Policing the OPEN ROAD

HOW CARS TRANSFORMED AMERICAN FREEDOM

Sarah A. Seo

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Introduction

> The horseless carriage was just arriving in San Francisco, and its debut was turning into one of those colorfully unmitigated disasters that bring misery to everyone but historians.
>
> Laura Hillenbrand, *Seabiscuit* (2001)

On April 11, 1916, eight years after the Model T's debut and just two years after the perfection of its moving assembly line, the Tucson, Arizona, sheriff's office received a call around midnight about a robbery and assault at Pastime Park, a pleasure resort just north of the city. Three officers jumped into a "public service automobile" and, on their way to the scene of the crime, saw a car that seemed to be heading toward them suddenly turn around. Suspicious, they sped up to the car and yelled "Stop!" and "We are officers!" to no avail. Deputy Sheriff Thomas Johns testified that he then fired his pistol at the wheel "to puncture the tire." He fired a second shot, Deputy Sheriff Joseph Wiley fired the third shot, and Police Officer Ramon Salazar followed with a fourth shot—all to "find out who the parties were in the car." As it turned out, Captain John Bates and his wife, Mary, innocent parties, were driving home from a friend's house.

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One of the shots struck and killed Mrs. Bates. All three officers faced murder charges.[1]

At trial, Captain Bates testified that his car was "very noisy" and the road "rough," which could have described all motor vehicles and country roads at the time. The "chains which hold up the tailboard were rattling up and down on the fenders which are over each rear wheel; in fact, every time [he] hit a bump they would jump up and down; the muffler of the machine was wide open, and the exhaust [was] directly in front of the driver, underneath the footboard." The driver of the public service automobile testified that his muffler was "wide open" as well. With all the racket that the cars were making, it was impossible for the Bateses to hear the officers' shouts for them to stop. This, plus the fact of the Bateses' actual innocence, convinced the jury that the three defendants had acted beyond their lawful authority and were guilty of murder.[2]

In the case of *Wiley v. State*, which affirmed the guilt of Deputy Sheriff Johns, whose shot had killed Mrs. Bates, the Arizona Supreme Court maintained that even if the Bateses had heard the shouts and refused to stop, the officers' manner of pursuit "was more suggestive of a holdup by highwaymen than an arrest by peace officers." The court was not at all being facetious. Recognizable police cars with black and white color blocks would not exist for another two decades, and the first revolving emergency light, the "Beacon Ray," would not be invented until 1948. As late as 1934, a consultant recommended that the police department in Dallas, Texas, paint its patrol cars "some unusual color, such as fire department red or bright yellow or perhaps with a fine grade of aluminum paint." Without "definite identification," his report warned of precisely what had happened to the Bateses: it was "not inconceivable that a frightened motorist thinking he is to be robbed may attempt to run away from officers, thereby creating a situation embarrassing and undesirable at its best and which may result in a serious accident or even in the officer, through mistaken identity, actually firing on and killing a reputable citizen." At the time of the Arizona incident in 1916, it was uncommon for "public service" vehicles to be branded as such. The exceptions had either a sign the size of a license plate attached to the radiator or the initials

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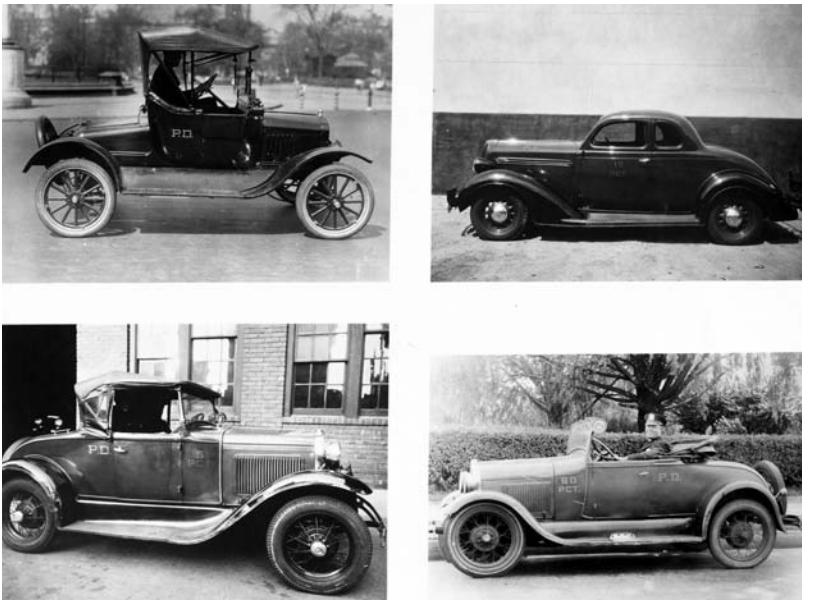

New York Police Department cars, circa 1925.

Courtesy of the Alfred J. Young Collection, Museum of the City of New York, X2010.11.11056.

"P.D." painted on the door—nothing that drivers could easily discern, especially at nighttime.[3]

The minuscule markings matched the small size of police forces at the time. When officers shared the task of enforcing the criminal laws with citizens and private patrol services, it would have been unfathomable that respectable citizens like the Bateses might be targets of a police chase. The law reflected this social reality. Because private citizens also pursued, arrested, and prosecuted those who had injured or wronged them, the common law clearly circumscribed the right to arrest in order to distinguish a lawful seizure of a person from a kidnapping or assault. Legal requirements ensured that arrestees would know the exact reason for the apprehension. So when Captain Bates and his wife drove home after an evening with friends, they had every reason to believe, as the court noted, that highway bandits were after them, firing away.[4]

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Unfortunately, an intact copy of the officers' brief in their defense has not survived the withering effects of time, but we can hazard an educated guess as to their argument. While half of the court's opinion dealt with the different degrees of murder and joint liability, the other half discussed an officer's arrest powers. As the court recited, the common law required the showing of a warrant, but it authorized warrantless arrests when an officer reasonably believed that an arrestee had committed a felony offense. The law also allowed an officer to kill a fleeing felon. Given these well-established precedents, the defendants likely claimed that their attempt to make a felony arrest unintentionally resulted in Mrs. Bates's death. An especially persuasive attorney would also have pointed out that, with motor-powered vehicles having practically invented the getaway, a rule that officers could not stop cars with gunfire would effectively nullify their authority to arrest suspected felons speeding away.[5]

The Arizona court rejected the officers' arguments, and rather than focusing on their right to arrest, it instead elaborated on the Bateses' right to drive. The opinion declared that the officers had violated the "personal liberty of both Capt. Bates and the deceased," who, "having committed no crime, were entitled to proceed on their way without interruption or molestation." This presented a broad statement on the rights of drivers. Entitling them *to proceed on their way without interruption or molestation* necessarily included the corresponding right to decide for themselves whether officers had legal cause to stop them. If they decided that an officer did not, then they would have had the additional right to refuse to pull over. Indeed, the court made this exact suggestion when it stated hypothetically that even if "the Bateses had heard [the officers'] outcries and refused to stop, no inference of guilt could have been reasonably drawn therefrom," a mandatory inference to justify an interference with the Bateses' right "to proceed on their way." The rules of the road according to the Arizona Supreme Court would have made it extremely difficult for officers to stop a car they found suspicious. This was the world of *Wiley v. State*, when the police were few in number, easily mistaken for highwaymen, and limited in their authority over innocent citizens.

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Ninety-Nine Years Later

On July 10, 2015, a Texas state trooper pulled over Sandra Bland for failing to use a turn signal. After a tense dialogue, the traffic stop quickly came to a violent end. The trooper first tried to yank the young, black woman from the car before forcing her out with a Taser gun. He then arrested Bland, who was lying face down, crying, and screaming in pain. Three days later, Bland was found dead in her jail cell. A year later, *The Nation* published an article that asked the question that had become a viral hashtag, #WhatHappenedtoSandraBland? To find the answer, the article examined Bland's life, beginning with her birth to a single mother in Chicago's West Side. The answer, according to the writer, was not just the neglectful conditions in that Texas county jail that led to her death. The answer was also unemployment, insufficient mental health care, and draconian drug laws. Bland's life story is tragic. Also tragic is that the themes of poverty and race in the criminal justice system are all too common.[6]

But another motif, although unnamed, loomed throughout the article. The automobile appeared in nearly every significant setback in Bland's life. Exorbitant traffic tickets that Bland paid for by "sitting out" in jail. Convictions for driving under the influence and arrest warrants for unpaid traffic fines that severely limited her employment options. Charges for possessing marijuana—her lawyer suspected that Bland was self-medicating—that the police discovered in her car. The automobile stood in the background in *The Nation*'s biography of Bland, but it played a prominent role as a site of violence, poverty, and discrimination.

The overpolicing of cars is a fact of life for people of color in America. Although Bland was not killed during the traffic stop, in 2015, the year of her death, 27 percent of police killings of unarmed citizens began with a traffic stop, according to one survey. Bland herself had been increasingly vocal on social media against police abuse and violence against African Americans, especially when the Black Lives Matter movement gained momentum after a police officer fatally shot eighteen-year-old Michael Brown. It turned out that what had happened in Ferguson, Missouri, on August 9, 2014, was part of a larger trend. The US Department of Justice opened an investigation of the

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Ferguson Police Department and found "a pattern of unconstitutional policing" that skewed along racial lines. Most encounters with law enforcement, the report concluded, began with a traffic stop, an experience that disproportionately befell Ferguson's black residents. In 2014, its municipal court had roughly 53,000 traffic cases, compared with about 50,000 nontraffic cases. This pattern was not limited to Ferguson in the American car-dominated society. In the words of several scholars, "No form of direct government control comes close to these [traffic] stops in sheer numbers, frequency, proportion of the population affected, and in many instances, the degree of coercive intrusion."[7]

What has not changed since the days of *Wiley v. State* is that the police's authority during car stops remains contested. After Bland's arrest, the *New York Times* asked several lawyers and law professors to assess the legality of Trooper Brian Encinia's actions. Although they believed, after having watched a video recording of the encounter, that Encinia had exceeded his lawful authority, they hedged their answers. The police rarely arrest drivers for failure to use a turn signal, but the legal experts recognized that it is technically an arrestable offense in Texas. There was no evidence that the officer feared for his safety to justify ordering Bland out of her car, but the police have "complete discretion" to do so, and drivers are legally obligated to comply. While Encinia forcefully restrained Bland, the law does allow the use of force in proportion to the circumstances of an arrest, and at least one of the commentators did not think that Encinia used disproportionate force. Throughout the twentieth century and into the present, motorists, the police, and even legal scholars have been unsure about the law of car stops.[8]

But what has changed since the early years of the automobile is that everyone's uncertainty stemmed not so much from officers' attempts to exceed their rather limited powers; instead, the inconclusiveness arose from questions about what rights individuals have against the police's broad authority. The dashboard camera in Sandra Bland's case was crucial in undermining Trooper Encinia's claim that his actions were defensible. Without the recording, a judge would have been more likely to take the officer's word that the driver was "combative and uncooperative," as Encinia alleged in the arrest af-

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fidavit. For most of the twentieth century, there were no tapes. This mattered when prosecutors, judges, and juries reliably accepted the police's version of the story. But even with the video, Encinia, in the end, faced no criminal charges, revealing just how much leeway the law gave police. A grand jury indicted the trooper only for perjury based on his false statements in the arrest affidavit. Special prosecutors then dropped that charge in exchange for Encinia's agreement never to work again as a police officer.[9]

What is the history that can account for the changes from *Wiley v. State* to Sandra Bland? In the span of a century, towns and cities throughout the country—and not just in metropolitan centers—expanded their forces and professionalized beat cops, turning them into "law enforcement officers." Figures are hard to come by, but one early report indicated that in the sixteen smallest states, the number of officers as a percentage of the population nearly doubled from 1910 to 1930. In addition to adding manpower, municipalities unified the police function and increased the police's discretionary authority. Courts then sanctioned that accumulation and concentration of power. The most glaring part of this history, considering that it culminated with mass incarceration by century's end, is race. Today, it would be improbable that Mrs. Bates, a white woman sitting in the passenger seat next to her husband of social standing, would be killed in a police shooting, a tragedy that now falls mostly on minority drivers. The statistics bearing this out, as well as stories like Sandra Bland's, not only reveal a problem of discrimination and implicit bias; they also raise a troubling question about our laws that have actually enabled racialized policing.[10]

Contrary to what one might expect, the social and legal developments that made the systematic policing of minorities possible did not originate with an intention to do so. This history begins with the mass production of the automobile and the immediate imperative to regulate the motoring public. From today's perspective, it may be unexpected—incredible, even—to call attention to the democratization of policing. But this was a consequence of mass automobility. Before cars, American police had more in common with their eighteenth-century forebears than with their twentieth-century successors. What revolutionized policing was a technological innovation

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that would come to define the new century. This is, therefore, a history about policing cars and, thus, about policing American society as it fast became an automotive society. It is thus also about the practical, theoretical, and legal problems of policing everybody who drove. Those who became subject to regular police surveillance included not just criminals in getaway cars but more importantly, and for the first time, the respectable class of citizens who were the automobile's early adopters. The need to discipline drivers and to do so without giving offense necessitated changes to the police function and to well-established constitutional laws. Officers now required discretion to administer the massive traffic enforcement regime and deal with the sensitivities of "law-abiding" citizens who kept violating traffic laws. The law's accommodation of discretionary policing profoundly altered what it meant to live free from state intrusion in the Automotive Age. By the postwar, Cold War years, American society's dependence on the police to maintain order raised troubling comparisons with totalitarian police. Unforeseen by midcentury jurists, their solution to the potential arbitrary policing of everyone led directly to the problem of discriminatory policing against minorities. Only by considering how American society as a whole came to be policed can we more fully understand the history of American criminal justice and its troubled present.

Mass production would not have been practicable without mass adoption, and Americans eagerly embraced the "horseless carriage." Numbers provide some sense of the dramatic change. While the number of traditional carriages manufactured in the country shrank from 2 million in 1909 to 10,000 in 1923, the number of automobiles produced during those same years went from about 80,000 to over 4 million. In 1910, the number of registered passenger cars, a category that gets closer to the number of drivers since it includes secondhand cars, was just under 500,000. That figure exploded to over 8 million in 1920 and to nearly 18 million in 1925—a thirty-fivefold increase in fifteen years. In Robert and Helen Lynd's famous study of the average American "Middletown," anonymized for Muncie, Indiana, there were an estimated 200 cars in 1906; in 1923,

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there were 6,221, or roughly two cars for every three families. By 1925, there was one car for every 4.85 Hoosiers, compared with the national average of one car per 6.5 persons. For a more qualitative portrait of this trend, consider architecture in the suburbs, itself a development that accompanied the automobile. The overhead garage door, a commonsensical space-saving contraption, was invented in 1921, and the electric garage door opener followed five years later. "Real-estate men testify that the first question asked by the prospective buyer is about the garage," an *Atlantic Monthly* writer reported in 1925. "The house without a garage is a slow seller."[11]

Perhaps no one has better captured the automobile's transformation of American life than James Willard Hurst, professor at the Wisconsin Law School from 1937 to 1980 and trailblazer in the method of legal studies that examines the relationship between law and society (aptly called "Law and Society"). In 1949, he counted 119 "Derivative Effects of the Auto upon the Law." Some of those effects' connections to the rise of automobility are now largely taken for granted. Road trips, for example, informed no. 68 on Hurst's list: "The hotel business, with new forms such as the tourist cabin grew, giving new importance to the law of innkeepers." The necessities of manufacturing and retail appeared higher up on the list: "4. Legal devices for private economic planning—contract, franchise, parent-subsidiary corporation relationships—became important for ordering an industry that draws together diverse sources of supply." Other effects' ties to cars are still pressing, such as no. 39: "Conservation problems developed in connection with the oil industry." Or familiar, as in no. 50: "It affected the extent and types of extra-legal sex relations through the privacy and mobility it afforded." Scanning the list gives the impression that the automobile left no area of law, or aspect of everyday life, untouched.[12]

Notwithstanding Professor Hurst's insights, scholars have not studied the law or its histories through the automobile. A prominent judge skeptical of such analytical frameworks once retorted, "Isn't this just the law of the horse?" But Americans did not think of the twentieth century as the Automotive Age for nothing. Cars radically changed daily lives and aspirations, culture and the built environment, and people's relationships with each other and their

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communities. Even more profoundly, the automobile came to represent individual solitude and freedom. The poet Stephen Dunn described the car as a "sacred place," where one can be "in it alone, his tape deck playing/things he'd chosen." It "could take him from the need/to speak, or to answer, the key/in having a key/and putting it in, and going." These lines spoke to the hallowed privacy (*in it alone*), individual self-determination (*things he'd chosen*), and the liberating mobility (*and going*) that cars provided. Cultural productions from high art to pop culture, from Great American novels to commercials and advertisements, reinforced these widely embraced notions about driving a car. Decades before Jack Kerouac's adventures on the road, Sinclair Lewis wrote about two restless souls leaving the dullness of small-town life with an open-ended road trip in his 1919 novel *Free Air*. In 1905, Americans sang "Come away with me, Lucile/In my merry Oldsmobile/Down the road of life we'll fly." Seventy years later, Bruce Springsteen would similarly, if more desperately, belt out to Mary, "It's a town full of losers/And I'm pulling out of here to win."[13]

Movies, too, featured the automobile as a plot device or a character in its own right. *The Hitchhiker*, *Bonnie and Clyde*, and *Thelma & Louise*, to give classic examples, all portrayed road trips as a form of escape. They also depicted a darker side of freedom with these "suicide machines," as Springsteen crooned. Drivers were vulnerable to the depredations of others on the road, and lawbreakers made their getaway, whether literally to be free from the authorities or metaphorically to break free from dominant society's mores.

Despite culture's consensus, the law did not treat cars as the preeminent symbol of the right to be left alone. The regulatory and police practices that developed soon after their mass adoption were ingrained in twentieth-century American life and have remained so through the twenty-first century. Then, as now, no one could drive without taking a test, applying for a license, registering the car, and buying insurance. And that was just the beginning. Once a person set out for a drive, speed limits, stoplights, checkpoints, and all the other requirements of the traffic code restricted how one could drive. A violation of any one of these laws authorized the police to stop the vehicle, issue a ticket, and even make an arrest. If at any

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Print advertisement for the 1924 Ford Model T.

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point during the traffic stop an officer suspected drugs inside the car—or liquor in the early twentieth century—criminal procedures empowered the officer to start investigating; if the officer's suspicions were confirmed, the individual almost certainly faced arrest, a severe sentencing regime, and an "eternal" criminal record. Confronted with the authority of the police to inspect and to intrude, the automobile was not quite the unmitigated freedom machine it was celebrated to be. In fact, driving, or even just being in a car, was the most policed aspect of everyday life.[14]

This automobile paradox offers a sense of how completely cars transformed the conditions of freedom in the twentieth century. Motorized vehicles offered unprecedented mobility, but at the same time their mass adoption created mass chaos that threatened everyone's safety. Police chiefs throughout the country identified traffic as the biggest police problem of their generation—a point they repeated for several generations. Local governments passed a long list of "public rights" regulating the use of cars pursuant to their "police power," a concept, distinguished from the authority of police officers, that refers to a sovereign state's inherent power to regulate for the public welfare.[15] This response was in line with the Progressive Era's legislating frenzy. But towns and cities quickly ran into an enforcement problem: everybody violated traffic laws. Noncompliance was not a new phenomenon, but violations of the rules of the road presented a different quandary for two reasons.[16] First, drivers included respectable people, and their numbers were growing every year. Second, traffic lawbreaking resulted in tremendous damage, injury, and death, and those numbers were increasing every day. It soon became clear that the public's interest in street and highway safety required more policing. The police power not only authorized social and economic regulations; it also sanctioned the police's power. In other words, the breathtaking expansion of the police rested on the same public rights that gave rise to the modern administrative state. Without examining how cars wreaked havoc in communities throughout the United States, it is difficult to account for modern, professionalized police. Only by integrating the histories of policing and the regulatory apparatus built around cars can we capture the full scope of the police power in the twentieth century.

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Certainly, policing as a mode of governance affected some groups more than others. But just as importantly, it changed the dynamic between *all* individuals and the police. Before cars, officers mainly dealt with those on the margins of society like vagrants and prostitutes. Voluntary associations governed everyone else. Churches enforced moral norms, trade groups managed business relations, and social clubs maintained social harmony. To be sure, the force of state power was palpable and vast, but the presence of the police was minimal because the "well-regulated society" of the nineteenth century, to use one historian's description, was self-regulating in that it depended largely on communal and private enforcement.[17]

Self-regulation described the domain of criminal law as well. Citizens and private groups like banks and insurance companies pursued criminal investigations and initiated prosecutions. Aside from the constable or sheriff who worked for the court and mainly executed warrants, publicly funded police figures rarely took part in private enforcement efforts. A nineteenth-century treatise on the "duties of sheriffs and constables" indicates that the bulk of their tasks was to serve summonses, warrants, and writs, as well as to supervise prisoners.[18] These were their roles even in cases of regulatory crimes that did not have a traditional victim.[19] Large cities began establishing police forces in the mid-nineteenth century, but even so, municipal coffers did not support the extent of protection that wealthier neighborhoods and business districts sought. A system of "special policemen" licensed by the government but paid for by private citizens—they were essentially private security—filled the void. As a criminal law scholar pointed out in 1936, "until quite modern times police duties were the duties of every man," meaning that communities were largely self-regulating.[20]

After the mass adoption of cars, *everyone* became subject to discretionary policing. In fact, modern policing began with the need to police upstanding citizens. The well off were among the first to buy cars, as were farmers who needed cars for more practical reasons. Even if independent farmers may not have been as wealthy as the early auto enthusiasts, as a group, they enjoyed social standing in a country with a strong sense of agrarian virtue. Driving quickly became a middle-class, or what used to be called "business-class,"

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Full-page print advertisement on the cover of *Motor Age*'s March 2, 1911, issue.

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phenomenon by the mid-1920s, when car ownership passed a tipping point: 55.7 percent of families in the United States owned a car in 1926. Eighteen percent of those families had more than one. But even the rest of the population who did not drive and instead walked were policed, too, for the regulation of drivers on public streets also required the regulation of pedestrians on those same streets.[21]

In the age of mass consumption, when the viability of mass sales needed to standardize everyone into an average consumer, references to "Everyman" appeared regularly in cultural discourses, especially

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in advertisements. Everyman, and its more common variant, the "law-abiding citizen," also surfaced in legal texts and policy papers as an object of policing. That this figure showed up most prominently in these two contexts suggests how the policing of cars facilitated the buildup of police governance throughout the United States. It also pointed to a problem. Those who invoked these seemingly generic labels meant to be all-embracing. But Everyman was hardly a class-, race-, or gender-neutral figure. The term held significance precisely because it conjured a white man from a respectable class who, before the twentieth century, had largely been shielded from policing. The physician, the merchant, the salesman, the farmer, the commuter—the list went on in the 1911 Brush Runabout print ad—were now motorists whose freedom on the road somehow had to be reconciled with the necessity of police law enforcement to maintain vehicular order.

Policing cars created conundrums both profound and practical. How could a democratic society founded on self-governance depend on police governance and still be free, an especially freighted question during ideological wars against authoritarian police states? And more delicately, how could the laws be fashioned to allow the investigation of potential criminal suspects without harassing law-abiding citizens when everybody drove? This was especially challenging with standardized cars that made it hard to tell the difference between the dangerous traffic violator and the ordinary one. Judges may have preferred to avoid these thorny questions, but litigant-drivers forced courts to look past their own guilt and consider Everyman when defining the difference between democratic policing and arbitrary policing, between a free society and a totalitarian regime.

These occasions usually arose in disputes over the Fourth Amendment, which states in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

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> describing the place to be searched, and the persons or things to be seized.

Because the first moment in a police encounter is a stop, otherwise known as a "seizure" of a person, which could then be followed by a "search," the guarantee against unreasonable searches and seizures was the main provision governing the police, whether in the US Constitution or state constitutions—"the Fourth Amendment," for the sake of simplicity. In the twentieth century, when many interactions with the police took place during a vehicle stop, one of the most litigated issues in criminal procedure was whether officers needed a warrant to stop and search a car. At stake in this legal question was the very legitimacy of discretion at the heart of police governance. Requiring officers to get a warrant from a magistrate would hold up their efforts to proactively investigate crime. Conversely, eliminating the warrant requirement would allow the police to act according to their own judgment. In adjudicating Fourth Amendment car cases, then, judges were, at bottom, redrawing the boundaries of legitimate policing.

The automobile served as the main setting for working out difficult questions about the police's power not only because its mass adoption prompted the changes in policing. It also undermined the public/private distinction, the cornerstone of nineteenth-century constitutional law. Cars were private property, which should have given individuals all the private rights attached to ownership and possession, including the Fourth Amendment rule that officers have warrants for searches and seizures. But cars traveled on public roads and were subject to public rights, and early twentieth-century judges believed that the warrant requirement did not apply in the public sphere of regulation and policing. In a legal tradition that hewed to categorical reasoning, judges floundered in their attempts to protect both individual expectations of the private sphere and the public's interest in orderly and crime-free highways. The need for police protection and protection from policing collided in Fourth Amendment car cases. Judges grappled with the warrant question precisely because robust police powers and equally robust ideas about the freedom of automobility had developed, paradoxically, in tandem.

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Justice Louis Brandeis embodied this contradiction. He believed, more confidently than his associates on the Supreme Court, that officers had the constitutional authority to search ships on the high seas and cars on public highways without warrants. At the same time, his dissent in the 1928 case *Olmstead v. United States* marked the first appearance of the right "to be let alone" from government intrusion in a Supreme Court opinion. Within half a century, Brandeis's "right to privacy" provided moral and legal authority for *Griswold v. Connecticut*, a 1965 case that established the fundamental right of married couples to use contraceptives, which, in turn, set off a series of cases staking rights to personal and sexual autonomy.[22] How did Brandeis reconcile a far-reaching power to govern with a visionary right of privacy? This was the great struggle in the twentieth-century United States. When American society shifted to policing as a mode of governance, the defense of liberty was not simply about restricting the police's power. When Everyman turned into a perpetrator on the road and Everyman depended on state protection from every other perpetrator, the challenge was to figure out how to incorporate policing within the meaning of freedom itself.

Examining the spate of car cases in state and federal courts that began in the 1920s and persisted throughout the century reveals a startling revelation: Fourth Amendment jurisprudence evolved not just to limit police discretion, as we have learned, but also to accommodate it. This conclusion is at odds with most accounts of twentieth-century criminal procedure. The familiar story, in brief, goes something like this: Beginning in the 1960s, the Warren Court overthrew the traditional arrangement in which federal courts left local police matters to the states in order to protect minorities and the poor. *Overthrew* is an appropriate word, considering that scholars refer to this as the Due Process *Revolution*. What was so revolutionary was the judicial creation of a national standard of criminal procedure. Put simply, the US Supreme Court began policing the police.[23]

But the standard narrative provides only half the story, not least because its emphasis on the conflict between individuals and the police overlooks the foundational shift to policing as a mode of

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governance. Fourth Amendment cases first shot up not in the 1960s, but in the 1920s, and not just in federal courts, but in state courts as well. A few scholars have traced the roots of the Due Process Revolution to the earlier period, and the main thrust of these accounts is that judges felt compelled to protect criminal defendants from flagrant police abuse, whether during National Prohibition or in the Jim Crow South. These histories, like the chronicles of the Warren Court, place the Supreme Court in the role of protector of individual liberty to explain the proliferation of criminal procedure rights in the twentieth century.[24]

But, in fact, American courts did more to encourage and sustain, rather than to check, the police's growing authority. This can be easy to miss if we look only at the Supreme Court's landmark cases. Instances where the police acted unlawfully and egregiously so—when, for example, they invaded a home, the most sacrosanct space in American constitutional law—presented easier cases for the Supreme Court to act boldly in the name of upholding democratic ideals. *Mapp v. Ohio*, which launched the Due Process Revolution in 1961, was such a case. More challenging were the matters where the exercise of discretion was seen as a crucial part of the police function. Once we examine the celebrated decisions alongside the underbelly of criminal procedure—the thousands of car cases that justified police action—the judicial endorsement of greater discretionary policing becomes undeniable.

To resolve the conflict between public and private rights in these car cases—to simultaneously empower discretionary policing for Everyman's safety and shield Everyman's privacy from discretionary policing—American law shifted from a binary analysis to a standard of reasonableness. Instead of deciding whether cars fell within the public or private sphere to determine whether stops and searches of cars, as a category, required warrants or not, judges evaluated whether a particular car stop and search was reasonable. Even Justice Brandeis, upon conceding that the right to privacy could ultimately be subject to the public's interest, resorted to "the reasonableness or unreasonableness of an act" to determine the boundary between competing rights. The *Wiley* right to drive "without interruption or molestation" quickly receded as a relic of the horse-and-buggy days. Cap-

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tain Bates would now have to pull over, but at least he would be dealt with reasonably.[25]

But it proved difficult to pin down a definition of reasonable policing, let alone flesh out a coherent theory for determining reasonableness, when patrolling the byways and highways presented a myriad of unexpected situations and often involved split-second decision-making. What jurisprudential philosophy could both enable and limit police discretion? Rather than settling on a principle, judges deferred to the police. When faced with the exigencies of automobility—and especially when those caught red-handed, not the wrongly suspected, were typically the ones who brought Fourth Amendment challenges—judges tended to side with order and security and conclude that zealous and intrusive police action for the sake of the public welfare was reasonable and did not compromise the values of a democratic society. In case after case, throughout the country and through the decades, courts concluded that the police had acted reasonably. Every now and then, an individual defendant won. But far more often, reasonableness functioned as a deferential standard. This deference, in turn, gave the police even more power. From the perspective of cars, the Due Process Revolution was not much of an overthrow of the existing order.

But the Court's revolutionary decisions left an opening for an insurgency, even if ultimately ill-fated. Increasing numbers of criminal defendants invoked the new rights established in home invasion cases and disputed the reasonableness of police action, forcing courts to mediate their encounters with police. Over time and without a consistent method or principle, all the individual reasonableness determinations accumulated into judicial rules, which became more numerous, more specific, and more complex. Scholars refer to the body of laws accrued from legal challenges against the police as "the modern regime of criminal procedure." These laws are procedural in the sense that they direct *how* the police should police, unlike substantive rights, which secure the right to be free from government, including police, intrusion. As illuminating as accounts of the Warren Court are, they do not explain why the justices settled on procedural rights to protect individuals from the police, rather than, for example, a substantive privacy right not to have one's car

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searched. It is easy to understand why minorities and the poor needed more rights. But standard narratives of the Due Process Revolution have passed over the more basic question of why those rights took the form they did.[26]

In truth, more significant than the choice between substance and procedure was the decision over how Americans would govern themselves. Because substantive rights would have greatly limited the discretionary policing that the "law abiding" wanted, minorities and the poor instead received rules regulating the police's ever-growing power. The upshot, as time would tell, was not the protection of individuals' privacy in their cars but the empowerment of highway patrollers and traffic cops who could take advantage of the thicket of procedures to exercise their power in discretionary, even discriminatory, ways. This was the legacy of the Fourth Amendment from the Automotive Age. By the end of the century, the Fourth Amendment was still in search of a theory. As the automobile became a site of inequality, it was also an area of law that lacked a theory of justice.

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