

ROUGH DRAFT

"The first requirement of a sound body of law," Justice Holmes wrote, "is, that it should correspond with the actual feelings and demands of the community."¹ Yet, the law of policing has had difficulty incorporating the feelings, demands, perspectives, and needs of ordinary people. This is largely because, especially after the Warren Court's criminal procedure "revolution,"² the task of directly regulating the police has belonged almost exclusively to the courts.³ Courts are keen to understand the experiences of litigants that are relevant to the case, but there is no direct mechanism for learning the feelings and demands of community members in general. Legislative and administrative rulemaking processes provide somewhat better avenues for incorporating community voices, but to date, those have been overlooked or avoided in the area of police regulation.⁴

Although scholars have long questioned whether judicial review is best suited to regulate police for decades,⁵ only recently has there been sustained questioning of the hyper-constitutional approach of police regulation. Some have argued that courts are poorly equipped to guide the use of new technologies of surveillance.⁶ Some have claimed that the judicial incapacity to manage policing is not only about their inability to fully reckon with new technology, and have suggested that courts pull back from directing the work of officers and push policymakers to pass legislation, initiate public rulemaking, and create avenues for civilian oversight to more effectively and democratically regulate the police.⁷ Some have pointed out that police officers' daily work is guided by federal statutes that are rarely viewed as part of policing law,⁸ while

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