Governing the American Police: Wrestling with the Problems of Democracy

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I. INTRODUCTION: GOVERNING THE AMERICAN POLICE—AND THE PROBLEM WITH DEMOCRACY

Winston Churchill, the famed Prime Minister of England, once observed that “it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”

Churchill’s trenchant remark well states the problem of governing the police in the United States. For many decades, and not simply in the period since the tragic events in Ferguson, Missouri, in August 2014, critics of the police have charged that the police are “out of control,” and a “law unto themselves,” acting with little regard for the law and standards of human decency. The melancholic truth, however, is that the police are not out of control in terms of democratic self-government. City police forces, which are the focus of our current national police crisis and also the subject of this Article, are directly controlled by popularly elected mayors and city councils. Sheriffs, on the other hand, are directly elected and their departments controlled by elected county boards. In short, the police in this country are and have...
always been subject to the will of the majority in the communities they serve. Civil liberties attorney and law professor Paul Chevigny, reflecting on the police problems in New York City in the 1960s, observed that “the pattern of police abuses continues because ... most people in our society do not wish to change the pattern.”

Despite many reform efforts since the 1960s, serious police-community relations problems continue to exist. A series of deaths at the hands of the police beginning in August 2014 provoked a national crisis that led President Barack Obama to appoint a Task Force on 21st Century Policing, which in its Final Report noted the “rifts in the relationships between local police and the communities they protect and serve,” and recommended a sweeping set of reforms. In order to fully mend these rifts, however, one must understand the nuanced problems inherent in the methods communities employ to govern their police forces.

This Article argues that the central problem of governing the police is that we suffer not from a lack of democratic control, but from a rather well functioning process of democratic governance in the pursuit of the wrong values. The democratic ideal of policing is that law enforcement agencies should be accountable to the people they serve through the electoral process, and be subject to the rule of law. The rule of law can be seen as a commitment to constitutional policing, involving limited use of force and search and seizure powers, and a commitment to the equal protection of the law. Although subject to democratic governance, local police forces have too often been subject to political influences and disregard for the rule of law.

The problem of democracy and the police merits serious consideration because of its implications for the pursuit of constitutional policing. If, as this Article argues, the majority of Americans have been disinterested in the ideal of constitutional policing, how then are we to reform the police in the pursuit of the rule of law? A number of significant police reforms have been achieved through the intervention of the courts, an undemocratic means. But as several commentators have observed, judicial enforcement of dealing with basic police issues).

6 PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 1 (2015). It should be noted that the President’s Task Force was the first-ever such presidential task force or commission devoted exclusively to the police.
7 This author agrees in part and disagrees in part with Barry Friedman & Maria Ponomarenko, Democratic Policing, 90 N.Y.U. L. REV. 1827, 1830–31 (2015) (arguing that our police problems are the result of “a failure of democratic processes and accountability,” and that “[i]n a nation that prides itself on the rule of law ... [and] speaks endlessly of democratic engagement and the popular will, policing is a distinct outlier”).
8 See infra Section V.D.
constitutional principles can at best touch only a small portion of all police activities. Ultimately, we have to confront the failures of existing democratic procedures for governing the police and find a way to make them effective instruments for establishing constitutional policing. After reviewing the trajectory of police reforms in the United States, this Article posits that the auditor/inspector general model of citizen oversight represents possibly the best approach to achieving constitutional policing under democratic governance.

Beginning in the 1960s, civil rights activists and their allies proposed a variety of changes designed to provide greater input into police policy for groups that had been excluded from having a voice in policing. The ensuing political struggles over issues of police abuse resulted in new procedures, such as citizen review of police complaints that were inevitably compromised as a result of the political process. All were supplements to the established form of governance of local police: mayors and city councils. This Article critically examines the most important reform ideas, viewing them from the perspective of the broader issue of governance. One important result of the various controversies surrounding the police has been the emergence of unintended consequences, which in some cases have impeded the goals of reformers. The emergence of police unions, and the collective bargaining agreements they have won, have become a major factor in the governance of the police. Ultimately, the recent history of controversies over the governance of local police, in short, is a highly complex story that includes not only strides toward a more democratic and constitutional police, but also results that represent less certain gains in terms of routine police practices.

The discussion of police reform efforts in this Article is facilitated by the framework for police reform developed by Joanna Schwartz's article, “Who Can Police the Police?” in this volume. Her framework consists of three elements: Leverage, “the pressure that a reformer can place on law enforcement agencies and officials to change their behavior”; Motivation, “the interests of reformers to exert whatever leverage they have over law enforcement agencies and officers”; and Resources, “the personnel, time, and money necessary for each type of reformer to pursue its reform goals.” The framework provides a

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10 See infra Section V.B.
11 See infra Section V.C.4.
13 Id. at 480–82.
consistent set of standards for assessing various reform efforts, and illuminates the capacity of each to achieve its stated goals.

Section II of this Article discusses the parameters of the Article, including the structural features of law enforcement in the U.S. that impinge upon police governance. Section III examines American policing in the nineteenth century, when the tradition of local political control of the police was established, leading to a tradition of unprofessional and lawless policing. Section IV examines the police professionalization movement, which began in the early twentieth century, achieved many important reforms, but also left an ambiguous legacy in terms of both democratic policing and constitutional policing. Section V examines the multiple crises that struck the police in the 1960s, and the various reform efforts that arose to achieve a more democratic form of policing. Section VI examines the major reform efforts from the 1970s to the present that have pursued the ideal of a democratic police. The Article concludes in Section VII with reflections on the challenge of establishing constitutional policing within the framework of democratic governance.

II. THE CHALLENGE OF GOVERNING THE AMERICAN POLICE

A. The Structure of American Policing

The formal structure of providing police services in this country is extremely complex.14 Law enforcement agencies are divided among three different levels of government—federal, state, and local—along with additional Special District agencies.15 Agencies at each level of government have very distinct missions. Federal law enforcement agencies have the most clearly defined missions; state law enforcement agencies have varying missions as defined by their respective legislatures;16 while local city police and county sheriffs have the broadest and most complex missions.17 Law enforcement agencies at each level of government are responsible to popularly elected legislative

16 See H. KENNETH BECHTEL, STATE POLICE IN THE UNITED STATES: A SOCIO-HISTORICAL ANALYSIS 31–44 (1995) (cataloging the formation of the law enforcement agencies of all fifty states and their missions as defined by state law).
17 See GOLDSTEIN, supra note 4, at 21–44; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 13 (1967) (arguing that the popular image of the police as crime-fighters had led "both the public and the police to underestimate the range and complexity of the total police task").
and executive branches of government: city councils and mayors at the
local level; legislatures and governors at the state level; Congress and
presidents at the national level.

The fragmented structure of American law enforcement creates
significant problems with respect to the governance of the police. There
is no centralized national authority with governing powers over all the
various law enforcement agencies in the country, nor are there
centralized authorities in the fifty states. This decentralized structure
contrasts sharply with the governance of the police in other countries,
where centralized control is the norm. The problem is particularly
serious at the local level. The Department of Justice (DOJ) estimates
that in 2013 there were 15,388 “general purpose” state and local law
enforcement agencies, including 12,326 local (i.e., municipal) police; 18
England and Wales, by comparison, have a total of forty-three law
enforcement agencies. 19 Each of the U.S. local agencies has full control
over most of its policies, procedures, and choice of law enforcement
strategies (e.g., community policing or no community policing). The
result is that some agencies are very forward-looking with respect to
these issues, while many others still retain old and discredited
approaches. 21 These local agencies are the focus of this Article.

Local law enforcement agencies are subject to some federal and
state authorities, but only on certain issues. In the history of the police,
a number of famous Supreme Court decisions have been a major
instrument of reform. 22 As many observers have pointed out, however,
Court rulings have left untouched vast areas of policing. 23 Moreover, it
is difficult to imagine that the Court, regardless of the ideological
orientation of the majority at any given moment, would find most
aspects of the management of police departments proper matters for its
consideration. 24 State supreme court rulings, based on state
constitutions and state legislation, have also exercised some control

18 See generally DAVID H. BAYLEY & PHILIP C. STENNING, GOVERNING THE POLICE:
EXPERIENCE IN SIX DEMOCRATIC COUNTRIES (forthcoming Mar. 2016) (examining the relations
between law enforcement agencies and political authorities in six common law, English-language
countries: Australia, Britain, Canada, India, New Zealand, and the United States).
20 BAYLEY & STENNING, supra note 18, at 77; see also The Police Act, 1996, c 16 U.K. (defining
the forty-three “police areas” of England and Wales).
21 See infra Section VI.D.
23 See Amsterdam, supra note 9, at 377–409; Goldstein, supra note 9, at 1129.
24 It is difficult, for example, to imagine a constitutional principle that would mandate a
police department to adopt community policing or to require one-officer as opposed to two-officer
police patrols (or vice versa).
over the police on certain subjects, but they too are limited in terms of their application to the full range of police activities.25

Local police are also affected by various federal equal employment opportunity laws, including Title VI and Title VII of the 1964 Civil Rights Act, and the Americans with Disabilities Act.26 The federal government has the potential for regulating local law enforcement agencies through the power of the purse, principally by making federal funds contingent upon an agency adopting certain policies or procedures, or by encouraging reform through federal grants. The community policing movement in the 1990s, for example, received an enormous boost through funds made available by the 1994 Violent Crime Control Act.27 Historically, however, presidents have been reluctant to exercise the power of the purse that is available to them through Title VI of the 1964 Civil Rights Act to force changes in local law enforcement agencies.28 In the area of public education, the political costs of using Title VI to force reform proved to be too high for presidential administrations.29

States govern local police departments in several different ways. State criminal law and criminal procedure statutes define the parameters of the role of law enforcement. All states require the pre-service training and certification of sworn law enforcement officers, and some have formal procedures for revoking certification.30 A number of states have enacted statutes governing police response to domestic

25 See infra notes 32–35, for examples of specific changes state governments have made.
26 No federal law, however, dictates the level of formal education required for recruitment by local or state law enforcement agencies, or the amount of pre-service training new employees should receive.
27 REAVES, supra note 15, at Table 8 (reporting that sixty-eight percent of all local police departments had a "mission statement with [a] community policing component").
28 See generally STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRRATIONAL LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995) (arguing that the threat of cutting off all federal funds to a city because of racial segregation in its schools, for example, was politically unacceptable, and that as a result both the President Lyndon Johnson and President Richard Nixon administrations shifted enforcement to the DOJ).
29 Id.
violence incidents, the conduct of high-speed motor vehicle pursuits, data collection on traffic stops, and other issues.

In the end, the federal and state authorities discussed above cover at best only a small portion of police management issues and day-in-day-out police activities. As a result, the structural fragmentation of American policing has impeded the development of consistent national standards governing all local police departments. In an alternate universe, leaving the primary control of local police vested in local governments might have created the opportunity for creative innovation by reform-minded local political activists. Despite this opportunity, this Article argues that, in practice, local political authorities have instead proven to be little interested in pursuing a style of law enforcement that reflects constitutional values.

B. Local Police Are the Focus of the National Police Crisis

This Article discusses local police, meaning primarily major 'city police departments, although with some attention to smaller cities and county sheriffs' departments where appropriate. Several considerations dictate this focus. First, the missions of the agencies at the three levels of government are so different that a full discussion of each would require a much longer and more diffuse article. Federal law enforcement agencies, for example, are heavily involved in various forms of surveillance—an issue of great concern today, but not one that is central to the current concerns surrounding local police, as is evident in the 2015 report of the President’s Task Force on 21st Century Policing. State police force agencies also have different missions, with many having an exclusive focus on traffic enforcement.

Second, local police are at the center of the national crisis over policing and police-community relations that erupted in the second half of 2014, and which prompted the creation of the President's Task Force on 21st Century Policing. These agencies deliver the vast majority of

32 Lisa A. Goodman & Deborah Epstein, Refocusing on Women: A New Direction for Policy and Research on Intimate Partner Violence, 20 J. INTERPERSONAL VIOLENCE 479, 480–81 (2005) (explaining that mandatory arrest laws require law enforcement to arrest a perpetrator of domestic violence when there is probable cause to believe that domestic violence has occurred).

33 NAT'L RESEARCH COUNCIL, supra note 14, at 55.


35 See generally PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, supra note 6 (addressing concerns primarily related to urban police departments and omitting discussions about surveillance).

36 Id. at III (explaining the urgency of the Task Force's work, "especially in light of recent events around the country that have underscored the need for and importance of lasting collaborative relationships between local police and the public").
police services to people in this country. The most recent DOJ Police-Public Contact Survey estimates that there are forty million police-public contacts per year. These contacts include the police officer conduct that is at the heart of the current national police crisis—unjustified shootings, excessive physical force, and improper use of race and ethnicity ("racial profiling")—that have for the past half century spurred reforms attempting to reform the governance of police departments.

C. The Cultural Tradition of Deference to the Police

Democratic governance of the police involves more than the formal structure of local governments. It is also shaped by social and political factors, and one of the most important of those is the deeply rooted cultural tradition of deference to the police. This deference explains to a great degree the reluctance of local prosecutors, grand juries, and criminal courts to prosecute and convict police officers who may have committed crimes by shooting and killing people or using extreme forms of physical force. The events of 2014–2015, particularly the controversies in Ferguson, Missouri, and Staten Island, New York, emphasize the difficulty in obtaining criminal prosecutions. Even in the 1960s, Chevigny concluded that “unfortunately most prosecutors . . . have chosen to side uncritically with the police.” The cultural tradition of deference to the police also explains the reluctance of mayors and city council members to criticize police misconduct and seek major reforms. In the bitter controversy over the New York City Civilian Complaint Review Board (CCRB) in 1966, rank-and-file police officers found that they could effectively fight proposed reforms with

37 The term “citizens” is the standard one used in this context. Nonetheless, many of the people with whom the police have contact are not formally citizens of the United States; they are either people legally residing in the U.S. or “undocumented” persons.


41 See HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 86 (1998) (explaining one of several reasons prosecutors may choose not to pursue a case against a police officer, “the traditionally close relationship between district or county attorneys and police officers who usually work together to prosecute other alleged criminals”).

42 CHEVIGNY, supra note 5, at 250.
accusations that a mayor is "antipolice" and endangering public safety. The power of public fear of crime has extended to the entire criminal justice system, and is largely responsible for the wave of harsh criminal sentencing laws that swept the country in the late 1970s and produced what has been labeled today's "mass incarceration."

III. WRONG FROM THE START: AMERICAN POLICING IN THE NINETEENTH CENTURY

A. A Politically Dominated System of Policing

"Modern" policing originated with the London Metropolitan Police in 1829 and is generally defined in terms of an agency providing continuous police service through publicly visible patrol and with full-time paid officers. The key figures in the creation of the London Metropolitan Police determined that "police impartiality was the key to public acceptance," and that "[r]emoval of the police from partisan politics was an important part of this impartiality." Critics of the Metropolitan Police felt that its "tight centralization prevented accountability to the public" and argued "that the force was increasingly cut off from local residents." Nonetheless, the centralized and undemocratic structure remained, and many observers believe that the divorce from local politics was responsible for the high standards of professionalism in the London Metropolitan Police. The political

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46 Miller, supra note 45, at 12.
47 Id. at 117 (In a persuasively subtle interpretation, the author argues throughout the book that there was on-going criticism of the London Metropolitan Police in the nineteenth century, particularly from the working class, but for the most part the force won broad acceptance from the people of London.).
48 See Clive Emsley, A Typology of Nineteenth Century Police, 3 Crime, Hist. & Societies 29, 30 (1999) ("Victorian Englishmen were proud of their police and praised the British model...free from corruption, as superior to a generalized European model, military, arbitrary, political,
domination of local police departments in the U.S., on the other hand, was responsible for the tradition of corruption, inefficiency, and lack of commitment to the rule of law.

The first modern police agencies in the U.S. appeared roughly in the 1830s, and from the very beginning were dominated by local politics with no commitment to public service or to the rule of law. Discussions of American police history should generally distinguish between the southeastern states and the rest of the country. First, during the time of chattel slavery and then from Reconstruction to the civil rights era (ending roughly in 1964), the police and the entire criminal justice system were devoted to upholding the racial status quo. Because of the salience of the issue of controlling the slave population, modern-style policing emerged in the southeast before it did in the cities outside the south. In very stark terms, then, policing in the southeast prior to the mid-1960s reinforces the central argument of this Article, that the police have traditionally served the will of the dominant white majority.

Policing outside of the southeast, although modeled after the highly centralized London Metropolitan Police, adopted a decentralized structure of political control. Urban historian Robert Fogelson characterized police departments as “adjunct[s] of the [political] machine,” and further argues that the system of local control was solidly rooted in American political thinking: “From the outset most Americans had a firm belief that the police should be controlled by local officials and organized along municipal lines.” Police departments

49 See, e.g., BECHTEL, supra note 16, at 33–36 (describing the first statewide law enforcement agency in Texas as “nothing but a mechanism which allowed the carpetbag government to build up its political machine”).

50 See SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 4 (2001) (examining slave patrols from 1700–1865 and finding that “[m]ost law enforcement was, by definition, white patrolmen watching, catching, or beating black slaves”); GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 968–69 (1944) (describing the different systems of arrest patterns, in which offenses by whites against African Americans were not considered “crimes,” while offenses or even rumors of offenses by African Americans against whites were considered the most heinous of all crimes); WAGNER, supra note 45, at 132 (reporting that after Reconstruction the Atlanta police “began to enforce misdemeanor laws specifically designed to entrap freed slaves”).

51 WAGNER, supra note 45, at 59 (arguing that the “traditional story [of American police history] mostly ignores what was happening in southern cities,” even though “southern cities used fully equipped police patrols long before they appeared in the northeast, in some cases as early as the 1780s”).

52 See WALKER, supra note 45, at 6 (arguing that “popular” control of the criminal justice system has reflected both the worst and the best of the history of American criminal justice).

53 See MILLER, supra note 45, at ix–x; id. at 3–31.

54 ROBERT M. FOGELSON, BIG-CITY POLICE 13 (1977).

55 Id. at 13–14.
were a source of both patronage (jobs for supporters of the political machine in power) and graft. Systemic bribes from saloons, gambling dens, and houses of prostitution ensured the protection of these services from law enforcement. Establishments run by the dominant party's opposition, meanwhile, were ready targets for either regular enforcement harassment or being closed down altogether.

B. Serving the Majority at the Minority's Expense

In addition to patronage and graft, the police served the will of the dominant political ideologies in a discriminatory manner. A long anti-union tradition developed, with police officers harassing union organizers and breaking up union meetings. Legal historian Frank Donner argues that, "in the course of the past hundred years urban police have served as the protective arm of the economic and political interests of the capitalist system." Radical political groups were denied meeting permits, or their meetings were violently disrupted. The Pennsylvania State Police acquired a particularly notable record for its anti-union activities, and were denounced by labor leaders as "Cossack[s]." The Los Angeles Police Department created an anti-radical, anti-union "Red Squad" in the 1920s, and many other departments followed suit. Police officers also systematically harassed and arrested vagrants and the unemployed, primarily aiming to chase them out of town. Police officer use of force was rampant and unchecked. Miller concludes that “[t]he general climate of violence [in New York City] encouraged the police to respond in kind for their own protection. There seemed to be no rules of the game which could reduce violence.”

C. ... And Serving Ineffectively

With respect to crime fighting, order maintenance, and service to the public, both urban and rural police in the nineteenth century were

56 Id. at 17-19.
57 Id. at 32.
58 See id. at 21.
60 Id. at 1-3.
62 DONNER, supra note 59, at 59-71.
64 MILLER, supra note 45, at 53.
utterly ineffective. In the absence of modern-day communications technology, crime victims could not readily contact the police, police departments could not efficiently dispatch officers to the scene of a crime or disorder, and officers could only respond on foot. Primitive communications technology also inhibited the effective supervision of rank-and-file officers by their sergeants. A sergeant had to track down the officers under his command (and the many reports of the period suggest that sergeants did not work too diligently themselves). The stereotype of the drunken cop, who spent much time in saloons rather than on patrol, was not far from the truth. Fogelson summed up the situation by commenting that “most chiefs had little if any control over the captains,” who were “absolute monarchs” in their respective districts.

Personnel standards, as they are understood today, simply did not exist. A political patron was the main qualification for employment as a police officer. Corruption pervaded police departments themselves; in New York City there was even a written list of the standard payoffs for promotion to higher rank: $1600 for promotion to sergeant and $12,000–$15,000 for captain. One of the earliest training academies for police officers was established in New York City in 1913, but recruit officers took no tests during courses and instructors kept no records on attendance.

In short, today’s problems of controlling police use of force and providing equal protection to all people and groups were firmly established in the nineteenth century. Physical brutality was routine and unpunished. (Shootings by police officers were not common, for the simple reason that handguns did not become common until the twentieth century.) The first systematic investigation of abusive police tactics did not occur until 1931 with publication of the Wickersham

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65 Most of what we know about nineteenth century policing comes from the many investigations conducted by the critics of the police. And while these were clearly biased sources, the absence of any contrary literature suggests that their indictments contained much truth.

66 See WALKER, supra note 45, at 21.

67 Id.

68 Id. at 10.

69 FOGELSON, supra note 54, at 22 (noting that “[t]he captain's wardman, a patrolman who collected the payoffs in the precinct, had more influence than many sergeants and roundsmen”).

70 Id.

71 Id.

72 Id. at 27.

73 Id. at 29–30.

74 WALKER, supra note 43, at 133–34.
Commission report, _Lawlessness in Law Enforcement_. Discrimination against African Americans by the police was not seriously challenged until the mid-1930s.

The crucial point is that the corruption, inefficiency, and brutality of policing in the nineteenth century were quite acceptable to the majority of the electorate in local communities. William Plunkitt, a Tammany Hall leader in New York City, candidly explained that Tammany Hall “always stood . . . for rewardin’ the men that won the victory,” and that the people of the city “knew just what they were doin’.” Police reform movements arose with some regularity in cities across the country, but they were essentially contests over the control of the local department that were couched in moralistic terms. In most instances, the principal substantive issue involved the enforcement of existing laws regulating the sale of alcohol, gambling, and prostitution. Reformers offered no vision of a more effective and efficient style of policing, beyond replacing “bad” leaders and officers with “good” people. Theodore Roosevelt (a self-styled “good” person) spent two flamboyant years as a commissioner of the New York City Police (1895–1897) but made no lasting changes to police management or officer conduct. Absent from the political wars over the police, moreover, was a factor that plays such a prominent role in today’s police controversies: public interest groups charging systematic violations of individual rights and proposing legal and administrative reforms to curb those abuses.

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77 **WILLIAM L. RIORDAN, PLUNKITT OF TAMMANY HALL 22 (1963).**

78 **See WALKER, supra note 45, at 26 (characterizing the struggle among political factions to use temporary political advantage to institute permanent control as “political football in local politics”).**

79 *Id.* at 24.

80 *Id.* at 25–28.

81 **See generally JAY STUART BERMAN, POLICE ADMINISTRATION AND PROGRESSIVE REFORM: THEODORE ROOSEVELT AS POLICE COMMISSIONER OF NEW YORK (1987); RICHARD ZACKS, ISLAND OF VICE: THEODORE ROOSEVELT’S DOOMED QUEST TO CLEAN UP SIN-LOVING NEW YORK (2012) (arguing that Roosevelt actually set back the cause of reform).
Looking at nineteenth century American policing through the lens of Schwartz's framework, it is evident that mayors and city council members had sufficient Leverage to affect reform, but lacked the Motivation to seek any fundamental changes in either police management or police conduct on the streets. The principal Resource they lacked did not involve material resources (staff, funds, etc.) but intellectual. As already suggested, there was no alternative vision of policing, which would include both improved police department management and a coherent sense of what professional policing would entail.

IV. POLICE PROFESSIONALIZATION AND ITS AMBIGUOUS LEGACY

A. The Police Professionalization Movement

The appalling condition of American policing by the end of the nineteenth century finally generated a national police reform movement. This movement, which emerged in the early years of the twentieth century, was one of the many social and political reform movements that historians include under the umbrella of Progressivism. The core assumption of Progressivism, which united an array of disparate movements on particular issues, was that the institutions of American society were inadequate to meet the needs of the new urban-industrial society and that major reforms were needed. The police were but one of those institutions.

The most important contribution of the police reform movement was to define policing as a profession with a commitment to non-partisan public service as opposed to serving political bosses. The specific goals included eliminating political influence from policing; appointing individuals with experience in leading large organizations as police chiefs; introducing principles of modern management into police departments; developing specialized units to address specific...
crime problems (e.g., juvenile and vice units); and raising personnel standards for rank-and-file officers through required qualifications for applicants and pre-service training. August Vollmer, who as police chief in Berkeley, California, emerged as the leader of the professionalization movement, set a dramatic new standard for police recruitment by encouraging the hiring of officers with college educations. Despite the daunting challenge it faced, the professionalization movement made notable progress over the course of a half a century. O.W. Wilson's influential text book, Police Administration, first published in 1950, serves as a useful benchmark. No similar book on how best to manage a police department existed in 1900. Moreover, the vast majority of the topics covered in the book, such as personnel management and the rational allocation of patrol officers, were not even matters of discussion in policing at that time. By the late 1950s, most police departments had made significant strides in fulfilling the principles Wilson articulated and were better managed than they had been fifty years earlier.

B. The Ambiguous Legacy of Police Professionalization

Notably absent from the professionalization agenda, however was any attention to the conduct of police officers on the street, particularly the issues that are today at the heart of the controversy over constitutional policing: the use of all forms of force; the conduct of searches, seizures, and interrogations; and systemic racism in all police activities. A revealing indicator of this neglect is the fourth edition of Police Administration, published in 1977, which contains no discussion of police discretion and the related problems of controlling police officer use of force and other exercises of police authority. Yet as indicated above, in various editions between the 1950s and 1970s, Wilson's book educated innumerable police chiefs and was widely regarded as the

89 See Goldstein, supra note 4, at 283–85 (discussing the development and acceptance of the general notion that police officers should be college educated).
90 See CARTE & CARTE, supra note 75, at 26–28 (chronicling Vollmer's development of the Berkeley Police School, the first ever formal school for police officers in the U.S. with instructors from the University of California, Berkeley); AUGUST VOLLMER, THE POLICE AND MODERN SOCIETY 230–34 (1936) (describing the importance of better police training).
92 See WALKER, supra note 43, at 172 (noting that "[b]y the early 1960s, Wilson's management principles defined the terms of police professionalism").
93 Id.
94 O.W. WILSON & ROY C. MCLAREN, POLICE ADMINISTRATION 542–47 (4th ed., 1977) (discussing firearms, types of weapons, and their storage and cleaning, with no word on when officers are permitted to use deadly force). The pioneering work on the problem of police discretion was KENNETH CULP DAVIS, POLICE DISCRETION (1975). See also GOLDSTEIN, supra note 4, at 93–130 ("Categorizing and Structuring Discretion").
Although the professionalization movement embraced the aspirations and rhetoric of other professions, it did not pursue the institutional structures and procedures of professional self-regulation, including high standards for admission to the profession; intensive pre-service training in accredited professional schools; accreditation for police organizations; the development of comprehensive professional standards; and procedures for stripping members of the profession of their license to practice.\textsuperscript{96}

The reformers did, however, embrace one aspect of professionalism that had a very adverse effect on the police-community relations crisis that erupted in the 1960s, and had a significant impact on controversies over the governance of the police. The idea that the police were professionals, who possessed a body of expert knowledge about their domain (crime, in this instance), gave them a weapon by which they could ignore public opinion and deflect criticisms.\textsuperscript{97} Goldstein observed that one of the \textquote{Negative By-Products of [professional] Autonomy} was that \textquote{little heed was paid to facilitating communication between the citizenry and the police.}\textsuperscript{98} They could readily argue that ordinary citizens and elected officials alike simply did not understand crime and effective crime control strategies and tactics, and therefore should not question police activities. As discussed below, the rhetoric of professional expertise was used cynically in the late 1950s and 1960s as a way of deflecting civil rights criticisms of police practices. Los Angeles Chief of Police William Parker, widely regarded as the head of the most professional police department in the country, added the additional tactic, borrowed from J. Edgar Hoover of the Federal Bureau of Investigation, of dismissing critics as \textquote{communists} or \textquote{communist sympathizers.}\textsuperscript{99} The tactic paralleled southern segregationists' dismissal of civil rights activists as \textquote{outside agitators}, that is, people with no legitimate standing to criticize established practices.\textsuperscript{100}

In the end, despite many achievements in raising the standards of American policing, the professionalization movement left a legacy that

\textsuperscript{95} Walker, supra note 43, at 172.


\textsuperscript{97} See Malcom K. Sparrow et al., Beyond 911: A New Era for Policing 38 (1990) (noting that the idea that \textquote{nobody can tell a cop his job} was rather appealing to cops).

\textsuperscript{98} Goldstein, supra note 4, at 135.

\textsuperscript{99} See, e.g., id. at 113–23 (attacking the California Supreme Court for imposing the exclusionary rule), at 162–63 (criticizing minority groups for \textquote{group identification}); Paul Jacobs, Prelude to Riot: A View of Urban America from the Bottom 44 (1968) (quoting Chief William Parker in 1956: \textquote{The helpless police officer is a defenseless target for ridicule and abuse from every quarter...This is a situation long sought by the Masters in the Kremlin.}); O.W. Wilson, Parker on Police 49–50 (1957) (warning of the Communist threat to America).

rendered American police departments ill-equipped to respond to the multiple crises that engulfed policing in the 1960s.

V. THE CRISES OF THE 1960S

A. Multiple Crises: Civil Rights, Riots, the Supreme Court, and Crime

American policing in the 1960s was overwhelmed by two crises: (1) the civil rights movement and urban riots that were an expression of African American frustration over systemic discrimination and the lack of progress toward full racial equality; and (2) the due process revolution of the Supreme Court, and the establishment of constitutional standards for key police crime-fighting procedures. Compounding these problems was a historic rise in crime, beginning around 1963,\textsuperscript{101} which profoundly affected public attitudes about the police, punishment, and public safety. High levels of crime persisted until 1993, when an equally historic decline began,\textsuperscript{102} and had profound effects on both the police, public fear of crime, and crime policy.

The various crises of the 1960s created a national crisis that provoked a sweeping reconsideration of the basic role of the police, the conduct of police officers, and—in particular—the role of the police in African American communities.\textsuperscript{103} The reconsideration of policing included fundamental challenges to the existing norms of police professionalization.\textsuperscript{104} And in a development most relevant to this Article, the national crisis provoked a variety of proposed reforms related to the governance of the police. The politics of police reform in this period were highly charged, with a complex mix of issues that included police misconduct, race, and public fears of crime. The most important reform related to the governance of the police—citizen oversight—was compromised because of opposition from contending forces. And the struggle over citizen oversight brought into being a new force, police unions, which over time proved to be a powerful opponent of reforms designed to enhance constitutional policing.\textsuperscript{105}

\textsuperscript{101} See FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 22–23 (1997).

\textsuperscript{102} See generally FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007) (analyzing the statistics and popular explanations of the historical drop in crime rates occurring in the early 1990s).

\textsuperscript{103} GOLDSMITH, supra note 4, at 157 (arguing that "interest in the control of police conduct first began to accelerate in the 1950s").

\textsuperscript{104} See WALKER, supra note 43, at 180–210.

\textsuperscript{105} See infra Section V.C.4.
B. The Civil Rights Movement and its Impacts

The civil rights movement challenged every aspect of policing: fatal shootings of citizens, particularly African Americans;\textsuperscript{106} the use of excessive physical force;\textsuperscript{107} racially discriminatory stop-and-arrest practices;\textsuperscript{108} aggressive crime-fighting strategies and tactics that alienated African American communities;\textsuperscript{109} the lack of equitable delivery of basic police services to African American communities;\textsuperscript{110} inadequate procedures for handling citizen complaints against police officers;\textsuperscript{111} and race discrimination in police employment practices.\textsuperscript{112}

The grievances expressed by the African American community—in public protests, lobbying, and litigation—reflected not just criticisms of the police, but a more fundamental sense that the governing processes regarding the police were unresponsive to its concerns.

The 1968 Kerner Commission report on the urban riots and civil unrest summed up the challenge to the established norms of police professionalization when it observed that “many of the serious disturbances took place in cities whose police are among the best led, best organized, best trained and most professional in the country.”\textsuperscript{113} Although the Commission did not mention any particular department, most observers understood that it was talking about the Los Angeles Police Department, which had vigorously promoted an image of professionalism and effectiveness.\textsuperscript{114} The remedy to the crisis, many experts concluded, lay not in fulfilling the goals of professionalization but in rethinking the established principles of professional policing.\textsuperscript{115}

\textsuperscript{106} NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 165 (1968) [hereinafter KERNER COMMISSION].
\textsuperscript{107} Id. at 158–59.
\textsuperscript{108} Id. at 159–60.
\textsuperscript{109} Id.
\textsuperscript{110} ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 212 (1971) (observing that “slum police precincts, like slum schools, become the repository of those who are in trouble with the command in the department”).
\textsuperscript{111} See KERNER COMMISSION, supra note 106, at 162–63.
\textsuperscript{112} Id. at 165–66.
\textsuperscript{113} Id. at 158. Forty-seven years later, the President's Task Force on 21st Century Policing reiterated the point that “[l]aw enforcement agencies should consider the potential damage to public trust when implementing crime-fighting strategies.” PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, supra note 6, at 16.
\textsuperscript{114} See GOLDSZTEN, supra note 4, at 2 (“Since the 1950s, Los Angeles has often been cited as the best example of a larger police agency whose organization and operations most fully conform to the [professional] model.”).
\textsuperscript{115} See generally George L. Kelling & Mark H. Moore, The Evolving Strategy of Policing, 4 PERSPECTIVES ON POLICING 1 (1988) (explicitly rejecting the established norms of police professionalism).
C. Demands for Greater Citizen Input into Police Practices

1. Civilian review of the police.

The lack of effective redress for people seeking to file complaints about their experience with the police was documented by the Kerner Commission, which concluded that “Negro hostility to police is the [result of an] almost total lack of effective channels for redress of complaints against police conduct.”\(^{116}\) The President’s Crime Commission, meanwhile, found that “police officers and departments often regard a citizen complaint as an attack on the police as a whole . . . and therefore, attempt to discourage citizens from filing them.”\(^{117}\) Many police departments had no formal complaint process whatsoever.\(^{118}\) Where procedures did exist, they were often poorly organized and staffed. Police departments generally regarded complaints as inherently unjustified, and there were numerous accounts of complainants being turned away by police officials or even threatened with arrest if they persisted with their complaints.\(^{119}\) Where citizen complaint procedures existed, civil rights activists alleged that complaint investigations were biased in favor of the subject officers and rarely resulted in discipline.\(^{120}\)

The idea of civilian review of police complaints involved the creation of an independent municipal agency (that is, formally independent of the police department), staffed entirely by individuals not employed by the police department who would review the files of individual complaints, and then recommend a finding to the police chief.\(^{121}\) Civilian review boards, as they were generally called, marked a notable alteration of the governance structure of police departments, as individuals who were not sworn police officers would have at least some limited voice in a critical matter of police management: the discipline of officers for misconduct.

Not surprisingly, police chiefs adamantly opposed civilian review. The International Association of Chiefs of Police adopted a formal statement of opposition in 1964.\(^{122}\) In addition to the possibility that far more complaints would be sustained in favor of complainants, civilian

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\(^{116}\) KERNER COMMISSION, supra note 106, at 162.

\(^{117}\) PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUST., supra note 17, at 195.

\(^{118}\) Id. at 195–96.

\(^{119}\) Id. at 195.

\(^{120}\) Id. at 197.

\(^{121}\) SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 19–49 (1st ed. 2001) (examining the history and growth of citizen oversight).

\(^{122}\) Int’l Ass’n of Chiefs of Police, Police Review Boards, POLICE CHIEF, Feb. 1964, at 12–35.
review represented an intrusion into the professional autonomy of the police by people they regarded as unable to understand the realities of police work. Because of this opposition and because elected officials tended to defer to the police, the campaign for civilian review boards was extremely unsuccessful. Only one new civilian review board was established in the 1960s, and the two existing boards that had been established in the 1950s were both abolished in the 1960s.

The Philadelphia Police Advisory Board (PAB) was created in 1958 by mayoral executive order. A municipal court in 1967 found that it illegally exercised a judicial function, and although the state supreme court overturned that decision, the mayor abolished the PAB by rescinding the original executive order. The New York City Civilian Complaint Review Board (CCRB) had been created as an internal New York City Police Department ("NYPD") dominated entity in 1953, largely because of a major corruption scandal. In response to the heated civil rights controversies in the 1960s (including a riot in 1964), the liberal New York City Mayor John V. Lindsay expanded the CCRB by executive order in 1966 to give it a citizen (i.e., non-employee of the NYPD) majority. Rank-and-file officers, through their police union, promptly responded by sponsoring a referendum in which the voters abolished the citizen-dominated board by a vote of nearly two to one.

The fate of the expanded New York City CCRB dramatized a key issue regarding the politics of police governance. The referendum clearly indicated that the overwhelming majority of the voters, when offered a clear choice, sided with the police and not their critics (essentially the African American community and its liberal and civil libertarian allies). This was a harbinger of things to come in the decades ahead with respect to police governance. Although a number of cities created citizen oversight agencies beginning in the mid-1970s,

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123 The Kansas City Office of Community Complaints (OCC) was established in 1969, marking the rebirth of civilian review after the two existing boards had been abolished. See Office of Community Complaints, KANSAS CITY POLICE DEP'T, http://kcmo.gov/police/office-of-community-complaints/ [https://perma.cc/W7QL-5P9U].

124 Walker, supra note 43, at 198 (documenting the rise and fall of citizen review boards in Philadelphia and New York).


126 Id. at 45–46 (noting that when the mayor announced the dissolution of the PAB at police headquarters, "[t]he announcement brought a one-minute standing ovation from the police officials in the audience"); see generally James R. Hudson, Organizational Aspects of Internal and External Review of the Police, 63 J. CRIM. L. & CRIMINOLOGY 427 (1973) (comparing Philadelphia's "internal, administrative-judicial" Police Board of Inquiry and the external, citizen-driven Police Advisory Board).


128 Id. at 77–93; RUCHELMAN, supra note 125, at 39–40.

129 RUCHELMAN, supra note 125, at 41–42.
mayors and city councils for the most part did not directly challenge the police practices that represented unconstitutional policing. The role of the rank-and-file police union in sponsoring the referendum to abolish the CCRB was part of a new assertiveness of police unions that had a major impact on police governance.

Three reasons dictate why civilian review of the police provides only a very limited degree of citizen participation in policing. First, citizen complaints represent a very small part of police operations, and most people who feel they have reason to complain do not actually file complaints. Second, with only a few exceptions, most citizen review boards only review the complaint file forwarded to them by the police department’s internal affairs unit. Thus, the critical initial investigation of a complaint remains with the police department, and a review board has limited capacity to determine whether an investigation was thorough. Third, review boards have only the power to make non-binding recommendations to the police chief regarding the disposition of complaints. The limited power of civilian review boards results from both a reluctance of elected officials to make greater concessions to the critics of the police and also the strong political opposition that instinctively supports the police due to alarm over civil disorders and rising crime rates. In important respects, then, the demand for greater oversight of the police, which began in the civil rights era, galvanized oppositional political forces, which entrenched their ideas about the proper governance of the police.

From the perspective of the Schwartz Framework, review boards have no Leverage whatsoever. They can make recommendations regarding the disposition of citizen complaints, but have no power to compel a disposition or disciplinary action. With respect to Motivation,
the community advocates of civilian review have strong motivation to ensure proper discipline of officers, but given the political factors surrounding the appointment of review board members and professional staff, it is not clear that all persons selected for those positions have similar levels of commitment. Finally, with respect to Resources, civilian review boards suffer from two problems. First, the many agencies that rely on police internal affairs files for their investigations lack the capacity to develop their own independent investigations of complaint incidents. Second, many review boards have suffered from limited budgets and limited staff.

2. Other responses to the civil rights crisis.

A number of other reforms designed to provide greater citizen input into police matters were proposed, and in some cases attempted, in response to the civil rights crisis of the 1960s. Some police chiefs, seeking to respond to protests and/or disorders, established police advisory committees, consisting of community leaders chosen by the chief to advise on various police-related issues. They had no real power to influence the critical policies or practices that were at the center of the national police-community relations crisis. Even the President’s Crime Commission, representing mainstream moderate-to-liberal perspectives, dismissed police advisory committees as “seriously deficient.” Many police departments also created special police-community relations (PCR) units, which primarily engaged in community outreach to African American communities, largely through speaking engagements. Evaluations of PCR units, however, found them to be isolated from the principal police activities of patrol and criminal investigation, with no influence over police policies. Civil rights activists generally dismissed them as ineffectual.

The most radical approach to changing the governance structure of the police involved “community control” of police departments. Reflecting a broader current of opinion among more radical community

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135 See Walker, supra note 121, at 61-67 (analyzing the relative independence of various review board models).
136 Id. at 136–37.
137 President’s Comm’n on Law Enforcement and the Admin. of Just., supra note 17, at 156.
138 Id. at 156.
140 See id.; see generally Robert Wasserman et al., Improving Police/Community Relations (1973).
141 Wasserman et al., supra note 140, at 1.
activists in the 1960s and early 1970s, community control involved dividing a police department into separate organizational units, primarily along racial lines, within a metropolitan community with control vested in separate community boards. The idea of community control was not limited in its application to police departments—it was also suggested in a highly controversial proposal for the New York City public schools in the late 1960s. In the policing context, a community control proposal was placed on the ballot in Berkeley, California, in 1971, but defeated by a two to one margin by the voters. Other than the Berkeley effort, however, community control proved to be too radical an idea about the proper form of governing the police and gained no traction in other communities.

3. A ghost from the past: police commissions.

The crises of the 1960s also brought renewed attention to the police commissions that had been widespread in the nineteenth century but had largely disappeared in the twentieth century. The nineteenth century police commissions were generally created by state legislatures as a means of wresting control of a police department from city political machines, which were controlled by the legislature’s rival political party. The political forces behind the creation of police commissions, however, did not have a vision beyond policing their opponents. The most notable police commissions that exist today include the Kansas City, Missouri, Police Commission; the Milwaukee Fire and Police Commission, created in 1885; the Los Angeles Police Commission; the San Francisco Police Commission; and the Detroit Board of Police Commissioners, which was created in 1973. A number of commissions also exist in smaller cities, largely in the northeastern United States.

143 Id.; see also ALAN A. ALTSHULER, COMMUNITY CONTROL: THE BLACK DEMAND FOR PARTICIPATION IN LARGE AMERICAN CITIES 14 (1970) (describing a goal of community control as the “devolution of as much authority as possible to neighborhood communities”); REISS, supra note 110, at 207–12 (noting in particular the diversity of populations within individual precincts or “communities,” which makes the lines of community demarcation arbitrary and unworkable).

144 See generally CONFRONTATION AT OCEAN HILL-BROWNSVILLE: THE NEW YORK SCHOOL STRIKES OF 1968 (Maurice R. Berube & Marilyn Gittell eds., 1969) (examining the bitter public school teachers’ strike in opposition to the community control plan for the schools in the named neighborhoods).


146 BRUCE SMITH, POLICE SYSTEMS IN THE UNITED STATES 182–87 (2d ed. 1960).

147 See WALKER, supra note 45, at 26–27 (discussing the power struggles involving police commissions in both New York City and Cincinnati).

Police commissions have not proven to be a viable alternative to the standard form of control of police departments by mayors and city councils—although the Los Angeles Police Commission has undergone significant changes in recent years, which are discussed below. For the most part, police commissions have not had a critical perspective on policing and have failed to address the issue of police-community relations and constitutional policing. In fact, several of the police departments governed by commissions have had very troubled histories related to police-community relations and constitutional policing. A 2006 report on the Milwaukee Fire and Police Commission, for example, found a “badly broken” citizen complaint process; that the Commission “underutilizes its policy review powers” for identifying inadequate police department policies and recommending corrective action; and that it was burdened by time-consuming responsibilities that “detract” from a focus on “police accountability and policy issues.”149 The Detroit Police Commission was established in 1974 for the purpose of making the police department more responsive to the African American community, which by then constituted a majority of the city population.150 Yet, the Detroit police department has for years engaged in civil rights abuses of people in the city of Detroit.151 The San Francisco Police Commission has no staff of its own, and in this respect has little capacity to independently investigate the San Francisco Police Department.152


The history of the Los Angeles Police Commission is more complex. Created in 1925, the five-member commission is the governing authority for the Los Angeles Police Department (LAPD). Members of the commission are appointed by the mayor and confirmed by city council. For decades, however, the commission exerted no meaningful oversight of the LAPD with respect to constitutional policing, as defined in this Article, and was extremely deferential to a series of strong-willed police chiefs. The 1991 Christopher Commission, appointed in the wake of the highly publicized Rodney King beating earlier that year, characterized the Commission's authority over the police department as "illusory." A series of major scandals, including the beating of Rodney King by LAPD officers and the Rampart corruption scandal, which came to light in 1997, led to changes that invigorated the Commission. The LAPD lost much of the traditional deference it had enjoyed, and in particular, the Police Commission acquired an Office of Inspector General empowered to conduct audits of the LAPD regarding issues of concern to the Commission. The inspector general is relevant to this Article because it represents the

Francisco Police Commission); see also WALKER, supra note 121. But see S.F., CAL. CITY CHARTER art. IV, § 4.127 (2004), http://charter.sanfranciscoode.org/lvIV/4.127/ [https://perma.cc/7YTF-ACZL] (noting that "[t]he Police Commission shall have the power and duty to organize, reorganize and manage the Office of Citizen Complaints" which "shall consist of no fewer than one line investigator for every 150 sworn members").


154 INDEP. COMM'N ON THE L.A. POLICE DEPT., supra note 153, at 184.

155 See JACOBS, supra note 99, at 36-37 (describing how a result of deference to police chiefs, "the department itself, and not the police commission, had judged . . . nearly 90 per cent of all the complaints made against its personnel, either from outside the department or from inside it").

156 INDEP. COMM'N ON THE L.A. POLICE DEPT., supra note 153, at 183.


158 Office of the Inspector General, L.A. POLICE COMM'N, http://www.oig.lacity.org/ [https://perma.cc/2J2C-DV9X?type=image]; see MERRICK BOBB ET AL., FIVE YEARS LATER: A REPORT TO THE LOS ANGELES POLICE COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT'S IMPLEMENTATION OF THE INDEPENDENT COMMISSION'S RECOMMENDATIONS 50-52 (1996) (setting out the five responsibilities of the Inspector General: (1) "oversee the complaint intake process," (2) "audit on-going investigations and classifications to make sure that both are properly conducted," (3) "interact directly with the public," (4) "conduct random audits on various subjects," and (5) "conduct the annual audit of the complaint process").
auditor/inspector general model of citizen oversight of the police, which is discussed below.\textsuperscript{159} The dynamics of the events in Los Angeles further illustrate the point, made earlier, that to a great extent reforms leading to greater police accountability—including both greater citizen input and procedures designed to enhance constitutional policing—required a highly publicized scandal to change the context of local politics and win support for reform.


The criticisms of the police in the 1960s provoked rank-and-file police officers to organize unions, which in the long run have had a profound impact on the governance of the police.\textsuperscript{160} In both the private and public spheres of employment, collective bargaining is seen as a form of shared control between management and union.\textsuperscript{161} And so it has been with police unions.

Feeling besieged from all directions (including the Supreme Court), rank-and-file officers successfully organized unions that became their legally recognized collective bargaining agents.\textsuperscript{162} Immediately after World War I and in the 1940s, officers attempted but failed to organize legally recognized unions.\textsuperscript{163} Those efforts failed because of hostile political and legal climates in those periods. The legal climate had changed significantly with respect to public sector unions by the 1960s, and police officers successfully availed themselves of the opportunity to organize.\textsuperscript{164}

As they gained strength in the 1970s and beyond, police unions affected the governance of police departments in two important ways. First, the New York City CCRB referendum taught them that they

\begin{footnotes}
\item[159] See infra Section VI.C
\item[160] See generally HERVEY A. JURIS & PETER FEUILLE, POLICE UNIONISM: POWER AND IMPACT IN PUBLIC-SECTOR BARGAINING (1973) (tracking the development of police unions and their impact on the administration of law enforcement and formulation of police policy); see also Samuel Walker, The Neglect of Police Unions: Exploring One of the Most Important Areas of Policing, 9 POLICE PRAC. & RES. 95 (2008) (arguing that social science scholars with a focus on the police have largely neglected police unions, and there is little research into their impact on police policies and practices).
\item[162] See RUCHELMAN, supra note 125, at 2–3 ("Like other civil servants, the police had formed associations by which they could better protect and promote their own interests."); WALKER, supra note 45, at 150–51, 199–200.
\item[163] See FRANCIS RUSSELL, A CITY IN TERROR: 1919, THE BOSTON POLICE STRIKE 234–35 (1975) (discussing how the famous strike had a major impact on discrediting police unions for about two decades).
\item[164] See JACK STIEBER, PUBLIC EMPLOYEE UNIONISM: STRUCTURE, GROWTH, POLICY 51–75 (1973) (discussing the formation, qualities, and membership of police and firefighters' unions); WALKER, supra note 43, at 150–51, 199–200.
\end{footnotes}
could effectively play on public fears of crime to argue against any reforms that significantly placed limitations on their practices. In this respect, police unions to a great extent neutralized mayors and city councils as potential critics of police practices. It should also be noted in this context that the police unions were not an isolated phenomenon in this regard, and public fear of crime was one of the driving forces behind the rise of mass incarceration in the U.S. Second, through collective bargaining, unions obtained contract provisions that limited the power of police chiefs to investigate misconduct and discipline officers. The most widely known provision requires waiting periods before department officials can interview an officer under investigation for an incident.

In short, rank-and-file police officers, through collective bargaining, are a significant factor in the governance of police departments, with significant input on such critical issues as the investigation of suspected misconduct, the procedures for disciplining officers, and the appeal of disciplinary actions.

D. The Supreme Court and the Police

The intervention of the Supreme Court, in which it imposed constitutional standards for traditional police crime-fighting tactics of searches and seizures and interrogations, was another crisis of the 1960s affecting the police. This Article is not the place to review in depth this historic development involving both the Court and the police, but it is important to discuss the impact on the governance of the police.

The famous Supreme Court decisions imposing constitutional limits on the police, including but by no means limited to Mapp v. Ohio and Miranda v. Arizona, were arguably the most significant police reforms of the 1960s. Their effect reached far beyond the strict

165 See discussion supra Section V.C.1; see also Ruchelman, supra note 125, at 39–40.

166 Alexander, supra note 44, at 236–38 (attacking the notion that high incarceration rates lead to low crime rates).


holdings of the decisions themselves. They prodded police departments to significantly improve their personnel standards with respect to qualifications for applicants, pre-service academy training, and regular in-service training. Additionally, they stimulated a law enforcement agency accreditation process, just as prisoner’s rights litigation spurred an accreditation process for correctional institutions. Finally, and perhaps most important, the Supreme Court decisions stimulated an administrative rulemaking process by which police departments adopted written internal policies governing critical police actions. These actions include use of deadly force, use of non-lethal force, response to domestic violence incidents, procedures for high speed motor vehicle pursuits, and other issues, with more being added or older policies being revised on a regular basis. The on-going process of administrative rulemaking has proceeded, in a very erratic and unsystematic way, and been largely unappreciated by both community critics of the police and many scholars.

Police department policy and procedures manuals are today the central instrument for managing a department and guiding officer conduct. Thus, judicial intervention in policing had the unintended consequence of stimulating greater self-governance among police departments.

The intervention of the Supreme Court had collateral consequences that are relevant to both the governance of the police and constitutional policing. First, the Court is the least democratic of the three branches of the American federal system. To the extent that the celebrated...
Court decisions of the 1960s represented extremely important reforms, they tended to divert the attention of reformers away from the pursuit of other avenues for achieving reform, most notably the established democratic procedures of local government.  

Second, in the process, the Supreme Court’s landmark decisions undoubtedly encouraged many reformers to think, uncritically, that the Court could address a wide range of police issues. A number of commentators pointed out, however, the courts have a very limited capacity to govern the police. Herman Goldstein argued that, “the potential effectiveness of the exclusionary rule as a control device is limited to that relatively small percentage of police business when the police are intent on prosecution.” Anthony G. Amsterdam, in a vigorous argument in favor of administrative rulemaking, stressed the “wild proliferation of police practices” and the “incredible variability of police activities,” which he believed rulemaking could better control than could the Supreme Court via the Fourth Amendment.

Third, the major Supreme Court decisions had a profound impact in provoking a social and political backlash, which in turn has deeply affected the governance of the police. The police and their conservative allies effectively raised the cry that the Court had “handcuffed” police crime-fighting efforts and was more interested in the rights of “criminals” than law-abiding citizens. The cry of “law and order” became a major issue in the insurgent presidential campaigns of Alabama Governor George Wallace, an avowed segregationist, in 1964 and 1968, and in Richard Nixon’s successful 1968 presidential campaign. The conservative backlash against Supreme Court decisions (which included constitutional limits on Cold War measures,
school integration, First Amendment protection of sexually explicit materials, and, beginning in the 1970s, constitutional protection of abortion), with its emphasis on law and order, only strengthened the cultural tradition of deference to the police discussed earlier. Finally, as already noted, the Court’s decisions on the police helped to fuel the growth of police unions. This growth illustrates David Schraub’s “sticky slope” phenomenon, in which a high profile victory in the courts stimulates the mobilization of opponents of the victory, thereby creating a political movement, where none had existed before, dedicated to reversing or at least blunting the impact of the victory.

VI. AFTER THE 1960s: THE CONTINUING QUEST FOR EXPANDED CITIZEN INPUT INTO POLICING

A. The Search for Alternatives to the Professionalization Model of Reform

Following the riots of the 1960s, the struggle to reduce police misconduct continued. The major developments included continued progress in administrative rulemaking on police conduct; the growth of citizen oversight of the police, which included the appearance of an important new form of oversight; the emergence of the community policing movement, which involved a significant rethinking of the role of the police and relations with the communities they serve; and the intervention of the DOJ, with the resulting settlements mandating the reform of subject police departments. Together, these developments introduced another new approach to the governance of the police.

B. Community Policing and Problem-Oriented Policing, 1980–Present

The crises of the 1960s prompted a rethinking of the police’s role, which in the early 1980s blossomed into the ideas of community policing and problem-oriented policing. Both emphasized the

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184 See discussion supra Section II.C.
185 See Schraub, supra note 177, at 1264 n.66.
186 There were a few isolated police misconduct-related riots after the 1960s. See generally Lou Cannon, Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD (1997) (examining what was arguably the major urban riot of the 1990s); Bruce Porter & Marvin Dunn, The Miami Riot of 1980: Crossing the Bounds (1984) (examining what was arguably the major urban riot of the 1980s).
187 See Walker & Archbold, supra note 175, at 66–103.
188 Nacole, supra note 133; see Walker & Archbold, supra note 175, at 41–42 (examining the achievements and shortcomings of law enforcement agency accreditation).
189 See infra Section VI.D.1.
190 See Jack R. Greene, Community Policing in America: Changing the Nature, Structure, and
importance of police departments developing partnerships with neighborhood groups, which in a limited but nonetheless important way, embraced the principle that members of the public should have some voice in important aspects of police policy-making.

Community policing embodied a critique of the principles of police professionalization, arguing that police organizations had become centralized, closed bureaucracies that were isolated from the communities they served. As a remedy, it emphasized decentralizing decision-making over policing strategies to the neighborhood level, and the creation of partnerships with community groups. Problem-oriented policing, first conceptualized by Herman Goldstein in 1979, embraced the same principles of decentralization, neighborhood-focused crime and disorder strategies, and partnerships with community groups. As discussed below, the mandate that the Cincinnati Police Department adopt problem-oriented policing as the central part of a negotiated settlement of civil rights lawsuits has been an extremely influential model in recent civil rights litigation.

To the extent that some community policing and most problem-oriented policing programs involved effective partnerships with neighborhood residents regarding strategies to address crime and disorder, they provided some limited but nonetheless meaningful community input into police policy-making. Community input did not extend to basic police department operations, such as patrol and...
criminal investigation, nor did it cover those police actions that are at
the heart of the major controversies over constitutional policing, such
as police use of force. Nonetheless, the idea and the practice of
partnerships with community groups represented a major departure in
the governing of the police, in which police departments willingly
conceded a certain degree of control over one of the principal missions
of the police, and set an important precedent for other reforms. Once
police departments concede the principle that neighborhood residents
should have a voice in crime and disorder control strategies for their
community, it becomes more difficult for the police to argue that
residents should not also have a voice in the use of force policy, stop-
and-frisk practices, and so on.

C. A New Form of Citizen Oversight: Auditors, Monitors, and
Inspectors General

In 1993, a new form of citizen oversight appeared as an alternative
to the traditional citizen review board, known variously as a police
auditor, monitor, or inspector general (and referred to in this Article as
the auditor/inspector general model of oversight). This Article argues
that this new model represents possibly the best approach to achieving
both democratic governance of police departments and a process for
effectively achieving constitutional policing.

The first police auditors in 1993 included the San Jose
Independent Police Auditor, the Special Counsel to the Los Angeles
Sheriff’s Department (LASD), and the Seattle Police Auditor. Subsequent agencies include the Inspector General under the Los
Angeles Police Commission and the Inspector General for the NYPD,

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196 See SCOTT, supra note 191, at 98–99.
197 WALKER, supra note 121, at 36–40, 86–113 (discussing the history of the auditor/inspector
general model and examining the model in detail).
198 Office of the Independent Police Auditor: Officer-Involved Shooting Incidents,
199 The Special Counsel to the LASD was created and maintained by a contract with the Los
Angeles County Board of Supervisors, and was never a formal government agency. The contract
was terminated in 2014, however. MERRICK BOBB ET AL., 34TH SEMIANNUAL REPORT OF THE
5498b74ce4b01fe317e2f2575/t/54ad496ce4b060bee0197499/1420642668163/34th+Semiannual+Repo
rt.pdf [https://perma.cc/YE27-PZGZ] (“This Semiannual Report concludes the first long-term,
voluntary civilian oversight by a monitor of law enforcement in the United States.”).
200 The original Seattle Auditor position is now within the Seattle Police Departments Office of
seattle.gov/opatr [https://perma.cc/C8WG-2P4Q]; see also JUDGE ANN LEVINSON, SEATTLE POLICE
DEPT OFF. OF PROF’L ACCOUNTABILITY SEMI-ANNUAL REPORT OF THE CIVILIAN AUDITOR
created in 2013. Some other citizen oversight agencies are hybrids, combining the functions of traditional review boards with those of auditor/inspector general, notably the Office of Police Complaints in Washington, D.C.

The auditor/inspector general model has a different mission from the traditional civilian review board. Instead of investigating individual citizen complaints with the goal of determining whether an officer violated departmental policy, the auditor/inspector general reviews a police department's policies and practices with the ultimate goal of changing the organization. Some goals of the auditor/inspector general model, well-expressed by the Police Assessment Research Center (PARC), are: "Identify Strategies for Avoiding Federal and State 'Pattern or Practice Inquiries’"; "Implement Management and Operational Strategies That Promote Efficiency, Effectiveness, and Accountability"; "Evaluate Critical Incidents and Devise Strategies for Future Improvement"; "Change and Track the Police-Community Relationship"; and "Implement Data-Driven Management," among others. Auditors/inspectors general have full access to the police department's operations and records and an unrestricted mandate regarding the issues they might choose to investigate. The Special Counsel to the LASD, for example, examined a broad range of issues between 1993 and 2014, including use of force, recruitment and hiring, risk management, the deployment of canines, and more. Auditors/inspectors general issue public reports defining the various problems investigated, the findings, and recommendations for changes in policies and practices. Auditors/inspectors general can also conduct follow up investigations of previous issues, examining whether the previous recommendations were implemented. In this respect, auditors/inspectors general represent a significant improvement over the traditional "blue-ribbon commission[s]," an approach with a long history in American policing, which expire after issuing their reports and have no capacity to review implementation.

Still, auditors/inspectors general do not have the power to compel implementation of their recommendations. Their influence lies essentially in the impact of openness and transparency, as they inform

the public and public officials about existing problems and possible solutions. At the present time, the evidence on the impact of police auditors/inspectors general is limited, but a number of cases indicate their capacity to address police department problems and to help change department policies. The first involves the San Jose Independent Police Auditor, which in its first year found that the San Jose Police Department had been misclassifying many serious citizen complaints, with the result that the department’s official data understated the extent of serious allegations against officers. The IPA recommended and the department adopted a more rigorous and accurate classification of citizen complaints. In a second case, the Special Counsel to the LASD examined the department’s deployment of the canine unit and recommended a new policy of tighter controls over deployments. The result was a ninety percent decline in the number of citizens bitten by LASD canines over a ten-year period. The Office of Police Complaints in Washington, D.C., investigated complaints of widespread harassment of young African Americans for violating a local ordinance requiring that bicycles be licensed and recommended that the ordinance be repealed. City Council adopted the recommendation, and that particular discriminatory harassment problem was solved. Finally, the Inspector General for the NYPD in 2015 issued a report on use of force policies and practices by the NYPD, which found serious deficiencies. The problems included a “vague and imprecise” use of force policy that provided “little guidance” to officers, and the lack of a centralized use of force data system, which would

206 Id.
208 POLICE COMPLAINTS BOARD, DC OFF. OF POLICE COMPLAINTS, PRETEXTUAL STOPS OF BIKES 1 (2005), http://policecomplaints.dc.gov/sites/default/files/dc/sites/police%20complaints/publication/attachments/policy_rec_bike.pdf [https://perma.cc/5YU6-F7UM] (finding that “the Office of Police Complaints has received a number of complaints alleging harassment in the enforcement of some bicycle regulations by Metropolitan Police Department (MPD) officers,” and recommending “the elimination of mandatory bike registration . . .”).
209 Id. at 9.
permit analysis of department performance. The report concluded with a set of fifteen recommendations on these and related issues. It should be noted that, consistent with the argument made earlier in this Article, the NYPD Inspector General was created in the context of a major legal and political controversy in the city over the NYPD's stop-and-frisk practices that significantly altered the political dynamics in the city regarding the police.

From the standpoint of the Schwartz Framework, the auditor/inspector general model possesses no formal Leverage. The Motivation, or will of police auditors to effect police reform, at least based on the evidence today, has been high. The Resources available to the agencies cited here have been high, enabling the agencies to conduct thorough audits of policies and practices, including in some cases detailed statistical analyses. Arguably, the most important resource possessed by the auditors/inspectors general cited here has been expertise in the area of policing. This expertise has included personal experience in the area of police misconduct and detailed knowledge of the issues, a critical perspective on problematic law enforcement policies and practices, and a familiarity with best practices around the country. The element of expertise highlights one of the great weaknesses of civilian review boards: board members lack any special expertise regarding the law enforcement policies (and corresponding officer actions) that are usually at issue in citizen complaints.

In this way the police auditor/inspector general model represents a new approach to democratic governance of the police. Created by local legislative bodies, they are solidly anchored in the duly elected representatives of the community, and function as specialized administrative agencies with the delegated authority to oversee the local law enforcement agencies. As this Article has argued, the historic problem with the democratic governance of local police has been that mayors and city council members have lacked either the will or the


212 Id. at 58–61.

213 The controversy is believed by many observers to have led to the election of Bill De Blasio as mayor, and also causing the city council to pass an ordinance designed to limit racial profiling. Amanda Holpuch, De Blasio at Centre of Police Storm After Two NYPD Officers Shot Dead, GUARDIAN (Dec. 21, 2014), http://www.theguardian.com/us-news/2014/dec/21/mayor-bill-de-blasio-police-two-nypd-officers-shot-dead [https://perma.cc/TC9D-MZK2].

214 Schwartz, supra note 12.

215 This assessment is based on this author's personal contacts with the various auditors/inspectors general whose work is cited here.
expertise, or both, to address major police problems. For the most part, the auditors/inspectors general to date have possessed both.

At the same time, the auditor/inspector general model does have significant weaknesses. First, the electorate may at any time choose to abolish this form of oversight of the police. It may do so directly by referendum or by electing mayors and city council members committed to such action. Secondly, mayors may appoint executive directors of auditor/inspector general agencies who are either incompetent or simply not committed to using the full powers of the agency. Such problems, however, are inherent in all democratic governance of the police.

D. DOJ "Pattern or Practice" Litigation

1. The nature and impacts of DOJ "pattern or practice" litigation program.

The most significant new development in the effort to curb police misconduct over the past twenty years has been the advent of federal investigations and litigation against local law enforcement agencies. This Article does not attempt to review the entire federal effort, but instead focuses on one aspect of certain recent settlements: the creation of community police commissions. The matter is relevant to this Article because the community police commissions represent a new approach to the governance of police departments in which such commissions, designed to broadly represent the entire community, have a formal voice regarding important police policies.

Section 14141 of the 1994 Violent Crime Control Act authorizes the Civil Rights Division of the DOJ to investigate local law enforcement agencies to determine if there exists a "pattern or practice" of civil rights violations against local residents. Where violations are found to exist, the Division is authorized to bring civil suits to order organizational reforms designed to end the abuses. To date, the DOJ

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218 42 U.S.C § 14141(a) (2015) ("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
has conducted more than forty investigations of law enforcement agencies, and reached enforceable settlements with about twenty-five different agencies. The reforms mandated by these settlements primarily involve internal accountability procedures, including use of force policies, procedures for investigating use of force incidents, procedures to end racial profiling, early intervention systems to identify officers with repeated performance problems, and citizen complaint procedures. Consent decrees and memoranda of agreement include a court-appointed monitor to oversee implementation of the mandated reforms, and to report regularly to the U.S. District Court where the settlement is entered. Because the reports are public documents, they represent an important advance in the openness and transparency of the departments in question.

Much controversy has surrounded the "pattern or practice" litigation effort. To date there is only one evaluation that would meet the existing standards of social science research in the field of police studies. The reports of the court-appointed monitors in each case essentially report that the department in question has implemented the required reforms, with only limited attention as to the impact of those reforms. A report by the Police Executive Research Forum, however, contains a number of statements by police chiefs and former chiefs who complied with consent decrees and in retrospect feel that overall their departments were better as a result. For example, Charles Ramsey,
former Commissioner of the Metropolitan Police Department of Washington, D.C., reported that in the end, the experience had a positive result and “[s]hootings [by officers] dropped by 80 percent and have remained low.”226 In the case of settlements that have been concluded, the court-appointed monitors have reported that the mandated reforms have been implemented, and in several instances have commented that the law enforcement agency in question has been transformed.227 The monitors’ reports, it should be noted, are process evaluations, assessing whether the department in question has complied with the terms of the court-ordered settlement, and not outcome evaluations assessing whether the reforms have achieved their substantive goals of reducing the use of excessive force, achieving more thorough and fairer investigations of force incidents, reduced racial profiling in police work, and so on.

2. Community police commissions.

Several recent settlements have mandated the creation of a community police commission or similar entities to provide community input into the development of important police policies. The idea of community police commissions reflects three separate developments. First, in the first period of pattern or practice litigation (1997–2001), there were criticisms that settlements largely excluded community groups from the implementation of consent decrees and memoranda of agreement, despite the fact that initiatives by those groups were in some instances instrumental in bringing about the DOJ investigation.228 Second, the 2002 Collaborative Agreement in Cincinnati, which paralleled the settlement with the DOJ, included a high level of community input.229 Third, among academic experts in policing there emerged a consensus of opinion on the importance of legitimacy in policing as necessary to ensure public trust and confidence in the police, if the police are to effectively fulfill their mission of addressing crime and disorder and providing services to the

226 Id. at 34.


228 WORKING GROUP ON POLICE PATTERN OR PRACTICE LITIGATION, REPORT TO THE U.S. ATTORNEY GENERAL 5 (2009) (arguing that “[t]o enhance enforcement of the pattern or practice statute, the Special Litigation Section should make special efforts to engage members of local communities,” citing the “unique” aspect of the Cincinnati Collaborative Agreement). The author of this Article was one of the co-organizers of the Working Group, with Professor David Harris of the University of Pittsburgh Law School. Copies of the Report are available from the author upon request.

public. The 2015 report of the President’s Task Force on 21st Century Policing strongly embraced this new consensus, recommending that “[l]aw enforcement should embrace a guardian mindset to build public trust and legitimacy,” and to that end recommended that police departments involve communities in the development of their polices.

To date, the DOJ-mandated community police commissions are relatively new, and exist in an estimated six settlements. The evidence regarding their operations and effectiveness is, therefore, extremely limited, and any conclusions about them are speculative at best. The commissions vary somewhat in terms of their structure and official mandate. The most fully developed commission exists in Seattle, and is discussed in more detail below. The 2015 Cleveland settlement mandated the creation of a Community Police Commission, “consisting of 13 members who represent the many and diverse communities in Cleveland,” and authorized “to make recommendations to the Chief and the City . . . on policies and practices related to community and problem-oriented policing, bias-free policing, and police transparency.” The settlement in New Orleans ordered the creation of the Police Community Advisory Board (PCAB), authorized to establish “partnerships” with community groups for the purpose of developing problem-oriented policing strategies. The settlement in East Haven, Connecticut, requires the creation of a Community Liaison Officer, to assist in the development of “collaborative problem-solving,” and also the hiring by the police department of a Joint Compliance Expert to assist in the implementation of the settlement. In Albuquerque, the settlement created Community Policing Councils in each of six Area Commands that are directed to assess the

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230 See LORRAINE MAZEROLLE ET AL., LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW 9 (2013); TOM TYLER, WHY PEOPLE OBEY THE LAW 4 (1990) (arguing that “legitimacy most effectively provides [leaders] with discretionary authority that they can use in governing”).

231 President’s Task Force on 21st Century Policing, supra note 6, at 11.

232 See infra Section VI.D.3.


234 Consent Decree Regarding the New Orleans Police Department, United States v. New Orleans, No. 12-CV-01924, at 61 (E.D. La. July 24, 2012), http://www.justice.gov/sites/default/files/crt/legacy/2012/11/07/nopd_consentdecre_7-24-12.pdf [https://perma.cc/S3P3-VB4V] (The New Orleans Police Department (NYPD) “agrees to continue to support community groups in each District (e.g., NONPACC) and to meet regularly with the communities each District serves.” NYPD also “agrees to establish extensive problem-solving partnerships and develop and implement cooperative strategies that build mutual respect and trusting relationships . . . .”).


236 Id. at 44.
“effectiveness of law enforcement strategies” and to “review[] and assess[] concerns or recommendations about specific APD policing tactics and initiatives.” The Portland, Oregon, settlement mandated the creation of a Community Oversight Advisory Board (COAB) to assess the implementation of the settlement; make recommendations on “additional actions” unspecified; advise the Chief and the Police Commissioner; keep the community advised about implementation of the settlement; participate in the development of a Community Engagement and Outreach Plan; and “receive comments and concerns.”

A notable feature of the various community police commissions is the inclusion of rank-and-file officers and/or command-level officers as either voting or non-voting members. This development is significant because, for the most part, rank-and-file officers have not been included in police reform activities, and have generally been voices of opposition to reform. The Seattle Settlement Agreement declared that “[p]olice officers also bring an important voice to the reform process. Their views, whether presented through their labor organizations or through other channels, should inform the development of the reform effort and its implementation.” Consequently, the Seattle Community Police Commission includes two sworn officers, one representing the rank-and-file officer police union and the other representing the command officers’ union. The Portland, Oregon, COAB includes five rank-and-file officers as non-voting members. The Cleveland Consent Decree specifies that the Cleveland Patrolmen’s Association, the Fraternal Order of Police, and the Black Shield each have one representative on the Community Police Commission, and also have representatives on the District Policing Committees.

The model for community police commissions is the Cincinnati Collaborative Agreement, an extremely important exercise in police

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240 See id. at 2–4.

241 Settlement Agreement, United States v. Portland, supra note 238, at 52.

242 Settlement Agreement, United States v. City of Cleveland, supra note 233, at 5.

243 Id. at 7–8.

244 Collaborative Agreement, In re Cincinnati Police, supra note 229. A forthcoming study of
reform, in part because of its experiment in establishing a community voice in police policy-making. The Collaborative Agreement was one of two parallel settlements regarding the Cincinnati Police Department in 2002. Following a series of fatal shootings of African American men by Cincinnati police officers that provoked civil disturbances and the imposition of martial law in the city, the DOJ investigated the police department and reached a settlement that resembled the settlements in other cases with respect to internal police accountability reforms.\footnote{245}

Several private racial profiling suits were pending at the time and they were consolidated and settled through the Collaborative Agreement which mandated that the police department abandon its traditional aggressive anti-crime activities and adopt problem-oriented policing.\footnote{246} Implementation of the Collaborative Agreement involved eight different community groups and feedback from over 3500 individuals.\footnote{247} One of the three principles of the Collaborative Agreement was achieving “mutually agreeable solutions” to the problem of police-community relations in the city.\footnote{248} The text of the Agreement was replete with references to community voice, including “partnership,” “\textit{two way dialogue},” “\textit{jointly accountable},” “\textit{mutual accountability plan},” and “in consultation.”\footnote{253}

The Cincinnati Collaborative Agreement has attracted considerable attention and has had some impact on policy-making. The decision and order settling the highly publicized suit against the stop-and-frisk practices of the NYPD, in which the U.S. District Court ordered a Joint Remedial Process, noted that “[t]he landmark Collaborative Agreement approved in 2002 by Judge Susan J. Dlott of the Southern District of Ohio as the settlement of class claims against the Cincinnati Police Department has been widely recognized as a successful model for other police reform.”\footnote{254} And as this Article argues, it has been the model for the various community police commissions in

the Cincinnati Collaborative Agreement experience is Candace McCoy, \textit{Participatory Policing} (tentative title).


\footnote{246}{Collaborative Agreement, \textit{In re Cincinnati Police}, \textit{supra} note 229, at 4–10. For a discussion of problem-oriented policing, see \textit{Goldstein, supra} note 191; \textit{Scott, supra} note 191, at 45–81.}

\footnote{247}{Collaborative Agreement, \textit{In re Cincinnati Police}, \textit{supra} note 229, at 2.}

\footnote{248}{\textit{Id.} at 4.}

\footnote{249}{\textit{Id.} at 7.}

\footnote{250}{\textit{Id.}}

\footnote{251}{\textit{Id.}}

\footnote{252}{\textit{Id.} at 10.}

\footnote{253}{\textit{Id.} at 17–18.}

\footnote{254}{\textit{Floyd v. New York}, 959 F. Supp. 2d 668, 686 (S.D.N.Y. 2013).}
the settlements of recent DOJ investigations of local police departments.


The Seattle Settlement Agreement provides the best evidence to date of a DOJ-mandated Community Police Commission (CPC).\textsuperscript{255} Implementation of the CPC, however, involved significant conflict between CPC members and the City, the U.S. Attorney, and the Monitor over the role of the CPC in implementing the terms of the Settlement Agreement.

The conflict arose over the Settlement Agreement’s mandate that the Seattle Police Department adopt a new use of force policy.\textsuperscript{256} The Settlement Agreement did not give the CPC a role in the development of the new use of force policy. Instead, the Agreement assigned the CPC a role in “review[ing] the reports and recommendations of the Monitor . . . and issu[ing] its own reports or recommendations to the City on the implementation of the Settlement Agreement.”\textsuperscript{257} A separate Memorandum of Understanding gave the CPC a specific role regarding five different policy issues: “Community Engagement,” “Accountability,” “Investigatory Stops and Data Collection,” “Officer Assistance and Support,” and “Transparency and Public Reporting.”\textsuperscript{258} Members of the CPC, however, soon reached a consensus among themselves that they should have a role in the development of the new use of force policy. Denying them such a role, they believed, would relegate them to the status of “window dressing” in the reform process.\textsuperscript{259} Representatives of the City, the U.S. Attorney, and the court-appointed monitor rejected the CPC’s argument, citing the explicit language of both the Settlement Agreement and the Memorandum of Understanding.\textsuperscript{260} At one point, members of the CPC

\textsuperscript{255} See Walker, supra note 217, at 8.


\textsuperscript{257} Id. at 3.


\textsuperscript{259} Walker, supra note 217, at 10 (reflecting the findings from interviews with key stakeholders in Seattle, including but not limited to members of the Community Police Commission).

\textsuperscript{260} Id. It is the judgment of this author, based in part on interviews with various stakeholders in the Seattle settlement agreement process, that at the heart of the dispute over development of the new use of force policy was a firm belief on both sides that the use of force policy is arguably the most important issue among all the mandated reforms and, therefore, they wanted to control its development.
threatened to resign as a group. The City, the Monitor, and the U.S. Attorney eventually acceded to the demands of the CPC, and it participated in the protracted and contentious negotiations that eventually produced a new use of force policy for the Seattle Police Department.

One notable aspect of the new Seattle use of force policy is its strong emphasis on de-escalation. De-escalation has in recent years emerged as a recommended “best practice” in policing, as a strategy and set of techniques for officers to defuse potentially volatile encounters with people, and as a consequence reducing uses of force and possible law suits, and in general improving relations with the community. The President’s Task Force on 21st Century Policing, for example, strongly endorsed de-escalation. The new Seattle use of force policy, unlike standard policies in American policing, begins with a discussion of de-escalation, and then proceeds to describe the circumstances when officers may use force. Members of the CPC regarded the achievement of the de-escalation policy as a major victory.

With respect to the issue of the governance of the police, the Seattle events raise several issues that deserve commentary. The first and most important is that the CPC represented a broadly representative community commission with some formal role in police policy-making. While the process of the CPC’s creation was non-democratic, the result was a policy-making process that was more broadly representative than before, and one that ultimately reached a successful resolution of a controversy over one of the most important police department policies.

Second, the conflict over the role of the CPC helped develop a sense of empowerment among its members that resulted in the assertion of a greater role for the CPC in the implementation process. To the extent

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261 Id.
263 See POLICE EXEC. RESEARCH FORUM, AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE (2012), http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integratted%20approach%20to%20de-escalation and%20minimizing%20use%20of%20force%202012.pdf [https://perma.cc/P54E-TG93].
264 PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, supra note 6, at 20 (recommending that “[l]aw enforcement agency policies for training on the use of force should emphasize de-escalation and alternatives to arrest or summons in situations where appropriate”).
265 Seattle Police Dep’t, supra note 262.
266 Walker, supra note 217, at 8–9 (citing interviews with key stakeholders).
that this sense of empowerment becomes a feature in future controversies over policing in the city, it would mark an institutionalized form of the governance of the Seattle Police Department. It should be quickly noted that the implementation of the Seattle Settlement Agreement is an on-going process as this Article is being written, and the ultimate result is unpredictable.

Third, the consensus among CPC members included an unexpected and unprecedented alliance among traditional opponents: civil rights and civil liberties activists on the one side, and representatives of the two police collective bargaining units on the other side. Two aspects of this development merit consideration and further research. The inclusion of the police union representatives served to bring them into the process of addressing police problems in the city as active participants. It is worth asking whether this serves as a model for other communities seeking to resolve police problems. As already noted, the settlement agreement process in Seattle is currently on going, and the answers to these questions are unknown.

When we apply the Schwartz Framework to the Seattle CPC, it is clear that the CPC had a certain degree of Leverage to bring about police reform, as the struggle over the development of the use of force policy indicated. It also seems clear that the members of the CPC had a high degree of Motivation to pursue police reform. Finally, the members of the CPC had considerable Resources, primarily in the form of the experiences and perspectives of its members (which include the institutional memories of the various organizations that members represented).

The more important issue, however, involves the process by which the CPC was created. The number of police departments likely to be investigated and sued by the DOJ is extremely low, given both the number of police departments in the U.S. and the limited resources of the Special Litigation Section of the DOJ. As a result, this particular mode of creation is certainly to be limited. The community policing commission model is one that cities are free to adopt of their own volition. On the one hand, such commissions might simply become a slightly different version of the old police commission model, which as this Article has argued, has not proven to be a viable alternative to the standard mayor/city council form of police governance. On the other

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267 Schwartz, supra note 12.

268 There has been some discussion that the DOJ litigation program has a deterrent effect, or more precisely a stimulating effect, in prodding police departments to institute reforms as a way of avoiding an investigation and possible consent decree. See, e.g., Rachel Harmon, Limited Leverage: Federal Remedies and Policing Reform, 32 ST. LOUIS U. PUB. L. REV. 33 (2012). The question has not been investigated in any systematic way, however.

269 See supra Section V.C.3.
hand, a community police commission that incorporates features of the police auditor/inspector general model of oversight, which this Article has argued embodies the Schwartz Resource factor of expertise, could become a viable path to a form of policing that is democratic in governance structure and committed to the principles of constitutional policing.

At this point it is possible to conclude only that the community police commission is an important innovation, but one that has not yet been fully tested over time across jurisdictions.

VII. CONCLUSION

As a result of a series of deaths at the hands of the police beginning in August 2014, American policing experienced a national crisis unlike anything since the 1960s. The president of the United States felt it necessary to respond by appointing a presidential task force on policing to study the crisis and make recommendations for reform. It was the first-ever presidential task force or commission devoted exclusively to the police. While the task force did not address issues of governance, the range of recommendations for improving policing lead inescapably to the conclusion that the basic forms of governance of local police have failed in many important respects.

This Article has argued that the problems of American policing are ultimately related to the problems associated with democratic governance of the police. The United States is unique in the world in the extent to which the governance of law enforcement agencies lies almost exclusively with local governance. Yet, as the Article has argued, democratic governance has failed to achieve the goal of constitutional policing, in which the police are committed to the rule of law, particularly with respect to due process of law and equal protection of the laws. Over the course of nearly 150 years, democratically elected mayors and city councils have been either indifferent to the goals of constitutional policing or actively hostile to the requirements of due process and equal protection. Since the 1960s, police reformers have sought to make local police agencies both more responsive to previously powerless groups, primarily the African American community, and more committed to constitutional policing. Some of the major reforms have failed with regard to both. Other more recent reforms, as the Article has argued, have demonstrated some success and show some promise for the future.

In the end, the heart of the problem has been the failure of the American people who democratically govern our police departments.

270 See supra Section VI.C.
Developing democratic and constitutional policing, therefore, involves two challenges. First, we must convince the majority of Americans of the urgent necessity of developing constitutional policing in the country as a way to address our national crisis over race and policing. Second, building on the tentative recent steps that have been taken, we must develop democratic governance structures for the police that will make possible the implementation of constitutional principles. This Article opened with a quotation from Winston Churchill. Given the basic conclusion of the evidence and discussion herein, it is appropriate to conclude with a paraphrase of a quotation from another famous Englishman, William Shakespeare. With respect to governance of the police, the fault, dear people, is not in our political structures, but in ourselves.271

271 See WILLIAM SHAKESPEARE, TRAGEDY OF JULIUS CAESAR, act I, sc. 2, at 44 (William A. Rolfe ed. 1889) ("The fault, dear Brutus, is not in our stars, But in ourselves . . .").