ADMINISTRATIVE REGULATION OF PROGRAMMATIC POLICING: WHY *LEADERS OF A BEAUTIFUL STRUGGLE* IS BOTH RIGHT AND WRONG

CHRISTOPHER SLOBOGIN*

In Leaders of a Beautiful Struggle v. Baltimore Police Department, *the Fourth Circuit Court of Appeals held that Aerial Investigation Research (AIR), Baltimore's aerial surveillance program, violated the Fourth Amendment because it was not authorized by a warrant. AIR was constitutionally problematic, but not for the reason given by the Fourth Circuit. AIR, like many other technologically-enhanced policing programs that rely on closed-circuit television (CCTV), automated license plate readers and the like, involves the collection and retention of information about huge numbers of people. Because individualized suspicion does not exist with respect to any of these people's information, an individual-specific warrant requirement can never be met by such a program. When police engage in suspicionless searches and seizures of the type exemplified by AIR, a different regulatory approach is needed, one that provides the protection against arbitrariness that the warrant process affords but does not require findings that specific people have violated the law. This Article argues that this regulatory alternative can be derived from administrative law principles. The logic of administrative law dictates that legislatures and agency rulemaking must be involved any time a policing agency wants to establish a program that will intentionally affect sizeable numbers of concededly innocent people. If administrative law principles applied, programs like AIR would not be permitted unless a legislature has delegated appropriate authority to the relevant police agency, implemented regulations have survived notice-and-comment and hard look judicial review, and the agency carried out the program in an even-handed fashion that minimizes discretion. At the same time, contrary to the holding in* Leaders of a Beautiful Stuggle, *if these requirements are met, the Fourth Amendment—at least the part of it requiring warrants and probable cause—would be irrelevant.*

* Milton Underwood Professor of Law, Vanderbilt University Law School. Portions of this article are taken from chapter seven of my book VIRTUAL SEARCHES: REGULATING THE COVERT WORLD OF TECHNOLOGICAL POLICING (NYU Press, 2022).

INTRODUCTION

In *Leaders of a Beautiful Struggle v. Baltimore Police Department*,[1] the Fourth Circuit Court of Appeals held that Aerial Investigation Research (AIR), Baltimore's aerial surveillance program, violated the Fourth Amendment. Relying on the U.S. Supreme Court's declarations in *Carpenter v. United States*[2] and *United States v. Jones*[3] that the Fourth Amendment governs both real-time and digital-record tracking, the Fourth Circuit correctly held that AIR's constant recording of Baltimore's pedestrian and car traffic constituted a "search" for Fourth Amendment purposes.[4] But it erred in holding that such a program requires a warrant—a conclusion that, in effect, made AIR impossible as a legal matter.[5] Because jurisdiction-wide systems like AIR do not purport to investigate a particular suspect, but rather aim only at gathering information that can later be used to carry out such investigations, they can never satisfy the Fourth Amendment warrant requirement, which regulates searches aimed at specific individuals.[6]

There was another significant legal problem with AIR, however. In setting up the program, Baltimore and its police department failed to follow proper democratic and administrative processes. This Article argues that this oversight should have been the focus of the Fourth Circuit's decision and should have been the death knell for the program. More generally, it argues that administrative law principles can and should fulfill the Fourth Amendment's reasonableness requirement when the government wants to conduct suspicionless searches and seizures. While *Carpenter*, *Jones*, and other Fourth Amendment cases that address the constitutionality of searches aimed at specific individuals are inapposite in such situations, administrative law's

1. 2 F.4th 330 (4th Cir. 2021) (en banc).

2. 585 U.S. 1 (2018).

3. 565 U.S. 388 (2012).

4. *Leaders of a Beautiful Struggle*, 2 F.4th at 341–42. *But see infra* note 34 (noting an alternative conclusion that the recording is a Fourth Amendment "seizure").

5. 2 F.4th at 346 ("[W]e hold that accessing [Aerial Investigation Research's (AIR's)] data is a search, and its warrantless operation violates the Fourth Amendment.").

6. *See infra* note 24 and accompanying text.

programmatic focus is ideally suited to govern data collection programs.

The aptly named *Leaders of a Beautiful Struggle* is a harbinger of cases to come as law enforcement continues to experiment with technologically-aided investigative techniques. In recent years, police departments and municipalities have avidly adopted surveillance systems using Automated License Plate Readers (ALPRs),[7] closed-circuit television (CCTV),[8] and facial recognition technology (FRT),[9] and have also moved toward database analytics using "fusion centers" and private companies.[10] Each of these programs involves the collection and retention of information about thousands, tens of thousands, or even hundreds of thousands of people. Because individualized suspicion does not exist at the time these law enforcement initiatives acquire information about people, imposition of an individual-specific warrant requirement makes little sense and, rigidly applied, would spell doom for all such programs, no matter how effective they are. A different regulatory approach is needed, one that provides the protection against arbitrariness that the warrant process affords but does not require findings that specific people have violated the law.

Because programmatic policing usually affects entire jurisdictions, this Article follows earlier work of mine in arguing that the regulatory regime in this setting should involve not just the courts, but significant engagement by the legislative and executive branches as well, as mediated through administrative law principles.[11] In fact, the logic of administrative law *requires* agency rulemaking any time a policing agency proposes an investigative technique that will intentionally affect sizeable numbers of innocent people—a phenomenon that occurs not only with surveillance programs like AIR, but in connection with a wide array of physical searches and seizures such as health and safety inspections, checkpoints, and drug testing

7. *See* Christopher S. Koper & Cynthia Lum, *The Impacts of Large-Scale License Plate Reader Deployment on Criminal Investigations*, 22 POLICE Q. 305, 306 (2019) (reporting that almost two-thirds of large police departments use Automated License Plate Readers (ALPRs)).

8. *See* Eric L. Piza, Brandon C. Welsh, David P. Farrington & Amanda L. Thomas, *CCTV Surveillance for Crime Prevention: A 40-Year Systematic Review with Meta-Analysis*, 18 CRIMINOLOGY & PUB. POL'Y 135, 136 (2019) (reporting that just under one-half of all police departments have used video surveillance).

9. *See* Mariana Oliver & Matthew B. Kugler, *Surveying Surveillance: A National Study of Police Department Surveillance Technologies*, 54 ARIZ. STATE L.J. 103, 107 (2022) (reporting that about ten percent of police departments surveyed use FRT).

10. *See Recommendations for Fusion Centers: Preserving Privacy & Civil Liberties While Protecting Against Crime & Terrorism*, CONST. PROJECT 4 (2012) (reporting the establishment of seventy-seven fusion centers nationwide) (on file with author).

11. *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 134–49 (2016).

programs. These "panvasive"[12] actions should not be permitted unless the requirements that typically govern informal rulemaking by all other agencies are met: a legislature must delegate appropriate authority to the relevant police agency, regulations must survive notice-and-comment and hard look judicial review, and the agency must carry out the program in an even-handed fashion that minimizes discretion. At the same time, contrary to the holding in *Leaders of a Beautiful Struggle*, if these administrative law requirements are followed, the Fourth Amendment—at least that part of it requiring warrants based on probable cause—should be irrelevant.

I. THE AIR PROGRAM AND *LEADERS OF A BEAUTIFUL STRUGGLE*

On May 1, 2020, the City of Baltimore, with the help of a company called Persistent Surveillance Systems (PSS), initiated a six-month trial of an aerial surveillance program called AIR.[13] AIR relied on cameras positioned on high-flying planes to monitor the city during the daytime.[14] If a crime was caught on camera or it otherwise came to the attention of the police, the aerial recordings were used to trace the people and cars near the crime scene when it occurred both forward and backward in time to help identify who they were. Because any individuals picked up on the cameras appeared merely as blurry dots, facial features were not observable.[15] But people could be identified by connecting them to certain residences and in various other ways. If identification occurred, subsequent interviews, interrogations, stops,

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12. *See* Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1723 (2014) (coining the term to describe government programs that are "invasive and pervasive" because they affect large segments of the population).

13. Jessica Anderson, *Baltimore Police to Launch First Surveillance Plane Friday, Over Some Objections*, BALT. SUN (Apr. 30, 2020, 5:05 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-surveillance-plane-launches-20200430-w73gmcvzxffapnzbfmzhvlayxu-story.html (noting how Baltimore had experimented with the same type of program in 2016).

14. *See id.*

15. As described by the Fourth Circuit in *Leaders of a Beautiful Struggle*:

> [A]ny single AIR image—captured once per second—includes around 32 square miles of Baltimore and can be magnified to a point where people and cars are individually visible, but only as blurred dots or blobs. The planes transmit their photographs to PSS (Persistent Surveillance Systems) "ground stations" where contractors use the data to "track individuals and vehicles from a crime scene and extract information to assist BPD (the Baltimore Police Department) in the investigation of Target Crimes." "Target Crimes" are homicides and attempted murder; shootings with injury; armed robbery; and carjacking.

Leaders of a Beautiful Struggle v. Baltimore Police Department, 2 F.4th 330, 334 (4th Cir. 2021).

and arrests were presumably governed by traditional Fourth and Fifth Amendment law.

Perhaps because of concerns about disparate racial impact, but also based on straightforward cost-benefit calculations, Baltimore ended its program in 2021.[16] That response is, of course, the government's prerogative. But in *Leaders of a Beautiful Struggle,*[17] the Fourth Circuit Court of Appeals took it upon itself to hold that, had the police department not ended AIR, it would have found the program unconstitutional under the Fourth Amendment.[18] In an eight to seven en banc opinion, the court analogized AIR's surveillance of Baltimore's populace both to *Carpenter*,[19] which held that police investigating a bank robbery engaged in a search when they accessed multiple days of Carpenter's cell-site location information from his common carrier,[20] and *Jones*,[21] which held that police investigating Jones for drug dealing engaged in a search when they tracked him for twenty-eight days using GPS signals.[22] In light of these opinions, the majority reasoned, the day-to-day aerial surveillance that took place under AIR was a Fourth Amendment search that required a warrant.[23] Because under well-established case law and the language of the Fourth Amendment itself,[24] a warrant is impossible to obtain until a crime has occurred or a suspect has been identified, the *Leaders of a Beautiful Struggle* holding prohibited the pre-crime and citywide recordings on which AIR depended.

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16. Nathan Sheard, *Officials in Baltimore and St. Louis Put the Brakes on Persistent Surveillance Systems Spy Planes*, ELECTR. FRONTIER FOUND. (Mar. 2, 2021), https://www.eff.org/deeplinks/2021/03/officials-baltimore-and-st-louis-put-brakes-persistent-surveillance-systems-spy.

17. 2 F.4th at 339.

18. To the claim that Baltimore's decision to end the surveillance program mooted the case, the court stated: "Plaintiffs have a concrete, legally cognizable interest in freezing BPD's access to these images, which were obtained only by recording Plaintiffs' movements and in which they may still appear." *Id.*

19. *Id.*

20. Carpenter v. United States, 585 U.S. 1, 3 (2018).

21. 2 F.4th at 341 ("More like the [cell-site location information] in *Carpenter* and GPS-data in *Jones* than the radio-beeper in *Knotts* [*v. United States*, 460 U.S. 276 (1983)], the AIR program 'tracks every movement' of every person outside in Baltimore.").

22. United States v. Jones, 565 U.S. 400, 402–04 (2012).

23. *Id.*

24. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); Carroll v. United States, 267 U.S. 132, 162 (1925) (stating that probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed).

The major flaw in *Leaders of a Beautiful Struggle* is its conceptualization of the problem. The majority opinion described AIR as a program that was aimed at "capturing everyone's movements outside during the daytime . . . ."[25] Citing *Carpenter* and *Jones*, it then declared that "prolonged tracking that can reveal intimate details through habits and patterns . . . invades the reasonable expectation of privacy that individuals have in the whole of their movements and therefore requires a warrant."[26] But that type of reasoning applies only to long-term tracking of *identified* suspects, as occurred in *Carpenter* and *Jones*. The issue before the court was not the constitutionality of such suspect-driven or crime-driven searches but rather the constitutionality of a program that collects, in the *absence* of suspicion about any given individual, the information used for such searches.[27]

This confusion between the legitimacy of the data collection and the legitimacy of its use permeated the majority's opinion. The Fourth Circuit appeared to be particularly concerned that the program retained recordings of the movements of everyone caught on camera for forty-five days.[28] But these recordings were not accessed unless a violent crime was caught on camera.[29] If at that point, the police wanted to view recordings surrounding the time and place of the crime, judicial authorization—a warrant or court order—might well be required.[30] But a warrant process aimed at determining whether there is cause to search for evidence against a specific person is ill-fitted to decisions about whether to create those records in the first instance and, if so, the length of time recordings are kept, the types of crimes they can

25. 2 F.4th at 345.

26. *Id.* at 341.

27. *Id.* at 333 (stating that the plaintiff was seeking "to enjoin implementation of the [AIR] program, a first-of-its-kind aerial surveillance program operated by the Defendants.").

28. *Id.* at 345 (citation omitted) ("People understand that they may be filmed by security cameras on city streets, or a police officer could stake out their house and tail them for a time. But capturing everyone's movements outside during the daytime for 45 days goes beyond that ordinary capacity.").

29. *Id.* at 334 (footnote omitted) ("The AIR program is not designed to provide real-time analysis when a crime takes place, though. Rather, the analysts prepare 'reports' and 'briefings' about a Target Crime as requested by the BPD officers on the case.").

30. *See* Christopher Slobogin, *Suspectless Searches*, 83 OHIO STATE L.J. 953, 959–63 (2022). In this article, I argue that when police want access to a database for "geofencing"—i.e., a technique designed to identify suspects by linking their phone number or, the case of AIR, their "dots," to the crime—they do not need a warrant, because only one piece of information about each individual is acquired (where they were during a short time period). However, I also conclude that police carrying out geofencing do need to obtain court orders that, consistent with the Particularity Clause of the Fourth Amendment, limit database access to the time and place of the crime and movements shortly before and after the crime.

be used to investigate, and other programmatic matters.

Another example of the majority's confusion was its reaction to the district court's finding that AIR images show only "a series of anonymous dots traversing a map of Baltimore."[31] In rebuking the lower court for relying on this fact, the Fourth Circuit correctly observed that the habitual behavior of those "dots" (such as starting and ending the day at home), when "analyzed with other available information, will often be enough for law enforcement to deduce the people behind the pixels."[32] But, again, that use of AIR was not before the court; had it been, the court could rightly have demanded a Fourth Amendment justification based on individualized suspicion.

In another passage, the majority—still conflating collection with use—asserted that "[t]he AIR program is like a [twenty-first] century general search, enabling the police to collect all movements, both innocent and suspected, without any burden to 'articulate an adequate reason to search for specific items related to specific crimes.'"[33] But in real time, AIR's day-to-day collection of pixels was not seeking information about any specific items, crimes, or people.[34] And its "general" nature made it a perfect candidate for jurisdiction-wide legislative regulation rather than case-specific judicial determinations.[35]

That was the gist of Judge Wilkinson's dissenting opinion. As he put it, "I have no problem if the AIR program is discontinued. I have a big problem, however, if this court and not the citizens of Baltimore are the ones to terminate it."[36] Judge Wilkinson noted that AIR had been established on an experimental basis, after obtaining endorsements from the governor of Maryland, the mayor of Baltimore, the Baltimore City Chamber of Commerce, and a number of other high profile groups, including community leaders in East and West Baltimore, the Greater Baltimore Committee ("the

31. 2 F.4th at 342.

32. *Id.* at 343.

33. *Id.* at 348 (citing Messerschmidt v. Millender, 565 U.S. 535, 560 (2012) (Sotomayor, J., dissenting)).

34. For this reason, one could argue that AIR does not involve a search at all. I have contended that people walking the streets are accorded a right to anonymity under the Fourth Amendment. *See* Christopher Slobogin, *Public Privacy: Camera Surveillance and the Right to Anonymity*, 72 MISS. L.J. 213, 237–51 (2002); *see also* Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343 (2015). But even if one does not accept that argument, recording one's movements should be seen as a "seizure" of that information. *See* Berger v. New York, 388 U.S. 41, 59–60 (1967) (holding that recording conversations of all persons who entered an area over a two-month period constituted a "seizure"); Ayeni v. Mottola, 35 F.3d 680, 688 (2d Cir. 1994) ("[T]he video and sound recordings were 'seizures' under the Fourth Amendment . . . .").

35. *See infra* text accompanying notes 40–42.

36. *Leaders of a Beautiful Struggle*, 2 F.4th at 359 (Wilkinson, J., dissenting).

region's premier organization of business and civic leaders"), the presidents of local universities, and religious leaders from the United Baptist Missionary Convention (representing 100 churches across the state).[37] The reason for this wide-ranging support was summarized by the local head of Neighborhoods United: "We have to do something. The murders are doing a lot of disruption to our city, especially in the black population."[38] Pointing to this community support, Judge Wilkinson concluded: "The people most affected by a problem are denied by this court a say in ameliorating it."[39]

In short, the Fourth Circuit had no business ending the program on the grounds it did. At the same time, the Judiciary was not the only branch of government that overreached in connection with the AIR program. The Baltimore Police Department was also too dominant in the decisionmaking process.[40] Despite the widespread official support for AIR, the Baltimore City Council never formally authorized it, even on a test basis, and the police department's guidelines under which it operated were not subject to community input.[41] The type of democratic process normally associated with the initiation of civilian, citywide programs was—at most—tangentially involved in vetting law enforcement's use of AIR.

In critiquing the majority's ruling, Judge Wilkinson quoted a statement from the concurring opinion of Justice Alito in *Jones* (joined by Justices Ginsburg, Breyer, and Kagan): "A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."[42] That call for legislative involvement is particularly apt when it comes to programmatic searches and seizures like AIR, given the inapplicability of the traditional, judicially-oriented warrant

37. *Id.* at 367–68.

38. *Id.* at 367 (citing Luke Broadwater, *Surveillance Airplane Gains a New Sales Pitch*, BALT. SUN A1 (Feb. 25, 2018), https://digitaledition.baltimoresun.com/tribune/article_popover.aspx?guid=62d87960-771f-4a16-853c-7253152cff1f.

39. *Id.* at 366.

40. *See id.* at 333–34 (majority opinion) (detailing how the BPD partnered with a private party to conduct aerial surveillance, planned town hall meetings to gain public support, and live-streamed a presentation on Facebook to inform the public about the program before Baltimore's Board of Estimates voted to approve the contract).

41. There was a Professional Services Agreement (PSA) between the BPD and the Persistent Surveillance System that established various restrictions on AIR's data collection and retention, and the department held several town hall-type meetings. *See id.* at 333–34. But the city council never debated the program and, thus, had no occasion to consider its scope, and the "regulations" in the PSA were never subject to notice-and-comment, as this Article argues should have occurred. *See infra* text accompanying notes 87–99.

42. United States v. Jones, 565 U.S. 400, 429–30 (Alito, J., concurring).

process.[43] Assuming so, there remains the crucial tasks of drawing the "detailed lines" to which Justice Alito refers and figuring out how to cajole legislatures and police agencies into promulgating them.

II. THE SUBSTANTIVE RULES OF PROGRAMMATIC POLICING

There are two broad issues raised by programmatic searches and seizures. The first is whether a particular program should be authorized. For what purposes may a municipality, state, or federal government establish panvasive dragnets like AIR, fusion centers, or random inspection regimes, and what types of information may these policing efforts collect? Assuming the program is authorized, the second issue is how long the information it obtains may be retained and under what conditions. May the data collected be maintained indefinitely or should it be destroyed after a finite period, and how can the accuracy and security of the data be assured?

A helpful conceptualization of how data collection and retention might be regulated comes from the American Law Institute (ALI), which recently completed its Principles of Policing Project after six years of deliberation.[44] The fourteen chapters of the Principles—which cover every aspect of the policing endeavor—were officially adopted by the full membership of the ALI in May 2022, after vetting by both an advisory committee (composed of judges and lawyers who work in the criminal justice system, police and advocacy organizations from both the left and right) and the ALI Council (composed of a select group of the full ALI membership).[45] As an associate reporter for the project, I was principally responsible for two of the Principles' chapters: "Policing in the Absence of Individualized Suspicion" and "Policing Databases."[46] Respectively, these two chapters provide principles that could govern the collection and retention issues raised by programmatic searches.

"Policing in the Absence of Individualized Suspicion" is defined by the ALI Principles as policing "conducted in the absence of cause to believe that the particular individual, place, or item subject to [the policing action] is involved in unlawful conduct . . . ."[47] It should be clear from previous discussion that surveillance programs like AIR fit within this definition;

43. *See id.*; BARRY FRIEDMAN, UNWARRANTED: THE FOURTH AMENDMENT 231 (2017).

44. *See generally* PRINCIPLES OF THE L.: POLICING (AM. L. INST., Tentative Draft No. 3, 2021).

45. *See* Press Release, Am. L. Inst., Principles of Policing Approved (May 18, 2022), https://www.ali.org/news/articles/principles-law-policing-approved/ (describing the makeup of the Principles of Policing advisory group).

46. PRINCIPLES OF THE L.: POLICING chs. 5–6 (AM. L. INST., Tentative Draft No. 3, 2021).

47. *Id.* § 5.01(b).

because they are panvasive, they are designed to obtain information before any individualized suspicion develops. In this way, they are like various types of physical search programs—such as checkpoints, health and safety inspections, and drug-testing programs—that operate in the absence of individual suspicion.

The ALI chapter on this type of policing provides that "[l]egislatures and agencies should authorize suspicionless policing activities only when there is a sound basis for believing that they will accomplish an important law-enforcement or regulatory objective, and when achieving that objective outweighs their infringement on individual interests such as privacy, dignity, property, and liberty."[48] If a suspicionless program is authorized, written policies should identify, among other things, "(a) the specific harm sought to be detected or prevented; (b) the permissible scope of the suspicionless policing activity; [and] (c) the persons, entities, or activities subject to the policing activity."[49] Additionally, the Principles state that any suspicionless policing activity so approved "should be conducted in a manner that ensures agency discretion is guided by neutral criteria that are applied evenhandedly and developed in advance," which must be accomplished by applying the procedure to every person within the target group, "a subset of that group that is selected on a random or neutral basis," or "a subset of that group that there is a sound basis for believing is more likely to be engaged in unlawful conduct or pose a greater risk of harm than the rest of the target group."[50] There are several more detailed principles in the chapter, but these three capture its gist: suspicionless searches and seizures should only occur when (1) there is a strong rational basis for the program after considering its impact on collective and individual interests; (2) policies explicitly identify its purpose and scope; and (3) the program is applied in a neutral, even-handed fashion.

The primary rationale for these principles is straightforward: "In the absence of warrants and individualized suspicion, it is essential that there be alternative mechanisms in place to ensure that searches and seizures and other policing activities are justified, are not directed at individuals or groups in an arbitrary or discriminatory fashion, and are limited in scope consistent with their justification."[51] The "sound basis" requirement for surveillance legislation is admittedly vague, but necessarily so. As Justice Alito's comments in *Jones* suggest, the initiation of panvasive programs calls for the kind of multifactor judgment that is best made initially by legislatures.[52] The

48. *Id.* § 5.03.
49. *Id.* § 5.02.
50. *Id.* § 5.05.
51. *Id.* § 5.01 ll. 11–14.
52. United States v. Jones, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring).

requirement that the purpose and scope of the program be explicitly identified ensures that these matters receive due deliberation by the appropriate decisionmaking bodies and that the policing agency has sufficient direction. The neutral criteria and even-handed application requirements minimize discretion and increase the likelihood that the program will be viewed by the public as both more legitimate and less intrusive (think, for instance, of TSA checkpoints at airports). These latter two requirements also make it likely that the program will affect those with political power, which acts as a brake on overly aggressive programs. As Justice Jackson stated in another context: "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[53]

The gist of the ALI chapter on policing databases can also be succinctly stated. It provides that "[a] policing database [defined to include databases that might be generated by AIR, CCTV, fusion centers, and the like] should be created only if necessary to facilitate a legitimate policing objective" and continues:

> Any policing database that contains information about identified or identifiable individuals should be governed by written policy or policies that specify: (1) the purpose of the data collection, including the criteria for inclusion in the database; (2) the scope of data to be collected, including the types of individuals, locations, or records that will be the focus of the database; and (3) the limits on data retention, the procedures for ensuring the accuracy and security of the data, the circumstances under which the data can be accessed, and mechanisms for ensuring compliance with these rules.[54]

The first two principles overlap with the provisions in the chapter on suspicionless policing requiring delineation of the purpose and scope of such search and seizure programs. The third principle is given more detailed treatment in the database chapter's subsequent provisions, which focus on:

- purging databases of irrelevant information by requiring, whenever feasible, destruction of files after a finite time period;[55]
- assuring data accuracy through standardized procedures for entering data; training and supervision of those who enter data; periodic audits for accuracy; and a procedure that allows correction of erroneous entries by data subjects (who are entitled to notification of their inclusion in a database anytime it is the basis

53. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

54. PRINCIPLES OF THE L.: POLICING § 6.01 (AM. L. INST., Tentative Draft No. 3, 2021).

55. *Id.* § 6.02.

for an "adverse action");[56]

- maintaining security through limiting access to those officers who are specifically authorized access through court order or otherwise; identifying an officer responsible for security; and monitoring the database for breaches;[57] and
- assuring accountability through an unalterable record of every instance of access (detailing when it occurred, by whom, and for what purpose, as well as by what method, e.g., via algorithm); and by making available to the public "statistics about the purposes and use of policing databases, the numbers of people in each database, and the extent to which the databases have been accessed, including any violations of access rules."[58]

These two sets of ALI principles, which are consistent with suggestions made by other entities and scholars,[59] provide guardrails for thinking about data collection and retention. But they are aspirational and expressed at a high level of generality. How can legislatures and policing agencies be pushed toward adopting something like them and then fleshing out the details in connection with specific policing programs? Supreme Court case law has provided very little impetus in this direction, and legislative inertia or resistance has led, at best, to piecemeal statutory regulation. After documenting those assertions, the remainder of this Article explains why another source of rules—administrative law—must play a central role in this regulatory framework. If the well-established administrative law principles that govern virtually all other government agencies are made applicable to policing agencies as well, they can *force* the legislative and executive branches to produce reasonable regulations of search and seizure programs.

III. CURRENT REGULATION OF PROGRAMMATIC POLICING

Fourth Amendment jurisprudence to date has largely ignored both the data collection and data retention issues. While legislatures have been more

56. *Id.* § 6.03.

57. *Id.* §§ 6.04–05.

58. *Id.* § 6.06.

59. *See, e.g.*, ABA STANDARDS FOR CRIM. JUST.: L. ENF'T ACCESS TO THIRD PARTY RECS. § 25-6.1 (AM. BAR ASS'N 2013); ABA STANDARDS FOR CRIM. JUST.: TECH.-ASSISTED PHYSICAL SURVEILLANCE § 2-9.1(f) (AM. BAR ASS'N 1999) (noting that government officials should be held accountable for their use of technologically-assisted physical surveillance by, *inter alia*, conducting periodic review of the scope of the surveillance and making publicly available the information being used); THE CONST. PROJECT, GUIDELINES FOR VIDEO SURVEILLANCE § III.A (2006); FRIEDMAN, *supra* note 43 at 211–82; DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 267–75 (2017).

active on these issues, some types of search and seizure programs today are not subject to any statutory constraints and those that are often only loosely so.

Contrary to the Fourth Circuit's assertion in *Leaders of a Beautiful Struggle*, the Supreme Court's decisions *Carpenter* and *Jones* provide no help on the issue of when a surveillance program or other search and seizure programs may be authorized; as explained earlier,[60] these cases involved suspect-driven searches, not panvasive ones. Of course, *Carpenter* and *Jones* do not exhaust the Fourth Amendment's potential. As David Gray has argued, for instance, the Fourth Amendment's language guaranteeing "the right of the people" to be secure from unreasonable searches and seizures could form the basis for protecting the collective interests of citizens against indiscriminate, arbitrary surveillance, and voracious and insecure databases.[61] Neil Richards has contended that the First Amendment's protection against chilling speech and assembly could fulfil much the same function.[62] While no Supreme Court case has endorsed these precise themes, scattered dicta hint that there may be constitutional limits on "data greed."[63] In *United States v. Knotts*,[64] after holding that short-term tracking of an individual was not a Fourth Amendment search, the Court suggested that "different constitutional principles" might apply to "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision."[65] And in *Whalen v. Roe*,[66] it recognized "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."[67] It remains the case, however, that the Court has yet to put any meat on these bones or even identify the specific constitutional provision that might do so.

The one existing Fourth Amendment doctrine that could potentially lead to something more comes from a convoluted series of Supreme Court

60. *See supra* text accompanying notes 25–34.

61. David Gray, *Collective Civil Rights and the Fourth Amendment After Carpenter*, 79 MD. L. REV. 66, 82 (2019) ("[T]he Fourth Amendment is not a defense of individual property rights. It is, instead, a restraint on government power—a restraint designed to preserve the independence and integrity of the people as a whole. It is a bulwark against tyranny.").

62. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 431–41 (2008) (arguing that First Amendment values enhance individual interests vis-à-vis government surveillance and access to personal records).

63. SARA BRAYNE, PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING 89 (2021) (coining the term "data greed" in describing data collection practices of the Los Angeles Police Department).

64. 460 U.S. 276 (1983).

65. *Id.* at 283–84.

66. 429 U.S. 589 (1977).

67. *Id.* at 605.

decisions that govern situations involving "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable."[68] In some of these so-called "special needs" cases, particularly those involving inspections and checkpoints conducted in the absence of individualized suspicion, the Court has appeared to endorse something akin to the ALI Principles' requirements that search and seizure programs have a rational basis and defined scope and be governed by a neutral plan that is administered even-handedly.

For instance, in *Donovan v. Dewey*,[69] after noting the many dangers associated with operating coal mines, the Court upheld a warrantless mine inspection program because the statute governing the program:

> [R]equires inspection of *all* mines and specifically defines the frequency of inspection. . . . [T]he standards with which a mine operator is required to comply are all specifically set forth in the [Mine Safety] Act or in . . . the Code of Federal Regulations. . . . [R]ather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence.[70]

The Court made the same type of point in a case involving a checkpoint designed to catch undocumented immigrants near the United States-Mexico border. In upholding the checkpoint, the Court emphasized that it was set up by higher-level authorities and that everyone who came to the checkpoint was subject to initial seizure.[71] In another case, while finding random license checks made on the whim of individual officers unconstitutional, the Court noted that statutorily-authorized license checkpoints that stop everyone—or every third or fifth person—would pass constitutional muster.[72]

These cases resonate with the ALI's principles governing suspicionless searches and seizures. As I have detailed elsewhere,[73] however, many of the Court's other special needs cases ignore these types of strictures. As a result, at best, the Court's message in this area is muddled.

The Court has been similarly circumspect about what the Constitution has to say concerning data retention, accuracy, and security rules. For instance, in *Herring v. United States*,[74] it suggested, without holding, that evidence found during an arrest based on an expired warrant would require exclusion if the defendant could demonstrate "routine" or "widespread"

68. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).
69. 452 U.S. 594 (1981).
70. *Id.* at 603–04.
71. United States v. Martinez-Fuerte, 428 U.S. 543, 554, 566 (1976).
72. Delaware v. Prouse, 440 U.S. 648, 663–64 (1979) (Blackmun, J., concurring).
73. Slobogin, *supra* note 12 at 1727–33.
74. 555 U.S. 135 (2009).

systemic errors in the arrest warrant database.[75] In *Whalen*, it noted with favor the fact that a state statute governing collection of prescription drug information prohibited unwarranted disclosures to the public, a protection it said "arguably has its roots in the Constitution" in some circumstances,[76] and in later cases it "assumed, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* . . . ."[77] Similarly, in *Maryland v. King*,[78] which upheld a statute permitting collection of DNA samples from arrestees, the Court emphasized that the state was prohibited from using the samples for any purpose other than identifying arrestees.[79] But none of these cases explicitly stated that there would be a constitutional cause of action if personal information in government-run databases is inaccurate, retained indefinitely for no reason, or gratuitously disclosed to the public.

Legislatures have been more engaged in regulating the content and use of databases. Most prominently, the federal Privacy Act and similar state statutes permit agencies to obtain and keep information only if it is "relevant and necessary to accomplish a purpose [the agency is authorized to accomplish]."[80] These statutes also prohibit public disclosure of personally identifiable information that has been collected without consent.[81] Various other federal and state statutes require the destruction of information after a limited period—or at least the creation of policies that dictate how long that period should be—and call for procedures for assuring accuracy and security.[82]

But these statutes can be remarkably lax when it comes to law enforcement. For example, the federal Privacy Act exempts from its strictures any agency "which performs as its principal function any activity pertaining to the enforcement of criminal laws" and specifically permits police agencies to retain any "investigatory material compiled for law enforcement purposes . . . ."[83] Neither the federal government nor most states have developed statutes that specify nor define what "investigatory material" is, or whether there are limits on the types of investigatory material that may be collected.

Of course, there are specialized statutes that deal with specific types of

75. *Id.* at 146–47.

76. Whalen v. Roe, 29 U.S. 589, 605 (1977).

77. NASA v. Nelson, 562 U.S. 134, 138 (2011).

78. 569 U.S. 435 (2013).

79. *Id.* at 444.

80. 5 U.S.C. § 522a(e)(1) (2012).

81. *Id.*

82. 16 C.F.R. §§ 314.4(b)(2), (c) (2017) (financial institutions); 45 C.F.R. § 164.310(d)(2)(ii) (2017) (medical establishments); 18 U.S.C. § 2710(e) (video businesses); N.Y. GEN. BUS. LAW § 399-h (McKinney 2017) (business organizations); 16 C.F.R. § 682.3(a) (2017) (consumer data).

83. 5 U.S.C. § 552a(j)(2), (k)(2).

programmatic searches. For instance, at both the federal and state levels, there are statutes regulating electronic surveillance, drone surveillance, ALPRs, and various types of records searches, including communications, tax, and video records.[84] But with the exception of electronic surveillance laws, these statutes are usually extremely vague with respect to the types of information that may be collected, the purposes for which the information may be used, and how long the information collected may be retained.[85] More significantly, for some types of programmatic searches, there is no authorizing statute at all; any rules that exist come solely from individual police departments.[86]

This is where administrative law principles can change the game.

IV. THE MANDATORY ROLE OF ADMINISTRATIVE LAW

Even if Fourth Amendment jurisprudence in this area remains moribund, well-worn principles of administrative law applied to program-driven searches and seizures could require both legislatures and police departments to provide more substantive regulation about the type of data collection and retention that occurs in connection with programs like AIR. Most government agencies—at the federal level, ranging from Food and Drug Administration to the Commerce Department, and at the state level, from environmental agencies to health services—are governed by administrative procedure acts (APAs).[87] Even some municipalities, such as New York City, have enacted such statutes meant to govern agencies.[88] These acts control how government agencies make decisions and promulgate rules. Of most relevance here is the stipulation found in the typical APA, including the federal APA upon which most other APAs are modeled, that whenever an agency develops a policy that is a "statement of general or particular applicability and future effect" which affects "the rights and obligations" of

84. *See* Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 495–99 (2013) (describing the gamut of data collection statutes).

85. *Id.* at 498–99 ("Close examination of statutory privacy protections simply affirms what the critics utter in complaint: that regulations are atomistic, inconsistent, atheoretical, and idiosyncratic.").

86. *See, e.g.*, Slobogin, *supra* note 11, at 147 (stating that "a large number of [panvasive] programs are not explicitly authorized by legislation," and noting that neither New York City's wide-ranging surveillance system nor the fusion centers of most states have express authorization from the relevant legislative body).

87. *See, e.g.*, 5 U.S.C. § 551(1) (defining "agency" extremely broadly).

88. N.Y.C. Charter ch. 45, § 1041 (2004).

the citizenry, it must follow certain procedures.[89]

Those procedures have four important components. First, whenever an agency plans to engage in programmatic actions, it must engage in a rulemaking process.[90] Second, that process calls for and encourages public participation in the fashioning of the rules, through the well-known notice-and-comment mechanism.[91] Third, under commonly accepted administrative law jurisprudence, agencies can be required to justify to a court the rules they create through what is known as "hard look" review to ensure both that the rules have a rational basis and that they are implemented even-handedly;[92] as the Supreme Court has said in the federal context, "The APA 'sets forth the procedures by which federal agencies are accountable to the public and their

89. Administrative Procedure Act, 5 U.S.C. § 551(4) (describing a rule as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency"); Long Island Care at Home, Inc. v. Coke, 551 U.S. 158, 172–73 (2007) (stating that a regulation that "directly governs the conduct of members of the public, 'affecting individual rights and obligations'" must use "full public notice-and-comment procedures") (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979))).

90. *See, e.g.*, 5 U.S.C. § 551(4); *Coke*, 551 U.S. at 172–73; Morton v. Ruiz, 415 U.S. 199, 232 (1974) (holding that a "substantive rule" that affects individual rights and obligations must be subject to notice-and-comment). The discussion in this Article uses the word "program" to refer to decisions made by policymakers, and can be thought of as analogous to the "policy or custom" that triggers municipal liability under § 1983. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983"); Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986) (holding that officers acting under authority of a "single decision"—here, an order of a prosecutor—can trigger municipal liability). If an individual officer is acting pursuant to a policy or custom, so defined, the analysis in this Article applies; otherwise, it does not.

91. *See, e.g.*, 5 U.S.C. § 553(b)(3) (stating that an agency must issue a generally available notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved.").

92. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'") (quoting Burlington Truck Lines, Inc., v. United States, 371 U.S. 156, 168 (1962))); Joseph T. Small, Jr. & Robert A. Burgoyne, *Criminal Prosecutions Initiated by Administrative Agencies: the FDA, the Accardi Doctrine and the Requirement of Consistent Agency Treatment*, 78 J. CRIM. L. & CRIMINOLOGY 87, 103–04 (1987) ("It is firmly established that an agency's unjustified discriminatory treatment of similarly situated parties constitutes arbitrary and capricious agency action."). *See generally* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 378–79 (2012) (describing the hard look requirement).

actions subject to review by the courts. . . . [i]t requires agencies to engage in 'reasoned decisionmaking.'"[93] Finally, before any of this can happen, legislation must set out an intelligible principle for the agency to follow. This requirement forces democratic consideration about whether the agency should be engaging in the practice at all and, if so, how it should accomplish its aims.[94]

All four of these procedural components could have a significant, concrete impact on policing programs. The rulemaking requirement would force police departments to think through how a given program will work and, combined with the rational basis requirement, should nudge them toward rules similar to those recommended by the ALI. The notice-and-comment process would facilitate local input about the program, something that today seldom occurs in the policing setting.[95] The even-handed application requirement could also have a potent impact on police departments, which have been known to arbitrarily focus on particular neighborhoods or groups.[96] Likewise, the requirement that programs be legislatively authorized is crucial in the police setting: programs like AIR are rarely the focus of legislation,[97] meaning that the source of their authority often consists solely of the omnibus direction, found in virtually every state code, that police departments detect, prevent, and deter crime.[98] That vague, capacious language is unlikely to satisfy even the

93. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (citations omitted).

94. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 50 (2010) (arguing that "delegations lacking intelligible principles are often less deserving of judicial deference because the resulting policies lack the political authority that typically underlies the rationale for the deference in the first place.").

95. *See, e.g.*, Sidney Fussell, *As Cities Curb Surveillance, Baltimore Police Took to the Air*, WIRED (Nov. 27, 2020, 7:00 AM), https://www.wired.com/story/cities-curb-surveillance-baltimore-police-took-air/ (stating that "[h]ardly anyone outside police department leadership and the vendor, Persistent Surveillance Systems, knew" about the BPD's first use of aerial surveillance in 2016); Colleen Long, *NYPD, Microsoft Create Crime-Fighting Tech System*, YAHOO! NEWS (Feb. 20, 2013), https://perma.cc/T43E-Q5T5 (quoting the director of the New York Police Department surveillance program as stating that the program "was created by cops for cops" and remarking that "the latest version has been quietly in use for about a year.").

96. Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO STATE. L.J. 1103, 1107–11 (2020) (recounting examples of racialized surveillance in Baltimore).

97. *See* Slobogin, *supra* note 11. Similar to other programs, AIR was never subject to a city council vote. *See generally* Leaders of a Beautiful Struggle v. Baltimore Police Department, 2 F.4th 330 (4th Cir. 2021).

98. *See, e.g.*, N.Y.C. Charter ch. 18, § 435(a) (2004) (providing, inter alia, that police shall "preserve the public peace, prevent crime, detect and arrest offenders" and "enforce and prevent the violation of all laws and ordinances in force in the city . . . ."); MD. CODE ANN., PUB. SAFETY § 2-301 (West 2023) (similar provisions).

lax mandates of the nondelegation doctrine.[99]

In other work, I have elaborated further how these four requirements might help implement access and retention rules of the type described in the ALI's principles.[100] Here, I will only reiterate why administrative law *must* have a role in regulating policing. That discussion is important because, even though police departments are administrative agencies and even though most APAs do not specifically exempt them from their provisions, the accepted wisdom to date has been that police do not have to follow administrative rulemaking procedures. A typical pronouncement one finds in administrative law treatises is that "[a]dministrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, *except* for those matters dealt with by the criminal law."[101]

On its face, this is a puzzling statement. As I have pointed out:

> [T]he APA requires that agencies abide by its rulemaking dictates when dealing with such matters as workplace ergonomics, the height of a fence around animals, and the precise manner in which farm yields are reported. A regime that requires the relevant agency to submit to administrative law constraints in these situations, but not when police want to require citizens to submit to drug testing, checkpoints, and surveillance, is seriously askew. [102]

The likely reason for this anomaly is the notion that police search and seizure rules are already governed by the criminal law or the Fourth Amendment; thus, they do not need to be subject to the process agencies must follow when they promulgate rules that apply to and that regulate the law-abiding public. While this rationale may exempt law enforcement from administrative law oversight, the rules that tell police when to conduct a stop, arrest, or search based on reasonable suspicion or probable cause are altogether different from rules governing data collection and retention programs. Stops, arrests, and traditional searches are suspicion-based; police

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99. The Supreme Court has struck down only two statutes on nondelegation grounds. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–27 (1943); Yakus v. United States, 321 U.S. 414, 420, 447 (1944). However, the Court may be on the verge of rethinking the nondelegation doctrine. *See generally* Trish McCubbin, Gundy v. U.S.: *Will the Supreme Court Revitalize the Non-Delegation Doctrine?*, Am. Bar Ass'n Sec. of Env't, Energy, & Res., Sept.-Oct. 2018, at 9.

100. *See* Slobogin, *supra* note 11, at 134–49.

101. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1 (3d ed. 1994) (emphasis added).

102. Slobogin, *supra* note 11, at 133–34 & n. 229 (first citing Chamber of Com. v. U.S. Dep't of Lab., 174 F.3d 206, 208, 211 (D.C. Cir. 1999) (ergonomics); then citing Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 171–72 (7th Cir. 1996) (fence height); and then citing Davidson v. Glickman, 169 F.3d 996, 999 (5th Cir. 1999) (farm acreage)).

have, or should have, reasonable suspicion or probable cause to believe the target has violated the criminal law.[103] In contrast, the policies that established AIR, CCTV systems, or fusions centers are not interpreting a criminal statute or a judicial search and seizure decision about who may be subject to police action, but rather authorize suspicionless actions against the entire populace or large segments of it. As is true with the rules of other agencies that must abide by rulemaking procedures, these policies have "general and future effect" on the "rights" of citizens because their panvasive nature has a direct impact on thousands of concededly innocent people, who must either submit to surveillance or modify their legitimate behavior if they want to avoid police intrusion.

A second possible reason for the de facto exemption of police agencies from the ambit of administrative law is that much policing is local, carried out by municipal police, not federal or state agents, and so is thought to be outside the purview of federal and state APAs.[104] But that would not explain why federal and state police agencies are not governed by their respective APAs, nor why the police departments in the nine states that consider municipal departments to be agencies of the state or the departments in those cities that have their own APA—such as New York—are exempt.[105] Furthermore, every municipality, not just those directly governed by an APA, enforces federal or state criminal laws; at least to that extent, they should be covered by federal or state APAs. Additionally, many data collection programs, such as those undertaken by fusion centers, have a much broader scope than a purely municipal program and are often funded by federal and state governments.[106] If none of these arguments win out, however, municipalities could still be brought into the fold through authorizing legislation that either is specific enough that little discretion is left to the department or mandates that departments follow administrative principles such as notice-and-comment review and even-handed application.[107]

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103. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (stops); Beck v. Ohio, 379 U.S. 89, 91 (1964) (arrests); Brinegar v. United States, 338 U.S. 160, 175 (1949) (searches).

104. *See generally* Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS (3d ed. 1987).

105. *Id.* § 2.80a ("[A municipal corporation] is variously described as an arm of the state, a miniature state, an instrumentality of the state, a mere creature of the state, an agency of the state, and the like.") (footnotes omitted).

106. *See, e.g.*, Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1042–43 (2022) (describing federal, state, and local sharing of information through fusion centers).

107. *See, e.g.*, CAL. CIV. CODE § 1798.90.51 (West 2016). This statute, authorizing police use of ALPRs in California, requires each department to "implement a usage and privacy policy in order to ensure that the collection, use, maintenance, sharing, and dissemination of

A third argument for exempting police agencies from the rulemaking process is that they have neither the wherewithal nor the expertise to develop rules. But, in fact, big police departments create detailed rules governing things such as use of force, stop and frisk, and surveillance techniques all the time.[108] Smaller departments can piggyback on this work and on the recommendations made by various organizations, ranging from the International Association of Police Chiefs to the ACLU, for specific guidance.[109]

Properly construed, Supreme Court case law provides a basis for this regulatory restructuring of suspicionless programs around administrative law principles. While the Supreme Court's special needs jurisprudence does not explicitly reference APAs, its decisions in the business inspection setting suggest that the Fourth Amendment requires some sort of rulemaking in situations where the warrant requirement is inapposite.[110] In addition to *Dewey*'s mention of the Code of Federal Regulations when it upheld warrantless inspections of coal mines, there is the Court's pronouncement in *Marshall v. Barlow's, Inc.*[111] that, to protect business owners from the "unbridled discretion [of] executive and administrative officers," the Judiciary must ensure that there are "reasonable legislative or administrative standards for conducting an . . . inspection . . . with respect to a particular [establishment]."[112] And in *Colonnade Catering Corp. v. United States*,[113] the Court said, in the course of authorizing warrantless inspections of liquor stores: "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment

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ALPR information is consistent with respect of individuals' privacy and civil liberties," and also, requires that police regulations "at a minimum" set out "the authorized purposes for using the ALPR system and collecting ALPR information . . . the employees and independent contractors who are authorized to use or access the ALPR system, or to collection ALPR information . . . a description of how the ALPR system will be monitored to ensure the security of the information and compliance with applicable privacy laws," and the rules governing the sharing, accuracy, and retention of information obtained. *Id.*

108. *See, e.g.*, *CCTV - Policies and Procedures*, D.C. METRO. POLICE DEP'T, http://mpdc.dc.gov/node/214522 (last visited Aug. 13, 2023) (discussing D.C. regulations governing use of closed-circuit television system).

109. *See, e.g.*, *Small Unmanned Aircraft*, INT'L ASS'N OF CHIEFS OF POLICE, https://www.theiacp.org/sites/default/files/2020-06/Unmanned%20Aircraft%20FULL%20-%2006222020.pdf (Apr. 2019); *Community Control Over Police Surveillance*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance (last visited Aug. 13, 2023).

110. *See, e.g.*, Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

111. 436 U.S. 307 (1978).

112. *Id.* at 323, 331 (last alteration in original).

113. 397 U.S. 72 (1970).

and its various restrictive rules apply."[114] Conversely, this passage suggests, if the Fourth Amendment's warrant requirement does not apply or cannot work, Congress or its agency delegee must act.

These various statements from the Supreme Court indicate that administrative law can perform the Constitution's regulatory function if the legislature or agency promulgates constraining rules. They also suggest that, if such rules are developed, they establish a safe harbor from aggressive judicial intervention.[115] Most importantly, they can be read to hold that the Fourth Amendment *requires* formal rulemaking by the police before a programmatic search or seizure may take place.

CONCLUSION

In *Leaders of a Beautiful Struggle*, the Fourth Circuit had an opportunity to reconceptualize the way the Fourth Amendment applies to programmatic police action.[116] It could have held that, when analyzing the constitutionality of policing programs aimed at large swaths of the population, administrative law principles provide a meaningful substitute for traditional Fourth Amendment strictures, even when no suspicion with respect to any given individual in that population exists. But instead, the court applied Fourth Amendment doctrine meant to govern individual cases to the panvasive setting; a move that, followed to its logical conclusion, renders information-gathering programs such as AIR unconstitutional. Administrative law principles, in contrast, allow governments to experiment with such programs, assuming sufficient legislative delegation, the development of rational, community-vetted regulations, and non-arbitrary implementation. This type of regime fits much better with the Fourth Amendment's overall admonition that searches and seizures be "reasonable."[117] A key advantage of subjecting police agencies to the administrative law principles that all other agencies must follow, however, is that they apply *regardless* of whether the Fourth Amendment does. APAs require a rulemaking process whenever agencies take actions, like Baltimore's police department did with AIR, that have general and future effect on the rights of citizens.

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114. *Id.* at 77.

115. *Cf.* John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 208 (2015) ("[T]he Court could offer a 'safe harbor' of relaxed constitutional scrutiny to jurisdictions that voluntarily adopt and comply with reforms . . . .").

116. *See generally* Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330 (4th Cir. 2021).

117. *See generally id.*