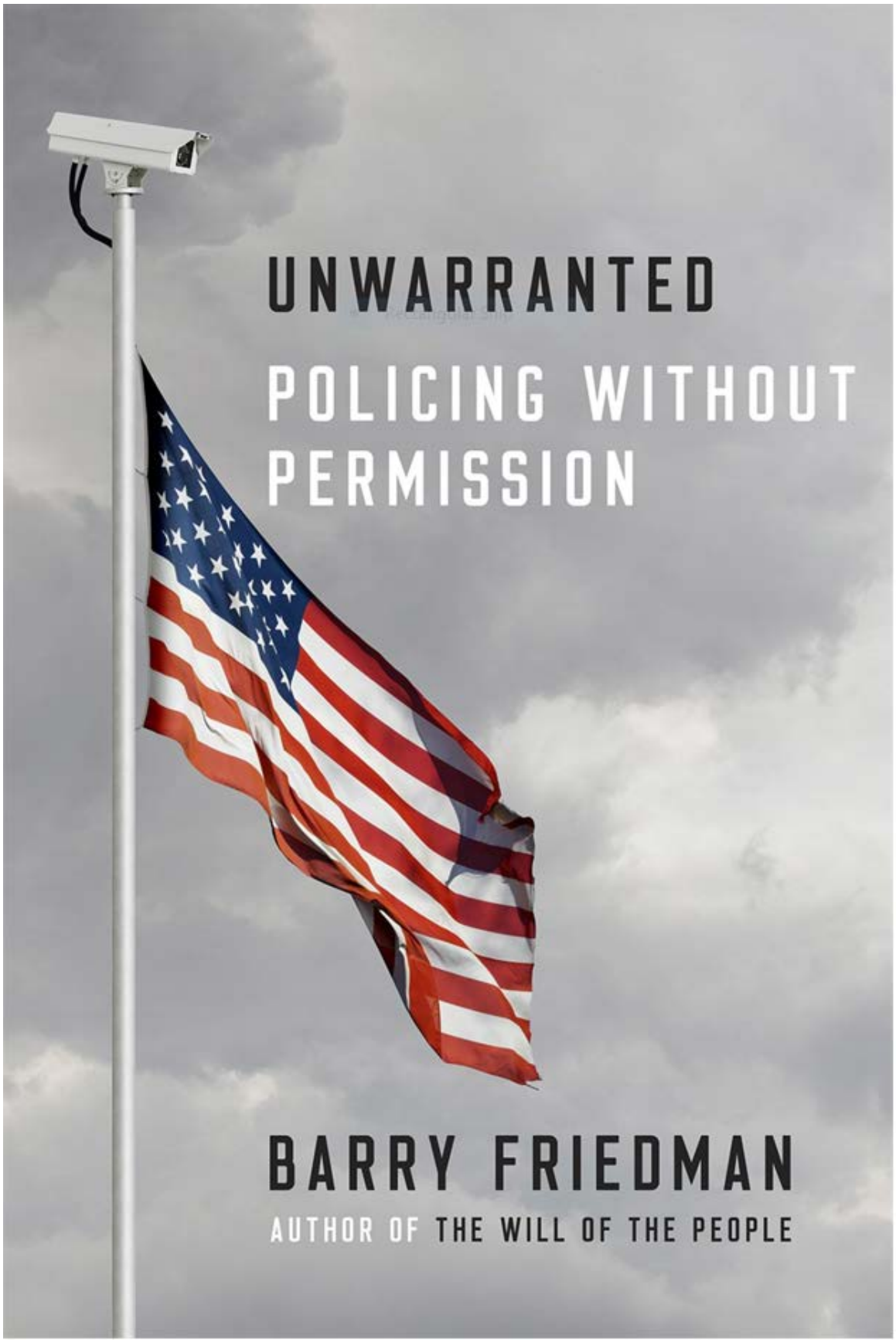
UNWARRANTED
POLICING WITHOUT PERMISSION
BARRY FRIEDMAN
AUTHOR OF THE WILL OF THE PEOPLE

UNWARRANTED

Policing Without Permission

BARRY FRIEDMAN

Farrar, Straus and Giroux New York

1

POLICING IN SECRET

The public can't participate in setting policing policy if people don't know what is going on. It's as simple as that. If anything should be obvious, it is that transparency is essential to democratic governance. Yet a veil of secrecy has shrouded policing for much of its history. Some of this is necessary, but much of it is habit. If democratic policing is to be a reality, we need to start by sorting out when secrecy is appropriate in policing, and when the veil must drop.

THE SECRET

February 11, 2014, was "The Day We Fight Back." Around the globe, a raft of consumer-friendly Internet companies, like Reddit, Tumblr, and Mozilla, and groups such as the Electronic Frontier Foundation, Human Rights Watch, and Amnesty International, sponsored a loosely knit series of events against mass surveillance. Chicago's event—a march starting at Daley Plaza, in Chicago's Loop, and ending in a dinner at Timothy O'Toole's Pub—was hosted by Restore the Fourth Chicago, "a nonpartisan political group of concerned individuals dedicated to restoring our Fourth Amendment rights."[1]

Among those in attendance in Chicago was Freddy Martinez. Martinez, a youthful techie with a degree in physics, had developed a

preoccupation with a law enforcement device he'd read about, one that scoops up cell phone transmissions. The device works by tricking cell phones into thinking it is a cell tower. The cell phones then ping it, revealing their unique identity numbers—their IMSI, or international mobile subscriber identity—as well as their locations.[2]

Although it goes by many names—including cell site simulator, or IMSI catcher—the device is mostly called a "Stingray." It's one of many brands made for law enforcement by the Harris Corporation, a large defense contractor. Stingrays can even capture content from cell phones—effectively wiretapping them. It is indiscriminate, though: when being used, a Stingray captures the data of all cell phones in the vicinity.[3]

Martinez's interest was part technical and part political. He had come to suspect that the Chicago police were using the device to conduct mass surveillance, and in particular to spy on peaceful protests. He was hardly alone in his suspicion. Now-public documents reveal the Miami police used a Stingray during demonstrations over the proposed Free Trade Area of the Americas. A *Christian Science Monitor* story suggested the same was occurring in Chicago. Martinez had begun to wonder whether, by fighting fire with technology fire, the Stingray could be defeated.[4]

While Martinez was struggling with the technical problem of countering the Stingray, a friend suggested filing a Freedom of Information request. And so he shot off an email to the Chicago Police Department (CPD): "I am seeking records pertaining to the purchase or reception of any IMSI catchers, commonly known as Stingrays (a trademark of Harris Corporation)."[5]

Eventually Martinez, aided by his attorney Matt Topic, sued the City of Chicago for the information. In return they got a handful of IMSI-catcher invoices. As the local CBS affiliate reported, "The Chicago Police Department has finally acknowledged that it had purchased cellphone interceptor devices back in 2008." The story noted that when CBS asked the very same question ten months earlier the CPD had "denied it."[6]

Martinez and Topic filed more requests, trying to get answers to a host of important questions about the use of Stingray devices. What sorts of surveillance were they being used for? Do the police get warrants, or other permission from judges, first? Are judges being told the

truth about what devices the police are using? Is the data that is captured stored somewhere? How is that data being used? Who has access to it? Are there protocols governing how and when a Stingray can be used? Has the CPD done any analysis of whether using a Stingray is even constitutional?[7]

It was like pulling teeth. The CPD hired a fancy law firm and quickly spent over $100,000 fighting off the requests. The deflections came shotgun style: No responsive documents exist. If they do exist, they are sealed from public view by court order. In any event, the information is a national security secret that is protected by federal law. Besides, it's a trade secret. And so on.[8]

The CPD's responses raised more questions than they answered. Court records do get sealed away from the public, but then they regularly get unsealed to respond to FOIA requests when the events are over—so why not these records? How is it a trade secret when Harris had filed public patent documents with much of the requested information? Given major constitutional questions about Stingray use, why was there no legal opinion in place?[9]

But the really odd thing was this: while the CPD was playing "I've got a secret" with Martinez and Topic, news about the use of Stingrays by law enforcement was popping up all over the country. Like mushrooms after a downpour. The secret they were struggling to keep was hardly a secret at all.

As details emerged, things got more curious still. The Anaheim Police Department released a letter on Stingrays (basically saying they couldn't say anything). Journalists noticed that Anaheim's letter looked an awful lot like one released in San Diego. And in Gwinnet County, Georgia, too, for that matter. In Martinez's case, the CPD offered up an affidavit of an FBI agent named Morrison about why this all must be kept under wraps. A Google search revealed Morrison was filing similar affidavits throughout the country.[10]

It turns out that for at least a decade the federal government had been subsidizing state and local law enforcement purchases of Stingrays—but with that money came a big catch: law enforcement could not divulge anything about the device. To anyone: to judges, to public officials, in court, under oath, nothing. It was in the contract with the Harris Corporation. And just to make sure matters were clear, the FBI made

local law enforcement sign nondisclosure agreements (NDAs) as well. As the story leaked out, it became obvious the FBI was orchestrating a campaign of noninformation.[11]

Policing officials argue that this game of cat-and-mouse makes us safer. They can't answer questions about Stingray use because "much like a jigsaw puzzle, each detail may aid in piecing together other bits of information" on what the government is doing. It would, as the FBI stated in a prepared press release to be used by local law enforcement, "provid[e] criminal elements with the ability to circumvent these devices." Not everyone sees it that way. "It's ridiculous," argues Hanni Fakhoury, an attorney at the Electronic Frontier Foundation. "It's secrecy for the sake of secrecy. It's not actually a public safety issue now."[12]

SECRECY'S COSTS

Stingrays indisputably have a role to play in law enforcement. One St. Louis judge, who does seem troubled by the "broad" way law enforcement is using them today, says they nonetheless are doing "miracle work." He had a case where a Stingray was used to catch a murderer. The FBI claims the technology is used in a variety of contexts: "It's how we find killers, it's how we find kidnappers, it's how we find drug dealers, it's how we find missing children, it's how we find pedophiles."[13]

But like many things in life, the question is whether all this sneaking around is worth the costs. Or even whether the secrecy surrounding the use of Stingrays is necessary. And it is at that level that Freddy Martinez and Matt Topic aren't buying it.

For one thing, Martinez and Topic are leery of how the Stingrays are being deployed, and in particular of whether the police are spying on peaceful, lawful protesters. The Chicago Police Department has a bad history this way. For decades its "Red Squad"—to quote a rather conservative judge—"spied on, infiltrated, and harassed a wide variety of political groups," including those that "were not only lawful . . . but also harmless." Martinez and Topic both worry the CPD is using Stingray technology to build up a database of protesters. "We just don't know," Topic says. "They aren't disclosing any information."[14]

Even if the Stingray is used only for perfectly legitimate criminal cases, Topic and Martinez had plenty of reason to suspect the police

were not being straight with judges. To conduct most electronic surveillance, the government needs some sort of a court order—a warrant, even. Given the secrecy provisions in the contract with the Harris Corporation and the FBI's nondisclosure agreement, were cops accurately explaining to judges what they wanted to do? In Charlotte, North Carolina, the judges themselves learned the answer was no after the local media obtained some documents through a FOIA request. It turned out that the Charlotte-Mecklenburg Police Department (CMPD) had had a Stingray since 2006, yet the police didn't even bother to go to court for an order until 2010. Then, when they did go to court—between 2010 and 2014—they didn't come clean with the judges about what they were doing. Court records suggest that a Stingray may have been used in more than five hundred cases, but law enforcement still didn't quite say so. (Since this all became public, the *Charlotte Observer* reported, the CMPD has "revised" its court filings to—these are the CMPD's words—"improve the effectiveness of the process and provide greater transparency.")[15]

Secrecy has threatened to overturn criminal convictions. If judges granted orders without accurate information—or if people were spied on unconstitutionally without any court order at all—then anything the police discovered as a result had to be thrown out at trial. The Charlotte prosecutor has had to go through those five hundred files to ensure nothing in them will require a reversal of a conviction. "That is our fervent hope," said the deputy district attorney. A similar situation confronts prosecutors in Tacoma, Washington.[16]

It is also clear that because of the demand for secrecy, some defendants are getting off easy—or even scot-free. Under the nondisclosure agreements, the FBI has the right to force local prosecutors to drop a case instead of revealing evidence of Stingray usage. The Bureau claims it's never done this, but the evidence is that, acting on those NDAs, cases have been dropped or generous plea bargains given to defendants. In Tallahassee, Florida, a couple of guys toting BB guns stole a cell phone and $130 worth of pot. They were quickly apprehended. When a defense lawyer asked how the heck the police caught their clients so quickly, the witness—a sergeant named Corbitt—claimed it was through a subscription database. Can't be, pointed out the lawyers, it was a prepaid "burner" phone. Under pressure, Corbitt admitted, "We do have

specific equipment that allows us to . . . direction find on a handset if necessary." When pressed yet further, he clammed up "[d]ue to a nondisclosure agreement with the FBI." Result: for a crime that carries a minimum of four years in prison, the defendants walked with six months' probation.[17]

Then there's the loss of trust in law enforcement generally. Matt Topic says of the faux-secrecy, "This is something that harms the credibility of law enforcement as they come in asking for the benefit of the doubt on other issues." Some judges have been apoplectic. In Baltimore—where records show a Stingray was used more than four thousand times between 2007 and 2015—a judge threatened the police with contempt if they did not detail the method of tracking cell phones. The prosecutors elected to do without the evidence. Since then, a Maryland appellate court has ruled that police are required to have probable cause and a warrant before they can track a phone with a Stingray. In the Tallahassee case, stymied by the NDA, defense counsel subpoenaed the device. The government argued it was exempt from Florida's open records statute. Judge Frank Sheffield demanded from the bench: "What right does law enforcement have to hide behind the rules and listen in and take people's information like the NSA?"[18]

But beyond all this there is something even more fundamental at risk: democratic governance itself. How can we govern something we don't know about? When shown a copy of the NDA in Florida, Bruce Jacob—the former dean of Florida's Stetson Law School—said, "It reminds me of what happens in totalitarian countries: you don't know what the hell is going on." In a FOIA suit brought by the ACLU in Erie County, New York, the judge referred to the secret agreements to dismiss criminal prosecutions when the FBI snapped its fingers, saying, "If that is not an instruction that affects the public, nothing is."[19]

Concern for democratic accountability, more than anything else, is what drives Martinez and Topic. It turns out Chicago actually has had Stingrays since 2005. Martinez worries that by the time we discuss this, it will be a fait accompli. "We should have had the discussion ten years ago." Topic insists, even if Stingray use is constitutional, "I reject the idea that you can use it without discussion."[20]

Just as Stingrays can play a real role in law enforcement, secrecy has its place too. The committed people who work to keep us safe do, on

some occasions, just need us to trust them. To leave them to do their job. The problem, as Matt Topic would say, is where to draw the line.

EARLY DAYS

Because of the muddled history of policing in this country, the question of how much autonomy law enforcement needs may seem tougher than it actually is. We've simply gotten into the bad habit of granting law enforcement more space than it requires.

Our Constitution does an inadequate job of regulating the police in large part because at the time it was written no one anticipated the sort of organized police forces we have today. The issues the Framers had with "policing"—and some were serious enough to be precipitating factors in the American Revolution, and to lead to ratification of the Fourth Amendment—were mostly about taxes and tax collection.

Early Americans didn't like being policed: law enforcement in the eighteenth century was, at best, a loose collection of sheriffs, constables, and night watchmen. They often lacked the most basic tools to do their job, as was evident in the case of the hapless Sheriff Hermanus Schuyler of Albany. A court fined Schuyler twenty pounds for failing to arrest two trespassers, though Schuyler kept trying to explain that the fellows really were quite dangerous. Proving Schuyler's point, court records indicate that the very day the fine was imposed, one of the men was sought for "assaulting and wounding the Sheriff of Albany, Hermanus Schuyler." (Poor Schulyer was then ordered to arrest him for that as well.) The night watch—a civic duty one could buy one's way out of in some jurisdictions—was the butt of many jokes. The *New York Gazette* of 1757 dubbed its watch a "[p]arcel of idle, drunken, vigilant Snorers, who never quelled any nocturnal Tumult in their lives . . . as ready to join in a Burglary as any Thief in Christendom." A half century later, the *Louisiana Gazette* said of the watch, "It is like setting wolves to guard the sheep."[21]

By the mid-1800s, though, civic disorder—or perceptions of it—led Americans to overcome their worries about "absolute police despotism." And so it "became necessary" to create urban forces, as an 1833 report explained, to have "in every large town . . . several intelligent and experienced men devoting their time and skill to the pursuit and arrest

of . . . Robbers, housebreakers, pickpockets and other felons." The model—only loosely followed here in the United States—was London's police force, which was created in 1829 under the guidance of Sir Robert Peel (hence the name "bobbies").[22]

These early forces, though, were little better than the night watch. Police were given a uniform, a club, handcuffs, and a whistle, and sent out to patrol for crime. (Guns came later.) They were ill-paid, and so it was understandable if they took the chance to slip off for a drink or a little nap. When Theodore Roosevelt became one of the commissioners of the New York police force in 1895, he went out to observe the troops and was startled to find them "in restaurants, asleep, or otherwise away from their posts." One late night, Roosevelt even found an officer "asleep on a butter-tub in the middle of the sidewalk, his snoring loud enough to be heard across the street."[23]

Nineteenth-century cops could be incompetent and brutal both. Philadelphia's first marshal of the city police had to let one-third of the force go only a year into the job, deeming his own troops "worthless, drunken, and totally unfit." Almost twenty-five years later, an 1872 *Philadelphia Ledger* article described a certain type of officer, "the men who upon merest whim, or the slightest show of resistance, fly into a gust of passion, pull out their revolver and make a serious affray out of what might have passed off as an unimportant incident."[24]

THE SEEDS OF UNACCOUNTABILITY

As for how this ragtag bunch became today's militarized, independent, and secretive forces—the die was cast on that roughly one hundred years ago. The trigger was corruption, which ran so deep and stank so bad that eventually it could no longer be ignored—corruption that threatened democratic governance itself.

On May 24, 1875, Inspector Alexander S. "Clubber" Williams retired from the New York police force. On March 25, 1917, he died. Both events occasioned long stories in *The New York Times*, for Inspector Williams was no ordinary officer.[25]

Williams got his nickname for his work on patrol and his "energetic action at popular gatherings." Famously, he said, "There is more law in the end of a policeman's nightstick than in a decision of the Supreme

Court." He was placed into one of New York's toughest precincts; on his first day on the job he tossed two of its biggest troublemakers through plate-glass windows. He didn't like the moniker—he went by Alex, and enjoyed "Czar of the Tenderloin," which is what the obituary called him—but he also defended his record when called "Clubber" by the mayor: "Just ask the Mayor if he can point to a single person I ever clubbed that did not deserve it. He can't name one and he knows it."[26]

When Williams retired from the force, however, he did not do so voluntarily, and clubbing was not the reason for his demise. It was the take. At the time he retired—on a half pension of $1,750 per year—Williams was a wealthy man, with a net worth well beyond the sum of his modest wages. Among his properties was an estate in Connecticut, *avec* yacht. When asked by the Lexow Commission, charged to investigate vice and corruption in New York, how he came by all this, he replied only, "I bought real estate in Japan and it has increased in value."[27]

Williams's path to the Lexow Commission was complex, but if it was paved by any one man, that man was the Reverend Charles Henry Parkhurst. Parkhurst held the pulpit at the Madison Square Presbyterian Church at a time when the Democratic political machine Tammany Hall ruled the city. Parkhurst became the head of the Society for the Prevention of Crime, a group of do-good New York citizens appalled by sprawling vice. At first Parkhurst thought the police were simply not doing enough, and hoped publicity would fix that. But then, it "began to dawn on me" that the police "protect and foster crime and make capital out of it." And that the corruption ran all the way to the top. In a sermon, Parkhurst called the mayor and his staff "a lying, perjuring, rum-soaked and libidinous lot of polluted harpies." The Lexow Commission was appointed when growing indignation—particularly among Republicans—got a bill passed in Albany and funding from private sources.[28]

Once the Lexow Commission got going, it uncovered a level of violence and graft that was breathtaking. Nearly ten thousand pages of transcripts detailed a system of police "blackmail, extortion and corruption." On a regular basis citizens were "abused, clubbed and imprisoned, and even convicted of crime on false testimony by policemen and their accomplices." There were prices, fixed prices, for everything, from police jobs, to keeping open a brothel, to the "protection" money paid by honest business owners. Stolen property was "recovered" at a price set

to pay off the pawnbroker and the cops. Owners of houses of prostitution were forced to stay open even when they wanted to close, to feed the yawning maw of the police.[29]

But it was the next thing the Lexow Commission discovered that called for immediate attention: widespread electoral fraud. "[I]n a very large number of the election districts of the city of New York," pronounced the Commission, "almost every conceivable crime against the elective franchise was either committed or permitted *by the police*, invariably in the interest of the dominant Democratic organization of the city of New York, commonly called Tammany Hall."[30]

New York, it turned out, was one cesspool of collusion between the city's machine and its police force. Cops bought their jobs, which they were placed into as a matter of political patronage. They then shook down the citizenry for money that feathered the nests of their superiors and fed back into the political machinery of the city, assuring its continued political domination.[31]

The phenomenon of a police force overly beholden to elected leaders was commonplace in many places in the country, even if Tammany's malfeasance could not be matched. In places not nearly as corrupt, the connection between political leadership and the police was still thought to foster deep ills. August Vollmer, the first police chief of Berkeley, California, was one of the great police reform figures of his time. In a 1917 report, he condemned the "era of incivility, ignorance, brutality and graft," noting that too often "the only requirement necessary for appointment as a policeman was political pull and brute strength."[32]

"PROFESSIONALISM" AND AUTONOMY

If the problem was that the police were corrupt, that they were uncivilized, that they were too close to the politicians, then the answer was clear: separate them from politics. Police forces would become autonomous, and above all else "professional." The independence of a professional police from political control became the fundamental operating assumption regarding policing, one that—despite many reforms since—has proven difficult to shake off. To this day, it's part of the reason we are so reluctant to govern and restrain the police. It's one of the reasons we don't have democratic policing.[33]

For reformers like Vollmer—and his protégé O. W. Wilson, the chief of several major police forces such as Chicago—the point of police professionalism was "scientific" and "efficient" policing. Much of what seems familiar to us today had its start in the early twentieth century. Police began formal recordkeeping, including the Uniform Crime Reports that still are kept. Crime labs were created and forensic technology was taking hold, the most ubiquitous aspect of which today is fingerprinting. Hiring standards for the police—and training once they got on the force—were on the upswing.[34]

Even if this new "professional" model was the right one, getting there wasn't easy. As late as 1931, the National Commission on Law Enforcement and Observance, commonly named the Wickersham Commission after the Attorney General who was its chair, found that corruption pervaded Prohibition-era policing. Police regularly employed the "third degree"—extracting confessions by engaging in practices all too akin to torture. In New York, which supposedly had been rescued by do-gooders, the Wickersham Commission heard reports of "fixed" charges, "shakedown arrests," and a force still all too in the thrall of Tammany.[35]

The cities were practically oases of professional policing compared with what went on in more rural parts of America such as the South or West, where vigilante justice often took on a nauseating form, particularly if the targets were African American. In 1936, in *Brown v. Mississippi*, the Supreme Court took what was then the remarkable step of overturning a state murder conviction. One defendant had been hung twice from a tree. He and others were whipped till their backs were in shreds, escaping further punishment only by confessing. Returning from the war, in 1946, Isaac Woodard became a rallying cry for the nascent civil rights movement after South Carolina law enforcement beat him to blindness for displaying insufficient deference to his white bus driver.[36]

Still, by fits and by starts, policing changed. "Professionalism" may not have been exactly the right word for it, conjuring as it does images of highly trained individuals who do their work free of supervision. In truth, police agencies were hierarchical bureaucracies, organized along military lines. Orders came down from above. But Progressive-era innovations such as the civil service allowed the police to break free of partisan politics. Officers could be hired on something approaching merit. When bipartisan police commissions proved an unwieldy

way to manage the force, the chiefs themselves were granted substantial autonomy as well.[37]

Gradually, these scientific, educated, efficient—professional—police were cut free from other responsibilities to focus their efforts single-mindedly on crime fighting. In the late nineteenth and early twentieth centuries, the police had been expected to deal not only with criminals, but also with the castoffs of an industrializing society. They performed a variety of social services, including even housing the homeless. But as the nation faced crime waves both real and manufactured—none more gripping than the tommy-gun-laden hijinks of Prohibition—society came to accept that the singular job of the police should be going after the bad guys.[38]

By the 1950s, if any single iconic image captured reform-era policing, it was the shiny squad car, with its two-way radio. Police patrolling their communities on foot was seen as passé. Mobile police would be freed up from their neighborhoods and all their social problems, and turned loose to quell crime and quickly nab offenders. Radio technology allowed a centralized HQ to maintain control, dispatching officers to answer emergency calls. Success could now be captured in measurable statistics: call response times and crime rates.[39]

PROFESSIONALISM'S FAILURE

And then it all went south.

The façade of professional policing crumbled entirely during the turbulent 1960s. Between 1963 and 1968 America's ghettos were set ablaze by riots during a series of "long, hot summers." The Kerner Commission—charged by President Lyndon Johnson to assess what had happened—pointed a sharp finger: It found "deep hostility between police and ghetto communities as a primary cause of the disorders." Police were "not merely the spark": "abrasive relationships between the police and . . . minority groups have been a major and explosive source of grievance, tension and, ultimately, disorder."[40]

The situation on America's campuses was not much prettier; in the face of student protests, police struck out aggressively at the intelligentsia and children of the Establishment. A neoconservative academic described how "thanks to the New York City Police Department, a large

part of the Columbia campus had become radicalized" because of police who "simply ran wild," giving the treatment not only to protesters but also to "[t]hose who tried to say they were innocent bystanders or faculty."[41]

The obvious problem with "autonomy," it turned out, was that it left the police free to make their own decisions, many of which were hardly "professional." This was clear in a number of disasters brought to the nation's attention courtesy of television. Viewers watched Southern police in Birmingham and Selma turn fire hoses, whips, and vicious dogs on peaceful protesters, adults and children alike. During the 1968 Democratic Convention, Chicago's police—"professionalized" by O. W. Wilson—used Mace and "unrestrained and indiscriminate police violence" against people, especially reporters and photographers, who had "broken no law, disobeyed no order, made no threat," in conduct an official report decided "only can be called a police riot."[42]

Above all, having set up crime statistics as the metric of success, police failed by their own measure: Crime rates rose at levels that alarmed the public. Fear of crime seemed to skyrocket even faster than crime rates themselves; the subject gripped the nation so firmly it became one of the two defining issues in the presidential election of 1968. (The other issue was the Vietnam War.)[43]

And so, the hunt was on for a new paradigm, some other way to understand and implement policing.

COMMUNITY POLICING

In the midst of all the chaos of the 1960s, "recognizing the urgency of the Nation's crime problem and the depth of ignorance about it," President Johnson appointed another blue-ribbon committee, his Crime Commission, to examine its causes and make recommendations. The report of the President's Commission, *The Challenge of Crime in a Free Society*, was revealing of what professionalism and reform had wrought.[44]

The problem was a lack of trust brought about by police misconduct. "Police agencies cannot preserve the public peace and control crime unless the public participates more fully than it now does in law enforcement," explained the Crime Commission. Yet "[t]here is much distrust of the police, especially among boys and young men, among the people the police often deal with." As a result, "[i]t is common in those neighborhoods for

citizens to fail to report crimes or refuse to cooperate with investigations." The Crime Commission was as clear as the Kerner Commission in stating the reason for the distrust: "Commission observers in high-crime neighborhoods . . . have seen instances of unambiguous physical abuse," "[t]hey have heard verbal abuse," they "have seen a certain amount of harassment."[45]

The Commission was firm in insisting that the wounds had to be healed, that the police and the communities had to learn to work together. And while the Commission was clear that "[c]itizen hostility toward the police is every bit as disruptive of peace and order . . . as police indifference to or mistreatment of citizens," still "the duty of taking the initiative clearly devolves on the police, both because they are organized and disciplined and because they are public servants sworn to protect every part of the community." The Commission recommended creating community relations "machinery," especially in minority communities. It also said there should be a "citizens' advisory committee" that is "broadly representative of the community" to "work out solutions to problems of conflict between the police and the community." "It is an urgent duty," the commissioners insisted.[46]

Nothing in the policing world changes quickly, but by the late 1980s progressive forces were embracing the idea of "community policing." Houston's police commissioner Lee P. Brown—the first African American chief of a major city department—set this all out in a 1989 manifesto that was a complete rejection of what the earlier professionalism movement had stood for. Those squad cars buzzing through the metropolis responding to emergency calls, controlled by centralized management—they turned out to be the problem, not the solution. Officers spent their time racing from pillar to post when what they needed to do was get out of their cars, walk the beat, and engage with their communities. They should be "encouraged to initiate creative responses to community problems." Police forces should "recognize the merits of community involvement," and should decentralize authority so that officers can "interact with residents on a routine basis and keep them informed." Brown also advocated "power-sharing," meaning "the community is allowed to participate in the decision-making process."[47]

This vision of community policing got a boost when, in his 1994 State of the Union address, President Bill Clinton vowed to put 100,000

new police officers on the streets. Later that year the Community Oriented Policing Services (COPS) office opened in the Department of Justice. Over the next six years nearly $9 billion was disbursed to state and local government to support community policing efforts. By 1999, the Bureau of Justice Statistics was reporting that fully one quarter of the police were "community policing" officers or their equivalent.[48]

There was a new sheriff in town, and this one was talking a real good game of police-community partnership. Perhaps the wall between the people and the police was about to come down.

THE FAILURE OF COMMUNITY POLICING

Even before Clinton focused national attention and resources on community policing, detractors rushed to call the concept into question. Manhattan's crusty longtime District Attorney Robert M. Morgenthau poured cold water on all the optimism about policing's new direction. To the extent "[c]ommunity policing . . . harks back to the halcyon days when an officer was permanently assigned to the same areas so that he came to know its residents and their problems," then—he wrote in an 1990 op-ed piece in *The New York Times*—"[n]o sensible law enforcement official" could disagree. Reforms like these were "long overdue."[49]

But community policing, Morgenthau argued, was asking too much of officers, more than their employers were prepared to train them to handle. "The new patrol cop is to be a municipal ombudsman—a conduit for the services of other city agencies and a catalyst for community self-help efforts." "[F]or this awesome task," Morgenthau proclaimed, "no one can seriously believe that five months at a police academy is adequate training."[50]

Morgenthau was hardly alone in his skepticism. As numerous observers pointed out, community policing was, like beauty, in the eyes of the beholder. It was variously described as "a hodge-podge of unintegrated programs, absent central purpose or theme," and "a buzzword," for which "the variety of activities associated with it seem to have little in common." Community policing programs came to be so amorphous, so all encompassing, that they even included hiring SWAT teams.[51]

To be sure, there was a buzz of activity, some of it admirable and effectual. With that much federal money being tossed around, one

certainly hoped so. One strand of community policing, perhaps its most prominent, emphasized problem solving, in which the police would work with the community to address root problems. For example, after lawsuits stopped the Colorado Springs Police Department (CSPD) from simply arresting homeless camp residents, a unit of the CSPD managed to eliminate the camps by leading a network of social service providers to help relocate residents. A remarkable collaboration in Los Angeles reduced gang violence in 2010. Police began athletic leagues; programs like Neighborhood Watch became regular features throughout the country.[52]

But community policing also had a dark side, what came to be known as "order maintenance" policing. In a game-changing article in the March 1982 issue of *The Atlantic* titled "Broken Windows," George Kelling and James Q. Wilson argued that disorder cannot be left alone because it breeds more disorder. "[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken." Then, disorder breeds fear of crime, which in turn creates an environment in which crime can prosper—"many residents will think that crime, especially violent crime, is on the rise, and they will modify their behavior accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows, moving with averted eyes, silent lips, and hurried steps." The answer was to go after disorder the moment it showed its face.[53]

As applied, order maintenance policing's aggressive approach served only to worsen police-community relations. In New York City, Mayor Rudy Giuliani brought it front and center, cracking down on turnstile jumpers and squeegee men, but also harassing local residents with the frequent use of stop-and-frisk. Measures like these, across the country, "undermine[d] the legitimacy of the criminal justice system" and bred yet further hostility in communities deeply in need of help from the police. As George Mason's Center for Evidence-Based Crime Policy explained, not only was there a serious debate about whether order maintenance policing reduced crime, "there is the concern that any effectiveness of broken windows policing . . . may come at the expense of reduced citizen satisfaction and damage to citizen perceptions of the legitimacy of police."[54]

Community policing, as people like Lee Brown promoted it, called for deep philosophical change, but most police forces simply did not

buy in. In 2008, Wesley Skogan, a Chicagoan and longtime student of policing, wrote "Why Reforms Fail," a lament about the demise of community policing aspirations. "Police," he wrote—echoing conclusions reached by many others—"are skeptical about programs invented by civilians." He attributed this to "police culture": "American policing is dominated by a 'we versus they,' or 'insider versus outsider' orientation that assumes that the academics, politicians, and community activists who plan policing programs cannot possibly understand their job." In short, "[t]hey do not like civilians influencing their operational priorities, or deciding if they are effective."[55]

As a result, the same lack of trust between police and policed communities that caused so much trouble in the 1960s once again reared its head publicly beginning in the summer of 2014, with the shooting of Michael Brown in Ferguson, Missouri. In the face of one "officer-involved" shooting after another, of riots and protests throughout the country, the distrust was plain to see. The country could no longer ignore the fact that policing still retained its "we versus they" perspective, aloof from the community, autonomous if not always professional, and not particularly welcoming to meddling or criticism.

And so, in the wake of the latest national turmoil over policing yet another president appointed yet another committee—the Task Force on 21st Century Policing—to make yet more recommendations. "Given the urgency of the issues," said Barack Obama (perhaps unintentionally echoing Lyndon Johnson), the group would report back in ninety days as to what should be done. Those recommendations were telling. Finding there was still a severe lack of trust between police and the communities they police, the Task Force called on law enforcement "to establish a culture of transparency and accountability to build trust and legitimacy." "[L]aw enforcement," it emphasized, cannot build community trust if it is seen as an occupying force coming from outside to impose control on the community."[56]

SECRECY FOR SECRECY'S SAKE

The problem is there will never be trust and accountability without transparency. Anyone who thinks otherwise is dreaming. To the extent we believe things are being hidden from us, we will not trust. And

unless we can know what law enforcement is doing, we cannot govern. Transparency is essential if the people are going to have a say in what the police do.

Yet, despite this basic truth, policing today remains shrouded in secrecy to a degree that is often difficult to comprehend.

In the early days of 2012, the Los Angeles County Sheriff's Department flew a plane over the ten-square-mile city of Compton, California, using a high-resolution camera to record what went on below. For nine days the plane captured video so fine the deputies could see auto accidents, a necklace snatching—and much else. None of the residents knew; even the mayor was kept in the dark. When the surveillance was discovered, a sergeant with the LACSD told a journalist, "This system was kind of kept confidential from everybody in the public. A lot of people have a problem with the eye in the sky, the Big Brother, so in order to mitigate those kinds of complaints we basically kept it pretty hush-hush."[57]

A statement like that—people would be upset, so we kept it secret—would be jaw-dropping if any other public official had said the same. Conor Friedersdorf, writing in *The Atlantic*, declared, "That attitude ought to get a public employee summarily terminated." Imagine the head of the school board saying, "We decided to send the best teachers to a school where we thought kids would benefit the most, but we knew it would bother people so we kept it quiet."[58]

It's not just the secrecy; it's the public prevarication, the outright lying. Cops shade the truth so much in court hearings that there is a colloquial name for it—"testilying." A 1987 study in Chicago found 76 percent of officers said they frequently "bent the facts" to establish probable cause; a 1992 survey of judges and lawyers in the same city estimated that in evidence exclusion cases there is outright perjury by the police 20 percent of the time. It is justified on the grounds that if cops are honest in court about what they did, bad guys will walk. (One cop described such lying as "God's work.") New York's 1994 Mollen Commission termed police perjury "probably the most common form of police corruption facing the criminal justice system." But this very same sort of misrepresentation is also seen at the highest levels—like when the president lied to the country about tapping Americans' overseas calls without a warrant, or when the head of national intelligence lied to Congress about bulk data collection.[59]

It's not just bad cops; it's a culture. When things go wrong in the policing world, the "Blue Wall of Silence" goes up to keep it in the family. In September 2010, a federal judge awarded the victim of a beating by a DEA agent $830,000. She made a point of calling out the police for their treatment of the Kansas City police detective Max Seifert, who labored to fight a cover-up of the incident. Seifert was subsequently drummed out of the force, losing part of his retirement benefits. The judge called the treatment of Seifert "shameful," saying he was "shunned, subjected to gossip . . . and treated as a pariah." A federal grand jury in Chicago fingered a similar "code of silence" in a case involving a drunken off-duty cop who beat a woman bartender for refusing to serve him more. A local reporter covering the case described the "underbelly of a police subculture": "the blue curtain, an understanding between police officers that they should cover for each other unconditionally and that testimony against a fellow cop amounts to a betrayal of their fellow bond." When the Department of Justice was investigating racial profiling along the New Jersey Turnpike, the New Jersey State Police worked hard to keep the data from federal investigators.[60]

But put aside the really ugly stuff and acknowledge that the most basic information about law enforcement, essential to sound oversight, is regularly kept from public view. The Task Force on 21st Century Policing decried the deplorable lack of data available even about the use of force. How can communities be expected to trust when they can't get the facts on how often guns are drawn, shots fired? It has taken reporting by *The Guardian* and *The Washington Post* to shame government into doing a better job of gathering this information. When plaintiffs asked a New York court to turn over New York Police Department stop-and-frisk data, the Department objected this would "give away information about specific policing methods, such as location, frequency of stops, and patterns." The ACLU conducted an analysis of the use of SWAT teams nationally; over half of the policing agencies contacted wouldn't answer. A UCLA law professor reported that when conducting an important study on the extent to which officers are indemnified if they are held liable for misconduct—after all, how can you develop a system of accountability if no one ever pays?—she was startled by the refusal to provide data or describe local policies.[61]

What's happened is an inversion of what should be the ordinary state of public affairs, in which government officials report to the people

for whom they work. The noted legal philosopher Jeremy Waldron puts matters bluntly: "In a democracy, the accountable agents of the people owe the people an account of what they have been doing, and a refusal to provide this is simple insolence."[62]

In the 1960s, Kenneth Culp Davis—America's foremost scholar of administrative governance—did an in-depth study of the Chicago Police Department. He concluded that the top officers of the CPD failed to understand that "they are not the proprietors of a private business. They work for the public. In a democratic system, the members of the public—the electorate—are their bosses. And the bosses have a right to know what is going on."[63]

What should be clear by now is that the more things change, the more they remain the same. Speaking of Stingrays, Freddy Martinez and Matt Topic would say that Kenneth Culp Davis's observation is a continuing problem. And they're right. In August 2015, *The Wall Street Journal* reported that law enforcement is using new devices—called "Wolfhounds" and "Jugulars"—that are cheaper than Stingrays but do basically the same thing. Given the difference in technology between Wolfhounds and Stingrays, law enforcement appears to be arguing that no judicial review is needed before deploying these devices. Not that they are saying much publicly. "We can't disclose any legal requirements associated with the use of this equipment," said a Baltimore Police Department spokesperson. "Doing so may disclose how we use it, which in turn interferes with its public-safety purpose." Doesn't this begin to sound awfully familiar?[64]

DRAWING LINES

The police are always going to say what they said about Stingrays—and now Wolfhounds. That they can't answer questions, because explaining things in public will allow criminals to more skillfully evade police detection.[65] Policing, they explain, is like a game of cat and mouse—as the cats get smarter, the mice adapt. The longer police are able to keep their investigative strategies secret, the longer they can maintain the upper hand.

Fair enough—sometimes, at least. But what's important is to make sure we aren't the mice, from whom unnecessary secrets are kept. That's why it is important to draw workable lines.

In reality, the need for secrecy is not nearly as acute as it may seem. When it comes to many of the police tactics that currently escape regulation—from protocols for the deployment of SWAT teams, to what police must do to obtain consent to search, to whether and for what Stingrays are used, there simply is no plausible case for keeping the public in the dark.

The key distinction, the one we should be making, is between the policy that governs policing, and some of its operational details. Operational details—both pertaining to a specific investigation and to investigative techniques that, if revealed, would encourage circumvention—are the sorts of things that ought not to be revealed. Police should not have to announce where they hide listening devices, or the specifics on how they conduct undercover operations. The last thing we would expect, or want to see, on a police department website is the protocol on how active shooter situations will be handled. But whether those tactics are to be used at all—surely that much can and must be made public and be publicly debated without undermining law enforcement.[66]

Take Stingrays. There may be some operational aspects that need to be kept secret. (It would be easier to have a sense of this if the entire matter were not under wraps.) But surely the public has the right—and the responsibility—to participate in answering questions like whether they will be used at all (some jurisdictions and law enforcement agencies have, by court decision or law enforcement policy, banned their warrantless use), whether they may be employed to collect data on protesters, where data is stored and accessible by whom, and whether and when the police need warrants or other court orders to use them.[67]

Most important, there's one clear place the line between secrecy and transparency should *never* rest, and that is with an argument such as the Compton cop made: that people would be mad if we told them what we were up to, maybe make us stop, so we didn't tell them. It should never, ever be an acceptable argument that if people knew what the police were doing, they would keep them from doing it, so the people cannot know.

That, for what it is worth, is precisely what Matt Topic and Freddy Martinez think the Stingray fight is all about. Martinez scoffs at the idea that secrecy is about tipping off the bad guys. "It is not about the techniques, everyone knows the techniques, tapping phones, the tried and

true techniques are all public . . . But they are illegitimate and people would say no." Topic concurs: "It is a thin, made-up justification to keep people from debating this stuff, which may lead to curtailing its use." "If we let people know what we are doing, people will argue with what we are doing and then they may limit our using it and jeopardize our national security." "But that," he says, "is just not how we do things in a democracy."[68]

Beginning in June 2014, Senators Patrick Leahy and Charles Grassley—the ranking members of the Senate Judiciary Committee—began asking probing questions of the Attorney General about what was going on with Stingrays. These two, a leading Democrat and Republican, often disagree. But on the necessary transparency of the Stingray policy, they were united.[69]

Since then, the FBI has been doing a slow about-face. First, it declared that its nondisclosure agreements "should not be construed to prevent a law enforcement officer from disclosing to the court or a prosecutor that this technology was used." Never mind that this is the opposite of how those agreements read. Next came a top-to-bottom policy review. Finally, the Department of Justice announced that the Bureau henceforth would obtain court warrants before using the device. (One can only speculate what local forces like Chicago are doing.)[70]

Time and again we'll see this. When there is transparency and disclosure, policy changes. That's how it is supposed to be in a democracy. Trust is built on transparency. And accountability requires it.

This is true even if the decision to limit the police would make us less safe. One can assume in all good faith that the police have our best interests at heart. That they believe what they are doing is necessary. They may even be right. But democracy means we get to make these decisions ourselves. Even if they are rotten ones.

Of course, transparency is only the beginning of the story. Transparency is the way we can see what our officials—those who work for us—are doing. But all the transparency in the world is only going to get us so far unless we do something with the information we obtain. What we should do is the subject of the next chapter.