this data is used. In doing so, they break the government's monopoly on both information creation and information disclosure. They also gather valuable data on policing without expanding police budgets. One drawback of trying to improve police data collection practices internally is that it risks funneling additional money and resources to the departments themselves. Extralegal monitoring protects against this. Further, such efforts allow communities

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421. Koningisor, Public Undersight, *supra* note 405, at 2248–49 (describing these groups).

422. See *id.* at 2250–521.

423. Witness, Planning Workbook: Police Violence Video Database 3 (2018), <https://elgrito.witness.org/portfolio/project-planning/> [<https://perma.cc/7KN6-XZVP>].

424. Berkeley Copwatch, People's Investigation: In-Custody Death of Kayla Moore 4–5 (2013), [https://9a46f9d7-48d3-4fb9-8191-4c83ccb5c68f.filesusr.com/ugd/9faa72\\_2d5720cfd6374afa811cfc2f6960238e.pdf](https://9a46f9d7-48d3-4fb9-8191-4c83ccb5c68f.filesusr.com/ugd/9faa72_2d5720cfd6374afa811cfc2f6960238e.pdf) [<https://perma.cc/PW7W-HCE4>].

425. See, e.g., Court Watch NYC, Same Game, Different Rules: Eyes on 2020: Lessons From the First 100 Days of New York's Bail Reform 3–4 (2020), [https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5f047ccd20db107e1570cd29/1594129629578/Same+Game+Different+Rules\\_CWNYC\\_July+2020.pdf](https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5f047ccd20db107e1570cd29/1594129629578/Same+Game+Different+Rules_CWNYC_July+2020.pdf) [<https://perma.cc/K5HK-FWLM>] (reporting the results of 360 hours spent observing criminal court arraignments).

426. See *id.* at 3 (advocating the abolition of money bail).

that have been long subjected to intensive police surveillance to instead cast their gaze back at the state.<sup>427</sup>

There are drawbacks as well. These efforts can be time-intensive and difficult to scale.<sup>428</sup> They are also limited in scope: By definition, these groups are able to monitor only the limited set of government activities that take place in public view. For this reason, a number of groups have utilized traditional legal avenues like public record requests in combination with extralegal avenues like court-monitoring or cop-watching.<sup>429</sup> Such extralegal efforts can place pressure on the existing statutory regime, incentivizing government actors to reform legal processes from the outside in.<sup>430</sup> In this way, both supporting and scaling up these extralegal efforts can help to curtail police secrecy as well.

### C. *Policing Reforms*

Structural changes in policing could reduce the harms of police secrecy too. Sometimes these effects are obvious: Abolishing or shrinking the police would diminish the costs of agencies' near-exclusive control over law enforcement information as well. Yet there are risks to recommending broader transformations in policing as a way out of the police secrecy box. This would almost seem to have it backward. The goal of ending police secrecy exceptionalism is to elicit more profound transformations, not the other way around. Transparency is an instrumental tool, one to be harnessed in the pursuit of substantive change.

That said, secrecy often operates as a form of power.<sup>431</sup> And decreasing law enforcement control over records and information can reduce this source of authority. Further, reforms in police secrecy can be deeply intertwined with more profound substantive change. Police secrecy exceptionalism is often a bottom-up process, with police departments exerting enormous control through their initial administrative-level responses. Change the culture and makeup of these departments, and heightened transparency may follow. Certain structural reforms in policing—for example, redistricting to create more racially mixed police districts<sup>432</sup>—could have the secondary effect of piercing the entrenched culture of secrecy that flourishes in certain districts or precincts.

Changes in funding models could have an effect as well. Police secrecy exceptionalism is expensive. Cities and towns pay enormous financial costs for police departments' refusal to comply with the dictates of the law.<sup>433</sup>

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427. See Koningsor, *Public Oversight*, *supra* note 405, at 2255–58.

428. See *id.* at 2259–61 (describing the time and effort involved in community monitoring of national security agencies).

429. See *id.* at 2224–25.

430. *Id.* at 2268–71.

431. See Weber, *supra* note 373, at 233.

432. See Bell, *Anti-Segregation Policing*, *supra* note 402, at 740–44.

433. See, e.g., Shur & Jackson, *supra* note 116.

Yet these penalties are often borne by the city, rather than the agency itself.<sup>434</sup> Changing these funding models so that the departments must internalize the financial costs associated with violating these statutory requirements could incentivize departments to comply with the law.<sup>435</sup> The burden of these financial costs might lead to improved response processes and undermine entrenched cultures of secrecy.<sup>436</sup>

Other changes proposed by policing scholars could have the effect of constraining police secrecy as well. Professor Monica Bell has argued for integrating reconciliation processes into policing, for example, an approach that could also peel back the curtain on police secrecy by requiring law enforcement agencies to identify and make public not only past but present and ongoing abuses.<sup>437</sup> And Professor Maria Ponomarenko has argued in favor of permanent administrative bodies to oversee police departments—what she refers to as “regulatory intermediaries”—as a mechanism for improving public oversight of policing and facilitating a more informed public debate.<sup>438</sup>

These are some examples. The policing scholarship is replete with proposals that would have the secondary benefit of destabilizing and constraining police secrecy powers.<sup>439</sup> While transparency in policing should not be pursued for its own sake, nor as a replacement for more radical and profound change, these instrumental and substantive reforms can be intertwined, even reinforcing one another. Access to police information can be harnessed to guide and to fuel deeper structural transformations. And changes in policing, in turn, can help to cabin excessive police secrecy.

#### CONCLUSION

Police departments have secured a vast set of exceptional secrecy protections that have been denied to other government actors and agencies. Mapping out the infrastructure of police secrecy illuminates the breadth and complexity of these various sources of informational protection. It also opens the door for a normative critique of the theoretical and doctrinal foundations that prop up this infrastructure. And it offers up an agenda for continued research. It uncovers a host of related inquiries that could benefit from further exploration, including

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434. *Id.*

435. See Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 *UCLA L. Rev.* 1144, 1165–73 (2016).

436. See, e.g., John Rappaport, *How Private Insurers Regulate Public Police*, 130 *Harv. L. Rev.* 1539, 1595–601 (2017) (describing the effect of increased police insurance premiums).

437. Bell, *Anti-Segregation Policing*, *supra* note 402, at 744.

438. Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 *Nw. U. L. Rev.* 1, 49–50 (2019).

439. See, e.g., Capers, *supra* note 30, at 725; Rushin, *supra* note 252, at 1244–47.

the pursuit of richer empirical data on police department records responses and a more comprehensive examination of the ways that these transparency statutes can be harnessed to support more radical and profound transformations in policing.

Finally, it demonstrates that it will not be enough to merely reverse these extraordinary protections piecemeal and return to baseline rules that “treat police departments like other agencies.”<sup>440</sup> Uprooting police secrecy exceptionalism requires far more. The many entangled and interlocking sources of police secrecy should be addressed together, and a new regime that removes control and authority over police records from law enforcement agencies should be constructed in its place.

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440. Bell, *Anti-Segregation Policing*, supra note 402, at 737.

