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## New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform

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# NEW GOVERNANCE AND THE “NEW PARADIGM” OF POLICE ACCOUNTABILITY: A DEMOCRATIC APPROACH TO POLICE REFORM

*Kami Chavis Simmons*<sup>+</sup>

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It is undoubtedly true, as [Justice Oliver Wendell] Holmes [Jr.] said that no formulation of legal rules, in the criminal law or elsewhere, can be effective to the degree that it is at cross-purposes with the beliefs and expectations of the community. But one difficulty in applying this standard lies in the accurate identification of what the prevailing consensus of those beliefs and expectations is.<sup>1</sup>

—Carl McGowan

## I. INTRODUCTION

Despite accusations of racial profiling, only Sergeant James Crowley knows what subjective motivations prompted him to arrest Harvard Professor Henry Louis Gates, Jr., for disorderly conduct at his home in Cambridge,

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1. Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

Massachusetts, on July 16, 2009.<sup>2</sup> While reasonable people may disagree about whether Officer Crowley engaged in racial profiling when arresting Gates, it is undeniable that Gates's arrest exposed a long-standing rift between some communities and the police officers who serve them. Following the incident, the divisions that have long existed in the United States between police and citizens became clear. Before a police panel conducted an independent investigation into the matter,<sup>3</sup> and after President Barack Obama publicly criticized the incident,<sup>4</sup> police unions nationwide predictably defended Officer Crowley's actions, citing his excellent record as an officer to dispute the claim that Gates's arrest was racially motivated.<sup>5</sup> Equally predictable was the response of Gates's supporters and pundits who decried Gates's arrest as emblematic of the racial profiling and indignities that minorities have suffered historically.<sup>6</sup> Days after the incident, Officer Crowley and Professor Gates met with President Obama and Vice President Joe Biden at the White House to discuss the incident.<sup>7</sup> Although the details of the Gates and Crowley meeting with President Obama and Vice President Biden were not publicized, this meeting symbolizes the dialogue between citizens and law-enforcement officers that now must occur on a national scale.

The historical rift between police officers and the citizens they serve has often caused communities to erupt in protests. An example of such unrest unfolded after an officer with the Bay Area Rapid Transit (BART) system shot and killed unarmed, twenty-two-year-old Oscar Grant on New Year's Day in 2009.<sup>8</sup> A week after Grant's shooting, over 200 people participated in

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2. Abby Goodnough, *Sergeant Who Arrested Professor Defends Actions*, N.Y. TIMES, July 24, 2009, at A3.

3. *Id.*

4. Helene Cooper, *Obama Criticizes Arrest of a Harvard Professor*, N.Y. TIMES, July 23, 2009, at A20. When commenting on the arrest, President Obama said that the police had "acted stupidly" by arresting someone shown to be living "in their own home." *Id.*

5. *Id.*; see also Goodnough, *supra* note 2 (noting that law-enforcement groups believed Crowley's actions were justified).

6. See Goodnough, *supra* note 2. For example, "the Congressional Black Caucus defended [the President]'s remarks and called on Congress to address the issue of racial profiling." *Id.*

7. See Peter Wallsten & Mike Dorning, *Understanding Raised with Mugs*, CHI. TRIB., July 31, 2009, at 12 (describing the White House meeting held over beers on a part of the lawn close to the Rose Garden).

8. See Marisa Lagos, *Video Shows Another BART Cop Apparently Striking Oscar Grant*, S.F. CHRON., Jan. 25, 2009, at B2 (reporting on the shooting of Grant by police); see also Demian Bulwa, *BART Urges Patience Over Video of Shooting*, S.F. CHRON., Jan. 5, 2009, at A1 (detailing the events leading up to Grant's shooting). Many witnesses captured Grant's shooting death on video, and by most accounts, Grant was unarmed, subdued, and in handcuffs when Officer Johannes Mehserle fatally shot him. See Lagos, *supra*. In the wake of the shooting, protests (at times becoming violent) erupted around the Bay Area, signaling the community's discontent with police officers and their interaction with citizens. See Demian Bulwa et al., *Cop in Killing Quits—Protest Turns Violent*, S.F. CHRON., Jan. 8, 2009, at A1.

protests—smashing storefronts, setting cars on fire, and blocking Oakland streets.<sup>9</sup> Over “300 businesses and hundreds of cars” sustained damage as a result of the protest.<sup>10</sup> To prevent tension between police and communities, citizens and police officers must have a voice in shaping the practices and policies that will impact their daily lives; they must also have the ability to cultivate trust and to form partnerships committed to making communities safe.

This Article proposes that policymakers should draw from the emerging New Governance theoretical framework—particularly democratic experimentalism—in order to develop strategies to successfully reform law-enforcement agencies. Modern police departments function like administrative agencies, and as such, they are susceptible to the same deficiencies that traditional agencies experience in other administrative contexts. Given the traditionally insular nature of law-enforcement agencies, the need for political legitimacy in the reform process is amplified in the policing context. Therefore, in order to eliminate patterns of police misconduct and corruption, reform measures should embody characteristics that promote stakeholder participation and local experimentation.

Law-enforcement officers are one of the few groups in society lawfully empowered to use deadly force in executing their duties.<sup>11</sup> Citizens give law-enforcement officials wide discretion and great power to perform the fundamental government duty of protecting the public. This vast discretion raises the expectation that those police officers who wield it will be held accountable if they abuse their power.<sup>12</sup> Oscar Grant’s death is a reminder that the responsibility to address police misconduct or corruption rarely rests solely with an individual, but rather, rests with the entire law-enforcement institution.<sup>13</sup> For example, abuses of police power raise important questions regarding proper officer training for the use of their service weapons. What role did supervisors play in this training? Have other officers previously displayed inappropriate uses of force, and if so, how did the department

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9. See Bulwa et al., *supra* note 8.

10. See Carolyn Jones, *Storekeepers Tell of Terror*, S.F. CHRON., Jan. 9, 2009, at A12.

11. See GEORGE L. KELLING, NAT’L INST. OF JUSTICE, “BROKEN WINDOWS” AND POLICE DISCRETION 5 (1999).

12. See *id.* (“Citizens should be concerned about controlling police: they have immense authority; they are armed and authorized to use force; and unlike the military, they are not sequestered on bases—they are spread throughout the community.”).

13. BART recently reached a \$1.5 million settlement in a wrongful death lawsuit filed on behalf of Grant’s minor daughter. Kristin Bender, *BART Reaches \$1.5 Million Settlement with Mother of Oscar Grant’s Daughter*, OAKLAND TRIB., Jan. 28, 2010. Unrelated to the settlement and consistent with the new paradigm of policing, BART has tripled the number of hours of officer training required and now mandates that officers report all uses of force. *Id.*

respond? Answers to these questions reveal important aspects of the institutional police culture.<sup>14</sup>

As in the Grant case, the civil unrest that often follows instances of police brutality or misconduct is symbolic of the tensions between police officers and citizens—especially between police and racial minorities.<sup>15</sup> Unfortunately, Grant's death is merely one incident among many that reveal the institutional failure of police departments to minimize police misconduct. Recently, investigations in Philadelphia,<sup>16</sup> Atlanta,<sup>17</sup> and Los Angeles<sup>18</sup> have uncovered egregious examples of police misconduct, which in some instances has resulted in the criminal prosecution of the offending officers.<sup>19</sup> These alarming stories demonstrate that without adequate accountability, the powers of the police are prone to abuse. These instances further suggest that United States police

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14. See generally INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT vii–xxiii (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (reporting widespread police misconduct in Los Angeles and the failure of supervisors to discipline such misconduct).

15. See, e.g., *id.* at xii–xiv (discussing the tensions between the Los Angeles Police Department (LAPD) and minority groups).

16. See Sam Wood et al., *Four Philadelphia Officers Lose Jobs Over Taped Beating*, S. FLA. SUN-SENTINEL, May 20, 2008, at 6A (observing that the Philadelphia Police Department fired four officers for misconduct on May 5, 2008, after nineteen police officers pulled three men from their car and beat them); see also Associated Press, *6 Cops Yanked Off Street After Philadelphia Video*, STAR-LEDGER, May 8, 2008, at 53 (reporting that investigators analyzed a video of the May 8, 2008, beating to determine what disciplinary actions to take against officers); *Philadelphia Police Suffer Loss, Scrutiny* (NPR News Weekend Edition radio broadcast May 10, 2008) [hereinafter NPR radio broadcast] (transcript available at <http://www.npr.org/templates/story/story.php?storyId=90344016&ft=1&f=1001>) (discussing whether the Philadelphia police officers were justified in using force).

17. See Press Release, U.S. Dep't of Justice, *Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman* 3 (Apr. 26, 2007) [hereinafter 2007 Press Release, U.S. Dep't of Justice], available at <http://www.usdoj.gov/usao/gan/press/2007/04-26-07.pdf> (announcing the indictment of Atlanta officers involved in the fatal shooting of a ninety-two-year-old woman, which disclosed widespread police corruption, including lying to magistrates to procure warrants and manufacturing evidence to cover up police misconduct).

18. See *Frontline: LAPD Blues* (PBS television broadcast May 15, 2001) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/etc/script.html>) (reporting a 1998 incident during which Officer Rafael Perez was alleged to have used his position to procure and sell illegal narcotics). In Los Angeles, the police department has been characterized as creating a culture that tolerated police misconduct. See generally CHRISTOPHER COMMISSION REPORT, *supra* note 14 (finding widespread police misconduct within the Los Angeles Police Department). For example, in the late 1990s, many criminal convictions were overturned, and several Los Angeles police officers faced prosecution when Officer Perez revealed extensive police misconduct, including the routine placement of evidence on suspects, using physical violence to coerce confessions, and even committing murder. See Andrew Blankstein, *Perez Details Gang Member Framing*, L.A. TIMES, May 10, 2005, at B4 (explaining that as a result of the Officer Perez scandal, the LAPD fell under scrutiny by a federal judge in accordance with a federal consent decree).

19. See *supra* notes 16–18.

departments are not haunted by a few “bad apples,” but instead are in dire need of widespread institutional reform to transform police culture.

Police culture is in part responsible for the prevalence of police misconduct and impedes meaningful police reform. The insularity of police institutions and the solidarity of rank-and-file police officers create an impervious shield around these institutions, which, by their nature, are most deserving of transparency and public accountability.<sup>20</sup> Increasing police accountability, however, is a tedious exercise because it must be done without alienating police officers. Thus, penetrating police culture to ensure transparency presents a key challenge to policymakers. Often, the very measures suggested to remedy the problems associated with police culture further alienate the officers and exacerbate tensions between them and the communities that they serve.<sup>21</sup>

Part II of this Article discusses the problematic role that the organizational culture of law-enforcement agencies plays in fostering police misconduct and corruption. This section contrasts the recent emphasis on institutional police reform with the limited effectiveness of traditional approaches to addressing police misconduct. In recent years, scholars have eschewed traditional, often adversarial, mechanisms in favor of more comprehensive institutional reform of law-enforcement agencies, often called the “new paradigm” of policing.<sup>22</sup> The current federal response to police reform under the United States Department of Justice’s (DOJ) Pattern or Practice legislation represents a shift from traditional adjudicatory approaches to comprehensive police reform.<sup>23</sup>

Part III conceptualizes police departments as administrative agencies and explains how the current implementation of federal legislation aimed at police accountability is analogous to traditional administrative rulemaking. The similarity between police departments and administrative agencies means that the new paradigm of policing inherently creates familiar problems associated with traditional administrative rulemaking. Without careful and purposeful

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20. See, e.g., *Brandon v. Allen*, 645 F. Supp. 1261, 1266–67 (W.D. Tenn. 1986) (describing a “code of silence” within police departments that pressured officers to refrain from testifying against each other); see also David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 481 n.60 (1992) (discussing the unwritten, but recognized, “code of silence” within police departments).

21. See, e.g., CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xiv (stating that law-enforcement policies emphasizing “crime control over crime prevention” lead to the alienation of the officers from the community).

22. See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 6 (2003) [hereinafter Walker, *The New Paradigm*] (referring to the federal government’s police-reform efforts under federal legislation as the “new paradigm of police accountability”).

23. See 42 U.S.C. § 14141 (2006) (authorizing the attorney general to conduct investigations and, if warranted, obtain “equitable and declaratory relief to eliminate” a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”).

planning to avoid these pitfalls, the same political legitimacy problems that have plagued administrative rulemaking and top-down approaches to institutional reform in the past will threaten the success of current police-reform efforts. Presently, stakeholders, including both citizens and police officers, have no voice in the reforms, and as a result, it may prove difficult for them to embrace the recommended reforms. Unlike traditional methods of addressing police misconduct, however, the current framework for federal intervention offers the novel opportunity to explore pragmatic approaches to law-enforcement reform by involving those stakeholders most affected by the reform process.

To resolve the political legitimacy issues inherent in police reform, Part IV asserts that New Governance theories should influence existing responses to police reform, particularly the federal government's efforts under its Pattern or Practice legislation.<sup>24</sup> Given the unique characteristics of police culture and the historical tensions between police and residents of certain communities, shifting to a bottom-up approach—a hallmark of New Governance programs—is preferable to ensure the political legitimacy of police reform. In particular, police-accountability measures should embrace democratic experimentalism—a subset of the New Governance theoretical framework.<sup>25</sup> The New Governance theoretical framework addresses “traditional policy needs but operat[es] outside the traditional, formal legal infrastructure” and is generally “characterized by the greater participation and collaboration of non-traditional players, the use of consensus building mechanisms, reliance on peer review and collaboration, and the integration of public-private partnerships and research experiments into the formal policy-making process.”<sup>26</sup> Embracing characteristics of democratic experimentalism, such as stakeholder engagement and local experimentation, allows for much-needed federal oversight without sacrificing local needs.

Part V argues that the same justifications for replacing the archaic command-and-control model of policing with community-policing models are relevant when considering institutional police reform. The principles underlying community policing are similar to those principles underlying the New Governance rationale and, in particular, democratic experimentalism. The shift to community policing, characterized by bottom-up approaches to

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24. See *id.* § 14141(a) (prohibiting a pattern or practice of police misconduct within police departments).

25. See Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 393–94 (2008) (“Experimentalist approaches are part of a constellation of so-called ‘new governance’ methods originally advocated in industrial and managerial context, and since applied to fields including government regulation of social problems.” (citations omitted)).

26. Christina Simpson, *Policy as a Process: The Pedagogical Role of the EU in Health Care*, 33 N.C. J. INT’L L. & COM. REG. 293, 302 (2007–2008) (citations omitted).



problem solving and police-citizen collaboration, supports the notion that police-citizen partnerships are beneficial to both community members and police officers. Community policing also establishes a precedent for police and communities to work together toward the common goal of neighborhood safety. This Part concludes that the current implementation of the DOJ's Pattern or Practice legislation, although a promising reform model, remains deficient when viewed through the lens of democratic experimentalism. However, several changes in the implementation of police accountability can ensure that the reform process more adequately reflects the ideals of democratic experimentalism and thus is more likely to result in better and more sustainable reforms.

## II. THE NECESSITY OF SYSTEMICALLY REFORMING LOCAL LAW-ENFORCEMENT AGENCIES: A PARADIGMATIC SHIFT

Police misconduct has been and continues to be a persistent problem in the United States.<sup>27</sup> The term "police misconduct" connotes the image of a violent police beating, reminiscent of the widely televised Rodney King incident.<sup>28</sup> In reality, however, police misconduct extends beyond actual violence and may take many forms, including failing to cooperate in investigations involving fellow officers,<sup>29</sup> racial profiling,<sup>30</sup> falsifying warrant affidavits,<sup>31</sup> planting

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27. See, e.g., 5 U.S. COMM'N ON CIVIL RIGHTS, JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 26 (1961) ("[P]olice brutality in the United States today is a serious and continuing problem." (citation omitted)); 4 U.S. NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT I (1931) (stating results of a 1931 investigation and finding that police misconduct was widespread); see also 2007 Press Release, U.S. Dep't of Justice, *supra* note 17 (announcing police misconduct in a 2006 shooting of a ninety-two-year-old woman by police).

28. See *The Rodney King Affair*, L.A. TIMES, Mar. 24, 1991, at B1 (chronicling the events of March 3, 1991, when Los Angeles police officers beat Rodney King while being videotaped).

29. See Alan Feuer, *3 Ex-Officers are Sentenced for Roles in Louima Torture*, N.Y. TIMES, June 28, 2000, at B3 (reporting that three officers were sentenced after covering up the assault of a man in custody by another officer); Alan Feuer, *Officer Convicted of Lying, in Last of the Louima Cases*, N.Y. TIMES, June 22, 2000, at B3 (discussing the conviction of an officer for attempting to cover up police brutality); see also Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1310 n.3 (2001) (discussing the conviction of police officers for covering up police misconduct).

30. See, e.g., Richard Winton, *Sheriff Settles ACLU Claim Over Racial Profiling*, L.A. TIMES, Feb. 3, 2009, at B5 (noting that the Los Angeles County Sheriff's Department settled a claim, which alleged that the Department stopped and searched African American students from the Los Angeles Trade-Technical College because of their race).

31. See, e.g., 2007 Press Release, U.S. Dep't of Justice, *supra* note 17 (describing the practices employed by some Atlanta police officers who secure warrants based on false information in order to satisfy their performance target goals).

evidence on suspects,<sup>32</sup> and perjury during a criminal trial.<sup>33</sup> Traditional methods to curb police misconduct have missed the mark because of their inability to transform police culture.<sup>34</sup> The inability of local authorities and adjudicative methods to address these issues effectively has prompted calls for increased federal oversight, requiring local police departments to change their internal practices and increase transparency and accountability.<sup>35</sup>

#### A. Police Organizational Culture Defined

In recent years, police experts examining the nature and causes of police misconduct have concluded that the roots of police misconduct rest primarily within the organizational culture of policing.<sup>36</sup> There is now widespread support for the proposition that police officers are not “independent agents” of the police agencies for which they work; rather, officers are individuals who operate within a “powerful organizational culture that significantly influences and constrains their judgments and conduct.”<sup>37</sup> Experts in police practices have identified several unique aspects of the organizational structure within law-enforcement institutions that tolerate and encourage a culture of police misconduct.<sup>38</sup> Three key components characterizing police culture include: (1) the phenomenon known as the “blue wall of silence”;<sup>39</sup> (2) the lack of effective

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32. Don Terry, *Officers' Corruption Trial Under Way in Los Angeles*, N.Y. TIMES, Oct. 14, 2000, at A12 (noting that several officers involved in the Los Angeles Rampart corruption scandal were charged with planting evidence and giving false testimony).

33. See, e.g., *Springer v. Coleman*, 998 F.2d 320, 321–22 (5th Cir. 1993) (affirming the aggravated-perjury conviction of a police officer who falsely testified that he had never abused or mistreated a prisoner in his custody).

34. See H.R. REP. NO. 102-242, at 137 (1991) (finding that the Department of Justice “lacks the authority” to correct patterns of police misconduct effectively).

35. See *id.* at 136–37 (determining that widespread police misconduct was persistent in some of the nation’s largest urban centers, including New York and Boston).

36. See, e.g., ALLYSON COLLINS, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 1, 33, 45 (1998) (reporting that many of the problems identified in police departments across the nation shared an organizational component); CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xiv–xv (discussing the Los Angeles Police Department’s management culture and its relation to police misconduct); MILTON MOLLEN ET AL., THE CITY OF NEW YORK COMMISSION REPORT: COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 51 (1994) [hereinafter MOLLEN COMMISSION REPORT] (“Police culture—the attitudes and values that shape officers’ behavior—is a critical component of the problem of police corruption today.”); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493–94 (2004) (detailing the organizational roots of police brutality).

37. Armacost, *supra* note 36, at 476.

38. See generally *id.* at 495–505 (highlighting weaknesses within the organizational structure of law-enforcement institutions that promote police misconduct and excessive force).

39. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998)

identification and discipline of problem officers; and (3) the widespread belief among various levels and ranks of police officers that some violence or brutality is a necessary part of effective policing.<sup>40</sup> These organizational characteristics foster an “us [versus] them” mentality between the officers and the communities that they serve.<sup>41</sup>

### 1. *The Blue Wall of Silence*

The code of silence, also known as the “blue wall of silence,”<sup>42</sup> is an unwritten code that “[g]enerally . . . refers to the refusal of a police officer to ‘rat’ on fellow officers, even if the officer has knowledge of wrongdoing or misconduct.”<sup>43</sup> Although it is not part of an officer’s formal training, the indoctrination of this code often begins at the inception of a police officer’s career. From the time he or she enters the police academy, a police cadet is introduced to the concept that it is unacceptable to report the misconduct of other officers.<sup>44</sup> The ubiquitous nature of this code of silence in police culture and its impact on police accountability is virtually undisputed.<sup>45</sup> Several courts

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(describing the “blue wall of silence” as an “unwritten code” that “prohibits disclosing perjury or other misconduct by fellow officers”).

40. See, e.g., CHRISTOPHER COMMISSION REPORT, *supra* note 14, at ix–x; see also Armacost, *supra* note 36, 498–99 (noting that police violence was encouraged in the work environment).

41. See David Crump, *The Social Psychology of Evil: Can the Law Prevent Groups from Making Good People Go Bad?*, 2008 BYU L. REV. 1441, 1442 (quoting former LAPD officer Rafael Perez’s testimony at his sentencing hearing where he explained that “[t]he ‘us against them’ ethos of the overzealous cop began to consume me”); see also Rebecca Rader Brown, *The Gang’s All Here: Evaluating the Need for a National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293, 324 (2009) (observing that police actions to “target[] gangs through suppression efforts may increase an ‘us [vs.] them’ mentality already prevalent in many minority neighborhoods, where fear and resentment of police are commonplace” (second alteration in original)); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 71 (2009) (explaining that discretionary decisions about “how we police and what we police” tend to “reinforce[] walls of ‘us’ versus ‘them’”).

42. See Chin & Wells, *supra* note 39, at 237.

43. See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 64 (2000) [hereinafter Gilles, *Breaking the Code of Silence*]; see also Rudovsky, *supra* note 20, at 481 n.60 (describing the code of silence as “an unwritten rule and custom that police will not testify against a fellow officer and that police are expected to help in any cover-up of illegal actions”).

44. See Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 234 (2000) (commenting on the duty of loyalty to other officers that is charged to a rookie officer).

45. See Gilles, *Breaking the Code of Silence*, *supra* note 43, at 63–64 (stating that the “‘code of silence’ is a well-documented phenomenon” dating back to New York’s “Boss Tweed gang of the 1840s”); see also Armacost, *supra* note 36, at 468 (noting that “police officers sometimes lie about police-citizen encounters”).

have even recognized the existence of a code of silence within police culture, noting that the code of silence facilitates police corruption and misconduct.<sup>46</sup>

Understanding why the code of silence persists in police institutions is imperative for developing effective measures to dismantle it, thus allowing for greater transparency and accountability. How and why does the code of silence develop among police officers? Scholars examining the prevalence of the code of silence have noted that it is “firmly rooted in a commitment to group loyalty.”<sup>47</sup> This group loyalty has developed because of the inevitable distinction between the “universe” of police culture and “civilians.”<sup>48</sup> Scholars have invoked militaristic parallels to describe the evolution of this phenomenon, noting that police officers perceive themselves as “‘us’—the brave warriors—against ‘them’—the rabble of the street.”<sup>49</sup> This separation of cultures prompts “[p]olice . . . to see themselves as ‘under siege’ by the very neighborhood communities whom they are sworn to protect, as well as by the political establishment, their own internal affairs unit, and anyone else seen as the voice of the outsiders.”<sup>50</sup> The embattled police—the “insiders”—view “outsiders” as “the enemies who are assaulting . . . the ‘brothers on the force.’”<sup>51</sup> Thus, the “[b]rothers band together, protecting their own and what the group as a whole stands for.”<sup>52</sup> Just as brothers in a military unit band together for mutual safety, security, and defense, police culture has developed the “brotherhood in blue.”<sup>53</sup>

The dangers associated with group loyalty are exacerbated when police officers are killed in the line of duty. In recent years, several individuals suspected of being involved in the deaths of officers have died in police

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46. See *Sledd v. Lindsay*, 102 F.3d 282, 288–89 (7th Cir. 1996) (reversing the lower court’s ruling to find that the claimant stated a valid claim by alleging that police officers operated under a code of silence); *Mason v. Stock*, 955 F. Supp. 1293, 1313–14 (D. Kan. 1997) (discussing “general orders” given by police officers to obey the code of silence by actions such as “testifying to less than the whole truth” (internal quotation marks omitted)); *Brandon v. Allen*, 645 F. Supp. 1261, 1266–67 (W.D. Tenn. 1986) (holding a Tennessee city liable for using the code of silence to facilitate abusive behavior in the local police department).

47. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 555 (2006).

48. Roberta Ann Johnson, *Whistleblowing and the Police*, 3 RUTGERS J.L. & URB. POL’Y 74, 76–77 (2005) (noting that feelings of respect and loyalty for their peers prompt officers “to abide by the code of honor and to heed the obligation of silence”); see also Chin & Wells, *supra* note 39, at 240 (referencing the “loyalty obligation” that coincides with the code of silence).

49. Taslitz, *supra* note 47, at 555.

50. *Id.*

51. *Id.*

52. *Id.*

53. Armacost, *supra* note 36, at 453–54.

custody under suspicious circumstances.<sup>54</sup> For example, suspect Ronnie White's death while in police custody in Prince George's County, Maryland, raises several unanswered questions about the conduct of correctional officers within that facility.<sup>55</sup> On June 29, 2008, correctional officers found White dead in his cell. Because he was facing first-degree murder charges for killing a county police officer, authorities suggested that White may have tried to end his own life before authorities could convict him.<sup>56</sup> Preliminary autopsy reports, however, dispelled suicide theories and concluded that White's death was a homicide.<sup>57</sup> The conditions surrounding White's death are particularly disturbing because they suggest that his homicide was an inside job.<sup>58</sup> White was held in a maximum-security unit, and only three guards were on duty on the morning of his death.<sup>59</sup> This evidence suggests that either the law-enforcement officers actively participated in White's death, or they knew who killed him and failed to come forward with relevant information, despite their sworn oath to uphold the law.<sup>60</sup>

The White case bears a striking resemblance to the police beating of Adolph Archie, who was suspected of killing New Orleans police officer Earl Hauck in 1990.<sup>61</sup> Archie allegedly fired fatal shots at Officer Hauck and officers subsequently shot him as he fled the scene, "knock[ing] him off his feet."<sup>62</sup> The officers who apprehended Archie then proceeded to beat him until he was nearly unconscious.<sup>63</sup> The officers then drove him to the emergency room, but,

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54. See, e.g., Aaron C. Davis et al., *Man Accused of Killing Pr. George's Officer Dies*, WASH. POST, June 30, 2008, at A1 (reporting the death of a man in police custody "less than 36 hours" after he was charged with killing a police officer).

55. *Id.* On June 29, 2008, correctional officers found Ronnie White dead in his jail cell in Prince George's County, Maryland. *Id.*

56. Charging documents against White accuse him of "intentionally" accelerating a stolen pick-up truck toward Prince George's County Corporal Richard S. Findley and fatally striking him.

57. Davis et al., *supra* note 54, at 101.

58. White was being held in a maximum-security cell where cloth or ropelike material was prohibited and guards checked his cell every thirty minutes. Furthermore, five medical examiners from across the country have stated that it would have been impossible for White's injuries to be self-inflicted. An autopsy report revealed that White was strangled possibly with "a sheet, a towel or the crux of [an] elbow." See Derek Kravitz, *Timeline: Prince George's Jail Murder Probe*, (Sept. 23, 2008), available at [http://www.co.pg.md.us/Government/PublicSafety/Police/CrimePE/pdfs/July2008ucr\\_county.pdf](http://www.co.pg.md.us/Government/PublicSafety/Police/CrimePE/pdfs/July2008ucr_county.pdf).

The Federal Bureau of Investigation has opened a civil-rights probe into White's death and two correctional officers have been named as persons of interest in the case and placed on administrative leave. *Id.*

59. *Id.*

60. See *supra* notes 54–59 and accompanying text.

61. See JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE & THE EXCESSIVE USE OF FORCE* 33–34 (1993).

62. *Id.*

63. *Id.* at 34.

contrary to established procedure, they did not take him inside; instead, they transported him to the police station before he received treatment.<sup>64</sup> Once the police finally returned Archie to the hospital, he had suffered two skull fractures, broken teeth, a broken larynx, bleeding testicles, and other injuries consistent with being kicked.<sup>65</sup> Twelve hours later, Archie died from his injuries.<sup>66</sup>

Despite the problems associated with police solidarity, there are nevertheless positive aspects of group loyalty among officers. In fact, the loyalty characteristic among police officers is often referred to as a desirable trait of effective police officers.<sup>67</sup> Indeed, some scholars have described this loyalty as “necessary to effective police work, promoting, at its best, acts of heroic daring and self-sacrifice, a sense of group cohesion, mission, and responsibility.”<sup>68</sup> Andrew Taslitz notes:

Loyalty enables officers to endure difficult times, adding meaning to their daily tasks by linking their fate to that of a greater whole and, at its best, also linking them to higher values, the sense of loyalty to the noblest of ideals. Loyalty provides a sense of safety in the face of danger, a sense of belonging in a world of isolation, a sense of virtue in a daily stew of suspicion and corruption.<sup>69</sup>

Despite the positive attributes of loyalty among police officers, this group loyalty creates dire consequences for officers who betray it. While investigating the New York City Police Department (NYPD), the Mollen Commission noted several ways that the code of silence allows police misconduct to flourish. First, the Commission noted that the code of silence creates “a standard that nothing is more important than the unswerving loyalty of officers to one another.”<sup>70</sup> Second, the Commission noted that the code of silence “thwart[s] efforts to control corruption.”<sup>71</sup> These findings reiterate that the code of silence can be detrimental to any reform efforts within a police department.

The pervasive nature of the code of silence is particularly troubling because it not only affects corrupt officers who are actively engaged in misconduct, but

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64. *Id.*

65. *Id.*

66. *Id.* Similarly, in May 2008, a news helicopter filmed several Philadelphia police officers beating three motorists during a traffic stop. See Wood et al., *supra* note 16. The beating came a few days after a Philadelphia police officer was killed during a response to an armed robbery. See NPR radio broadcast, *supra* note 16.

67. See KELLING, *supra* note 11, at 6 (“Police work, in this view, as Egon Bittner once said, could be conducted by persons who have ‘the manly virtues of honesty, loyalty, aggressiveness, and visceral courage.’” (quoting EGON BITTNER, ASPECTS OF POLICE WORK 6 (1990))).

68. Taslitz, *supra* note 47, at 556 (internal quotation marks omitted).

69. *Id.* (citation omitted).

70. MOLLEN COMMISSION REPORT, *supra* note 36, at 51.

71. *Id.*

it equally impacts honest officers who are not directly involved in wrongdoing. Officers who actively participate in stealing department property or “roughing up” suspects are assured that colleagues will not reveal their misconduct for fear of retribution. Officers who report the misconduct of their fellow officers risk being labeled as “rats” or informers and experiencing systematic alienation from other officers. For example, in *White-Ruiz v. City of New York*, Officer Paula White-Ruiz reported to supervisors her suspicions that her partner had stolen a large sum of money from the body of a man they found dead in his apartment.<sup>72</sup> Her reports led to an investigation that resulted in the discharge of her partner.<sup>73</sup> Immediately, White-Ruiz’s fellow officers began harassing her by vandalizing her car, tampering with her locker, and making threatening phone calls to her home.<sup>74</sup> The *White-Ruiz* case demonstrates that police-reform efforts are hindered by the code of silence and loyalty among officers. Honest officers find it difficult to report the misdeeds of others, and this reluctance negatively impacts efforts to reform police agencies and discipline culpable officers.

## 2. Hard-Nosed Tactics and Violence as Part of the Job

Another troubling aspect of police culture is the sometimes violent nature of the job. Every day, police officers must face the harsh reality that they may be killed or injured in the line of duty. The Federal Bureau of Investigation (FBI) reported that in 2007, 57 United States law-enforcement officers were killed and 59,201 officers were assaulted while performing their duties.<sup>75</sup> Statistics like these prompt many police officers to adopt the belief that a certain amount of violence is necessary to protect themselves and execute their duties as officers. Viewing the police as an occupational group, scholars such as William Westley have explored the use of violence by the police and the ways in which police officers have justified the use of violence through their occupational experiences.<sup>76</sup> Westley found that when describing situations in

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72. *White-Ruiz v. City of New York*, 983 F. Supp. 365, 368 (S.D.N.Y. 1997) (summarizing the harassment that White-Ruiz suffered after she reported a fellow officer for wrongdoing); see also Gilles, *Breaking the Code of Silence*, *supra* note 43, at 69–71 (discussing *White-Ruiz* and the retaliation directed against the officer for breaking the code of silence).

73. *White-Ruiz*, 983 F. Supp. at 368.

74. *Id.* at 368, 371.

75. See U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: TABLE 1 (2008), [http://www.fbi.gov/ucr/killed/2007/data/table\\_01.html](http://www.fbi.gov/ucr/killed/2007/data/table_01.html) (last visited Feb. 18, 2010); U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: TABLE 65 (2008), [http://www.fbi.gov/ucr/killed/2007/data/table\\_65.html](http://www.fbi.gov/ucr/killed/2007/data/table_65.html) (last visited Feb. 18, 2010) [hereinafter TABLE 65]. The rate of officer assaults in 2007 was 11.4 per 100 sworn officers, with 26.1% of the officers assaulted sustaining injuries. TABLE 65, *supra*.

76. See WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY* 121–22 (1970) (reporting the responses of seventy-four policemen asked to describe situations when they felt the use of force was necessary).

which police officers believed they were justified to use force, the responses could be grouped into one of these nine categories: “[d]isrespect for the police,” “[o]nly when impossible to avoid,” “[t]o obtain information,” “[t]o make an arrest,” “[f]or the hardened criminal,” “[w]hen you know [a] man is guilty,” “[f]or sex criminals,” “[f]or self-protection,” and “[w]hen pressure is on you.”<sup>77</sup> Similarly, the Mollen Commission found that this toleration and intentional use of violence is “not limited to street-level cops but extend[s] to supervisors who . . . tend[] to turn a blind eye to evidence of unnecessary violence around them.”<sup>78</sup>

This endemic culture of violence is tolerated or even condoned by some police departments. Several commissions studying the issue have commented on the “unnecessarily aggressive” policing style that characterizes many police departments.<sup>79</sup> The Mollen Commission noted that although “most officers [we]re genuinely sickened” by egregious instances of brutality, many officers willingly tolerated violence toward suspects.<sup>80</sup> Additionally, the Christopher Commission, which examined the policies and practices of the Los Angeles Police Department (LAPD) in the wake of the Rodney King beating, found that the LAPD emphasized crime control over crime prevention and rewarded “hardnosed” tactics.<sup>81</sup> Officers were evaluated in part based on statistical measures such as the number of “arrests made” and the number of “calls handled.”<sup>82</sup> The LAPD also trained officers to engage in aggressive crime-control techniques resulting in a high rate of street encounters.<sup>83</sup> The Commission concluded that the combination of these strategies resulted in a “siege [‘us versus them’] mentality” between officers and citizens.<sup>84</sup> Similarly, New York City’s aggressive quality-of-life policing initiatives, which encouraged custodial arrests for misdemeanor offenses,<sup>85</sup> resulted in increased

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77. *Id.* at 122.

78. Armacost, *supra* note 36, at 501 (quoting MOLLEN COMMISSION REPORT, *supra* note 36, at 49).

79. *See, e.g.*, CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xiv; *see also* Armacost, *supra* note 36, at 499–501 (detailing the findings of the Christopher Commission, the Kolts Commission, and the Mollen Commission, all of which indicated that police brutality is a systemic problem).

80. *See* MOLLEN COMMISSION REPORT, *supra* note 36, at 49 (noting that many officers do not oppose the use of “a few blows and bruises now and then”).

81. *See* CHRISTOPHER COMMISSION REPORT, *supra* note 14, at xiv (“Witness after witness testified to unnecessarily aggressive confrontations between LAPD officers and citizens, particularly members of minority communities.”).

82. *See id.*

83. *See id.*

84. *See id.*

85. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292 (1998) (explaining the quality-of-life initiatives as “an order-maintenance policing strategy”).



citizen complaints against the police.<sup>86</sup>

The “us versus them” characterization of police-community relations is particularly prevalent in minority communities.<sup>87</sup> Unnecessarily aggressive police violence is troubling in itself, but racial disparities involving the victims of police misconduct are even more disturbing.<sup>88</sup> These disparities create a perception within minority communities that police are not trustworthy and, in some instances, should be feared.<sup>89</sup>

### 3. *Ineffective Supervision and Discipline of Police Officers*

In addition to the code of silence and aggressive policing styles, ineffective supervision and inadequate discipline contribute to an organizational police culture that facilitates police misconduct. In its July 1991 report, the Christopher Commission concluded that “there is a significant number of officers in the LAPD who repetitively use excessive force against the public.”<sup>90</sup> The Commission also found that police department management condoned this behavior “through a pattern of lax supervision and inadequate

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86. See *id.* at 377–78 (noting the “sharp increase” in citizen complaints against the police upon the initiation of order-maintenance policing).

87. See Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 987 (1999) (noting that officers often see their jobs in terms of “us vs. them”); see also Hon. Milton Mollen, *Police Violence: Causes and Cures*, *Edward V. Sparer Public Interest Law Fellowship Forum, Brooklyn Law School, April 15, 1998*, 7 J.L. & POL’Y 75, 95 (1998) (discussing the “us against them” attitude).

88. See, e.g., Brief for Appellee-Respondent at 23–26, *Tennessee v. Garner*, 471 U.S. 1 (1985) (No. 83-1035) (citing statistical information related to the disproportionate numbers of African Americans and Hispanics who are victims of police violence); see also I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 845–46 (2008) [hereinafter Capers, *Testilying*] (noting that police brutality is common among minority communities).

89. See, e.g., KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 46 (1998) (discussing racial profiling and noting that “for young Black men, the police represent Public Enemy number one”). As Professor Jerome Culp explained, this fear and suspicion of the police among minorities transcends age, class, and social standing. See Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199, 203–04 (1992–1993) (describing Culp’s own negative experiences with law enforcement).

90. CHRISTOPHER COMMISSION REPORT, *supra* note 14, at iii. The Commission further elaborated that

[t]he failure to control these officers is a management issue that is at the heart of the problem. The documents and data that we have analyzed have all been available to the Department; indeed, most of this information came from that source. The LAPD’s failure to analyze and act upon these revealing data evidences a significant breakdown in the management and leadership of the Department. The Police Commission, lacking investigators or other resources, failed in its duty to monitor the Department in this sensitive use of force area.

*Id.* at iv.

investigation of complaints.”<sup>91</sup> Instead of being fired, demoted, or otherwise disciplined for poor behavior, many of the officers who were the subject of complaints had been promoted or received positive performance evaluations.<sup>92</sup> In many instances, supervisors did not mention complaint history when completing performance reviews for officers, even though the complaint information was readily available.<sup>93</sup> Further complicating matters, “the LAPD apparently had no overall system or plan for keeping track of more generalized data involving officer uses of force, excessive or otherwise.”<sup>94</sup> Among other things, the LAPD lacked important features, including the following: (1) an auditing procedure for use-of-force reports; (2) a “mechanism for monitoring force-related civil damages suits and settlements for purposes of officer discipline or training”; and (3) a systematic method to review officers “with multiple complaint histories involving [the use of] excessive force.”<sup>95</sup> Scholars have long recognized that efforts to address police misconduct, no matter how sincere, are doomed to fail if they consistently focus on the behavior of individual officers rather than the “distinctive and influential organizational culture” of police institutions.<sup>96</sup> The following section explores the traditional mechanisms used to remedy police misconduct and their inherent inability to confront the root causes of police misconduct and corruption.

#### *B. Traditional Remedies and Their Failure to Address Systemic Issues Plaguering Police Agencies*

Traditional measures used to address police misconduct include the following: excluding evidence illegally obtained from criminal suspects,<sup>97</sup>

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91. See Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816 (1999) (discussing the Christopher Commission’s findings); see also CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 32, 158.

92. See CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 40–42.

93. See *id.* at 41–42.

94. Armacost, *supra* note 36, at 497.

95. *Id.*

96. *Id.* at 455; see also SKOLNICK & FYFE, *supra* note 61, at 187 (“[I]f police reform is to be more than window dressing, it must be supported by the powerful institutions among which police organizations exist.”).

97. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (holding that evidence obtained in violation of a suspect’s constitutional rights will be excluded). The underlying (and much debated) rationale for the exclusionary rule is that exclusion of the evidence would deter police officers from engaging in constitutional violations. See *id.* 657–58. But see *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968) (noting that many routine police functions related to evidence gathering render the exclusionary rule “ineffective as a deterrent”). Scholars have questioned the deterrent effect of the exclusionary rule and its ability to reach police-citizen encounters that are not subject to adjudication. See Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 18–25 (2001) (discussing the exclusionary rule, civil-rights actions, administrative discipline, and commission reports as models for preventing police misconduct);

imposing civil sanctions on police officers engaged in wrongdoing,<sup>98</sup> imposing municipal liability for police misconduct,<sup>99</sup> prosecuting officers engaged in misconduct under state or federal law,<sup>100</sup> performing internal investigations of police misconduct and implementing internal disciplinary measures,<sup>101</sup> and

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see also John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 806–11 (discussing the limits of federal prosecution of law-enforcement officers under 18 U.S.C. § 242).

98. See, e.g., 42 U.S.C. § 1983 (2006). Victims of police misconduct may file civil actions under 42 U.S.C. § 1983, which provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* Critics of civil actions argue that these remedies are ineffective strategies to combat police misconduct because municipalities almost always indemnify the individual police officer so that the officer does not pay the costs of the defense or any penalties imposed by the suit. See Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 759–60 (1993) (observing that in practice, the victim of police misconduct challenges the entire municipality when filing a § 1983 suit). Furthermore, critics argue that civil-litigation strategies are rarely successful in targeting flawed management, policies, or patterns of abuse. *Id.* at 792, 797–99.

99. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–92 (1978) (establishing that a municipality may be held liable under § 1983).

100. See, e.g., 18 U.S.C. § 242 (2006) (providing a federal remedy for police misconduct). Experts have eschewed state and federal criminal prosecutions of police officers as ineffective means to address institutional reform of police agencies. See Jacobi, *supra* note 97, at 802–11 (discussing problems with state and federal prosecution of police misconduct). Prosecutors in many cities rarely prosecute officers for police brutality, and the failure to prosecute officers is often attributed to the inherent conflict of interest that exists between prosecutors' offices and the police officers upon whose work the prosecutors rely to secure convictions. See *id.* at 803–04. When states are errant in prosecuting officers for unlawful actions, the federal government may decide to prosecute the officers under 18 U.S.C. §§ 241–242. Section 241 makes it unlawful for “two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.” 18 U.S.C. § 241 (2006). Section 242 provides that it is unlawful for a person acting “under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject[] any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” 18 U.S.C. § 242 (2006). Despite the availability of federal intervention, DOJ officials have often asserted that state prosecution is the preferred avenue for criminal prosecutions of law-enforcement officers and that federal intervention should serve only as a “backstop.” See *Police Brutality Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 3 (1991) [hereinafter *Police Brutality Hearings*] (statement of John R. Dunne, then-Assistant Att’y Gen., Civil Rights Division, United States Department of Justice) (suggesting that federal prosecutions should be secondary to state and local prosecutions).

101. See PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 79 (1995) (explaining that the NYPD created an Internal Affairs Division to combat police misconduct following the findings of the Mollen Commission). These investigations, often

establishing citizen complaint-review boards.<sup>102</sup> Experts have criticized these traditional approaches to police misconduct for various reasons. All of these traditional remedial measures are litigation-based and adjudicatory in nature. Each measure has been criticized by experts:<sup>103</sup> although the adjudicatory nature of these measures makes them well-suited to addressing individual incidents, they offer little hope in spurring systemic change because they fail to emphasize proactive problem-solving. Given the shortcomings of these remedies to address police misconduct, the potency of injunctive relief appears to be the best approach for eradicating problematic practices within an agency and forcing troubled agencies to implement reforms. In many contexts involving constitutional violations, litigants have successfully advocated for injunctive relief to facilitate structural reform within institutions: for example, injunctive remedies have been used to structurally reform school systems and prisons.<sup>104</sup> In the context of police reform, however, the prospect of injunctive

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perceived as illegitimate, are plagued by conflicts of interest existing among the officers. *See id.* at 79–80 (observing that in the Internal Affairs Division of New York City’s Police Department, high-ranking “officers did not want to root out corruption, both because it might threaten their jobs and because they wanted to maintain a good image for the department”). The blue code of silence also makes it difficult for investigating officers to gather information regarding alleged instances of police misconduct. *See* MOLLEN COMMISSION REPORT, *supra* note 36, at 51–52 (noting that the code of silence “thwart[s] efforts to control corruption” because police officers “refus[e] to provide information about serious corruption in their commands”); Gilles, *Breaking the Code of Silence*, *supra* note 43, at 84–85 (discussing the lack of cooperation police officers experience when investigating fellow officers).

102. *See* Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 654–55 (2004) (noting that although citizen review boards were established to encourage transparency in police investigations, critics of citizen complaint review boards have noted that the retrospective investigation of complaints is inadequate to identify and prevent police misconduct).

103. *See, e.g.*, Armacost, *supra* note 36, at 465 (recognizing that three primary obstacles curbing police misconduct are: practical obstacles, doctrinal obstacles, and the “individual-specific and incident-specific nature of civil rights litigation”); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1399–1401 (2000) [hereinafter Gilles, *Reinventing Structural Reform Litigation*] (stating that traditional approaches have not addressed systemic police misconduct); Patton, *supra* note 98, at 771–72 (stating that traditional approaches fail because the actual “cost” to individual officers is minimal and the expense to police departments is viewed as an acceptable cost of doing business); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 323 (2005) (studying oversight of police departments and noting that “the ensuing wrangling between those who favor and those who oppose such oversight deflects attention from the underlying issue—how best to police police corruption”).

104. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 690–91 (1978) (demonstrating the use of a structural injunction to require compliance with prison reform); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16 (1971) (applying injunctive relief to aid school desegregation); *see also* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 4–6 (1978) (arguing for the availability of injunctive relief in civil rights cases); Gilles, *Reinventing Structural Reform Litigation*, *supra* note 103, at 1402 (highlighting the importance of the DOJ’s authority to provide injunctive relief to compel structural reform).

relief has been limited because courts are reluctant to allow structural injunctions to reform police agencies and have severely limited injunctive relief in this context because of federalism concerns. Some courts have adopted the view that it is not the role of federal courts or the federal government to monitor local police departments.<sup>105</sup> For example, in *Rizzo v. Goode*, the United States Supreme Court refused to grant injunctive relief to citizens challenging the Philadelphia Police Department on the basis of police misconduct.<sup>106</sup> Furthermore, in *United States v. City of Philadelphia*, the United States Court of Appeals for the Third Circuit held that the federal government lacked “implied statutory authority to sue a local government or its officials to enjoin violations of citizens’ constitutional rights.”<sup>107</sup> Similarly, the Supreme Court’s decision in *City of Los Angeles v. Lyons* prevents private citizens injured by police misconduct from seeking injunctive relief, absent the (almost impossible) ability to show a likelihood of future harm.<sup>108</sup>

*C. The “New Paradigm” of Police Accountability: The Current Federal Response to Addressing Institutional Police Reform*

Recognizing the inability of traditional methods to compel systemic reform of police agencies, policymakers advocated the need for and developed a “new paradigm” of police accountability designed to address the core factors of problematic police culture—factors such as poor management and

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105. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 380–81 (1976) (reversing the grant of injunctive relief, reasoning that principles of federalism prevent an injunction designed to govern the functions of a police department).

106. See *id.* In *Rizzo*, the Court considered the availability of an injunction against the City of Philadelphia that required the police department to implement reforms in its citizen complaint process. *Id.* at 364–65. The Court reversed the lower court’s grant of the injunction, holding that the patterns or practices of constitutional violations were insufficient to grant standing to the victims of the abuse. *Id.* at 375.

107. *United States v. City of Phila.*, 644 F.2d 187, 198–99 (3d Cir. 1980).

108. See *City of L.A. v. Lyons*, 461 U.S. 95, 111–13 (1983). In *Lyons*, a Los Angeles resident sued the City after police officers administered an unprovoked chokehold that rendered him unconscious following a routine traffic stop. *Id.* at 97–98. The *Lyons* dissent noted that from 1975 to 1982, sixteen people died as a result of LAPD-administered chokeholds and that it was Los Angeles city policy to permit officers to use chokeholds even without a threat of violence. *Id.* at 115–16 (Marshall, J., dissenting). Lyons was awarded damages for his injury, but the Supreme Court held that Lyons lacked standing to obtain an injunction restricting the use of chokeholds because he could not demonstrate a substantial likelihood that he would be choked again. *Id.* at 111. The *Lyons* holding limits the use of injunctive relief as a technique for curbing police misconduct because unless a person harmed by police misconduct can show a substantial likelihood that he or she will suffer the same harm again (which is unlikely), that person lacks standing and an injunction is not proper. *Id.* at 111; see also H.R. REP. NO. 102-242, at 138 (1991) (“To ensure that the issues being litigated are not hypothetical, and to provide a court with the benefit of a factual context, the [Omnibus Crime Control] Act [of 1991] requires that a private citizen seeking injunctive relief have been injured by the challenged practice.”).

organization.<sup>109</sup> Congress responded to this call by enacting 42 U.S.C. § 14141, codifying a new cause of action for regulating unlawful police patterns or practices.<sup>110</sup> Section 14141 authorizes the DOJ to obtain injunctive relief for the goal of reforming internal practices of law-enforcement agencies where the DOJ determines either that a pattern or practice of unconstitutional violations exists or that violations of federal law persist.<sup>111</sup> The DOJ's enforcement authority under § 14141 is triggered when the DOJ learns that a local police department may be engaging in such unlawful practices.<sup>112</sup> Once the DOJ is informed of the alleged unlawful practices, it conducts a preliminary investigation by reviewing witness interviews and other pleadings—including depositions or testimony—in order to determine whether a pattern or practice of constitutional violations exists.<sup>113</sup> If the preliminary investigation reveals sufficient evidence of the allegations, the DOJ then launches a formal investigation.<sup>114</sup> If the formal investigation reveals a pattern or practice of constitutional violations, § 14141 authorizes the DOJ to file a

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109. See CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 97–106 (demonstrating a correlation between the LAPD's management culture and police misconduct); COLLINS, *supra* note 36, at 45 (discussing the failures of traditional police management); Armacost, *supra* note 36, at 493–94 (detailing the organizational origin of police brutality).

110. 42 U.S.C. § 14141 (2006). The Violent Crime Control and Law Enforcement Act of 1993 included the 1991 provision authorizing the attorney general to pursue injunctive relief for patterns of police abuse.

111. *Id.* Section 14141, entitled “Cause of action,” provides:

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

*Id.*

112. See *Oversight of the Department of Justice—Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 18–19 (2002) [hereinafter *Oversight Hearing*] (statement of Ralph Boyd, Jr., Assistant Att’y Gen., Civil Rights Division, United States Department of Justice) (describing the attorney general’s process for filing a § 14141 action).

113. *Id.* In his testimony before the Senate Judiciary Committee, Ralph Boyd, Jr., then-Assistant Attorney General for the DOJ Civil Rights Division, compared the process to making “a [§] 1983 assessment . . . as to whether there is some formal policy or some unspoken practice that is leading to some level of repetitive unconstitutional uses of authority by police officers.” *Id.* at 19.

114. *Id.*

lawsuit against the law-enforcement agency under investigation.<sup>115</sup> In practice, however, the DOJ typically refrains from filing lawsuits, preferring instead to negotiate agreements in consent decrees or Memoranda of Agreement (MOA) with the culpable police departments.<sup>116</sup> Most recently, the DOJ's practice has been to send technical assistance letters merely notifying the police agency of existing problems and suggesting reforms.<sup>117</sup>

An integral feature of this new paradigm of policing is ensuring increased transparency, and this is the first step in dismantling the culture of insularity that permeates police departments.<sup>118</sup> This new paradigm emphasizes changing police systems rather than focusing on individual police officers; it encourages the collection and analysis of systemic data to identify recurring problems. There is also recognition that both internal and external accountability strategies can be beneficial to the reform process.<sup>119</sup>

The reform measures developed by the DOJ directly respond to the aspects of police culture previously discussed. For example, problems such as lax supervision and poor monitoring can be ameliorated by improved recordkeeping and tracking abilities. Unlike the adjudicative nature of the traditional methods of addressing police misconduct, the new paradigm

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115. *See id.*

116. *See, e.g.*, Press Release, U.S. Dep't of Justice, Department Files Police Misconduct Lawsuit Against the City of Columbus, Ohio (Oct. 21, 1999) [hereinafter 1999 Press Release, U.S. Dep't of Justice], available at <http://www.justice.gov/opa/pr/1999/October/494cr.htm> (noting that the DOJ "prefer[s] to bring about needed changes in the police department through negotiations, rather than contested litigation"). The DOJ has entered into court-enforced consent decrees with local law-enforcement agencies in the following locations: Los Angeles, California; Steubenville, Ohio; Pittsburgh, Pennsylvania; Prince George's County, Maryland; Detroit, Michigan; Cincinnati, Ohio; Washington, District of Columbia; and the state of New Jersey. *See infra* notes 118–20 and accompanying text. The DOJ also filed a lawsuit against the Police Department in Columbus, Ohio, but subsequently dropped the suit after determining that Columbus was in compliance with the constitutional principles. 1999 Press Release, U.S. Dep't of Justice, *supra*.

117. *See, e.g.*, Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, Civil Rights Div., U.S. Dep't of Justice, to Frank James, Attorney, Baker, Donelson, Bearman, Caldwell & Berkowitz PC (Nov. 9, 2004), available at [http://www.justice.gov/crt/split/documents/split\\_alabaster\\_talet\\_11\\_09\\_04.pdf](http://www.justice.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf) (detailing the DOJ investigation of the Alabaster, Alabama, Police Department and outlining concerns identified regarding the department); Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, Civil Rights Div., U.S. Dep't of Justice, to Kerry Drue, Attorney Gen., U.S. V.I., Elton Lewis, Office of the Police Comm'r, V.I. Police Dep't & Daniel Mattarangas-King, Office of the Police Comm'r (Oct. 5, 2005), available at [http://www.justice.gov/crt/split/documents/virgin\\_island\\_pd\\_talet\\_10-5-05.pdf](http://www.justice.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf) (discussing the DOJ investigation of the U.S. Virgin Islands Police Department and requesting production of additional documents to aid the investigative efforts).

118. *See Police Brutality Hearings, supra* note 100, at 3 (explaining that in police reform, federal enforcement efforts serve only as a "backstop" to other resources). The DOJ stated that the role of remedying police misconduct "properly lies with the internal affairs bureaus of law enforcement agencies and with State and local prosecutors." *Id.*

119. *See Walker, The New Paradigm, supra* note 22, at 8–9.

encourages prospective solutions to identify problems within police institutions before police misconduct can manifest. In the agreements between the DOJ and the police departments, the most common provisions include (1) the development of an early warning tracking system; (2) the collection of use-of-force reporting; and (3) the creation of a civilian complaint review process.<sup>120</sup>

### *1. Implementing an Early Warning Tracking System*

Identifying officers who exhibit a pattern of misconduct can have a significant impact on preventing constitutional violations within the department as a whole. In order to meet this goal, the federal government has required many jurisdictions to devise and implement an early warning tracking system or early intervention system to identify “problem” officers within the department.<sup>121</sup> This requirement stems from the concern that a small number of police officers within a department are typically responsible for the majority of the police misconduct within the department.<sup>122</sup> A notable example of this phenomenon is the Christopher Commission analysis of complaints against 1800 Los Angeles police officers between 1986 and 1990.<sup>123</sup> According to the Commission’s report, 1400 of the 1800 officers had only one or two allegations.<sup>124</sup> In contrast, “183 officers had four or more allegations, 44 had six or more [allegations], 16 had eight or more [allegations], and one had 16 allegations.”<sup>125</sup> The Commission found that “[t]he top 5% of officers ranked by number of reports accounted for more than 20% of all reports, and the top 10% accounted for 33%.”<sup>126</sup> Even if only a small number of officers are involved, these figures demonstrate the need for reform at an organizational level, because they indicate that little is being done at a departmental level to identify, discipline, or retrain these officers to improve their conduct. Despite

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120. *See id.* at 6–7 (setting forth best practices for police accountability); *see also* U.S. DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES 3–20 (2001), *available at* <http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf> [hereinafter DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY] (outlining best practices and concepts for “promoting police integrity”). Many of these same principles form the basis of the reforms required by consent decrees and MOAs developed by the DOJ under § 14141. *See Walker, The New Paradigm, supra* note 22, at 7 (observing that the best practices generated by the DOJ are included in § 14141 consent decrees and MOAs).

121. *See* DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY, *supra* note 120, at 10 (recommending that several jurisdictions implement early warning tracking systems better to identify “at-risk conduct”).

122. CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 31; SKOLNICK & FYFE, *supra* note 61, at 21.

123. CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 36.

124. *Id.*

125. *Id.* Similarly, when examining the use-of-force reports involving 6000 officers from January 1987 to March 1991, more than 4000 of the officers had fewer than 5 reports each, but the Commission noted that 63 officers had 20 or more reports each. *See id.*

126. *Id.*



engaging in a pattern of misconduct, many of these “problem” officers in Los Angeles avoided both negative personnel evaluations and disciplinary action; in some instances, these officers were promoted in spite of their misconduct.<sup>127</sup> In order to address patterns of misconduct, the federal government issued consent decrees or MOAs, recommending the development of an early warning tracking system in the following locations: Los Angeles, California;<sup>128</sup> the New Jersey State Police;<sup>129</sup> Pittsburgh, Pennsylvania;<sup>130</sup> Prince George’s County, Maryland;<sup>131</sup> Steubenville, Ohio;<sup>132</sup> Cincinnati, Ohio;<sup>133</sup> and Washington, District of Columbia.<sup>134</sup>

When early warning tracking measures are in place and working correctly, identifying officers who engage in misconduct or who are the subject of numerous complaints may significantly impact the number of complaints received by a department. These officers, at a minimum, may need retraining, or they may be disciplined or fired. Similarly, officers will be on notice that the department is monitoring their behavior, and this transparency, in itself, may encourage officers to modify troubling behavior. Finally, easily identifying problem officers will no longer allow supervisors to feign

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127. See, e.g., *id.* at 41 (reporting that evaluations of the forty-four officers receiving six or more complaints were generally “very positive” and “failed to give an accurate picture of the disciplinary histories of these officers”). Many of the performance evaluations did not reference any of the complaints against the officers, prompting the Commission to note that “the picture conveyed in an officer’s personnel evaluation file was often incomplete and commonly at odds with contemporaneous comments appearing in the officer’s . . . complaint files.” *Id.* For specific examples of those inconsistencies, see *id.* at 42–47.

128. Consent Decree, *United States v. City of L.A.*, No. 00-11769 GAF, ¶¶ 39–52 (C.D. Cal. June 15, 2001) [hereinafter Los Angeles Consent Decree], available at <http://www.justice.gov/crt/split/documents/laconsent.php>.

129. Consent Decree, *United States v. New Jersey*, No. 99-5970 (MLC), ¶¶ 40–56 (D.N.J. Dec. 30, 1999) [hereinafter New Jersey Consent Decree], available at <http://www.justice.gov/crt/split/documents/jerseysa.php>.

130. Consent Decree, *United States v. City of Pittsburgh*, ¶ 12 (W.D. Pa. Apr. 16, 1997) [hereinafter Pittsburgh Consent Decree], available at <http://www.justice.gov/crt/split/documents/pittssa.php>.

131. Memorandum of Agreement Between the United States Department of Justice & Prince George’s County, Maryland, & the Prince George’s County Police Department, ¶¶ 75–84 (Jan. 22, 2004) [hereinafter Prince George’s County MOA], available at [http://www.justice.gov/crt/split/documents/pgpd/pg\\_memo\\_agree.pdf](http://www.justice.gov/crt/split/documents/pgpd/pg_memo_agree.pdf).

132. Consent Decree, *United States v. City of Steubenville*, ¶¶ 71–77 (S.D. Ohio Sept. 3, 1997) [hereinafter Steubenville Consent Decree], available at <http://www.justice.gov/crt/split/documents/steubensa.htm>.

133. Memorandum of Agreement Between the United States Department of Justice & the City of Cincinnati, Ohio, & the Cincinnati Police Department, ¶ 57 (Apr. 12, 2002) [hereinafter Cincinnati MOA], available at <http://www.justice.gov/crt/split/Cincmoafinal.php>.

134. Memorandum of Agreement Between the United States Department of Justice & the District of Columbia & the District of Columbia Metropolitan Police Department, ¶ 2 (June 13, 2001) [hereinafter District of Columbia MOA], available at <http://www.justice.gov/crt/split/documents/dcmoa.php>.

ignorance regarding problem officers. Supervising officers who fail to act on information available as part of the early warning tracking efforts may also be held accountable for the conduct of those problem officers within their unit. These accountability measures may undermine part of the rationale for the police code of silence, particularly where supervisors are concerned, if the supervisors' positions and prospects for upward mobility are linked to alleviating corruption and misconduct within their unit.

## *2. Implementing Use-of-Force Reporting Systems*

In addition to the early intervention systems, another important component of some of the consent decrees and settlement agreements is the requirement that local police agencies either develop and implement use-of-force reporting systems or modify their existing use-of-force policies to require better supervision after an officer uses force.<sup>135</sup> The consent decrees and agreements typically address “substantive use of force polic[ies], incident reporting requirements, the investigation of force incidents, and entry of force reports into a departmental early intervention (EI) or risk management system.”<sup>136</sup> For example, jurisdictions may be required to “implement a use of force policy that is in compliance with applicable law and current professional standards.”<sup>137</sup> Alternatively, the MOAs and consent decrees might require specific reforms that limit certain practices, such as the deployment of canines, the use of particular chemical agents, or the use of certain physical restraints.<sup>138</sup>

Beyond the substantive modifications of use-of-force policies, administrative rulemaking in the various consent agreements extends to the investigations surrounding uses of force. Generally, the provisions in the agreements are designed to correct problems in the investigative process and maintain the integrity and impartiality of the investigation. For example, the Prince George's County MOA contains requirements related to critical firearm discharges.<sup>139</sup> Not only does the Prince George's County MOA require the police department to investigate all critical firearm discharges, but it also requires that each department create a special board to review such discharges.<sup>140</sup>

While the substantive changes in use-of-force policies may alleviate unnecessary uses of force and reduce citizen complaints, the most important

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135. See, e.g., *id.* at ¶ 53. These policies mandate that officers “notify their supervisor immediately following any use of force or receipt of an allegation of excessive use of force.” *Id.*

136. Walker, *The New Paradigm*, *supra* note 22, at 33.

137. See, e.g., Pittsburgh Consent Decree, *supra* note 130, at ¶ 13.

138. See, e.g., Prince George's County MOA, *supra* note 131, at ¶¶ 35–39 (detailing revisions and augmentations to the police department's policy regarding use of the chemical agent, Oleoresin Capsicum, commonly known as pepper spray).

139. *Id.* at ¶¶ 46–48.

140. *Id.* at ¶ 47.

aspect regarding the use of force relates to how and under what circumstances the local police department conducts investigations. If officers know that they will need to document every use of force or explain such force to a special board, they may be reluctant to use force in situations in which it is not warranted, such as in some instances, discussed by Westley, when individuals disrespect an officer. Such requirements may encourage officers to resolve situations with more appropriate uses of force or no force at all. Again, like the early warning tracking system, efforts to train, monitor, and investigate uses of force directly address some of the core problems of police culture, particularly that the department either condones or tolerates such inappropriate uses of force and the belief that violence is necessary in certain situations.

### 3. *Devising a Civilian Complaint Process*

Another common provision of consent decrees and negotiated MOAs calls for either the improvement of the police department's existing citizen complaint process or the development of a new system to handle citizen complaints.<sup>141</sup> Provisions related to the civilian complaint process generally focus on facilitating the methods by which citizens can file a complaint. A common provision might require the police department to allow citizens to make complaints in writing, verbally, by mail, by telephone, by facsimile, or by e-mail, and may further require the police department to provide a confidential twenty-four-hour telephone hotline to record complaints against officers.<sup>142</sup> Beyond delineating the methods for receiving complaints, a common reform provision may stipulate the manner in which complaints are processed and investigated.<sup>143</sup> For example, the Los Angeles consent decree required the police department to make audio or video recordings of all complainants—including the officers and witnesses involved—in addition to investigating the scene of the incidents to secure evidence.<sup>144</sup>

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141. See DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY, *supra* 120, at 7. The DOJ's report, *Principles for Promoting Police Integrity: Examples of Promising Police Practices and Policies*, sets precedent for many of these policies; the report states that law-enforcement agencies have an obligation to "provide a readily accessible process in which community and agency members can have confidence that complaints against agency actions and procedures will be given prompt and fair attention." *Id.* The report details the acceptance of misconduct complaints, stating that "[l]aw enforcement officers should be required to report misconduct by other officers." *Id.*

142. See, e.g., *id.* at 7–8.

143. See, e.g., *id.* at 8.

144. Los Angeles Consent Decree, *supra* note 128, at ¶ 80(a)–(b).

### III. IMPLICATIONS OF FEDERAL INTERVENTION IN LOCAL POLICE REFORM: ANALOGIES TO THE ADMINISTRATIVE CONTEXT

Policing and police reform have historically been a local function, and thus the emergence of a federal response to police accountability—such as that embodied in § 14141<sup>145</sup>—marks a departure from previous reform efforts.<sup>146</sup> The need for federal intervention, however, is clear: the insular nature of law-enforcement institutions and the inability of traditional mechanisms to bring about changes in police culture require federal attention. In forging ahead with this new paradigm of police accountability, policymakers and scholars must anticipate obstacles that threaten to impede the progress of police reform. In this context, the similarity between police departments and traditional administrative agencies becomes apparent. Additionally, a key component of the agreements between the DOJ and municipalities is the emphasis on administrative rulemaking as a tool to guide officers' conduct in the field, establish investigatory protocols, and implement supervisory review.<sup>147</sup> In this sense, the new paradigm of police accountability is analogous to the experience of administrative agencies during rulemaking. Given the emphasis the federal government has placed on reforming internal practices and policies of local police departments, and the active role that the federal government plays in the process, the implementation of new rules under the new paradigm makes the reform process susceptible to many of the ills associated with traditional administrative rulemaking. Drawing from the administrative rulemaking context helps to anticipate potential pitfalls associated with federal intervention in police reform.

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145. See 42 U.S.C. § 14141 (2006).

146. Bill Lann Lee, former DOJ Acting Assistant Attorney General for the Civil Rights Division, noted the preference for handling police misconduct locally stating, "The arm of government that principally polices the police is the local district attorneys and the state attorneys general." *Interview with Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, US Department of Justice*, 4 GEO. PUB. POL'Y REV. 119, 121 (1999). Lee nevertheless added that

[i]t is important . . . for the federal government to have that back-up jurisdiction, because sometimes in our nation's history, the local authorities have not prosecuted the police when they have engaged in misconduct. That hasn't happened as a systemic matter in many years. But it is still important that the federal government have that jurisdiction.

*Id.*

147. See Walker, *The New Paradigm*, *supra* note 22, at 14 (explaining that administrative rulemaking "lies at the core of the new paradigm of police accountability").

*A. Conceptualizing Police Departments as Administrative Agencies*

Although rarely viewed through the lens of administrative law,<sup>148</sup> police departments operate in a manner similar to traditional regulatory agencies.<sup>149</sup> In the traditional regulatory context, agencies promulgate regulatory rules because of their expertise in certain substantive areas. Police departments operate in the same way, but rather than determining emission standards for a particular factory or the lead content of a particular product, they determine which citizens will be arrested for certain criminal violations and which citizens will not. Additionally, police determine how they will effectuate an arrest, what level of force will be used in making an arrest, what interrogation methods will be employed, and whether they will stop or report the misconduct of fellow officers. Finally, police departments, often without external oversight, decide whether and how the department will discipline officers who have engaged in misconduct. Indeed, more than thirty years ago, Kenneth Culp Davis recognized that “police are among our most important policymaking administrative agencies.”<sup>150</sup> Similarly, Judge Carl McGowan noted that police “departments have begun to look and act more like other large governmental agencies under the discipline of embodying their principles of action in visible rules.”<sup>151</sup>

Rules governing the operations of individual police officers and police departments are especially important given the peculiar position police occupy in democratic societies. The very power necessary to administer crime control may, at times, be at odds with the ideals of democracy. As Hudson Janisch and Ron Levi observe, “[e]ven if one can remedy specific tensions or clarify particular misconceptions, it is arguable that the symbiotic antagonisms between policing and democracy are simply intractable.”<sup>152</sup> They further state that “[w]hile interdependent, the relationship between the two tends to turn

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148. See Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. C.L. & C.R. 43, 44 (2006) (noting that police and prosecutors are rarely considered part of the administrative-law context “despite the fact that they are precisely the governmental actors who most directly intervene in people’s lives,” and despite the enormous discretion afforded to them by the American legal system).

149. See Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 703–04 (1974) (“Top officers, not subordinates, should determine major policy.”); see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717 (2005) (observing the lack of scholarly commentary on whether administrative law principles can be applied appropriately to criminal-justice agencies and examining agencies responsible for criminal-justice policies on sentencing).

150. Davis, *supra* note 149, at 703; see also Barkow, *supra* note 149, at 717 (applying administrative-law principles to the Federal Sentencing Commission).

151. McGowan, *supra* note 1, at 667. Judge McGowan further noted that police are governed by rules that are developed externally. *Id.*

152. Hudson Janisch & Ron Levi, *Criminal Justice from the Bottom-Up: Some Thoughts on Police Rulemaking Processes*, in THE PROVINCE OF ADMINISTRATIVE LAW 243, 246 (Michael Taggart ed., 1997).

adversarial, since police carry both the responsibility to protect fundamental rights and freedoms as well as the power to abuse them.”<sup>153</sup> Recognizing the vast amount of discretion afforded to police officers and the relative insularity of police institutions, scholars have advocated administrative rulemaking within police departments to serve as a check on this discretion and encourage institutional change.<sup>154</sup> In the realm of deadly force, rulemaking has had “salutary effects on the frequency with which officers use their firearms.”<sup>155</sup>

Police rulemaking is also beneficial because it provides transparency to the public.<sup>156</sup> Kenneth Culp Davis argued that “open” police rulemaking is “more likely to be based on enlightenment” than on “ignorance,” unlike the informal rules that police officers adopt in their day-to-day experiences.<sup>157</sup> Proponents of police rulemaking also promote the benefit of public comment, which subjects the rules to public scrutiny and encourages community involvement.<sup>158</sup>

In addition to the similarities between police departments and administrative agencies, federal intervention in police reform offers additional support for applying principles of administrative law. Although not related to search and seizure policies, interrogation techniques, or discretionary police conduct, the practices and policies that the federal government seeks to implement in local jurisdictions under § 14141 are essentially administrative rulemaking measures. The primary difference is that these predominantly procedural

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153. *Id.*

154. See Davis, *supra* note 149, at 704–05. In his seminal article, Anthony Amsterdam argued that police “[r]ulemaking would . . . tend to tame the welter of police practices that now come before courts for fourth amendment adjudication by preventing some of those practices from being used in the first place.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 421 (1974); see also Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 362 (1986) (acknowledging that by the mid-1970s, many scholars agreed on the need for administrative rulemaking to guide police conduct).

155. Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in POLICE VIOLENCE 23, 29 (William A. Geller & Hans Toch eds., 1996).

156. See Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 603–04 (2000) [hereinafter Luna, *Principled Enforcement*] (advocating transparent police rulemaking to guide police in the use of force and other practices).

157. See Davis, *supra* note 149, at 717. Davis notes that many illegal police practices “are created by personnel with an average education of 12.4 years, are made by the least qualified personnel at the bottom of the organization, and are responses to portions of problems and not to whole problems.” *Id.*; see also Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1166 (2000) (remarking that requiring legitimacy is particularly important in the criminal-justice system because the “power to deprive liberty and self-autonomy through the criminal process is unparalleled”).

158. See, e.g., Jason W. Eldridge, Comment, *The Fourth Amendment: The Privacy of Overhead Luggage Compartments on Commercial Buses*, 27 WM. MITCHELL L. REV. 2003, 2025–26 (2001) (examining rulemaking in the context of the Fourth Amendment and observing that rulemaking benefits the community by permitting public scrutiny of police procedures).

measures are designed to spur systemic changes within the police department to improve police accountability. By way of analogy, the DOJ attorneys, in conjunction with police consultants, provide “expertise” to local police departments subject to § 14141 under negotiated consent decrees or MOAs in the same way that other federal regulatory agencies provide expertise to state and local entities. These local police departments are charged with implementing federal policies charged to them by the DOJ.<sup>159</sup> The DOJ monitors the progress of the police-department reforms and has the authority to seek legal action if the local departments do not comply.<sup>160</sup> As the similarities between police departments and agency rulemaking become more apparent, policymakers must be cautious of the problems associated with conventional rulemaking that could undermine the reforms that the DOJ implements in a particular jurisdiction.

*B. The Inherent Democratic Deficiencies in Administrative Rulemaking: The Search for Political Legitimacy*

Although there is a demonstrated need for the federal government’s involvement in local police reform, either through its enforcement authority under § 14141 or another mechanism, federal intervention inherently begets issues of political legitimacy. Below, I argue that these political legitimacy issues apparent in the traditional rulemaking context are even more acute in the police-reform context.

In traditional informal rulemaking, the federal agency promulgating the rule drafts the text of the proposed rule.<sup>161</sup> After comment within the agency, the proposed rule is printed in the Federal Register, and the public is invited to comment.<sup>162</sup> After reviewing the comments, the agency evaluates issues identified during the comment period and may choose to revise the rule.<sup>163</sup> The final rule is then published in the Federal Register and is later incorporated into the Code of Federal Regulations.<sup>164</sup>

Erik Luna articulates a number of benefits associated with rulemaking generally.<sup>165</sup> For example, rulemaking allows people to identify unacceptable

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159. See Eugene Kim, Note, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance from Procedures in Complex Litigation*, 29 HASTINGS CONST. L.Q. 767, 773, 794–95 (2002) (discussing the DOJ’s negotiation of consent decrees at the local level rather than large-scale litigation).

160. See, e.g., Prince George’s County MOA, *supra* note 131, at ¶¶ 113–14, 116–17.

161. See Luna, *Principled Enforcement*, *supra* note 156, at 594–96 (describing the informal administrative rulemaking process).

162. *Id.* at 595–96.

163. See *id.*

164. See Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 134–35 (1985) (describing the traditional rulemaking process).

165. See Luna, *Principled Enforcement*, *supra* note 156, at 597.

conduct and modify their behavior according to legal standards.<sup>166</sup> The capacity for the public to share information causes some to contend that rulemaking results in superior decision-making.<sup>167</sup> Similarly, rulemaking provides accountability and promotes citizen participation in articulating principles—a process that “increases popular compliance based on perceptions of government legitimacy.”<sup>168</sup>

Despite the benefits of rulemaking, scholars have criticized the process, arguing that traditional rulemaking “has marched steadily toward reliance on the judiciary to settle disputes and away from direct participation of affected parties.”<sup>169</sup> Specifically, critics have noted that where inherently political questions are at issue, rulemaking “has resulted in a crisis of legitimacy that is the current malaise.”<sup>170</sup>

In the United States, agencies set forth standards regarding almost every aspect of social and economic activity.<sup>171</sup> Given the complex and often controversial issues governed by regulatory policies, the importance of democratic legitimacy in promulgating regulations cannot be overstated. Nevertheless, “unelected government officials” make most regulatory policy, therefore giving rise to what Cary Coglianese terms a “democratic deficit.”<sup>172</sup> Officials involved in rulemaking decisions are not elected, and as a result, they are not publicly accountable.<sup>173</sup> These individuals, however, play major roles in developing rules that affect the public at large.<sup>174</sup> Thus, citizen participation during the comment period, either in public hearings or advisory committee

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166. *Id.*

167. *Id.*

168. *Id.*

169. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 113 (1982).

170. *Id.* at 17. The Administrative Conference of the United States recommended negotiated rulemaking as a means of increasing direct participation in administrative rulemaking. 1 C.F.R. § 305.82-4 (1983). Federal law defines negotiated rulemaking as “rulemaking through the use of a negotiated rulemaking committee”; such committee is defined as “an advisory committee established by an agency . . . to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.” 5 U.S.C. §§ 562(6), (7) (2006); *see also* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256 n.6 (1997) (defining “negotiated rulemaking” and noting that sometimes “regulatory negotiation” is used interchangeably with “negotiated rulemaking” despite the technical distinction between the two phrases); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33 & n.1 (2000) (noting that “regulatory negotiation,” or “reg-neg” as it is commonly referred, is sometimes described as “negotiated rulemaking”).

171. *See* Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 354 (2004) (noting that federal regulations “govern virtually every major aspect of contemporary life”).

172. *Id.*

173. *Id.* at 372.

174. *Id.*



meetings, is beneficial in preserving the democratic legitimacy of the promulgated rule.<sup>175</sup>

In addition to the democratic deficit, scholars have articulated several additional reasons why informal rulemaking fails to create “effective, implementable, and legitimate rules.”<sup>176</sup> Professor Jody Freeman observes that “the indirect nature of rule making tends to undermine problem solving and reward adversarialism.”<sup>177</sup> She continues by noting that the extreme positions held by parties during the notice and comment period force the agencies to choose from a limited range of possible solutions.<sup>178</sup> Another concern Freeman notes is that “only after the Notice of Proposed Rule Making (NPRM) do parties supply detailed arguments about the technical and practical difficulties of implementing a rule, instead of much earlier when the information might be more valuable to the agency in formulating the proposed rule.”<sup>179</sup> Thus, policymakers should not underestimate the benefits of stakeholder participation and local experimentation early in the administrative rulemaking process. As the following section demonstrates, the emerging New Governance theoretical framework supports greater stakeholder participation in general regulatory initiatives and may cure the democratic deficits inherent in the federal government’s efforts to reform local police departments.

#### IV. NEW GOVERNANCE AND POLICE REFORM: A DEMOCRATIC EXPERIMENTALIST APPROACH

##### A. *New Governance Defined*

New Governance theories that advocate a bottom-up approach to regulatory reform directly address the democratic deficit inherent in regulatory rulemaking and may help to restore political legitimacy in the administrative rulemaking context. The command-style regulatory model emerged as the dominant regulatory model in the wake of New Deal-era policies and the proliferation of administrative agencies and administrative rulemaking during the 1960s and 1970s.<sup>180</sup> Throughout this period, administrative agencies operated on the assumption that issues plaguing the government were far too complex for the general public to participate actively in developing

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175. *Id.*

176. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11 (1997).

177. *Id.*

178. *Id.* at 11–12.

179. *Id.* at 12.

180. Bradley C. Karkkainen, *Reply: “New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473–74 (2004).

solutions.<sup>181</sup> The prevailing notion was that agencies developed expertise in particular substantive areas and thus were best equipped to develop the appropriate policy response.<sup>182</sup> This model resulted in “one-size-fits-all rules” instead of nuanced responses to policy problems.<sup>183</sup>

Scholars characterize New Governance theories as a paradigmatic shift away from top-down regulation and toward flexible, pragmatic approaches to regulation developed from the bottom up.<sup>184</sup> New Governance theories offer a dramatically different response to the democratic legitimacy problems plaguing policy reform efforts in a number of contexts.<sup>185</sup> In contrast to the command-and-control regulatory framework, the New Governance regulatory model, according to its advocates, “breaks with fixity, state-centrism, hierarchy, excessive reliance on bureaucratic expertise, and intrusive prescription.”<sup>186</sup> The New Governance model of regulatory reform “aspires . . . to be more open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic.”<sup>187</sup> By increasing public participation, the New Governance model creates an opportunity for a diverse influx of expertise and experience by “involving more actors” in each step of the process.<sup>188</sup> This in turn allows for the promulgation of regulations more closely tailored to the needs of those for whom the regulations are intended.<sup>189</sup> New Governance is not a single theory, but rather, it reflects a synthesis of related approaches to governance intended to remedy ineffective forms of regulation.<sup>190</sup>

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181. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 270 (1998).

182. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373 (2004).

183. Karkkainen, *supra* note 180, at 474 (explaining that the uniform rules “in truth . . . did not quite fit anyone”).

184. See, e.g., Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 673.

185. See Karkkainen, *supra* note 180, at 474–75. Scholars have analyzed a wide range of public-policy issues through the lens of the New Governance theoretical framework including, “environmental protection, public school reform, ‘problem solving courts,’ health care reform, workplace gender discrimination, equal protection generally, labor rights, community policing, community economic development, and public law litigation.” *Id.* at 475 (citations omitted).

186. *Id.* at 474.

187. *Id.*

188. Lobel, *supra* note 182, at 373.

189. See *id.* at 373–74 (advocating citizen participation in regulatory reform in order to address broader policy goals).

190. Karkkainen, *supra* note 180, at 496.

### B. Democratic Experimentalism

Democratic experimentalism is a subset of the broader New Governance framework. Michael Dorf and Charles Sabel define democratic experimentalism as an “overall system of public problem solving that combines federal learning with the protection of the interests of the federated jurisdictions and the rights of individuals.”<sup>191</sup> Democratic experimentalism refers to innovative methods of regulation and policy development that utilize “robust public participation, benchmarking, and information sharing to solve public problems.”<sup>192</sup> Democratic experimentalism has also been described as a form of governance in which “decentralization and experimentation will ultimately lead to the advancement of knowledge.”<sup>193</sup> It seeks to address typical democratic shortcomings through its encouragement of collective problem-solving and local expertise in responding to regulatory initiatives.<sup>194</sup>

Essentially, democratic experimentalism seeks to improve governmental effectiveness in policymaking by promoting information sharing, institutional best practices, and citizen engagement. Scholars have identified several characteristics of democratic experimentalism, including its commitment to benchmarking best practices, learning by monitoring, encouraging direct stakeholder deliberation, and engaging in local experimentation.<sup>195</sup> Benchmarking is “an exacting survey of current or promising products and processes which identifies those products and processes superior to those the company [or agency] presently uses, yet are within its capacity to emulate and eventually surpass.”<sup>196</sup> Learning by monitoring involves the exchange of information between agencies, regular evaluation of progress, and continuous adjustment of means to reach stated ends.<sup>197</sup> Dorf and Sabel envision direct citizen participation through governance councils that would assess the utility of services provided by local agencies and compare the progress among similar agencies.<sup>198</sup> In Dorf and Sabel’s view, the governance councils link citizens to government but do not replace current administrative leadership.<sup>199</sup> Agencies

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191. See Dorf & Sabel, *supra* note 181, at 288.

192. Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 822 (2008) (book review essay).

193. Kruse, *supra* note 184, at 677.

194. See Dorf & Sabel, *supra* note 181, at 430–31 (“Our anti-commandeering principle only requires that when the federal government does find it attractive to enlist the states directly in its regulatory programs, it does so by offering them the possibility of true cooperation.”).

195. Solomon, *supra* note 192, at 822.

196. Dorf & Sabel, *supra* note 181, at 287.

197. *Id.*

198. *Id.* at 316–17.

199. *Id.* at 319.

would remain accountable to a department head, who in turn is accountable to the directly elected executive.<sup>200</sup>

### C. New Governance in Action in the Criminal-Justice Context

There are several aspects of the criminal-justice system for which courts and policymakers have advocated practices or programs that embody New Governance characteristics. The jurisprudence of the Warren Court, for example, represents the Court's recognition that local or state experimentalism could play a key role in developing rules related to criminal procedure. This understanding is evident in the Court's opinions interpreting the Fifth and Sixth Amendments and in its decision in *Miranda v. Arizona*.<sup>201</sup> Katherine Kruse notes specifically that "[t]he Court announced its rule[] in . . . *Miranda* . . . with the explicitly stated goal of encouraging legislatures and law-enforcement agencies to take their own steps to improve police investigatory practices."<sup>202</sup> In *Miranda*, the Court recognized that states and localities could exercise "their creative rule-making capacities" to develop alternatives for protecting the privilege against self-incrimination.<sup>203</sup>

Kruse analyzes reforms that the state of Wisconsin has implemented to address wrongful convictions. For example, in 2005, the Wisconsin Supreme Court interpreted the state constitution to prohibit impermissibly suggestive identifications even if the identification was deemed to be reliable.<sup>204</sup> This holding represented a departure from federal due process that allows suggestive identifications if they are otherwise reliable.<sup>205</sup> That same year, the Wisconsin state legislature mandated that local law-enforcement agencies develop written policies for eyewitness identification procedures in the hope of decreasing the possibility of mistaken identification.<sup>206</sup> Specifically, the bill "mandate[d] the electronic recording of all juvenile custodial interrogations, and declare[d] a state policy that all custodial interrogations of adults in felony

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200. *See id.*

201. *See Kruse, supra* note 184, at 663–67; *see also* *Miranda v. Arizona*, 384 U.S. 436 (1966).

202. *See Kruse, supra* note 184, at 671. Kruse discusses *United States v. Wade*, in which the Court held that "the postindictment lineup was a critical stage of the prosecution" and thus required the presence of counsel. 388 U.S. 218, 237 (1967). The Court noted, however, that "[l]egislative or other regulations" of lineups might "remove the basis for regarding the stage as critical" for purposes of determining whether there is a right to counsel. *Wade*, 388 U.S. at 239 (internal quotation marks omitted); *see generally* Dorf & Sabel, *supra* note 181 (discussing *Miranda v. Arizona* in experimentalist terms).

203. *Miranda*, 384 U.S. at 467.

204. *State v. Dubose*, 699 N.W.2d 582, 599 (Wis. 2005).

205. *Manson v. Brathwaite*, 432 U.S. 98, 106, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

206. *Kruse, supra* note 184, at 647.

cases should be electronically recorded.”<sup>207</sup> Under the Wisconsin reforms, local agencies are developing and periodically reviewing their policies; because the authority to develop these practices is left to the local agencies, Kruse argues that these policies fall within the democratic experimentalist paradigm.<sup>208</sup>

Dorf and Sabel have described drug treatment courts as “evolving experimentalist institutions.”<sup>209</sup> These specialized courts typically allow the defendant to plead guilty or accept responsibility for the criminal violation, but, as an alternative to incarceration, defendants are placed in a court-mandated drug-treatment program.<sup>210</sup> If the offender successfully completes treatment, the conviction is usually expunged.<sup>211</sup> The courts necessarily require the cooperation of judges with “administrative, not-for-profit, or private-sector organizations.”<sup>212</sup> Consistent with the principles of democratic experimentalism, information is pooled among each of these groups, and the progress of individuals is subject to intense monitoring. Dorf and Sabel note that the “information . . . allows identification of good and bad performers, improvement of the quality of the monitored information, and eventually, of the services provided.”<sup>213</sup> This collaboration allows actors collectively to “explore and evaluate solutions to complex problems that neither alone would have been likely to identify, much less investigate or address, without the exchanges with the others.”<sup>214</sup>

*D. Democratic Experimentalism Principles and Police Accountability: The Value of Stakeholder Deliberation and Local Experimentation*

The value of stakeholder deliberation and local experimentation emphasized in the democratic experimentalist paradigm are values readily applicable in the context of police reform.<sup>215</sup> The public distrust created by insular police institutions threatens the political legitimacy of police reform because it lacks transparency and citizen involvement. By employing a democratic experimentalist approach to police reform, policymakers can eliminate

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207. *Id.* (citing WIS. STAT. §§ 175.50, 938.31, 968.073, 972.115 (2006)).

208. Kruse, *supra* note 184, at 648. For a detailed discussion of the legislation and the agency’s responsibilities, see *id.* at 648 n.10.

209. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts & Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 837 (2000).

210. *Id.* at 832.

211. *Id.*

212. *Id.* at 833.

213. *Id.* at 833–34.

214. *Id.* at 834.

215. See Kruse, *supra* note 184, at 678–79 (describing the characteristics of the democratic experimentalist model).

deficiencies in police culture, dissolve historical tensions between police and communities, and restore political legitimacy to the police-reform process.

Democratic theorists have emphasized that “citizens should participate in the design and implementation of the policies that affect them.”<sup>216</sup> Adhering to these values may create not only better substantive reforms, but may also increase the legitimacy of the ultimate police reforms implemented in a particular jurisdiction. In their discussion of the values deliberation, Amy Gutmann and Dennis Thompson identify several distinct values of deliberation, each of which has special relevance in the context of police reform.<sup>217</sup> Gutmann and Thompson note that opportunities for citizens to engage in “deliberative forums” allow groups previously excluded from the political realm to participate in the political process.<sup>218</sup> Specifically, the tension experienced between police officers and communities, especially poor, minority communities, can be traced to the political disenfranchisement these community members have historically experienced.

The opportunity for police officers and community members to deliberate about police conduct and police-citizen interactions is key to dismantling the “us versus them” mentality.<sup>219</sup> Active deliberation also encourages citizens “to take a broader perspective on questions of public policy” and consider the claims of other citizens, including the police.<sup>220</sup> When applied in the context of police reform, different groups of community members, including victims of crime and victims of police misconduct, might come to value each other’s perspective. Similarly, community members can gain insight from police officers about the daily experiences that shape their reaction to proposed reform efforts. Finally, deliberation ensures that various groups of stakeholders involved in developing a policy can learn from each other and respect the positions of others while continuing to disagree. Although the benefits of deliberation in the context of police reform may be obvious, the lack of opportunity for stakeholders to participate and discuss the implementation of new policies threatens the success of the reforms, because the lack of participation in police reforms may exacerbate the alienation and distrust that police officers and citizens already harbor toward each other.

Stakeholder participation is inextricably linked with another bedrock principle of democratic experimentalism: local experimentation. Democratic

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216. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 175 (2004) (defining the scope of “Associative Democracy”).

217. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 39–51 (1996) (discussing the values that inform deliberation and how they affect the democratic process of governing).

218. See *id.* at 42 (noting the possible risks and rewards of additional political voices).

219. See *supra* note 41 and accompanying text.

220. *Id.* (recognizing the importance of a broad focus by citizens in the public forum).

experimentalism “is based on the belief that the openness of decentralization and experimentation will ultimately lead to the advancement of knowledge.”<sup>221</sup> This paradigm is “built on a vision of ‘continuous change and improvement.’”<sup>222</sup> Without stakeholder participation, however, local experimentation becomes difficult to achieve; in the context of police reform, the lack of stakeholder participation means that communities cannot actively participate in setting reform priorities. Thus, such reforms may be ineffective or viewed with suspicion because there is no connection between the reform and the community’s experiences. For example, use-of-force reforms may unduly focus on shootings by the police when the community may be equally concerned about canine deployment in non-threatening encounters. Similarly, police officers cannot impart valuable information about the importance of certain policing strategies that may be unpopular but that are necessary for public safety.

*E. The Importance of Achieving Political Legitimacy in the Police-Reform Context*

The political legitimacy concerns plaguing the general regulatory context are amplified when formulating rules and regulations impacting the police. The characteristics defining police culture—such as the code of silence, violence, and lack of internal discipline—make it difficult for the public to trust police and may make the public skeptical of efforts to hold police accountable. By their inherent nature, the operations of police institutions and investigations of misconduct allegations are “shrouded in secrecy” and shielded from the public.<sup>223</sup> This propensity toward insularity, and the resulting tension between police officers and their community, lead police and community members alike to become skeptical of the reform process. The rank-and-file officers abhor being second-guessed by inexperienced bureaucrats unfamiliar with the dangers that the officers face on a daily basis.<sup>224</sup> On the other hand, community members dismiss police-reform attempts as mere “lip service” or public relations stunts designed to quell tensions after high-profile incidents of police misconduct.<sup>225</sup> This skepticism threatens to undermine the political legitimacy of any police-reform process. Thus, achieving political legitimacy

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221. Kruse, *supra* note 184, at 677.

222. *Id.* (quoting Lobel, *supra* note 182, at 380).

223. AMNESTY INT’L, UNITED STATES OF AMERICA: RACE, RIGHTS AND POLICE BRUTALITY 6–7 (1999); *see also* Davis, *supra* note 149, at 703–04 (noting that much of the “police policy” is often “kept secret from those who are affected by it”).

224. *See, e.g.*, SKOLNICK & FYFE, *supra* note 61, at 221 (discussing the fervent reaction New York policemen had to the possibility of a civilian review board).

225. *See id.* at 224 (observing that “when citizens ask for review of police conduct by civilians, they do so because they don’t trust the police to investigate themselves”).

is critical to ensuring that stakeholders, police, and residents “buy in” to the reforms.<sup>226</sup>

*1. Historical Tensions Between Police and Their Communities Create a Sense of Mistrust*

In addition to the pathologies prevalent in police organizational culture, historical tensions between police officers and certain communities in the United States present additional challenges to the political legitimacy necessary for meaningful police reform. Police-citizen interactions in poor, urban, and minority communities have consistently been strained. Numerous studies and polls show that minority groups have a disturbingly negative perception of police officers.<sup>227</sup> The relationship between these two groups has been fraught with mistrust, and at times, minority communities have erupted in violence over allegations of police misconduct.<sup>228</sup> Over the last fifty years, police brutality has sparked many civil disturbances throughout the country.<sup>229</sup> Los Angeles has been the site of the most well-known examples of volatility between police and urban minority communities. In 1965, in the Watts area of Los Angeles, police arrested Marquette Frye on suspicion of driving while intoxicated.<sup>230</sup> The arrest drew a crowd, and officers began to beat members of the crowd with their batons, sparking a five-day riot during which 34 people were killed, 1000 people were injured, and approximately \$183 million of property damage was incurred.<sup>231</sup> Later studies examining the underlying causes of the riots linked the unrest with growing tensions between the

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226. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 537–41 (2008) (advocating the need for stakeholder inclusion in police-reform efforts and the value of political legitimacy).

227. See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1797 & n.6 (1998) (“Whites rated local police favorably by a margin of 67%–31%” while “blacks rated local police unfavorably by a margin of 50%–43%.”); see also Capers, *Testilying*, *supra* note 88, at 844 (summarizing polling statistics showing that sixty-four percent of blacks believe that the police provide unfair treatment to blacks and that nearly one-fourth of blacks have little confidence in the police).

228. See, e.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 93 (1968) [hereinafter KERNER COMMISSION REPORT] (examining the conditions causing violence to break out in minority communities).

229. See I ANTONY M. PATE & LORIE A. FRIDELL, POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES 7 (1993) (explaining that perceptions of police brutality contributed to the Harlem riot in 1935, the Watts riot in 1965, numerous riots during 1967, and the Miami riot in 1980).

230. Cecilia Rasmussen, *Then and Now: 1965–1992*, L.A. TIMES, May 2, 1992, at A24.

231. See *id.* (property-damage figure adjusted for inflation); see also KERNER COMMISSION REPORT, *supra* note 228, at 20 (noting that the Watts riots were triggered by police action and caused many deaths and millions of dollars in property damage).



minority city residents and the all-white police department.<sup>232</sup> In 1992, Los Angeles again erupted in violence after the acquittal of four officers who participated in the videotaped beating of Rodney King.<sup>233</sup> In April 2001, Cincinnati experienced three days of rioting after a police officer shot and killed unarmed nineteen-year-old, Timothy Thomas.<sup>234</sup> Thomas, who was wanted for several misdemeanors, was the fifth African American killed by Cincinnati police officers within a seven-month period and the fifteenth African American killed by police since 1995.<sup>235</sup> On November 25, 2006, New York City police officers shot and killed Sean Bell in a barrage of fifty bullets hours before his wedding.<sup>236</sup> The April 25, 2008, acquittal of the three officers involved in Bell's death sparked widespread protests among African Americans across the city.<sup>237</sup>

Courts, police experts, and government officials alike have recognized the negative perceptions that minority communities have of the police. For example, the Christopher Commission noted that “[w]ithin the minority communities of Los Angeles, there is a widely-held view that police misconduct is commonplace.”<sup>238</sup> Specifically, the Commission noted that police officers “frequently treat[ed] minorities differently from whites, more often using disrespectful and abusive language, employing unnecessarily intrusive practices . . . and engaging in use of excessive force when dealing with minorities.”<sup>239</sup> In 1999, then–United States Attorney General Janet Reno explicitly acknowledged that minority communities’ mistrust of police officers stems from the belief that “police have used excessive force, that law enforcement is too aggressive, [and] that law enforcement is biased, disrespectful and unfair.”<sup>240</sup>

If the distrust among minority communities was simply due to misperceptions or unsubstantiated allegations of police bias, it might be easier

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232. See SKOLNICK & FYFE, *supra* note 61, at 76 (explaining the African American community’s mistrust of the Los Angeles police).

233. Richard A. Serrano & Tracy Wilkinson, *Trial: Governor Deploys Troops at Mayor’s Request After Arson, Looting Erupts*, L.A. TIMES, Apr. 30, 1992, at A1.

234. See Anne Michaud, *Cincinnati Cleans up, Amid Many Black-White Questions*, BOSTON GLOBE, Apr. 29, 2001, at A6.

235. See Sufiya Abdur-Rahman, *NAACP Today: 2008 NAACP Convention*, THE CRISIS, Summer 2008, at 37 (noting the high incidence of African American murders between 1995 and 2001).

236. See Robert D. McFadden, *Police Kill Man After a Bachelor Party in Queens*, N.Y. TIMES, Nov. 26, 2006, at A1.

237. See Nicole Bode, *Bell Case Protestors Jam Street at Garden*, N.Y. DAILY NEWS, May 1, 2008, at 15; Cara Buckley & Thomas J. Lueck, *Verdict in Sean Bell Case Draws a Peaceful Protest, but Some Demand More*, N.Y. TIMES, Apr. 28, 2008, at B3.

238. CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 70.

239. *Id.*

240. Associated Press, *Reno Urges Officers to Try to Regain Trust*, BALTIMORE SUN, Apr. 16, 1999, at 7A.

to develop solutions to ease this distrust. Unfortunately, empirical evidence supports the notion that African Americans' perceptions of mistreatment and differential treatment by the criminal-justice system are in fact substantiated.<sup>241</sup> Some scholars have found that the underlying cause of this distrust is linked to the excessive force and aggressive policing techniques that police have consistently employed in minority communities.<sup>242</sup> In 1968, the United States Supreme Court's decision in *Terry v. Ohio* noted the link between racism and the aggressive patrolling of minority communities:

[I]t cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."<sup>243</sup>

In recent years, the war on drugs has disproportionately impacted minority communities. These communities are often targeted for drug use even though they represent a minority of drug users.<sup>244</sup> Numerous studies indicate that minority groups, particularly African Americans, experience discriminatory treatment from police officers<sup>245</sup> and are victimized by police officers using deadly force.<sup>246</sup>

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241. See MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 7–8 (1995) (discussing changes in economic and social conditions over the past twenty years, which have resulted in high crime rates for African Americans). African Americans, particularly African American males, are disproportionately represented at almost all levels of the criminal-justice system. See *id.* at 1–5, 28–29. For example, forty-five percent of those arrested for violent crimes are African American, and nearly one-third of African American men are supervised by the criminal-justice system. See *id.* at 1.

242. See Capers, *Testifying*, *supra* note 88, at 844–46 (“[T]he very fact that most victims of police brutality are members of poor and minority communities . . . contributes to the perception that the police are more likely to engage in force when dealing with a minority suspect[,] . . . a perception for which there is evidentiary support.”).

243. *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1967) (quoting LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* 47–48 (Frank J. Remington ed., 1967)).

244. See Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution, and the Black Community*, 24 U.C. DAVIS L. REV. 557, 609 (1991) (observing that eighty to ninety percent of United States drug arrests are of African American males while that same demographic comprises only twelve percent of the country's drug users).

245. See, e.g., Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 622–28 (1993) (revealing statistics showing the discriminatory treatment that police employ against young African American males through arrests and incarceration).

246. See Mark Blumberg, *Police Use of Deadly Force: Exploring Some Key Issues*, in POLICE DEVIANCE 201, 211 (Thomas Barker & David L. Carter eds., 3d ed. 1994) (“All studies are in agreement that blacks are the victims of police deadly force in numbers disproportionate to their representation in the general population.” (citations omitted)); see also William A. Geller,

Racial profiling also creates the perception that many police officers, regardless of their race, harbor and exercise racial animus when policing communities of color.<sup>247</sup> Studies indicate that many minorities believe that police are more likely to stop, question, or detain them, as opposed to white citizens, when investigating crimes.<sup>248</sup> Likewise, empirical evidence reveals that racial profiling is not a figment of the imagination; rather, it is a widespread practice employed by police officers in many communities.<sup>249</sup> In New Jersey, African Americans and Hispanics constituted seventy-eight percent of “the motorists [that police] stopped and searched.”<sup>250</sup> Although police stopped and searched white individuals far less frequently, officers uncovered evidence of criminal wrongdoing twenty-five percent of the time that they searched white motorists.<sup>251</sup> In 1998, African American women were “9 times more likely than White women who were U.S. citizens to be x-rayed after being frisked or patted down” by U.S. Customs officers even though they were found to be “less than half as likely to be found carrying contraband.”<sup>252</sup> In New York City, Mayor Rudy Giuliani’s quality-of-life policing initiatives, implemented in the early 1990s, resulted in police officers stopping and

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*Deadly Force: What We Know*, 10 J. POLICE SCI. & ADMIN. 151, 163 (1982) (noting the disproportionate rate of police shootings involving African Americans).

247. See Capers, *Testilying*, *supra* note 88, at 842–44, 849; Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 58 (2001).

248. See Capers, *Testilying*, *supra* note 88, at 844; Garrett, *supra* note 247, at 52–53. The term “racial profiling,” which generally connotes an illegitimate practice, can sometimes be difficult to define and differentiate from legitimate means of criminal profiling, but it is generally defined as occurring “whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.” See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002); see also Capers, *Testilying*, *supra* note 88, at 849 (citing a Gallup poll indicating that forty percent of African Americans “who had been pulled over for traffic stops believed that the police had targeted them” specifically based on their race).

249. See Capers, *Testilying*, *supra* note 88, at 849–52.

250. *Id.* at 850.

251. *Id.* Similarly, in Maryland, although African Americans constituted “only 17.5% of the drivers violating traffic laws” on a particular stretch of Interstate 95, they comprised “72.9% of all of the drivers that were stopped and searched along [that] stretch.” *Id.* “Similar studies in other jurisdictions have produced similar data.” See *id.* at 850 & n.86 (listing evidence of racial profiling in several American cities).

252. U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD/AIMD-00-150, U.S. CUSTOMS SERVICE: OBSERVATIONS ON SELECTED OPERATIONS AND PROGRAM ISSUES 10 (2000); see also Capers, *Testilying*, *supra* note 88, at 851 & n.87 (stating that studies have revealed that African American women are searched more frequently than others in airports); John Gibaut, *Marked for Humiliation*, 85 A.B.A. J. 46, 46 (1999) (describing experiences of African American women frequently being strip-searched in airports); *Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17.

frisking a disproportionate number of racial minorities.<sup>253</sup> Recent data demonstrates that police in New York City continue to stop and frisk African Americans and Hispanics in numbers disproportionate to their representation in the general population.<sup>254</sup> In 2006, out of 508,540 reported stops by police, 55% involved African Americans, 30% involved Hispanics, and 11% involved whites.<sup>255</sup> In addition to excessive force and racial profiling dominating minority communities, under-enforcement of crime in the African American community is another source of tension between minority communities and police.<sup>256</sup>

Given the distrust of police that exists within certain communities, it is logical that residents may view police-reform efforts with skepticism and cynicism.<sup>257</sup> Those citizens who view the criminal-justice system as corrupt and police officers as agents of a biased system will also likely view reform measures as illegitimate.<sup>258</sup> To counteract this perception of illegitimacy, scholars have argued for increased transparency in policing as part of any reform effort.<sup>259</sup> What scholars have not addressed is *how* best to achieve this

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253. See OFFICE OF THE ATT'Y GEN. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: EXECUTIVE SUMMARY: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL vii–xii (1999), available at <http://www.nysl.nysed.gov/scandoclinks/ocm43937374.htm> (reporting disparities in New York City stop rates between minorities and whites during the 1990s); Reenah L. Kim, Note, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 464 n.12 (2001); see also Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1273–77 (2000) (describing Mayor Giuliani's quality-of-life policing initiatives of the 1990s).

254. See, e.g., Christopher Dunn, *NYPD Stops and Frisks and the Fourth Amendment*, N.Y.L.J., Feb. 27, 2007, at 3.

255. See *id.*; see also Tim Roche & Constance Humburg, *Stops Far Too Routine for Many Blacks*, ST. PETERSBURG TIMES, Oct. 19, 1997, at 1A (reporting statistics indicating a disproportionate number of stops and frisks of minorities).

256. See Capers, *Testilying*, *supra* note 88, at 853.

257. See *id.* at 840–42, 871–73 (discussing the important link between perceived legitimacy of the criminal-justice system and crime prevention); David Cole, Foreword, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1091–92 (1999).

258. See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 392–93 (2000) (arguing that strong relationships between citizens and law enforcement lead to compliance with the law); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 193–94 (1998) (finding that stigmatization of African Americans by police impedes adherence to law).

259. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 917 (2006). Some scholars have broadened this perception of insularity beyond police officials to include many other professionals in the criminal-justice system, including judges, prosecutors, and defense counsel. See, e.g., *id.* at 911–18 (describing the relationship between trust and legitimacy of the criminal-justice system). Policing and police

transparency given the cultural and organizational impediments inherent in law-enforcement institutions. Borrowing from the regulatory context, New Governance theories—such as democratic experimentalism, which emphasizes a bottom-up approach to problem-solving and local experimentation—could be beneficial in restoring dialogue among affected stakeholders.

## V. MEASURING UP

### *A. Current Federal Efforts to Reform Local Police Departments Systemically and the Ideals of Democratic Experimentalism*

The tenets of democratic experimentalism address many of the issues impeding police reform, particularly those in which political legitimacy is a concern. Drawing from the framework of New Governance theories, policymakers should craft reforms that restore political legitimacy by encouraging deliberation among stakeholders. Current reform efforts under § 14141, however, fail to reflect adequately the ideals of the New Governance theoretical framework. Instead, the current § 14141 reform process lacks several key components of democratic experimentalism and dangerously parallels traditional top-down regulation eschewed in New Governance scholarship.

#### *1. Section 14141 Takes a Top-Down Approach to Police Reform that Excludes Stakeholders and Impedes Local Experimentation*

The current federal police-reform process is reminiscent of top-down command-and-control regulation as opposed to a bottom-up approach that considers the viewpoints of a wide range of potential stakeholders. The DOJ currently lacks a mandate and a mechanism to include rank-and-file police officers, community members, or other interest groups that may have a stake in the reform process.<sup>260</sup> These exclusions threaten the legitimacy of the reform process at its inception and the sustainability of any progress made by the DOJ through consent decrees or MOAs.<sup>261</sup>

There is very little opportunity to engage in local experimentation (another cornerstone of democratic experimentalism), because the current implementation process excludes important stakeholders.<sup>262</sup> Many of the proposed police reforms are “drawn from recognized ‘best practices’ related to accountability already in place in other more progressive police

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reform represent only a few areas in the criminal-justice system in which a lack of transparency threatens the legitimacy of the system.

260. See Simmons, *supra* note 226, at 494.

261. Garrett, *supra* note 247, at 45.

262. See *id.* at 101 (noting that federal reforms make it difficult for community members to intervene).

departments.”<sup>263</sup> Although these broad principles are a useful starting point to guide the reform process, the DOJ should also actively encourage local police departments to develop solutions specially tailored to their jurisdictions.<sup>264</sup> Without a structure currently in place for community groups to influence reforms, it is difficult to discern whether the reform policies adequately reflect the sentiment of those most affected by them—the citizens of the affected community. Under the Bush Administration’s practice of issuing technical assistance letters, a formal mechanism enabling local groups to inform the DOJ and police of their priorities appeared to be lacking. Similarly, rank-and-file officers are without the opportunity to express their own views about the technical-assistance-letter recommendations. As a result, police officers have little hope that the DOJ, the city, or community residents will consider their concerns.

Additionally, the local nature of policing and police reform raises obvious federalism concerns when the federal government directs the implementation of state or city police reforms.<sup>265</sup> Opponents of increased federal involvement in police reform will likely argue that local entities must retain control. They will insist, perhaps correctly, that issues involving law-enforcement agencies are best handled at the local level by locally elected or appointed officials who are most familiar with the specialized needs of particular communities.<sup>266</sup> The DOJ should certainly offer expertise and promote broad principles for police reform, but a one-size-fits-all approach—whether real or perceived—is inappropriate. The greater local experimentation, stakeholder participation, information sharing, and flexibility that is characteristic of the New Governance paradigm is superior to top-down approaches that have consistently failed to achieve legitimacy.

## 2. *The DOJ’s Implementation of the Pattern or Practice Legislation Fails to Encourage Information Sharing Among Affected Jurisdictions*

Many of the DOJ’s suggested reforms require police departments to collect detailed information about both personnel and local police practices. There is no evidence, however, that jurisdictions affected by the legislation are encouraged to analyze the data or share information with the public during the reform process.<sup>267</sup> The information collected is generally retained internally,

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263. Walker, *The New Paradigm*, *supra* note 22, at 5–6; *see also* Garrett, *supra* note 247, at 96.

264. *See* Garrett, *supra* note 247, at 96.

265. *See id.* at 74–76.

266. *See* Rob Yale, *Searching for the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1852–53 (1997) (concluding that local law-enforcement agencies are best suited to curb police brutality).

267. *See* Garrett, *supra* note 247, at 83–85.

and there is no requirement that the information be disclosed to the public.<sup>268</sup> In recent years, the DOJ has even ceased entering into MOAs with binding conditions; rather, the DOJ has sent letters merely recommending technical assistance to jurisdictions requiring reform.<sup>269</sup>

The DOJ has ignored the recommendations of scholars and policymakers to enforce aggressively § 14141; thus, to date, the DOJ has entered into consent decrees or MOAs with relatively few police departments and has filed even fewer civil suits under § 14141.<sup>270</sup> The propensity to issue technical assistance letters to troubled police departments severely hampers the transparency of the accountability process because there is less public awareness of technical assistance letters than there is of consent decrees, MOAs, or lawsuits. Therefore, even if the DOJ encouraged and enabled these local police agencies to share information, there would be few cases to provide meaningful comparisons. Similarly, the affected jurisdictions tend to be small cities and towns rather than large urban police departments widely known to have a history of police corruption and misconduct.<sup>271</sup> Under a purely democratic experimentalist program, these local entities would operate as local laboratories in the police-reform movement.<sup>272</sup>

### *3. Implementation of § 14141 Does Not Encourage Flexible and Continuous Reform*

In order to bring the DOJ's Pattern or Practice legislation under the umbrella of the New Governance paradigm, greater emphasis should be placed on flexibility and continuous reform. In the past, once the police department had satisfied the terms of the MOA, the DOJ's relationship with, and monitoring of, the police department ended.<sup>273</sup> Once the police department complied with the DOJ's terms, the federal government's role ended, thus leaving no means to ensure that the department adhered to the reforms.

### *4. Learning by Monitoring*

All MOAs and consent decrees to date have included provisions for the selection of an Independent Monitor, who is chosen collectively by the city,

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268. *Id.* at 101.

269. *See* Simmons, *supra* note 226, at 511.

270. *See* Gilles, *Breaking the Code of Silence*, *supra* note 43, at 1407–08; Jacobi, *supra* note 97, at 833–34; Livingston, *supra* note 91, at 815–16.

271. *See* Gilles, *Breaking the Code of Silence*, *supra* note 43, at 1407–08.

272. *See, e.g.*, Kruse, *supra* note 184, at 693 (describing Wisconsin's innocence reforms as experimental "because they are a state-level experiment in criminal procedural regulation").

273. Each consent decree and MOA establishes a timeline for investigation and compliance with reforms. *See, e.g.*, Cincinnati MOA, *supra* note 133, at ¶¶ 109–11; District of Columbia MOA, *supra* note 134, at ¶¶ 181–82; Los Angeles Consent Decree, *supra* note 128, at ¶¶ 178–79; Pittsburgh Consent Decree, *supra* note 130, at ¶¶ 78–79.

the law-enforcement agency, and the DOJ.<sup>274</sup> The Independent Monitor reviews and reports on the police department's compliance with the agreement. The recent practice of sending technical assistance letters, however, has no analogous requirement.<sup>275</sup>

*B. All Is Not Lost: A Sustainable Institutional Structure*

Despite the shortcomings of federal efforts to induce changes in police institutions, police-accountability reform under § 14141 nevertheless offers an institutional framework that could incubate and sustain democratic experimentalism ideals. Unlike other police-reform efforts, the DOJ's Pattern or Practice legislation offers an institutional framework that is easily adaptable to stakeholder inclusion and other facets of democratic experimentalism. The DOJ already works in conjunction with city officials and police executives, and as such, the reform process is amenable to broader stakeholder participation. The DOJ should actively identify additional stakeholders in the jurisdictions affected by its Pattern or Practice legislation and invite them to participate in developing and considering the reforms.<sup>276</sup>

Although certain programs embody characteristics of the democratic experimentalist paradigm, it is difficult to find programs that fully exemplify democratic experimentalism.<sup>277</sup> In fact, some scholars have acknowledged that "a full-blown experimentalist regulatory regime has not fully emerged in the world."<sup>278</sup> However, a few changes in the DOJ's current implementation of § 14141 could push police reform toward the ideal of democratic experimentalism: for example, a mechanism to promote inclusion of stakeholders and make more data available to the public. Cincinnati's approach to police accountability illustrates this concept by reflecting a more

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274. See, e.g., Cincinnati MOA, *supra* note 133, at ¶ 92; District of Columbia MOA, *supra* note 134, at ¶ 161; Los Angeles Consent Decree, *supra* note 128, at ¶ 158; Pittsburgh Consent Decree, *supra* note 130, at ¶ 70.

275. See, e.g., Letter from Shanetta Y. Cutlar to Frank James, *supra* note 117, at 1–2.

276. This Article does not seek to offer a detailed summary of the various ways that the DOJ could achieve and implement broader stakeholder participation. A process akin to negotiated rulemaking, however, provides a detailed framework for considering stakeholder selection and participation in developing police reforms. See generally Simmons, *supra* note 226, at 539–41 (advocating the application of negotiated rulemaking procedures in police-reform efforts as a means of ensuring stakeholder participation).

277. For descriptions of programs and reform efforts that embody aspects of democratic experimentalism, see, e.g., James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 213–29 (2003) (describing new developments in school reform and explaining how this bottom-up reform embodies democratic experimentalist ideals).

278. See, e.g., Kruse, *supra* note 184 (analyzing the Wisconsin innocence reforms in the context of democratic experimentalism).



democratic experimentalist model, which values deliberation by incorporating community feedback and participation in police-reform strategies.<sup>279</sup>

### C. Learning from Locals

#### 1. The Paradigmatic Shift from Professional-Era Policing to Community Policing Provides Precedent for Police-Community Interaction

With its emphasis on bottom-up approaches, strands of the New Governance framework are evident in what has now become the dominant model of policing in the United States: community policing, also referred to as community-oriented policing. The community-policing model, consistent with New Governance approaches to reform, emphasizes a bottom-up approach to crime prevention and encourages collaborative problem-solving. This model has replaced the traditional professional model of policing that is characterized by top-down approaches to crime control. The shift in policing models across the country parallels the shift that must now take place in police reform. This shift not only supports the proposition that the “new paradigm of policing” should embody features of the New Governance theoretical framework, but it also provides precedent for police-community interactions that are critical to implementing sustainable reforms.

At the turn of the century, there was “widespread sentiment that intimacy between the police and the community, as well as between the police and political leaders, had encouraged police corruption,” which “had resulted in the targeting of outsiders for ‘curbstone justice’—particularly those outsiders who belonged to minority ethnic and racial groups.”<sup>280</sup> The professionalization of police departments emerged as a response intended to establish legitimacy and fairness.<sup>281</sup> The police forces of the professional era operated independently, and their sole directive was to combat crime and secure arrests.<sup>282</sup> These crime-control efforts occurred largely to the exclusion of the community and “[a]ctivities that drew the police into solving other kinds of community problems . . . were identified as ‘social work,’ and became the object of derision.”<sup>283</sup> Experts believed that the most efficient and effective means for

279. See *infra* Part V.C.2 (examining recent police reform in Cincinnati, Ohio).

280. Waldeck, *supra* note 253, at 1261.

281. *Id.* at 1260–62.

282. See, e.g., KELLING, *supra* note 11, at 5 (“[P]olice in the reform era moved to narrow their functioning to crime control and criminal apprehension. Police agencies became *law enforcement agencies*.”).

283. See GEORGE L. KELLING & MARK H. MOORE, NAT’L INST. OF JUSTICE, THE EVOLVING STRATEGY OF POLICING 5–6 (1988). Anthony C. Thompson noted that

[t]he traditional form of professional policing is reactive in nature. The police respond to complaints and only pursue those crimes in which victims and witnesses are ready and willing to cooperate in the processing of a criminal case. Police rarely interact with members of the community except in connection with the investigation of a specific crime:

police departments to implement crime control was through a detached and hierarchical organizational structure.<sup>284</sup> The professional-era organizational subculture was characterized by the “brotherhood in blue” and an “us versus them” mentality.<sup>285</sup> The purpose of the professional model was “to develop a paramilitary team of officers able to respond with speed and force to quell criminal disturbances in the community.”<sup>286</sup> Technological developments of the twentieth century enabled officers to respond quickly to emergencies and distanced police from their communities, allowing them to wait at the police station or in patrol cars for emergency calls to be dispatched.<sup>287</sup> William J. Bratton, former New York Police Department Commissioner, developed the “three Rs” to describe the professional era of policing: “rapid response,” “random patrol,” and “reactive investigation after the crime occurred.”<sup>288</sup> Officers exhibited “semi-automatic” responses to crime rather than taking deliberate, preventative measures to improve communities while citizens occupied a merely passive role in the professional-policing model.<sup>289</sup>

The professional model of policing began its decline as policing experts and citizens alike questioned the model’s effectiveness and its theoretical underpinnings.<sup>290</sup> More importantly, the professional model of policing became unworkable due to rising tensions between police officers and minorities, who had suffered disparate treatment by officers.<sup>291</sup> Additionally, the militaristic, hierarchical, and detached professional-policing model

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when the officers are not working on a specific case, they cruise the neighborhood in a patrol car or wait at the precinct station house to be dispatched to the scene of a crime.

Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 339 (2002); see also Waldeck, *supra* note 253, at 1261 (noting that in some jurisdictions, police were not allowed to live in the “beats” that they patrolled).

284. See Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, in POLICING: KEY READINGS 392, 393–94 (Tim Newburn ed., 2005).

285. See Waldeck, *supra* note 253, at 1265.

286. See Thomas M. Riordan, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 726 (1994) (“The philosophy behind this type of policing is simply to put away the bad guys.”).

287. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 567 (1997).

288. William J. Bratton, *New Strategies for Combating Crime in New York City*, 23 FORDHAM URB. L.J. 781, 782 (1996).

289. Michael S. Scott, *Community Justice in Policing*, 42 IDAHO L. REV. 415, 416–17 (2006) (describing the role of citizens as witnesses or crime reporters, but not as proactive in policing the community).

290. See Waldeck, *supra* note 253, at 1262 (“Regardless of increases in the sizes of police departments and technological advances, the police were not becoming more effective in controlling crime.”).

291. See *id.* (stating that “minorities began to protest mistreatment by officers and the insufficient levels of police services with which they had been provided”).

increased hostility toward police and impaired community wellness.<sup>292</sup> The traditional policing model created a large rift between police and particular communities such that the two became distrustful of each other, leading to an increase in crime incidents. Rising antagonism between the police and the public required a new model. Community policing developed from this need.<sup>293</sup>

Early attempts to implement problem-oriented policing began in the 1970s. Herman Goldstein, John Alderson, James Q. Wilson, and George Kelling are credited with developing community-oriented policing concepts, such as “problem solving by beat officers” and “the idea that experiments should be systematically evaluated.”<sup>294</sup> During the 1980s, law-enforcement agencies throughout the United States began to implement community-policing strategies, and by 1994, then-Attorney General Janet Reno opened the DOJ Office of Community Oriented Policing (COPS), officially signaling “that community policing had arrived in American law enforcement.”<sup>295</sup>

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292. See, e.g., Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 369 (2001). Tyler argues that

the effort to exert control over citizens that is central to command and control styles of legal authority can itself increase danger for and risk to the police and . . . community residents. In the case of the police, by approaching people from a dominance perspective, police officers encourage resistance and defiance, create hostility, and increase the likelihood that confrontations will escalate into struggles over dominance that are based on force. The police may begin a spiral of conflict that increases the risks of harm for both the police and for the public.

*Id.* (citations omitted); see also Riordan, *supra* note 286, at 727 (stating that the professional police model “tends to inculcate members of the police force with an ‘us versus them’ siege mentality”). Riordan further explains that

[t]he professional model emphasizes “crime control over crime prevention and isolate[s] the police from the communities and the people they serve.” Consequently, the police consider residents living in high-crime areas as potential criminals, instead of possible victims; in turn, those people fear, resent, and distrust the police “command presence.”

*Id.* (alteration in original) (citations omitted) (quoting CHRISTOPHER COMMISSION REPORT, *supra* note 14, at 98–100).

293. James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 3 (2004).

294. WESLEY G. SKOGAN & SUSAN M. HARTNETT, *COMMUNITY POLICING: CHICAGO STYLE* 10 (1997).

295. Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1596–97 (2002). Wesley G. Skogan and Susan M. Hartnett describe community policing as

an organizational strategy that redefines the goals of policing, but leaves the means of achieving them to practitioners in the field. It is a process rather than a product. Efforts to do it share some general features, however. Community policing relies upon organizational decentralization and a reorientation of patrol in order to facilitate two-way communication between police and the public. It assumes a commitment to broadly focused, problem-oriented policing and requires that police be responsive to citizens’ demands when they decide what local problems are and set their priorities. It also implies

Community policing has developed as the antithesis to the professional model of policing and rejects the “arrogant, heavy-handed, technologically driven, and aloof” nature that epitomized the traditional professional-policing models formerly employed by many police departments, such as the LAPD.<sup>296</sup> The community model’s four general principles include: (1) “organizational decentralization and a reorientation of patrol in order to facilitate communication between police and the public”; (2) “commitment to broadly focused, problem-oriented policing”; (3) “police respond[ing] to the public when they set priorities and develop their tactics”; and (4) “commitment to helping neighborhoods solve crime problems on their own, through community organizations and crime-prevention programs.”<sup>297</sup> In stark contrast to the command-and-control style policing that the community model replaced, community policing encourages residents to partner with police and promotes community participation in prioritizing shared problems.<sup>298</sup> Because community-policing models are based on consent, they foster legitimate crime-prevention strategies in neighborhoods where they are employed.<sup>299</sup> The same community-police interaction advocated by democratic experimentalist models could help establish legitimacy in the context of police reform.

## 2. Cincinnati’s Multistakeholder Approach to Police Accountability

In addition to community policing, the efforts used in Cincinnati, Ohio, to implement systemic police reforms exemplify New Governance principles in action within the context of reforming police institutions. Cincinnati’s reform process embodies many of the principles espoused by New Governance theorists and illustrates the collaborative efforts in which police and citizens can engage to design a reform process that maintains political legitimacy. Following the 2001 fatal shooting of an unarmed African American man in Cincinnati, the city erupted in riots.<sup>300</sup> At that time, the Cincinnati Police Department and inner city minority communities were engaged in a volatile

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a commitment to helping neighborhoods solve crime problems on their own, through community organizations and crime prevention programs.

SKOGAN & HARTNETT, *supra* note 294, at 5.

296. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1779 (2005).

297. SKOGAN & HARTNETT, *supra* note 294, at 6–8.

298. See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 52–54 (2004) (considering the role community policing plays in diffusing tensions between the community and the police).

299. See Kim, *supra* note 253, at 462, 476 (“[B]asic models for both civilian oversight and community policing represent mechanisms by which communities might exert control over the police, not only with respect to harmful practices but also with respect to the establishment of local policing priorities.”).

300. Jay Rothman & Randi Land, *The Cincinnati Police-Community Relations Collaborative*, 18 CRIM. JUST. 35, 36–37 (2004).

relationship; this incident represented the fifteenth fatal police shooting of an African American within a six-year period.<sup>301</sup> The 2001 shooting precipitated the DOJ's investigation pursuant to § 14141, which led to the discovery of a pattern of constitutional violations within the Cincinnati Police Department.<sup>302</sup> On March 15, 2001, the Ohio chapter of the American Civil Liberties Union, in conjunction with the Cincinnati Black United Front, initiated a suit, unrelated to the DOJ's investigation, against the city on behalf of a plaintiff alleging racial profiling.<sup>303</sup> The federal judge handling the racial-profiling suit, Judge Susan J. Dlott, believed that the complex issues involved carried "such deep emotional content" that an adversarial proceeding was improper to dispose of the issues.<sup>304</sup> Instead, the court urged the parties to reach a settlement, which culminated in the adoption of a collaborative agreement involving citizens, the municipality, and police officers.<sup>305</sup>

The parties agreed to negotiate, and they also invited the local chapter of the Fraternal Order of Police, the local police union, to take part in the negotiations.<sup>306</sup> Judge Dlott appointed a local conflict resolution specialist as special master to direct the negotiation.<sup>307</sup> An advisory group consisting of attorneys and key stakeholders was formed to negotiate a collaborative settlement that was ultimately executed in April 2002.<sup>308</sup> The collaborative settlement stipulated, among other things, that the City must adhere to the provisions set forth in its MOA with the DOJ pursuant to § 14141.<sup>309</sup> Judge Dlott described the details of the collaborative agreement as follows:

[T]he collaborative will include an opportunity to receive the viewpoints of all persons in the Cincinnati community regarding their goals for community-police relations. . . . The collaborative will include an opportunity for dialogue about these responses in structured group sessions. . . . [T]he collaborative will also include a

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301. *Id.* at 35–36; *see also* Abdur-Rahman, *supra* note 235, at 37.

302. *See* CINCINNATI POLICE DEP'T, FIFTH STATUS REPORT TO THE INDEPENDENT MONITOR 2 (2003). In April 2001, the Mayor of Cincinnati requested that the DOJ conduct a review of the Cincinnati Police Department's policies and procedures, specifically those regarding the use of force. *See id.*

303. Rothman & Land, *supra* note 300, at 35–36 (discussing the case of Bomani Tyehimba, "an African American businessman who claimed that two police officers had violated his civil rights by handcuffing him and unjustifiably pointing a gun at his head during a traffic stop").

304. *Id.* at 36.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. Collaborative Agreement at 16, *In re Cincinnati Policing*, No. C-1-99-317 (S.D. Ohio Apr. 12, 2001); *see also* CINCINNATI POLICE DEP'T, *supra* note 302, at 2.

process for expert analysis of the current practices of the Cincinnati Police Division (CPD) and [best] practices in other communities.<sup>310</sup>

As it unfolded, Cincinnati's approach to police reform exemplified the "bottom-up" approach encouraged by the New Governance paradigm. The advisory group sought participation from many constituencies across the city and organized the constituents into eight stakeholder groups, including "African American citizens, city employees, police and their families, white citizens, business/foundation/education leaders, religious and social service leaders, youth, and other minorities."<sup>311</sup> Through the media, these groups were invited to complete questionnaires and participate in feedback groups.<sup>312</sup> The advisory group also sought the assistance of a policing expert to research the best practices and model programs in order to make recommendations to the interested parties.<sup>313</sup> Besides responding to the questionnaires, over 700 citizens participated in group meetings with members of their stakeholder groups.<sup>314</sup> Finally, in April 2002, the Cincinnati Collaborative Agreement was signed; it included, among other things, substantive changes on ways to rally community members through problem-oriented policing, use-of-force reporting, external criticism of the agreement's execution, collaboration by the parties to maintain fair treatment of all citizens, and citizen review processes.<sup>315</sup>

## VI. CONCLUSION

The new paradigm of policing attempts to address many negative aspects of police culture that continue to plague local law-enforcement agencies nationwide. Increased transparency and accountability have become hallmarks of this new paradigm. Unfortunately, political legitimacy issues stemming from historical tensions between police and citizens threaten to undermine and impede the progress of these reforms. New Governance principles, particularly the characteristics of democratic experimentalism, include promising features on which police reforms should be based to ensure their political legitimacy and long-term sustainability. The current federal efforts to promote police accountability at the local level are necessary, but they must include opportunities for local experimentation and stakeholder deliberation in order to maintain the legitimacy of these reforms. The shift from professional-

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310. Order Establishing Collaborative Procedure at 3, *Tyehimba v. City of Cincinnati*, No. C-1-99-317 (S.D. Ohio May 3, 2001).

311. Rothman & Land, *supra* note 300, at 37.

312. *Id.* The questionnaires asked about the goals each group had for "future police-community relations in Cincinnati," the reasons these goals were important, and the ways in which these goals could be achieved. *Id.* Over 3500 people answered the questionnaires. *Id.*

313. *Id.*

314. *Id.* at 38.

315. *Id.* at 39.

era policing to community-policing models underscores the need for police-citizen interaction and lends support to the proposition that these groups can collaborate to solve issues of local relevance. Benefits of such interaction are not, however, limited to crime-prevention models. As the Cincinnati police-reform process demonstrates, police and citizens can work together to develop policies governing the conduct of the police. Drawing from democratic experimentalist models to effectuate stakeholder participation, deliberation and local experimentation will legitimize these police-reform efforts and ensure the overall quality and sustainability of police-accountability measures.