

ARTICLES

HOW CAN WE ACHIEVE ACCOUNTABILITY IN POLICING? THE (NOT-SO-SECRET) INGREDIENTS TO EFFECTIVE POLICE REFORM

by

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The summer of 2020 was marked by a series of high-profile police killings of citizens, highlighting excessive force as the most pernicious form of racial injustice in American policing. The persistence of the excessive use of force problem over decades raises serious questions regarding what we know about police accountability, and has led some to argue for defunding or even abolishing the police. However, the roadmap to effective police accountability is tangible and known. In this Article, we delineate eight guiding principles and eight strate-

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gies that have emerged as reoccurring themes in the pursuit of police accountability and transparency. The principles and strategies of effective police accountability have proven difficult to implement and maintain, and we discuss the primary barriers to positive change. Despite these obstacles, we conclude with a sense of optimism about the potential for real police reform in the immediate to near future.

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PREFACE

The police are not merely a “spark” factor. To some [Blacks] police have come to symbolize [W]hite power, [W]hite racism, and [W]hite repression. And the fact is that many police do reflect and express these [W]hite attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among [Blacks] in the existence of police brutality and in a “double standard” of justice and protection—one for [Blacks] and one for [W]hites.¹

* * *

The Commission has found, however, that there is a significant number of officers who repetitively misuse force and persistently ignore the written policies and guidelines of the Department regarding force. . . . The problem of excessive force in the LAPD is fundamentally a problem of supervision, management, and leadership.²

* * *

This shouldn’t be “normal” in 2020 America. It can’t be “normal.”³

I. INTRODUCTION

For more than 50 years,⁴ excessive use of force by police has led to public outrage, incited riots, and prompted calls for reform.⁵ Images from the recent protests in summer 2020 are eerily and sadly similar to images from Ferguson and Baltimore in 2014–2015,⁶ Los Angeles in 1992 (riot after the acquittal of the four officers who

¹ NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968) [hereinafter KERNER REPORT]. In this Article, and consistent with the *Chicago Manual of Style’s* convention to allow authors to choose whether to capitalize racial and ethnic terms, we follow the recommendations of the American Psychological Association and the American Medical Association by capitalizing all such words.

² INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 31–32 (1991), <https://archive.org/download/ChristopherCommissionLAPD/ChristopherCommissionLAPD.pdf>.

³ Barack Obama (@BarackObama), TWITTER (May 29, 2020, 9:06 AM), <https://twitter.com/BarackObama/status/1266400635429310466> (statement of the former U.S. president on the death of George Floyd).

⁴ The text of this Article is formatted in accordance with *The Redbook*. BRYAN A. GARNER ET AL., THE REDBOOK: A MANUAL OF LEGAL STYLE (4th ed. 2018). According to Rule 5.3 of that style manual, numbers ten and below are spelled out, whereas numbers 11 and above are expressed in numerals.

⁵ Kim Michelle Lersch, *Police Misconduct and Malpractice: A Critical Analysis of Citizens’ Complaints*, 21 POLICING 80, 80 (1998).

⁶ See Jasmine Payoute, *It’s Deja Vu’ | St. Louisans Notice Similarity Between Minneapolis and Ferguson Protests*, KSDK (May 28, 2020, 6:40 PM), <https://www.ksdk.com/article/news/local/george-floyd-protests-minneapolis-ferguson/63-088b7f52-614e-43b7-b083->

beat Rodney King),⁷ and Newark and many other cities in the 1960s.⁸ The quotes above from the Kerner Commission in 1968,⁹ the Christopher Commission in 1991,¹⁰ and most recently from former President Obama in 2020¹¹ painfully demonstrate the long-term persistent undercurrent of racial injustice in U.S. policing.¹² Excessive use of force by police is the most pernicious form of that racial injustice. Even though policing has advanced considerably in the twenty-first century in terms of tools and tactics,¹³ some police departments throughout the United States still struggle to effectively control their officers' use of force.¹⁴ The end result is a continuing cascade of minority lives lost, public outrage, widespread distrust of

298f9daa96d6; Baltimore Sun Editorial Board, *Ghosts of Freddie Gray: Minneapolis Is the New Baltimore | Commentary* (May 31, 2020, 2:33 PM), <https://www.baltimoresun.com/opinion/editorial/bs-ed-0601-freddie-gray-minneapolis-20200529-5xkxdrbeaba5znrh5wfmkqojie-story.html>.

⁷ Tim Arango, *In Los Angeles, the Ghosts of Rodney King and Watts Rise Again*, N.Y. TIMES (Feb. 14, 2021), <https://www.nytimes.com/2020/06/03/us/rodney-king-george-floyd-los-angeles.html>.

⁸ See Gwen Prowse & Vesla Mae Weaver, *How a 50-Year-Old Report Predicted America's Current Racial Reckoning*, VOX (June 24, 2020, 10:40 AM), <https://www.vox.com/first-person/2020/6/24/21299649/george-floyd-protests-police-brutality-kerner-commission>.

⁹ KERNER REPORT, *supra* note 1, at 5.

¹⁰ INDEP. COMM'N ON THE L.A. POLICE DEP'T, *supra* note 2, at 31–32.

¹¹ Obama, *supra* note 3.

¹² For a discussion of the origins and persistent undercurrent of racial injustice in U.S. policing for at least the past 175 years, see MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 9–12 (2016); Robert A. Brown, *Policing in American History*, 16 DU BOIS REV. 189, 189 (2019); see also Keisha N. Blain, *Violence in Minneapolis is Rooted in the History of Racist Policing in America*, WASH. POST (May 30, 2020, 3:00 AM), <https://www.washingtonpost.com/outlook/2020/05/30/violence-minneapolis-is-rooted-history-racist-policing-america/>; David A. Harris, *Why Police Violence Against Black People Persists—And What Can Be Done About It*, FORTUNE (June 30, 2020, 4:00 PM), <https://fortune.com/2020/06/30/police-violence-brutality-black-racism/>; Liz Mineo, *Why America Can't Escape Its Racist Roots*, HARV. GAZETTE (June 4, 2020), <https://news.harvard.edu/gazette/story/2020/06/orlando-patterson-explains-why-america-cant-escape-its-racist-roots/>.

¹³ WHITE & FRADELLA, *supra* note 12, at 117–45, 155–59.

¹⁴ See, e.g., PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 19–30 (2015) [hereinafter TASK FORCE REPORT], https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 42 (1993); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 487–91 (1994); cf. ELLEN M. SCRIVNER, U.S. DEP'T OF JUSTICE, THE ROLE OF POLICE PSYCHOLOGY IN CONTROLLING EXCESSIVE FORCE iii (1994), <https://www.ncjrs.gov/pdffiles1/Digitization/146206NCJRS.pdf> (documenting the ongoing problems with controlling police use of force and proposing psychological interventions to address the problem).

the police,¹⁵ and serious questions about their legitimacy¹⁶—perhaps best illustrated by amplified calls in summer 2020 to defund the police.¹⁷

Given the consequences of police use of force, researchers, policymakers, and police leaders have devoted significant attention to identifying the principles and strategies that can provide accountability with regard to use of force.¹⁸ The most recent example is the final report of the President's Task Force on 21st Century Policing, which identified nearly 60 recommendations for building public trust, more effectively reducing crime, and enhancing police accountability.¹⁹ Yet five years after that final report was released, police continue to use deadly force against people of color under circumstances that, at best, are legally questionable, and perhaps more aptly unjustifiable and criminal, such as when Minneapolis (MN) police killed George Floyd,²⁰ Louisville (KY) police killed Breonna Taylor,²¹ Atlanta (GA) police killed Rayshard Brooks,²² and Kenosha (WI) police shot Jacob Blake.²³ The persistence of the excessive use of force problem raises serious questions regarding what we know about police accountability. Have we learned anything over the last 50 years about how to control police use of force? Are the components of effective police accountability still elusive in 2020?

In this Article, we argue the principles and strategies for effective police accountability are known and well-established in both the scholarly literature and police practice.²⁴ Unfortunately, our understanding of what works and does not work

¹⁵ Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html>.

¹⁶ See TASK FORCE REPORT, *supra* note 14, at 5; see also Meghan G. McDowell & Luis A. Fernandez, 'Disband, Disempower, and Disarm': Amplifying the Theory and Practice of Police Abolition, 26 CRITICAL CRIMINOLOGY 373 (2018); Glenn D. Walters & P. Colin Bolger, *Procedural Justice Perceptions, Legitimacy Beliefs, and Compliance with the Law: A Meta-Analysis*, 15 J. EXPERIMENTAL CRIMINOLOGY 341 (2019).

¹⁷ Scottie Andrew, *There's a Growing Call to Defund the Police. Here's What It Means*, CNN (June 17, 2020, 10:32 AM), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html>.

¹⁸ For a review, see Tim Prenzler et al., *Reducing Police Use of Force: Case Studies and Prospects*, 18 AGGRESSION & VIOLENT BEHAV. 343, 354–55 (2013).

¹⁹ TASK FORCE REPORT, *supra* note 14.

²⁰ Blain, *supra* note 12.

²¹ Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

²² Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html>.

²³ Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>.

²⁴ WHITE & FRADELLA, *supra* note 12, at 117–45; see also SAMUEL E. WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (3d ed. 2020). See generally U.N. OFFICE ON DRUGS & CRIME, *HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT, AND*

in police accountability has, to some extent, gotten lost in the contentious dialogue among police reformers, abolitionists, researchers, policymakers, and police leaders.²⁵ Moreover, these principles and strategies have proven very difficult to establish and maintain despite the fact that they have been implemented successfully in police departments across the country by progressive police chiefs and, in some cases, as a result of federally-imposed judicial oversight (i.e., consent decrees following civil claims filed by the Civil Rights Division, U.S. Department of Justice).²⁶ In this Article, we take a step back and review what we know about police accountability. Our goal is to outline a list of (1) guiding principles and (2) critical ingredients for effective police accountability. We also tackle the difficult question: if these principles and strategies are known, why do police departments continue to struggle to implement them? Why do images from the summer of 2020 look just like images from summer 1967? We discuss the primary barriers to police reform and offer some recommendations for institutionalizing accountability.²⁷

II. THE FOUNDATIONAL PRINCIPLES OF POLICE ACCOUNTABILITY

Several guiding principles should serve as an anchor for effective police accountability. These include: prioritize the protect-life mission; acknowledge the persistent undercurrent of racial injustice in policing; embrace legitimacy and adopt procedural justice as a mechanism for achieving it; focus on organizational change; become a learning organization; be transparent; become data-driven; and account for the social cost of policing. Each of the principles is described below.

INTEGRITY, at iv–v, U.N. Sales No. E.11.IV.5 (2011), https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf.

²⁵ Emerson Sykes, the host of the ACLU's podcast series "At Liberty," interviewed ACLU staff attorney Carl Takei, who litigates police practices, about such events. *At Liberty: Obstacles and Opportunities in the Fight for Police Accountability*, ACLU (Aug. 1, 2019), <https://www.aclu.org/podcast/obstacles-and-opportunities-fight-police-accountability-ep-58>.

²⁶ For more information, see Geoffrey P. Alpert et al., *Consent Decrees: An Approach to Police Accountability and Reform*, 20 POLICE Q. 239 (2017).

²⁷ Portions of this Article were drawn from an unpublished report prepared by the authors for the Civil Rights Division, U.S. Department of Justice, as part of a grant awarded to Arizona State University by the Civil Rights Division and Arnold Ventures. The grant, titled "Evaluating the Impact of U.S. Department of Justice Consent Decrees on Police Departments," was awarded in 2015 under the Obama Administration and canceled in 2017 under the Trump Administration. The authors gratefully acknowledge the contributions of Dr. Jessica Saunders and Dr. Janne Gaub on that earlier project.

A. *Prioritize the Protect-Life Mission*

Dr. James Fyfe repeatedly argued “the primary purpose of the police is to protect life. All policy follows from that.”²⁸ Fyfe’s argument is grounded in his belief that a singular focus on egregious police behavior that violates the law is too narrow. Instead, effective police accountability should also address coercive police actions that are unnecessary, overly aggressive, and careless, but lawful (what some refer to as “lawful but awful”).²⁹ Moreover, the narrow, “split-second” lens for reviewing police officer use of force often excuses such violence because it ignores earlier poor decisions by the officer and focuses only on the actions immediately preceding the use of force.³⁰

The lens for viewing any coercive police action should consider all of the officers’ actions during an encounter—start to finish—and simply ask, were the officer’s actions “consistent with the protection of life mandate?”³¹ This lens considers the decisions made by an officer at the earliest stages of an encounter. Did the officer give a citizen time to explain what is happening and why? Did the officer maintain safe distance? Did the officer use language or behavior that unnecessarily antagonized the citizen? Did the officer unholster his or her firearm prematurely? Did the officer take advantage of opportunities to de-escalate the encounter? Though none of these issues represent potential policy or legal violations, they are factors that increase the risk of unnecessary violence and potentially violate the protection-of-life mandate. This broader lens of review is also consistent with the “guardian” mindset, highlighted in the ongoing debate over whether police officers are “warriors or guardians.”³²

The protection of life sentiment was reflected in the final report of the President’s Task Force on 21st Century Policing which states that “a clearly stated ‘sanctity of life’ philosophy must also be in the forefront of every officer’s mind.”³³ In their *30 Guiding Principles* report, the Police Executive Research Forum noted “the

²⁸ Candace McCoy, *Preface: Observations on the Study of Police Accountability*, in HOLDING POLICE ACCOUNTABLE xiii, xxii (Candace McCoy ed., 2010); see also James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in VIOLENT TRANSACTIONS: THE LIMITS OF PERSONALITY 207 (Anne Campbell & John J. Gibbs eds., 1986).

²⁹ William Terrill, *Police Use of Nondeadly Force: From Determining Appropriateness to Assessing the Impact of Policy*, in HOLDING POLICE ACCOUNTABLE, *supra* note 28, at 55, 68; see also POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 119 (2016) [hereinafter PERF PRINCIPLES], <https://www.policeforum.org/assets/30guidingprinciples.pdf>.

³⁰ Fyfe, *supra* note 28, at 218.

³¹ ROBERT J. KANE & MICHAEL D. WHITE, JAMMED UP: BAD COPS, POLICE MISCONDUCT, AND THE NEW YORK CITY POLICE DEPARTMENT 169 (2013).

³² Sue Rahr & Stephen K. Rice, *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*, NEW PERSPECTIVES IN POLICING, Apr. 2015, at 1, 1–2, <https://www.ncjrs.gov/pdffiles1/nij/248654.pdf>.

³³ TASK FORCE REPORT, *supra* note 14, at 19.

sanctity of human life [of the general public, police officers, and criminal suspects] should be at the heart of everything an agency does.”³⁴ In January 2017, 11 law enforcement leadership organizations released a policy paper entitled *National Consensus Policy and Discussion Paper on Use of Force* that was updated in July of 2020.³⁵ The opening sentence of the policy section states: “It is the policy of this law enforcement agency to value and preserve human life.”³⁶ The sanctity of human life principle involves treating all people with dignity and respect, and it places a premium on police officers doing everything in their power to preserve life.

B. Acknowledge the Persistent Undercurrent of Racial Injustice in Policing

It is long overdue for police to acknowledge their roles as instruments of control over people of color and the attendant harms perpetuated by that control. Slave patrols constitute the earliest forms of policing in Colonial America, especially in the South.³⁷ After the abolition of slavery, police became the enforcers of segregation and the “Black Codes” restricting labor, housing, and a range of social practices on racial grounds.³⁸ “Whites staffed urban police forces as well as State militias, intended . . . to ‘keep good order and discipline amongst the [Black] population.’”³⁹ Perhaps it is therefore unsurprising that even when Black communities found ways to prosper during an era when lynchings were commonplace, as the Greenwood massacre illustrates, police did little to protect such areas and their inhabitants.⁴⁰

³⁴ PERF PRINCIPLES, *supra* note 29, at 34.

³⁵ NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE (2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force_07102020_v3.pdf. The consortium that jointly authored this paper includes the Association of State Criminal Investigative Agencies (ASCIA), the Commission on Accreditation for Law Enforcement Agencies (CALEA), the Fraternal Order of Police (FOP), the Federal Law Enforcement Officers Association (FLEOA), the International Association of Chiefs of Police (IACP), the Hispanic-American Police Command Officers Association (HAPCOA), the International Association of Directors of Law Enforcement (IADLEST), the National Association of Police Organizations (NAPO), the National Association of Women Law Enforcement Executives (NAWLEE), the National Organization of Black Law Enforcement Executives (NOBLE), and the National Tactical Officers Association (NTOA). *Id.* at 16.

³⁶ *Id.* at 2.

³⁷ Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, PERSPECTIVES ON POLICING, Jan. 1990, at 1, 3–4, <https://www.innovations.harvard.edu/sites/default/files/121019.pdf>; see also JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES 19 (Raymond A. Mohl ed., 1974).

³⁸ Williams & Murphy, *supra* note 37, at 6–7.

³⁹ *Id.* at 7 (quoting ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 203 (1988)).

⁴⁰ In 1921, a mob of White people attacked the Greenwood section of Tulsa, Oklahoma. Three hundred people were killed and the entire section of the city was burned down, effectively eradicating what had been referred to as “Black Wall Street.” Notably police arrested the Black

The economic prosperity that built a strong middle class in the post-World War II period did not extend to most members of racial and ethnic minority groups for a multiplicity of reasons, not the least of which was the continuing effect of segregation and racial discrimination.⁴¹ But even as the Civil Rights Movement eroded barriers to full civic participation, poverty in U.S. cities disproportionately affected members of racial and ethnic minorities, a situation that worsened with “White flight” and its attendant effects—vacant houses, eroded tax bases, closed businesses, high unemployment, and an increase in a host of other problems.⁴² Many of these conditions prompted police responses, especially in the wake of the “wars” on crime and drugs.⁴³ This, in turn, led Black people to see “the police as symbolizing the entire ‘system’—those institutions and resources that had been so unresponsive to their needs.”⁴⁴

When the community policing era began during the late 1970s, people of color were largely excluded from efforts to improve police-community relations.⁴⁵ Indeed, law enforcement responses to urban problems enhanced police views of an “us vs.

people defending their homes and stores, rather than White people who were attacking. Maggie Astor, *What to Know About the Tulsa Greenwood Massacre*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/06/20/us/tulsa-greenwood-massacre.html>; see also Gabrielle Bruney, *A Very Abbreviated History of the Destruction of Black Neighborhoods*, ESQUIRE (May 30, 2020), <https://www.esquire.com/news-politics/a32719786/george-floyd-protests-riots-black-community-destruction-history/>. Sadly, such ruinous actions are not confined to the distant past. The decimation of Lincoln Heights, Ohio, did not involve a storming mob, but the once thriving Black community is nonetheless in shambles as a result of neglect that was “no accident.” Alana Semuels, *The Destruction of a Black Suburb*, ATLANTIC (July 13, 2015), <https://www.theatlantic.com/business/archive/2015/07/lincoln-heights-black-suburb/398303/>.

⁴¹ See, e.g., Michael B. Teitz & Karen Chapple, *The Causes of Inner-City Poverty: Eight Hypotheses in Search of Reality*, 3 CITYSCAPE 33, 43 (1998).

⁴² Williams & Murphy, *supra* note 37, at 11.

⁴³ See, e.g., Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/> (explaining the political causes of criminal justice responses to substance use and abuse, rather than public health ones). Indeed, Richard Nixon’s domestic policy adviser, John Ehrlichman, reported that Nixon started the war on drugs for explicitly racist reasons. German Lopez, *Was Nixon’s War on Drugs a Racially Motivated Crusade? It’s a Bit More Complicated.*, VOX (Mar. 29, 2016, 2:00 PM), <https://www.vox.com/2016/3/29/11325750/nixon-war-on-drugs>. Although there are some reasons to doubt Ehrlichman’s veracity in light of his hatred of Nixon, because he served time in prison as a result of Watergate, it is indisputable that Nixon and, later, Ronald Reagan, both fostered responses to many urban social problems that shifted them into the realm of criminal justice. *Id.*; see also DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 98–104 (2007).

⁴⁴ Williams & Murphy, *supra* note 37, at 11.

⁴⁵ *Id.* at 10–11; see also Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1428, 1432–34 (2016) (noting the deep strain and distrust between law enforcement and communities of color).

them” mentality, which only served to exacerbate the “minority view” of policing that Hubert Williams and Patrick Murphy explained in 1990.⁴⁶

The disjuncture between law enforcement and communities of color worsened through the 1990s and 2000s when police adopted aggressive tactics and strategies—often aimed at quality-of-life and drug offenses—that targeted people of color.⁴⁷ Such actions degraded race relations in many urban areas while simultaneously eroding police legitimacy in the eyes of Black and Hispanic people.⁴⁸ In short, the “deep distrust of law enforcement” in communities of color “is multi-generational and well-founded.”⁴⁹

The historical and ongoing undercurrent of racial injustice in U.S. policing continues to produce disparate outcomes for people of color.⁵⁰ And as the string of police killings of unarmed men and women of color painfully illustrate, street encounters between police and people of color turn deadly far too frequently.⁵¹ Worse yet, there often do not appear to be any acceptable reasons for such tragic outcomes:

⁴⁶ Williams & Murphy, *supra* note 37, at 2–3; *see also, e.g.*, Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 797–98 (2000) (discussing how the “us-versus-them” mentality contributes to racism).

⁴⁷ WHITE & FRADELLA, *supra* note 12, at 82–87; Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 464–72 (2000) (tracing how Broken Windows Theory led to the development of order-maintenance policing (OMP) that ultimately morphed in aggressive interdiction efforts that exceeded the theory’s “subtle connection” between disorder and crime); Andrew Ingram, *Breaking Laws to Fix Broken Windows: A Revisionist Take on Order Maintenance Policing*, 19 BERKELEY J. CRIM. L. 112, 127 (2014); Michael D. White et al., *Why Police (and Communities) Need ‘Broken Windows’*, CRIME REP. (Aug. 11, 2015), <http://thecrimereport.org/2015/08/11/2015-08-why-police-and-communities-need-broken-windows/>.

⁴⁸ Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 175 (2015) (“The fact that racial minorities in cities disproportionately encounter police in both constitutional and unconstitutional contexts fuels [their] perceptions of the illegitimacy of the police.”); *see also* Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 266 (2010) (reporting that people of color “felt that their neighborhoods had been besieged by police”); Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 775 (2014) (reporting that widespread use of street stops as part of aggressive OMP undermined police legitimacy).

⁴⁹ Samuel Kuhn & Stephen Lurie, *American Police Must Own Their Racial Injustices*, AM. PROSPECT (July 18, 2018), <https://prospect.org/civil-rights/american-police-must-racial-injustices/>.

⁵⁰ For a range of data points on contemporary racial inequalities, *see* Janelle Jones et al., *50 Years After the Kerner Commission: African Americans Are Better Off in Many Ways, But Are Still Disadvantaged by Racial Inequality*, ECON. POL’Y INST. (Feb. 26, 2018), <https://www.epi.org/publication/50-years-after-the-kerner-commission/>.

⁵¹ *See supra* notes 20–23.

“Black suspects are more than twice as likely to be killed by police than are persons of other racial or ethnic groups; even when there are no other obvious circumstances during the encounter that would make the use of deadly force reasonable.”⁵²

Following the lead of International Association of Chiefs of Police former president Terrence M. Cunningham,⁵³ law enforcement must accept responsibility and apologize for their past and ongoing actions that contribute to racial injustice.⁵⁴ Doing so is the first step in reconciliation. Although officers and their unions may feel that such apologies accept blame “for the actions of a few, or for historical reasons for which they are not responsible,” that should not stop law enforcement leaders from taking steps that can ultimately serve their agencies and communities alike.⁵⁵ Acknowledging the harm of past actions and apologizing for them can help build trust and cooperation, which can lead to “mutual respect that enables sustainable improvement to public safety practices.”⁵⁶

C. Embrace Legitimacy and Adopt Procedural Justice as a Mechanism for Achieving It

Tom Tyler defined legitimacy as “a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just.”⁵⁷ The value of legitimacy for police lies in how it shapes citizens’ attitudes and behavior. Tyler argued that legitimacy generates self-regulated deference to authority, as people follow the law and obey the police because they believe it is the right thing to do.⁵⁸ The President’s Task Force on 21st Century Policing noted: “Building trust and nurturing legitimacy on both sides of

⁵² Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 951 (2020).

⁵³ Timothy Williams, *Official Apologizes for Police Role in Mistrust by Minorities*, N.Y. TIMES (Oct. 17, 2016), <https://www.nytimes.com/2016/10/18/us/official-apologizes-for-police-role-in-mistrust-by-minorities.html>.

⁵⁴ Thomas C. O’Brien et al., *Reconciling Police and Communities with Apologies, Acknowledgements, or Both: A Controlled Experiment*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 202 (2020).

⁵⁵ *Id.* at 211. See generally Robert R. Weyeneth, *The Power of Apology and the Process of Historical Reconciliation*, PUB. HISTORIAN, Summer 2001, at 9, 11 (exploring the values of apologies for past harms).

⁵⁶ Kuhn & Lurie, *supra* note 49.

⁵⁷ Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375 (2006).

⁵⁸ *Id.* at 376; see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–5 (1990); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 514 (2003).

the police/citizen divide is the foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve.”⁵⁹ Prior research has consistently connected enhanced police legitimacy to important outcomes for the police, most notably citizen compliance with police commands during an encounter, cooperation with police authority (reporting crimes, providing information about crimes, etc.), and obedience to the law.⁶⁰

Procedural justice is an established mechanism for achieving legitimacy.⁶¹ Procedural justice refers to the way in which police treat citizens and the fairness of the decisions that police make.⁶² Prior research has identified four key components of procedural justice: citizen participation (being given the opportunity to state one’s case), fairness and neutrality, dignity and respect, and trustworthy motives.⁶³ Procedural justice is a key ingredient for generating police legitimacy,⁶⁴ and several studies have noted that the relationship persists even in encounters with negative outcomes.⁶⁵ The President’s Task Force on 21st Century Policing concluded that procedural justice leads “to relationships in which the community trusts that officers are honest, unbiased, benevolent, and lawful.”⁶⁶ Research has also documented that legitimacy is weakened when police are viewed as procedurally unjust.⁶⁷ Each officer interaction with a citizen represents an opportunity to enhance police legitimacy through the officer’s procedurally just treatment of the citizen. Conversely, procedurally unjust actions by an officer, and a department’s failure to hold officers accountable for those actions, can undermine a community’s trust in the police.

⁵⁹ TASK FORCE REPORT, *supra* note 14, at 1.

⁶⁰ TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Lyn Hinds, *Youth, Police Legitimacy and Informal Contact*, 24 J. POLICE & CRIM. PSYCHOL. 10, 19 (2009); Lyn Hinds & Kristina Murphy, *Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 27, 29–30 (2007); Sunshine & Tyler, *supra* note 58, at 534–35.

⁶¹ Natasha S. Madon et al., *Promoting Police Legitimacy Among Disengaged Minority Groups: Does Procedural Justice Matter More?*, 17 CRIMINOLOGY & CRIM. JUST. 624, 625–29 (2017); Hinds & Murphy, *supra* note 60, at 27; Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33, 51 (2013); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC’Y REV. 11, 16 (1984).

⁶² Sunshine & Tyler, *supra* note 58, at 514.

⁶³ Mazerolle et al., *supra* note 61, at 35.

⁶⁴ Sunshine & Tyler, *supra* note 58, at 513.

⁶⁵ Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 256 (2008).

⁶⁶ TASK FORCE REPORT, *supra* note 14, at 10.

⁶⁷ Ronald Fischer et al., *Support for Resistance Among Iraqi Students: An Exploratory Study*, 30 BASIC & APPLIED SOC. PSYCHOL. 167, 173 (2008) (noting that when the Iraqi government was perceived as illegitimate, support for Iraqi resistance fighters among Iraqi students increased).

D. Focus on Organizational Change

Departments often rely on the “rotten apples” explanation for police excessive use of force, which posits that the misdeeds of police can be explained by the actions of one or a few rogue officers (the rotten apples),⁶⁸ but past experience and research show that this justification is not sufficient.⁶⁹ In their investigation of police misconduct in the New York Police Department (NYPD), the Knapp Commission soundly rejected the rotten-apple explanation:

According to this theory, which bordered on official Department doctrine, any policeman found to be corrupt must promptly be denounced as a rotten apple in an otherwise clean barrel. It must never be admitted that his individual corruption may be symptomatic of underlying disease. . . . The rotten-apple doctrine has in many ways been a basic obstacle to meaningful reform. . . . The Commission examined and rejected the premises upon which the rotten-apple doctrine rested.⁷⁰

The rotten-apple justification allows a department to confine misconduct to just a few problematic officers and effectively avoid the real underlying problems, which typically involve inadequate management practices and permissive organizational culture.⁷¹ The opening foreword from the Christopher Commission highlights this point.⁷² Police accountability efforts should focus on organizational change, not changing individual officer behavior. Samuel Walker and Carol Archbold note that “[c]hanging police organizations, rather than changing single policies or prosecuting individual officers, is the focus of ‘pattern or practice’ by the Civil Rights Division of the U.S. Department of Justice.”⁷³ Walker and Archbold outline

⁶⁸ WALKER & ARCHBOLD, *supra* note 24, at 23.

⁶⁹ *Id.*; cf. Catherine Griffin & Jim Ruiz, *The Sociopathic Police Personality: Is It a Product of the “Rotten Apple” or the “Rotten Barrel?”*, 14 J. POLICE & CRIM. PSYCHOL. 28, 28–29 (1999); Rashawn Ray, *Bad Apples Come from Rotten Trees in Policing*, BROOKINGS (May 30, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/05/30/bad-apples-come-from-rotten-trees-in-policing/>.

⁷⁰ COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE CITY’S ANTI-CORRUPTION PROCEDURES, THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 6–7 (1972) [hereinafter KNAPP REPORT].

⁷¹ William A. Geller & Hans Toch, *Improving Our Understanding and Control of Police Abuse of Force: Recommendations for Research and Action*, in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 277, 279, 282 (William A. Geller & Hans Toch eds., 1995); WALKER & ARCHBOLD, *supra* note 24, at 23; Sanja Kutnjak Ivković, *Rotten Apples, Rotten Branches, and Rotten Orchards: A Cautionary Tale of Police Misconduct*, 8 CRIMINOLOGY & PUB. POL’Y 777, 780 (2009); Petter Gottschalk et al., *Police Misconduct and Crime: Bad Apples or Systems Failure?*, 15 J. MONEY LAUNDERING CONTROL 6, 6–7 (2012).

⁷² INDEP. COMM’N ON THE L.A. POLICE DEP’T, *supra* note 2, at iv.

⁷³ SAMUEL WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 21 (2d ed. 2014).

the key features of an organizational focus on accountability, including critical incident reporting, an open and accessible complaint system, an early intervention system, and external oversight through an auditor.⁷⁴ We advocate for many of these same systems below.

E. Become a Learning Organization

In order to facilitate organizational change, departments must become learning organizations that are strategic, introspective, and proactive.⁷⁵ Under Charles Ramsey, former Commissioner of the Philadelphia Police Department and Co-Chair of the President's Task Force on 21st Century Policing, the Philadelphia Police Department stated that "a learning organization is one that has a shared vision and mission, has the means and willingness to learn from the experiences of its members, seeks out best practices and makes changes as required."⁷⁶ A learning organization embraces change and continually engages in introspection to identify deficiencies that require modification.

Sentinel events review is one mechanism for becoming a learning organization.⁷⁷ Sentinel events review is reflective of an overall emphasis on organizational learning through introspection. Adapted from the aviation and medical fields, sentinel events review applies an organizational accident mindset to negative singular events.⁷⁸ Instead of a plane crash or patient death, the organizational accident in policing could be an officer-involved shooting or an excessive use of force. A sentinel event in a complex system like policing is "rarely the result of one individual's mistake. Rather, multiple small errors combine and are exacerbated by underlying system weaknesses."⁷⁹ The goal of the sentinel events process is to understand the errors or weaknesses that led to the event, allowing for similar events to be avoided in the

⁷⁴ WALKER & ARCHBOLD, *supra* note 24, at 66–240.

⁷⁵ *Id.* at 26; see also John P. Crank & Andrew Giacomazzi, *A Sheriff's Office as a Learning Organization*, 12 POLICE Q. 351, 351–53 (2009).

⁷⁶ PHILA. POLICE DEP'T, PREVENTING CORRUPTION WITHIN OUR RANKS: CREATING A VALUES-DRIVEN ORGANIZATION 2 (2010), <http://www.phillypolice.com/assets/docs/PPD.PreventingCorruptionFINAL.8.5.10.pdf>.

⁷⁷ James M. Doyle, *NIJ's Sentinel Events Initiative: Looking Back to Look Forward*, NAT'L INST. JUST. J., Mar. 2014, at 10, 11.

⁷⁸ *Id.*

⁷⁹ NAT'L INST. OF JUSTICE, SPECIAL REPORT: MENDING JUSTICE: SENTINEL EVENTS REVIEWS 1 (2014), <https://www.ncjrs.gov/pdffiles1/nij/247141.pdf>.

future.⁸⁰ In July 2020, the Tucson Police Department created a sentinel events review board to review and understand the events leading to a recent death-in-custody.⁸¹ James Doyle states:

Working steadily on organizational error analysis creates an increased system consciousness among the practitioners who staff the criminal justice system. The forward-looking accountability that this practice creates can be an important—and arguably indispensable—element of a new criminal justice professionalism. Today’s police lieutenants, for example, will make better police captains next year thanks to their participation in the rigorous organizational accident analysis of a known error or near miss. All of the system’s stakeholders will gain a better understanding of their individual responsibility for the system’s collective outcomes from working on all-stakeholder reviews.⁸²

Sentinel events review is reflective of an overall emphasis on organizational learning through introspection.

F. Be Transparent

Effective police accountability should be publicly transparent.⁸³ For the public to fairly judge their local law enforcement’s adherence to constitutional principles and practices, they need to be adequately informed about law enforcement’s policies and practices. A department could have all the best internal accountability mechanisms, but without being publicly accessible and transparent, it may not be responsive to community concerns. Therefore, effective accountability must rely heavily on a transparent approach that gives the public the information it needs to make fair and informed judgments about its police departments and their actions.

Departments can achieve transparency through a variety of methods. Walker and Archbold highlight the importance of external citizen oversight, preferably through an auditor.⁸⁴ The auditor can conduct organization-level investigations into critical agency policies and practices, from use of force and first-line supervision to investigation of citizen complaints.⁸⁵ The auditor can issue public reports on

⁸⁰ James M. Doyle, *Learning from Error in the Criminal Justice System: Sentinel Event Reviews*, in NAT’L INST. OF JUSTICE, *supra* note 79, at 3, 3.

⁸¹ Christopher Conover, *TPD Forms Board to Review ‘Critical’ Incidents*, ARIZ. PUB. MEDIA (July 7, 2020), <https://news.azpm.org/p/news-splash/2020/7/7/176097-tpd-forms-board-to-review-critical-incidents/>.

⁸² Doyle, *supra* note 80, at 16.

⁸³ Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 425–26 (2010).

⁸⁴ WALKER & ARCHBOLD, *supra* note 24, at 213–40.

⁸⁵ *Id.* at 215–19.

those practices that include recommendations for change.⁸⁶ Many police departments have adopted body-worn cameras (BWCs) in an effort to demonstrate transparency to their communities.⁸⁷ The recording of use of force events on BWCs represents an additional opportunity to show transparency to the community, or to fail to do so. Some departments have established formal procedures for the public release of BWC footage within a set period of time. For example, the Los Angeles Police Department releases footage of officer-involved shootings within 45 days.⁸⁸ Also, some departments, like Philadelphia's,⁸⁹ have begun to publicly release use of force data as a show of transparency, either individually on department websites or as part of the Federal Bureau of Investigation's national data collection effort.⁹⁰

G. *Become Data-Driven*

Adoption of many of the principles above hinges on the creation of robust data systems.⁹¹ Without data collection and the subsequent analyses, positive change at both the organizational and individual officer levels would be impossible. Accountability requires good data. Put simply, "[t]op management today cannot effectively run a department without systematic data on reported crimes, arrests, traffic stops, uses of force, and so on."⁹² At a minimum, an agency should collect, analyze, and release data on use of force including by overall prevalence, by type of force used, by officer, and by citizen race and ethnicity. Complaints, force investigations, lawsuits involving use of force, and what Hickman and colleagues refer to as the "force factor"—a reciprocal measure of use of force and citizen resistance—are other important metrics that should be captured, examined, and made publicly available on

⁸⁶ *Id.* at 214.

⁸⁷ SHELLEY S. HYLAND, U.S. DEP'T OF JUSTICE, BODY-WORN CAMERAS IN LAW ENFORCEMENT AGENCIES, 2016, at 3 (2018), <https://nccpsafety.org/assets/files/library/bwclea16.pdf> (stating that about 80% of agencies listed "reduce/resolve civilian complaints" as a reason for acquiring BWCs); MICHAEL D. WHITE, U.S. DEPT. OF JUSTICE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 19 (2014), https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/diagnosticcenter_policeofficerbody-worncameras.pdf.

⁸⁸ *Board of Police Commissioners Critical Incident Video Release Policy*, L.A. POLICE DEP'T (Feb. 20, 2018), http://www.lapdonline.org/home/news_view/63555.

⁸⁹ *Officer Involved Shootings*, PHILA. POLICE DEP'T, <https://www.phillypolice.com/ois> (last visited May 26, 2021).

⁹⁰ *Id.*; *FBI Releases 2019 Participation Data for the National Use-of-Force Data Collection*, FED. BUREAU INVESTIGATION (July 27, 2020), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-participation-data-for-the-national-use-of-force-data-collection>; *Use of Force*, POLICE DATA INITIATIVE, <https://www.policedatainitiative.org/datasets/use-of-force/> (last visited May 26, 2021).

⁹¹ See, e.g., Geoffrey P. Alpert et al., *Investigating Racial Profiling by the Miami-Dade Police Department: A Multimethod Approach*, 6 CRIMINOLOGY & PUB. POL'Y 25, 51–52 (2007).

⁹² WALKER & ARCHBOLD, *supra* note 24, at 25.

a regular basis.⁹³ The collection, analysis, and dissemination of data is central to reforms imposed through the U.S. Department of Justice Civil Rights Division's "pattern or practice" litigation. The Civil Rights Division notes:

In agreements addressing use of force, the Division typically tracks data such as:

- The rate of use of force—overall, by type of encounter (i.e., street stop, traffic stop, arrest, call for service); by type of force; by location; and by subject's race, ethnicity, gender, and age;
- The number of civilian complaints regarding use of force and how often those complaints are sustained or substantiated;
- How often force reviews reveal that a use of force violated agency policy or the law;
- The number of officers who have had more than one instance of force found to violate agency policy or the law; and
- How often officers or members of the public are injured during police encounters.⁹⁴

Oftentimes, the Civil Rights Division consent decree will also require the collection and analysis of "qualitative data sufficient for the independent monitor to assess the reasonableness of uses of force or the quality of a department's investigation and review of instances of force."⁹⁵

H. Account for the Social Cost of Policing

Empirical research on strategies often focuses on their effects on crime rates,⁹⁶ but typically ignores their associated costs.⁹⁷ From a financial standpoint, we know

⁹³ Matthew J. Hickman et al., *Reliability of the Force Factor Method in Police Use-of-Force Research*, 18 POLICE Q. 368, 373 (2015).

⁹⁴ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 25 (2017), <https://www.justice.gov/crt/file/922421/download>.

⁹⁵ *Id.*

⁹⁶ See, e.g., NAT'L ACAD. SCIS., ENGINEERING, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 5 (David Weisburd & Malay K. Majmudar eds., 2018).

⁹⁷ Martin Kaste, *Studies Show 'Proactive Policing' Works, but Social Cost Less Clear*, NPR (Nov. 9, 2017, 11:00 AM), <https://www.npr.org/2017/11/09/562876139/studies-show-proactive-policing-works-but-social-cost-less-clear>. We note that legal scholars have paid far more attention to the social costs of policing tactics and strategies that not only have broad unintended effects on society at large, but also disproportionate negative impact on communities of color. See, e.g., Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 566 (2017); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 34–36 (2017); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 762 (2012); K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the*

that we spend in excess of \$100 billion annually on policing in the United States.⁹⁸ Yet our knowledge about “what works” is limited.⁹⁹

Unlike in other areas of government, cost-benefit analyses are uncommon in criminal justice—especially with regard to policing.¹⁰⁰ Even when the benefits and costs of specific police tactics, strategies, or technologies can be calculated, the social costs of policing—the impact policing practices have on people and communities—are nearly always ignored.

[S]tudies don’t count George Floyd’s death as a cost, or the costs of far less publicized uses of force. They don’t estimate the impact of reduced civic engagement that comes in the wake of police violence, or the emotional and physical toll of the constant fear of police violence that forces Black parents to have “The Talk” with their kids. They don’t account for any of the micro or macro costs of, say, the fact that as many as 79 percent of all young Black men in New York City were stopped by the police at the peak of Stop, Question, and Frisk: the shame, the fear, the emotional and other effects of so racially targeted a policy.¹⁰¹

Mark Cohen developed a typology of social harms caused by racialized policing practices. Table 1 presents an abridged version of his taxonomy.¹⁰²

Real Costs to Law-Abiding New Yorkers of Color, 34 N.Y.U. REV. L. & SOC. CHANGE 439, 445 (2010).

⁹⁸ Barry Friedman & Elizabeth G. Jánsszy, *Policing’s Information Problem*, 99 TEX. L. REV. 1, 3 (2020); see also Barry Friedman, *We Spend \$100 Billion on Policing. We Have No Idea What Works.*, WASH. POST (Mar. 10, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/03/10/we-spend-100-billion-on-policing-we-have-no-idea-what-works/>.

⁹⁹ Friedman, *supra* note 98; see also David Weisburd & Peter Neyroud, *Police Science: Toward a New Paradigm*, NEW PERSPECTIVES IN POLICING, Jan. 2011, at 1, 3, <https://www.ncjrs.gov/pdffiles1/nij/228922.pdf>.

¹⁰⁰ Friedman, *supra* note 98; CHRISTIAN HENRICHSON & JOSHUA RINALDI, VERA INST. OF JUSTICE, COST-BENEFIT ANALYSIS AND JUSTICE POLICY TOOLKIT 2 (2014), https://www.vera.org/downloads/Publications/cost-benefit-analysis-and-justice-policy-toolkit/legacy_downloads/cba-justice-policy-toolkit.pdf.

¹⁰¹ John Pfaff, *Policing Studies Measure Benefits to Crime Reduction—But Not Social Costs*, APPEAL (Oct. 2, 2020), <https://theappeal.org/policing-studies/> (internal citations omitted). For example, “[p]olice misconduct can powerfully suppress one of the most basic forms of civic engagement: calling 911 for matters of personal and public safety.” Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 857 (2016) (reporting the results of a study that Black people were far less likely to call law enforcement—to the tune of tens of thousands of reduced 911 calls—after police assault or kill a Black person).

¹⁰² Mark A. Cohen, *The Social Cost of a Racially Targeted Police Encounter*, 8 J. BENEFIT-COST ANALYSIS 369, 376–77 (2017).

Table 1: Social Harms Caused by Racially Unjust Policing Practices

Group	Harm
Targeted Individual	<i>Physical harm or death</i> , such as Medical costs, lost wages, pain & suffering, lost quality of life
	<i>Fear of harm</i> – the perceived risk of physical harm while undergoing unwarranted encounter
	<i>Opportunity cost of time</i> – the time spent by individual dealing with police encounter and collateral consequences
	<i>Humiliation cost</i> – the psychic costs associated with having been targeted beyond risk or actual injury
Members of Racial Minority Group	<i>Fear of unwarranted encounter</i> , stemming from perceived risk
	<i>Humiliation costs</i> , stemming from being member of the targeted minority group
	<i>Avoidance behaviors</i> taken to reduce risk of unwarranted police encounter
Other Members of Society	<i>Value of living in non-discriminatory society</i> , compared to the costs of living in a discriminatory one
Police and Criminal Justice System Costs	<i>Resources wasted on socially unproductive activities</i> , including the opportunity costs of time that could have been more productively spent by police and other criminal justice agencies
	<i>Lack of trust</i> leading to higher crime rates and reduced clearance or conviction rates

As Friedman and Jánosky note, there are additional social harms to which modern policing contributes about which we need to be honest.¹⁰³ For instance, as police technologies like closed-circuit cameras equipped with facial recognition software and automated license plate readers expand their sophistication, scope, and reach, we increasingly live in “a society of panvasive surveillance.”¹⁰⁴ Such technologies “vastly erode personal privacy,” stoking governmental distrust evocative of an omnipresent “Big Brother” that is always watching.¹⁰⁵ The social costs of the militarization of police serves as another example. With negligible or no benefits to crime control,¹⁰⁶ the use of tanks and other equipment of war escalates violence and induces negative public reactions.¹⁰⁷ It is long overdue for us to be transparent about the direct, social, opportunity, and distributional costs of policing, generally, and specific tactics and strategies, in particular.¹⁰⁸

¹⁰³ Friedman & Jánosky, *supra* note 98, at 3.

¹⁰⁴ *Id.* at 29 (citing Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1723 (2014)).

¹⁰⁵ Friedman & Jánosky, *supra* note 98, at 4. *See generally* GEORGE ORWELL, 1984 (Houghton Mifflin Harcourt 2017) (1949).

¹⁰⁶ Friedman & Jánosky, *supra* note 98, at 15; *see also* Anna Gunderson et al., *Counterevidence of Crime-Reduction Effects from Federal Grants of Military Equipment to Local Police*, 5 NATURE HUM. BEHAV. 194, 199 (2021).

¹⁰⁷ *See* Friedman & Jánosky, *supra* note 98, at 16–17.

¹⁰⁸ *Id.* at 49–52.

III. STRATEGIES FOR EFFECTIVE POLICE ACCOUNTABILITY

The principles summarized in Part II represent the foundation of effective police accountability. Once that foundation is in place, accountability can be achieved and maintained through a host of strategies that touch upon all aspects of the police organization, from policy and training to supervision and reporting.¹⁰⁹ Throughout the literature on police accountability, there exists one constant thread: there is no “silver bullet,” or single best accountability mechanism that is guaranteed to eliminate problematic use of force. Rather, the optimal approach for a police department is to employ several different mechanisms both inside and outside of the police department, each playing an important role in a comprehensive package of accountability.¹¹⁰ We discuss these strategies below, though the discussion is necessarily brief given space constraints and their review elsewhere.¹¹¹

A. Careful Recruitment and Selection

The traditional recruitment and selection process hinges on a series of mechanisms designed to screen out ill-qualified applicants, such as physical tests, interviews, polygraph, a background investigation that includes criminal history and credit checks, as well as interviews of family members, neighbors, and former employers.¹¹² Well-established red flags include prior criminal behavior, a history of drug use, poor performance in prior employment, and actions displaying questionable morality, like lying on the job application.¹¹³ These “screen out” criteria are important for police departments because they can identify applicants who, if hired, would be at risk of engaging in problematic behavior. However, the recruitment and selection process should also include efforts to identify candidates with sought-after qualities who should be “screened in” to the organization. Kane and White highlighted “the importance of screening *in* or identifying potential police officers whose

¹⁰⁹ For a comprehensive review of many of these strategies, see WALKER & ARCHBOLD, *supra* note 24.

¹¹⁰ Jocelyn Cheung, *Police Accountability*, 78 POLICE J. 3, 13–19 (2005); Michael D. White, *Preventing Racially Biased Policing Through Internal and External Controls: The Comprehensive Accountability Package*, in RACE, ETHNICITY AND POLICING: NEW AND ESSENTIAL READINGS 468, 468–69 (Stephen K. Rice & Michael D. White eds., 2010).

¹¹¹ See WALKER & ARCHBOLD, *supra* note 24; WHITE & FRADELLA, *supra* note 12, at 117–45; White, *supra* note 110, at 468–84.

¹¹² William T. Jordan et al., *Attracting Females and Racial/Ethnic Minorities to Law Enforcement*, 37 J. CRIM. JUST. 333, 334 (2009); ROBERT LANGWORTHY ET AL., LAW ENFORCEMENT RECRUITMENT, SELECTION AND TRAINING: A SURVEY OF MAJOR POLICE DEPARTMENTS IN THE U.S. 26–29 (1995).

¹¹³ See David A. DeCicco, *Police Officer Candidate Assessment and Selection*, FBI L. ENFORCEMENT BULL., Dec. 2000, at 1, 2–3.

presence in police organizations may have the effect of making them better behaved.”¹¹⁴ Relevant personal attributes would include good judgment, empathy, patience, an even temperament, respect and appreciation for diversity, creativity and problem-solving skills, the ability to think on one’s feet and handle pressure, and effective leadership skills.¹¹⁵ Early research by Bittner and Muir identified many of these characteristics of “good craftsmanship” and they are still relevant today.¹¹⁶ Applicants’ personal characteristics can be assessed through standardized personality tests, participation in community service, reference-check interviews that probe for such characteristics, and in-person interviews that explore applicants’ personal attributes.¹¹⁷

B. *Effective Training*

Careful recruitment and selection must be followed by effective training. In plain terms, proper training will reduce problematic officer behavior.¹¹⁸ At the academy, the goal of training is to provide officers with the basic skills and knowledge necessary to become a police officer. Following graduation from the academy, officers are typically assigned to a veteran officer for a period of field training.¹¹⁹ This is a formative stage of a police officer’s career, and it is critically important for field training officers to impart the principles of good policing and the values of the organization.¹²⁰ The final form of training, called “in-service,” can be used to refresh officers on ethical issues, proper tactics, and to reinforce organizational values.¹²¹

In addition to the traditional components that focus on law and tactics, training should emphasize the non-criminal aspects of the mission, including homeless-

¹¹⁴ KANE & WHITE, *supra* note 31, at 105.

¹¹⁵ *Id.* at 104–05; *see also* Egon Bittner, *The Functions of the Police in Modern Society* (1971), reprinted in *POLICING: A VIEW FROM THE STREET* 32, 37–39 (Peter K. Manning & John van Maanen eds., 1978).

¹¹⁶ *See* Bittner, *supra* note 115, at 33, 37, 39; WILLIAM KER MUIR, JR., *POLICE: STREETCORNER POLITICIANS* 3–5 (1977).

¹¹⁷ Susan Hilal et al., *A Signalling Theory of Law Enforcement Hiring*, 27 *POLICING & SOC’Y* 508, 509 (2017); Taiping Ho, *The Interrelationships of Psychological Testing, Psychologists’ Recommendations, and Police Departments’ Recruitment Decisions*, 4 *POLICE Q.* 318, 337 (2001).

¹¹⁸ David Eitle et al., *The Effect of Organizational and Environmental Factors on Police Misconduct*, 17 *POLICE Q.* 103, 115 (2014).

¹¹⁹ Steven Hundersmarck, *Police Recruit Training: Facilitating Learning Between the Academy and Field Training*, FBI L. ENFORCEMENT BULL., Aug. 2009, at 26, 29.

¹²⁰ *See id.* at 29–30; Brad W. Smith, *Structural and Organizational Predictors of Homicide by Police*, 27 *POLICING* 539, 551 (2004).

¹²¹ *Police-Mental Health Collaboration (PMHC) Toolkit: In-Service and Roll-Call Training*, U.S. DEP’T OF JUSTICE, <https://bja.ojp.gov/program/pmhcltraining#training> (last visited May 26, 2021).

ness, substance abuse, and mental illness. Recent research has highlighted the effectiveness of training in crisis intervention (CIT),¹²² procedural justice,¹²³ and de-escalation.¹²⁴ Training, especially in the academy, should be expanded considerably to cover the non-crime-related aspects of the job. The number of training academy hours required to become a police officer varies considerably by state, though most require between 500 and 1,000 hours.¹²⁵

In his review of how police training can be structured to reduce violence between police and citizens, Fyfe presented a number of key recommendations: effective training must be realistic; training should be tailored to the officers' and community's needs; training must be continuous; and the adequacy of training should be assessed through examination of officers' conduct rather than incident outcomes.¹²⁶ He goes on to say:

The development of successful boxers, diplomats, combat soldiers, and trial lawyers demonstrates that maintaining one's temper under stressful and confrontational conditions is a skill that can be taught. At the broadest level, police training designed to do so may involve providing students with what Muir (1977) calls *understanding*—a nonjudgmental sense that peoples' behavior, no matter how bizarre or provocative, may usually be explained by factors that go beyond the dichotomy of good and evil. . . .

Even if genuine *understanding*, as defined by Muir, cannot be imparted to individuals who bring extremely narrow views to policing, officers can be made to know in training that they simply will not be permitted to act out their prejudices through violent, or even discourteous, conduct.¹²⁷

¹²² Randolph Dupont & Sam Cochran, *Police Response to Mental Health Emergencies—Barriers to Change*, 28 J. AM. ACAD. PSYCHIATRY & L. 338, 338 (2000); Michael S. Rogers et al., *Effectiveness of Police Crisis Intervention Training Programs*, 47 J. AM. ACAD. PSYCHIATRY & L. 414, 418 (2019).

¹²³ George Wood et al., *Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*, 117 PROC. NAT'L ACAD. SCI. 9815, 9815 (2020).

¹²⁴ David Klinger, *Can Police Training Affect the Use of Force on the Streets?: The Metro-Dade Violence Reduction Field Experiment*, in HOLDING POLICE ACCOUNTABLE, *supra* note 28, at 95–96; Kyle McLean et al., *Randomized Controlled Trial of Social Interaction Police Training*, 19 CRIMINOLOGY & PUB. POL'Y 805, 806 (2020).

¹²⁵ E.g., Holly Yan, *States Require More Training Time to Become a Barber than a Police Officer*, CNN (Sept. 28, 2016, 4:03 PM), <https://www.cnn.com/2016/09/28/us/jobs-training-police-trnd/index.html> (reporting that California requires 664 hours, Florida 770 hours, and Massachusetts 900 hours of police training). Notably, these requirements are well below the required training hours for other professions, such as a barber (1,528 hours in North Carolina) or cosmetologist (1,600 hours in California). *Id.*

¹²⁶ James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE, *supra* note 71, at 163, 167, 169, 173–74.

¹²⁷ *Id.* at 163–64.

C. *Effective Administrative Policy*

Five decades of research demonstrates the value of formal administrative policy, especially in structuring the parameters for police officers' decision-making. Policy that is clearly articulated, disseminated widely in the organization, and enforced appropriately can directly shape informal culture and change police officer behavior.¹²⁸ Walker and Archbold highlight an administrative rulemaking framework with three key features.¹²⁹ First, agencies should develop written policies that specify what is (and what is not) appropriate behavior during given circumstances.¹³⁰ Second, agencies should require officers to write a written report following a critical incident because making officers explain their decisions is an essential part of structuring discretion.¹³¹ Third, agencies should require supervisory review of critical incident reports to ensure the officer acted within policy and law.¹³² Each of these features enhances accountability by setting departmental expectations of what is appropriate and by conveying a clear message to officers that they will be required to explain their decision-making (e.g., a police officer recently explained to one of us that "C.Y.A." now stands for "can you articulate?"). The positive impacts of establishing clear policies have been demonstrated across a wide range of police behaviors including officer-involved shootings,¹³³ less-than-lethal force,¹³⁴ high-speed pur-

¹²⁸ SAMUEL E. WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CIVILIAN OVERSIGHT* 150–53 (2001).

¹²⁹ WALKER & ARCHBOLD, *supra* note 24, at 72.

¹³⁰ *Id.*

¹³¹ *Id.* at 72–73.

¹³² *Id.* at 73.

¹³³ Michael D. White, *Controlling Police Decisions to Use Deadly Force: Reexamining the Importance of Administrative Policy*, 47 CRIME & DELINQ. 131, 147–48 (2001) (finding that "policies that guide officers' behavior in earlier stages of potentially violent encounters and minimize the likelihood of nonelective deadly force decisions" would be effective policies in officer-involved shootings).

¹³⁴ GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE: OFFICERS, SUSPECTS, AND RECIPROCITY 19–22 (2004); Richard M. Hough Sr. & Kimberly M. Tatum, *An Examination of Florida Policies on Force Continuums*, 35 POLICING 39, 40 (2012); William Terrill & Eugene A. Paoline III, *Police Use of Less Lethal Force: Does Administrative Policy Matter?*, 34 JUST. Q. 193, 193 (2017).

suits,¹³⁵ use of police dogs,¹³⁶ foot pursuits,¹³⁷ and responses to domestic violence incidents.¹³⁸ The importance of policy enforcement cannot be overstated. Officers must recognize that violations of policy will have consequences. Quite simply, officers seek to avoid behavior that will get them into administrative or legal trouble.¹³⁹ Accordingly, if the informal culture of the department is defined by permissiveness and a lack of accountability when transgressions occur, the risk of excessive use of force increases dramatically.¹⁴⁰

D. Effective Supervision and Review

Supervision of police officers is a critical department task that serves as a foundational element in the agency's effort to guide and control officer behavior. Key ingredients for effective supervision include proper span of control (eight to ten officers per sergeant), proper training for supervisors (good supervision can and should be taught) and holding supervisors accountable for the behavior of their subordinates.¹⁴¹ Sergeants play a vital role in preventing and controlling officer misconduct.¹⁴² Weisburd and colleagues reported that nearly 90% of police officers surveyed agreed that effective supervision prevents misconduct.¹⁴³

¹³⁵ GEOFFREY P. ALPERT & ROGER G. DUNHAM, POLICE PURSUIT DRIVING: CONTROLLING RESPONSES TO EMERGENCY SITUATIONS 62 (1990); John R. Batiste et al., *Preventing Traffic-Related Line-of-Duty Deaths*, POLICE CHIEF, July 2011, at 52, 53–55; David P. Schultz et al., *Evidence-Based Decisions on Police Pursuits: The Officer's Perspective*, FBI L. ENFORCEMENT BULL., Mar. 2010, at 1, 1–2.

¹³⁶ See Charlie Mesloh, *Barks or Bites? The Impact of Training on Police Canine Force Outcomes*, 7 POLICE PRAC. & RES. 323, 323–25 (2006).

¹³⁷ Robert J. Kaminski et al., *Correlates of Foot Pursuit Injuries in the Los Angeles County Sheriff's Department*, 15 POLICE Q. 177, 177–78 (2012).

¹³⁸ Amanda L. Robinson & Meghan Stroshine Chandek, *Philosophy into Practice? Community Policing Units and Domestic Violence Victim Participation*, 23 POLICING 280, 280–81 (2000).

¹³⁹ Holly Campeau, *'Police Culture' at Work: Making Sense of Police Oversight*, 55 BRIT. J. CRIMINOLOGY 669, 683–84 (2015).

¹⁴⁰ See TOM COCKCROFT, POLICE CULTURE: THEMES AND CONCEPTS 86 (2012); KANE & WHITE, *supra* note 31, at 33.

¹⁴¹ See Timothy N. Oettmeier & Mary Ann WycOFF, *Personnel Performance Evaluations in the Community-Policing Context*, in POLICE AND POLICING: CONTEMPORARY ISSUES 57, 64–65, 71 (Dennis Jay Kenney & Robert P. McNamara eds., 2d ed. 1999); Joseph A. Schafer, *Developing Effective Leadership in Policing: Perils, Pitfalls, and Paths Forward*, 32 POLICING 238, 253–55 (2009).

¹⁴² Fyfe, *supra* note 126, at 164.

¹⁴³ DAVID WEISBURD ET AL., NAT'L INST. OF JUSTICE, POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY 6 (2000), <https://www.ncjrs.gov/pdffiles1/nij/181312.pdf>.

Walker and Archbold posit a broader conception of review that includes but goes beyond supervision of officers.¹⁴⁴ They argue departments should also regularly engage in review of policies, training, and administrative protocols.¹⁴⁵ Moreover, administrative review of officer behavior in critical incidents should include consideration of larger issues in training, policy, and supervision. This type of broad-level review can occur periodically, or in the wake of critical incidents via a sentinel events approach, which examines one event as “a significant, unexpected negative outcome—for example, a wrongful conviction, an erroneous release from prison or a cold case that stayed cold too long—that signals a possible weakness in the system or process.”¹⁴⁶

Police body-worn cameras (BWCs) have diffused widely in American law enforcement over the last few years, and the proliferation of the technology is driven, in large part, by concerns tied to police use of force and a lack of accountability.¹⁴⁷ Early evidence suggests BWCs have numerous benefits including reduced civilian complaints and use of force,¹⁴⁸ as well as evidentiary value in police investigations and criminal cases.¹⁴⁹ White and colleagues completed an analysis of 304 agency administrative policies governing use of BWCs, and more than 80% of agencies allow supervisors to review the BWC footage of their subordinates for administrative, compliance, and performance review purposes.¹⁵⁰ This technology offers a

¹⁴⁴ WALKER & ARCHBOLD, *supra* note 24, at 22.

¹⁴⁵ *Id.*

¹⁴⁶ Doyle, *supra* note 77, at 11.

¹⁴⁷ White, *supra* note 87, at 13.

¹⁴⁸ MICHAEL D. WHITE & AILI MALM, COPS, CAMERAS, AND CRISIS: THE POTENTIAL AND THE PERILS OF POLICE BODY-WORN CAMERAS 9 (2020); Barak Ariel et al., *Using Wearable Technology to Increase Police Legitimacy in Uruguay: The Case of Body-Worn Cameras*, 45 LAW & SOC. INQUIRY 52, 54, 59 (2020); Wesley G. Jennings et al., *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs) on Response-to-Resistance and Serious External Complaints: Evidence from the Orlando Police Department (OPD) Experience Utilizing a Randomized Controlled Experiment*, 43 J. CRIM. JUST. 480, 483–84 (2015).

¹⁴⁹ CATHERINE OWENS ET AL., U.K. COLL. OF POLICING, THE ESSEX BODY WORN VIDEO TRIAL: THE IMPACT OF BODY WORN VIDEO ON CRIMINAL JUSTICE OUTCOMES OF DOMESTIC ABUSE INCIDENTS 16–17 (2014), <http://library.college.police.uk/docs/college-of-policing/Body-worn-video-trial-2014.pdf>; Weston J. Morrow et al., *Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence*, 19 POLICE Q. 303, 316–17 (2016).

¹⁵⁰ MICHAEL D. WHITE ET AL., KEY TRENDS IN BODY-WORN CAMERA POLICY AND PRACTICE: A FOUR-YEAR POLICY ANALYSIS OF US DEPARTMENT OF JUSTICE-FUNDED LAW ENFORCEMENT AGENCIES 2–3 (2019), https://bwcta.com/sites/default/files/inline-files/BWC%20Policy%20Analysis%20-%204th%20edition%20FINAL.Dec_.2019.pdf; see also Michael D. White & Henry F. Fradella, *The Intersection of Law, Policy, and Police Body-Worn Cameras: An Exploration of Critical Issues*, 96 N.C. L. REV. 1579, 1635–36 (2018).

promising mechanism for supervisors to monitor officers' behavior, and respond accordingly when unnecessary or excessive use of force occurs.

E. A Proactive Internal Affairs Unit

An Internal Affairs (IA) unit plays a crucial role in establishing police accountability. The traditional IA unit is almost entirely reactive; IA detectives open an investigation only after a complaint has been lodged or there are circumstances in which department policy calls for an inquiry into an officer's actions.¹⁵¹ This type of internal reactive policing is essential, but there are several ways in which an IA Unit can more proactively contribute to effective accountability in a police department.

First, there are many instances where an officer is suspected of problematic behavior, but the evidence is not sufficient to draw definitive conclusions.¹⁵² In cases where problematic behavior is suspected, IA detectives can devise an "integrity test" to proactively target potential misconduct.¹⁵³ The integrity test provides an officer who is suspected of misbehavior with a staged opportunity to engage in misconduct. Peer comparisons are also useful in the investigation of problematic behavior,¹⁵⁴ and IA can lead this effort. An analysis of use of force among peer officers who work in similar areas or shifts with the same assignment should identify outliers—those who are far above the group average for the activity of interest. Further investigation can then determine if an officer has a legitimate reason for being an outlier or if there is problematic behavior occurring.

Moreover, many complaints against officers are not sustained because there is no corroborating evidence either way: the complainant alleges the officer did or said something, the officer denies it, and there is no evidence to support either claim.¹⁵⁵ But complaints that are not sustained still represent important information about an officer's performance, especially if there are patterns of alleged misbehavior.¹⁵⁶ For example, Derek Chauvin, the Minneapolis police officer who killed George Floyd by kneeling on his neck for over nine minutes, had eighteen complaints filed

¹⁵¹ See James P. McElvain & Augustine J. Kposowa, *Police Officer Characteristics and Internal Affairs Investigations for Use of Force Allegations*, 32 J. CRIM. JUST. 265, 265–66 (2004).

¹⁵² E.g., Ashley Southall et al., *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished.*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html>.

¹⁵³ Tim Prenzler & Carol Ronken, *Police Integrity Testing in Australia*, 1 CRIMINOLOGY & CRIM. JUST. 319, 321 (2001).

¹⁵⁴ David I. Ashby, *Policing Neighbourhoods: Exploring the Geographies of Crime, Policing and Performance Assessment*, 15 POLICING & SOC'Y 413, 435–41 (2005).

¹⁵⁵ WALKER & ARCHBOLD, *supra* note 24, at 153.

¹⁵⁶ *Id.* at 161.

against him over his nineteen-year career, though only two resulted in discipline.¹⁵⁷ Chauvin's long history of complaints, regardless of whether or not they were sustained, were a series of red flags about potentially problematic behavior that should have been investigated. A proactive IA unit can engage in this sort of pattern analysis to identify officers who are using force unnecessarily or excessively.

F. Accessible Civilian Complaint Process

Building on the previous point about complaints, effective police accountability is grounded in the notion that civilians should have a simple, accessible mechanism for filing complaints against officers.¹⁵⁸ In the past, investigations have often found that misconduct-prone agencies ignore or actively obstruct citizens who seek to file complaints.¹⁵⁹ For example, Rodney King's brother attempted to file a complaint at the Foothill station of the Los Angeles Police Department the day after King was beaten and arrested. He was turned away by the desk sergeant.¹⁶⁰ George Holliday was similarly dismissed by the LAPD when he offered to hand over the video tape of the Rodney King beating.¹⁶¹ When he was turned away, his next stop was the local television station down the street.¹⁶² Walker and Archbold argue an effective citizen complaint process is defined by openness and transparency.¹⁶³ Kerstetter applied a procedural justice lens to investigation of citizen complaints, noting the process should feature "perceived fairness . . . a substantial opportunity for the parties to provide information and express views . . . a credible decision maker . . . [and] indications that the decision maker gave due consideration to both sides of the dispute."¹⁶⁴

Law enforcement agencies vary widely in terms of how citizen complaints are investigated. In many cases, the IA unit receives, investigates, and adjudicates complaints.¹⁶⁵ Some agencies have an external citizen oversight board that receives, and

¹⁵⁷ Michelle Mark, *18 Complaints in 19 Years, and a Murder Charge: What We Know About Ex-Minneapolis Police Officer Derek Chauvin*, BUS. INSIDER: AUSTL. (June 10, 2020, 3:46 AM), <https://www.businessinsider.com.au/derek-chauvin-minneapolis-police-background-life-2020-6>.

¹⁵⁸ See SKOLNICK & FYFE, *supra* note 14, at 231.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.* at 3.

¹⁶² *Id.*

¹⁶³ WALKER & ARCHBOLD, *supra* note 24, at 141.

¹⁶⁴ Wayne A. Kerstetter, *A "Procedural Justice" Perspective on Police and Civilian Satisfaction with Investigations of Police Use of Force: Finding a Common Ground of Fairness*, in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE, *supra* note 71, at 223, 230–31.

¹⁶⁵ WALKER & ARCHBOLD, *supra* note 24, at 140–41.

in some cases, investigates complaints.¹⁶⁶ Walker describes a range of different citizen oversight models that vary by investigatory authority, subpoena power, and independence from the police department.¹⁶⁷ Regardless of the mechanism (e.g., internal or external to the police department), the process should be defined by openness, integrity, and accountability.

G. Non-Punitive Early Intervention System

An early intervention (EI) system is a sophisticated computerized program designed to identify officers who may be engaged in questionable conduct.¹⁶⁸ The EI system relies on a series of pre-determined “red flags” that represent threshold levels of risky outcomes.¹⁶⁹ Though departments vary widely with regard to what is considered a red flag,¹⁷⁰ use of force reports, citizen complaints, frequency of high-speed chases, and civil litigation have been identified as some of the more common red flags.¹⁷¹ When an officer is flagged, a supervisor is notified to investigate and determine if there is a reasonable explanation, or if the officer is indeed engaged in problematic activities. If problematic behavior is identified, the supervisor then delivers or assigns a non-punitive intervention to address the behavior, such as training, peer mentoring, or referral to services (e.g., marital counseling).¹⁷² Continued monitoring by the supervisor ensures that the problematic behavior has stopped. Walker and Archbold note that EI systems have emerged as a “best practice” in policing.¹⁷³ In 2001, the Commission on Accreditation for Law Enforcement Agencies (CALEA) adopted EI systems as a required component of their accreditation process:

A comprehensive Personnel Early Warning System is an essential component of good discipline in a well-managed law enforcement agency. The early identification of potential problem employees and a menu of remedial actions can

¹⁶⁶ *Id.* at 142.

¹⁶⁷ See WALKER, *supra* note 127, at 151.

¹⁶⁸ Geoffrey P. Alpert & Samuel Walker, *Police Accountability and Early Warning Systems: Developing Policies and Programs*, 29 JUST. RES. & POL'Y 59, 60 (2000); Christopher J. Harris, *Towards a Career View of Police Misconduct*, 31 AGGRESSION & VIOLENT BEHAV. 219, 220 (2016).

¹⁶⁹ WALKER & ARCHBOLD, *supra* note 24, at 178, 185–86.

¹⁷⁰ See John A. Shjarback, *Early Intervention Systems*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 655, 656 (Roger G. Dunham et al. eds., 8th ed. 2021) (discussing examples of different “red flags” in police departments).

¹⁷¹ SAMUEL WALKER ET AL., RESPONDING TO THE PROBLEM POLICE OFFICER: A NATIONAL STUDY OF EARLY WARNING SYSTEMS 1.7 (2000), <https://www.ncjrs.gov/pdffiles1/nij/188565.pdf>.

¹⁷² Alpert & Walker, *supra* note 168, at 66.

¹⁷³ WALKER & ARCHBOLD, *supra* note 24, at 180.

increase agency accountability and offer employees a better opportunity to meet the agency's values and mission statement.¹⁷⁴

EI systems have also been the centerpiece of reforms required by the U.S. Department of Justice's Civil Rights Division in litigation against police departments under Section 210401 of the Violent Crime Control and Law Enforcement Act of 1994¹⁷⁵ and associated consent decrees.¹⁷⁶

EI systems are complex, difficult to maintain, and do not guarantee results. For example, the Minneapolis Police Department has had an EI system in place since 2009 but it failed to identify Derek Chauvin.¹⁷⁷ Moreover, the research on EI systems is mixed. Walker and colleagues evaluated EI systems in the Miami-Dade Police Department, the Minneapolis Police Department, and the New Orleans Police Department and found that use of force and complaints dropped for officers who were flagged and received an EI intervention.¹⁷⁸ Other studies have found an EI system may also lead to officers becoming less proactive.¹⁷⁹ Shjarback reported some positive effects among agencies which were required to implement an EI system, but concluded the "effectiveness of EI systems may have been overstated."¹⁸⁰ Christi L. Gullion and William R. King recently completed a state-of-the-art review of EI systems.¹⁸¹ They identified eight studies and noted that the majority reported that the EI system led to reductions in use of force and/or complaints, though they noted a few studies found no effect and more research is needed.¹⁸² Overall, they conclude "[a]n effective EI system can be a valuable supervisory and accountability tool for a police organization."¹⁸³

¹⁷⁴ CALEA LAW ENFORCEMENT AGENCY STANDARDS § 35.1.9 cmt. (COMM'N ON LAW ENF'T AGENCIES 2006).

¹⁷⁵ Pub. L. No. 103-322, 108 Stat. 2071 (1994) was originally codified at 42 U.S.C. § 14141 (2012). As a result, civil actions filed by the U.S. Attorney General pursuant to it have long been referred to as "Section 14141" actions. Effective in September of 2017, the provision was reclassified at 34 U.S.C. § 12601 (2018).

¹⁷⁶ See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 18–19 (2009).

¹⁷⁷ See Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>.

¹⁷⁸ SAMUEL WALKER ET AL., NAT'L INST. OF JUSTICE, *EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER 2* (2001).

¹⁷⁹ Robert E. Worden et al., *Intervention with Problem Officers: An Outcome Evaluation of an EIS Intervention*, 40 CRIM. JUST. & BEHAV. 409, 415 (2013).

¹⁸⁰ John A. Shjarback, *Emerging Early Intervention Systems: An Agency-Specific Pre-Post Comparison of Formal Citizen Complaints of Use of Force*, 9 POLICING 314, 314, 316–17 (2015).

¹⁸¹ Christi L. Gullion & William R. King, *Early Intervention Systems for Police: A State-of-the-Art Review*, 43 POLICING 643, 644 (2020).

¹⁸² *Id.* at 649–51.

¹⁸³ *Id.* at 653.

H. External Oversight

External oversight of a police department can take many forms, from a citizen oversight board to a full-time, permanent auditor.¹⁸⁴ It is widely recognized that some form of external oversight of the police accomplishes several important objectives, the first of which is transparency. Skolnick and Fyfe state “a strong case can be made for civilian review based primarily on the notion that police cannot be impartial when investigating other police, and even when they are, they are unlikely to be credible.”¹⁸⁵ Indeed, the perception of bias can undermine police investigations of officer misconduct, especially in jurisdictions where police-community relations are strained.¹⁸⁶

Nevertheless, there are numerous challenges associated with citizen oversight of the police, such as concerns about the qualifications (or lack thereof) for those who serve on an oversight board, the cooperation between the board and the police department, the authority of the board to investigate complaints and recommend discipline, and the responsiveness of the police department to board recommendations.¹⁸⁷ Walker and Archbold advocate for the auditor model of oversight because it overcomes many of the limitations with traditional citizen oversight.¹⁸⁸ Under this model, one individual (or office) with some degree of legal and/or policing expertise serves as a full-time independent auditor.¹⁸⁹ Auditors are typically permanent positions created by local or state law, and in most cases, they have much greater authority than the more traditional citizen oversight board.¹⁹⁰ Auditors often focus on organizational level processes rather than individual complaints.¹⁹¹ Specific functions of the auditor can include auditing the complaint process (how civilian complaints are received and investigated), auditing police operations and policy (use of the TASER; activation of BWCs), engaging in community outreach (serving as a liaison between police and civilians), and contributing to transparency (publishing reports that detail the activities of the auditor).¹⁹² There are about a dozen police

¹⁸⁴ Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 159–63 (2003); White, *supra* note 110, at 481–82.

¹⁸⁵ SKOLNICK & FYFE, *supra* note 14, at 227.

¹⁸⁶ Tammy Landau, *When Police Investigate Police: A View from Complainants*, 38 CANADIAN J. CRIMINOLOGY 291, 292–93 (1996).

¹⁸⁷ See Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 11–12 (2009).

¹⁸⁸ See WALKER & ARCHBOLD, *supra* note 24, at 231; see also Clarke, *supra* note 186, at 11.

¹⁸⁹ WALKER & ARCHBOLD, *supra* note 24, at 214; see also Clarke, *supra* note 186, at 17–19.

¹⁹⁰ WALKER & ARCHBOLD, *supra* note 24, at 216.

¹⁹¹ *Id.*

¹⁹² *Id.* at 216–19.

auditors throughout the United States, and the experiences in many of those jurisdictions highlight the model's effectiveness as an accountability mechanism.¹⁹³

IV. THE PRIMARY BARRIERS TO EFFECTIVE POLICE ACCOUNTABILITY

The principles and strategies described above represent the ingredient list for effective police accountability. We also believe there are no surprises on this list. In fact, many of these principles and strategies have continually appeared in the recommendations of blue-ribbon panels examining the police over the last 50 years, from the President's Commission on Law Enforcement and the Administration of Justice in 1968¹⁹⁴ and the Knapp Commission in 1972¹⁹⁵ to the President's Task Force on 21st Century Policing in 2015.¹⁹⁶ If these principles and strategies are known, why do we continue to witness horrific cases of police brutality and excessive force? Former President Obama is correct: "[t]his shouldn't be 'normal' in 2020 America."¹⁹⁷

History demonstrates that these principles and strategies are very difficult to implement and maintain in a police department. There are structural features of the police profession in the United States that contribute to the difficulty of maintaining accountability, from the tremendous fragmentation of an industry with nearly 18,000 different law enforcement agencies¹⁹⁸ and an impossibly vague and broad mandate,¹⁹⁹ to the longstanding and persistent undercurrent of racial injustice that can be traced back to the origins of the profession.²⁰⁰ The structural features are deep-seated, and in some cases, nearly impossible to change. But there are also other impediments to reform that are less intransigent and can be directly addressed. Below we highlight some of the strongest barriers to effective police accountability, along with our thoughts about overcoming them.²⁰¹

¹⁹³ White, *supra* note 110, at 482. For more information, see INT'L L. ENFORCEMENT AUDITORS ASS'N, <https://ileaa.org/> (last visited May 26, 2021).

¹⁹⁴ See KERNER REPORT, *supra* note 1.

¹⁹⁵ See KNAPP REPORT, *supra* note 70.

¹⁹⁶ See TASK FORCE REPORT, *supra* note 14.

¹⁹⁷ Obama, *supra* note 3.

¹⁹⁸ DUREN BANKS ET AL., U.S. DEP'T OF JUSTICE, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), <https://www.bjs.gov/content/pub/pdf/nslead.pdf>.

¹⁹⁹ Peter K. Manning, *The Police: Mandate, Strategies, and Appearances*, in *POLICING: A VIEW FROM THE STREET*, *supra* note 115, at 7, 12.

²⁰⁰ See *supra* note 12.

²⁰¹ There are other barriers to police reform, but here the focus is on those we believe are the most prevalent and persistent. These barriers likely vary significantly by agency.

A. *Police Subculture*

There is an extensive body of research on the existence of a police subculture and the power of that subculture in determining the informal norms of a police department.²⁰² Skolnick described a police “working personality” defined by several occupational attributes including an emphasis on danger, solidarity among police, and isolation from citizens.²⁰³ Kappeler and colleagues outlined a police worldview defined by an “us v. them” mentality, strong cultural themes (emphasizing bravery, autonomy, secrecy), an acculturation process that teaches those themes, and an elaborate set of rules or postulates that govern the subculture.²⁰⁴

The police subculture often resists change and can be a strong barrier to reform. Guyot equated organizational change in policing to “bending granite.”²⁰⁵ Skolnick and Fyfe maintained that subculture, especially the “cops as soldiers” philosophy, has deepened the divide between police and citizens, and that it contributes to police excessive use of force.²⁰⁶ The division between police and citizens has been further exacerbated by the recent perceived “war on cops.”²⁰⁷ The President’s Task Force on 21st Century Policing acknowledged the power of culture:

There’s an old saying, “Organizational culture eats policy for lunch.” Any law enforcement organization can make great rules and policies that emphasize the guardian role, but if policies conflict with the existing culture, they will not be institutionalized and behavior will not change. In police work, the vast majority of an officer’s work is done independently outside the immediate oversight of a supervisor. But consistent enforcement of rules that conflict with a military-style culture, where obedience to the chain of command is the norm, is nearly impossible. Behavior is more likely to conform to culture than rules.²⁰⁸

The Task Force report discusses how culture can be aligned with the values of the organization, primarily through adoption of a guardian mindset and procedural

²⁰² E.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 6 (1966); SKOLNICK & FYFE, *supra* note 14, at 112; Jason R. Ingram et al., *A Multilevel Framework for Understanding Police Culture: The Role of the Workgroup*, 51 *CRIMINOLOGY* 365, 366–68 (2013).

²⁰³ SKOLNICK, *supra* note 202, at 42, 52–58.

²⁰⁴ VICTOR E. KAPPELER ET AL., *FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING* 89–107 (2d ed. 1998).

²⁰⁵ Dorothy Guyot, *Bending Granite: Attempts to Change the Rank Structure of American Police Departments*, 7 *J. POLICE SCI. & ADMIN.* 253, 253 (1979).

²⁰⁶ SKOLNICK & FYFE, *supra* note 14, at 113–16.

²⁰⁷ HEATHER MAC DONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* 3–4 (2016); Michael D. White, *Ambush Killings of the Police, 1970–2018: A Longitudinal Examination of the “War on Cops” Debate*, 23 *POLICE Q.* 451, 452–53 (2020).

²⁰⁸ TASK FORCE REPORT, *supra* note 14, at 11–12.

justice as guiding principles and abandonment of the “cops as soldiers” mentality.²⁰⁹ In addition to the principles and strategies outlined here, we also believe that increasing the racial, ethnic, gender, and sexual orientation diversity of a department can break down the negative aspects of police subculture. For years, there have been calls for police to be more representative of the communities they serve.²¹⁰ There are a number of reasons why diversity in police departments is emphasized, most notably the perceived link between under-representation and tense, long-term conflict between police and minority communities.²¹¹ Moreover, many believe that increasing the diversity of the police force will enhance police legitimacy, which will ultimately increase community cooperation and police effectiveness.²¹²

We believe increased minority and female representation can also weaken the predominantly White male police subculture. Though some researchers have questioned this idea,²¹³ others have argued that diversity in the workforce is central to effective police reform. In 2015, the Civil Rights Division of the U.S. Department of Justice and the Equal Employment Opportunity Commission (EEOC) created an “Advancing Diversity in Law Enforcement” initiative, noting that:

Research further suggests that increased diversity can make law enforcement agencies more open to reform, more willing to initiate cultural and systemic changes, and more responsive to the residents they serve. Some have pointed to increased diversity as a catalyst for reform, enabling officers and law enforcement leaders alike to become more introspective and reflective about problems in their departments.²¹⁴

²⁰⁹ *Id.* at 11.

²¹⁰ *E.g.*, KERNER REPORT, *supra* note 1, at 165–66, 329–33. For a discussion of why it is important to have police departments that mirror the diversity of their communities, see Mike Maciag, *Where Police Don’t Mirror Communities and Why It Matters*, GOVERNING (Aug. 28, 2015), <https://www.governing.com/topics/public-justice-safety/gov-police-department-diversity.html>.

²¹¹ SKOLNICK & FYFE, *supra* note 14, at 240–41.

²¹² NAT’L RES. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 312–14 (Wesley Skogan & Kathleen Frydl eds., 2004).

²¹³ Eugene A. Paoline, III et al., *Police Culture, Individualism, and Community Policing: Evidence from Two Police Departments*, 17 JUST. Q. 575, 577 (2000); *see also* Jennifer Cobbina, *Is Hiring More Black Officers the Key to Reducing Police Violence?*, U.S. NEWS & WORLD REP. (Feb. 5, 2020), <https://www.usnews.com/news/cities/articles/2020-02-05/is-hiring-more-black-officers-the-key-to-reducing-police-violence>.

²¹⁴ U.S. DEP’T OF JUSTICE & EQUAL EMP’T OPPORTUNITY COMM’N, ADVANCING DIVERSITY IN LAW ENFORCEMENT ii (2016), <https://www.justice.gov/crt/case-document/file/900761/download>.

Though the diversity of police departments has increased over time, national data from 2016 indicate that only 12% of officers were female and 24% were Hispanic or Black.²¹⁵ Clearly, there is more work to be done in this area, and some innovative police leaders have identified key steps to achieving a more diverse workforce.²¹⁶

B. *Poor Leadership*

Police accountability hinges on strong, effective leadership. The chief sets the tone for the entire organization, not only through the creation and enforcement of formal rules, but also by influencing the informal norms of the department. When the informal norms of the department support or tolerate excessive use of force and those who engage in it go unpunished, formal administrative policies become meaningless. Darryl Gates in Los Angeles, Frank Rizzo in Philadelphia, and Harold Breier in Milwaukee demonstrate how attitudes of the chief can send a message to line staff that abusive conduct is acceptable.²¹⁷ Alternatively, after a major corruption scandal in the NYPD during the 1970s, Patrick Murphy was appointed Police Commissioner.²¹⁸ Skolnick and Fyfe note: “Murphy used his three and a half years in office to create an environment that loudly and clearly condemned abusive police conduct, those who engage in it, and—equally important—those who *tolerate* it.”²¹⁹ The Mollen Commission concluded in their investigation of misconduct in the NYPD that “commitment to integrity cannot be just an abstract value. It must be reflected not only in the words, but in the deeds, of the Police Commissioner.”²²⁰

Regrettably, poor leadership still exists today. Under Sheriff Joe Arpaio, the Maricopa County Sheriff's Office engaged in widespread, unconstitutional racial profiling, leading to federal court oversight of the organization, a criminal contempt of court conviction for Arpaio in 2017 and nearly \$178 million in legal and compliance costs.²²¹ The investigation by the U.S. Department of Justice's Civil Rights

²¹⁵ SHELLEY S. HYLAND & ELIZABETH DAVIS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 5–6 (2019), <https://www.bjs.gov/content/pub/pdf/lpd16p.pdf>.

²¹⁶ Patrick Oliver, *Creating a Multicultural Law Enforcement Agency: An Intentional Priority*, POLICE CHIEF ONLINE (Mar. 8, 2017), <https://www.policechiefmagazine.org/creating-a-multicultural-law-enforcement-agency/>.

²¹⁷ SKOLNICK & FYFE, *supra* note 14, at 138–45.

²¹⁸ *Id.* at 178–79.

²¹⁹ *Id.* at 180.

²²⁰ COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT (1994), *reprinted in* 6 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894–1994, at 112 (Gabriel J. Chin ed., 1997).

²²¹ Jacques Billeaud, *Taxpayer Bill from Arpaio's Profiling Case Will Reach \$178M*, U.S. NEWS & WORLD REP. (May 22, 2020), <https://www.usnews.com/news/best-states/arizona/>

Division into the Ferguson, Missouri Police Department found the department was engaged in a pattern or practice of unlawful conduct that violated citizens' constitutional rights, and much of the unlawful conduct was driven through revenue generation sought by city leaders and the chief of police.²²² "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing."²²³ For instance, when one commander attempted to discipline an officer for over-ticketing, Chief Thomas Jackson responded "[n]o discipline for doing your job."²²⁴ The report also noted the unlawful conduct extended to use of force:

Force frequently is not reported. When it is, there is rarely any meaningful review. Supervisors do little to no investigation; either do not understand or choose not to follow FPD's use-of-force policy in analyzing officer conduct; rarely correct officer misconduct when they find it; and do not see the patterns of abuse that are evident when viewing these incidents in the aggregate. While Chief Jackson implemented new department policies when he joined FPD in 2010, including on use-of-force reporting and review, these policies are routinely ignored.²²⁵

In contrast to Arpaio and Jackson, police executives who embrace the principles and strategies outlined in this Article will send a clear message to their line officers about accountability. It is incumbent upon city leaders, activist groups, citizens, and police officers themselves, to demand effective leadership.

C. Unions and Civil Service as an Impediment to Reform

Police unions play a "powerful role" at the micro-level by shielding "bad apples" who engage in specific instances of misconduct.²²⁶ But unions also serve as

articles/2020-05-22/taxpayer-bill-from-arpaio's-profiling-case-will-reach-178m; Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR: TWO-WAY (July 31, 2017, 4:08 PM), <https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt>.

²²² CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

²²³ *Id.*

²²⁴ *Id.* at 12.

²²⁵ *Id.* at 38.

²²⁶ Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 109 (2017); see also Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 187 (2005); Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1340–41 (2020).

major obstacles to macro-level, systemic policing reform.²²⁷ In fact, collective bargaining agreements specify grievance procedures that not only complicate the discipline of misbehaving officers,²²⁸ but also frustrate other forms of police accountability.²²⁹ The latter is accomplished in two distinct ways—by contractual provisions purposefully designed to prevent changes to the status quo and by the political and public relations positions that police unions take in opposition to reform efforts.²³⁰ For instance, “police unions have resisted and have been quick to throw their weight behind politics and policies that appear to exacerbate racial tensions and the likelihood of violence.”²³¹ Sometimes they even use mass media and social media to stake out positions that defend police actions and policies that ought to be indefensible, such as when the police union in Cleveland criticized Tamir Rice, the 12-year-old whom a police rookie killed by firing two shots into the child’s back while he played with a BB gun at a neighborhood park.²³² But even when not responding to specific controversies, it is indisputable that the Fraternal Order of Police, both nationally and locally, has been stridently opposed to reform initiatives and vocally supportive of “politicians and policies hostile to criminal justice reform and racial justice.”²³³

Some have called for the elimination of police unions.²³⁴ Others reject abolition, but nonetheless call for a major overhaul of police unions.²³⁵ We join the latter group—and not simply because there is value in supporting public sector unions

²²⁷ Harmon, *supra* note 97, at 799; Levin, *supra* note 226, at 1340–41.

²²⁸ Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1198 (2017) (analyzing more than 175 police collective bargaining agreements and concluding that “a substantial number . . . unreasonably interfere with or otherwise limit the effectiveness of mechanisms designed to hold police officers accountable for their actions”); *see also* Nick Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability*, 52 U.S.F. L. REV. 275 (2018) (detailing how so-called “Bills of Rights” for law enforcement officers in Baltimore, Chicago, and Cleveland worked to protect the officers involved in the killings of Freddie Gray, Laquan McDonald, and Tamir Rice, respectively).

²²⁹ Levin, *supra* note 226, at 1341–42; Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 859, 870–72 (2019).

²³⁰ Levin, *supra* note 226, at 1342–48.

²³¹ *Id.* at 1347.

²³² *Id.* at 1349–50; *see also* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747–49 (2017) (discussing the “zeal and leverage” with which police unions in many U.S. cities have publicly come to the defense of officers accused of killing civilians, even in cases of clear-cut officer wrongdoing).

²³³ Levin, *supra* note 226, at 1352.

²³⁴ *See* Paul Butler, *The Fraternal Order of Police Must Go*, NATION (Oct. 11, 2017), <https://www.thenation.com/article/archive/the-fraternal-order-of-police-must-go/>; Jeff Jacoby, *Don’t Reform Police Unions. Abolish Them*, BOS. GLOBE (June 16, 2020, 3:23 PM), <https://www.bostonglobe.com/2020/06/16/opinion/dont-reform-police-unions-abolish-them/>.

²³⁵ Bies, *supra* note 226, at 112–13; Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 997 (2017).

given their mission for supporting the rights of labor. But as Levin argues, police unions are different from other public employee unions for a host of reasons.²³⁶ Still, we believe that they can be a part of the solution.

In theory, police unions could be agents of reform in at least two ways. First, as representatives of the line officers who have daily contact with the community whom the police are supposed to protect and serve, unions could help improve the relationship between police and citizens, and help ensure that force is used wisely and prudently, and that arrests are made and citations issued only when doing so actually improves life for the community. Second, unions could become intermediaries to convey the concerns of line personnel to management in a way that will improve policing. But to do either of those, unions would have to develop genuine and sustained enthusiasm for improving the quality of policing.²³⁷

Although there are examples of police unions cooperating with select policing reforms,²³⁸ they need to go further.

For the sake of increasing police legitimacy, improving police-community relations, and decreasing many of the social costs of policing, unions should embrace the strategies outlined in Part II.²³⁹ Their own self-interests are at stake, as evidenced by the backlash against the head of the police union in Minneapolis following the police killing of George Floyd, and the police chief's subsequent withdrawal from contract talks with the union to seek ways to increase "transparency and accountability."²⁴⁰ If unions persist in refusing to embrace meaningful reforms, then we endorse Brian Mogck's proposal that federal legislation be enacted requiring effective accountability measures in collective bargaining agreements as a condition for police unions to maintain their tax-exempt status, similar to the way that Congress imposed the loss of such status on racially discriminatory social clubs.²⁴¹

²³⁶ Levin, *supra* note 226, at 1354–87.

²³⁷ Fisk & Richardson, *supra* note 232, at 759.

²³⁸ *Id.* at 759–66.

²³⁹ See *supra* notes 109–193 and accompanying text; see also Moran, *supra* note 235, at 993–1003 (advocating for many of these same strategies).

²⁴⁰ David Schaper, *Calls for Reform Put Minneapolis Police Union Leader in Hot Seat*, NPR (June 13, 2020, 10:25 PM), <https://www.npr.org/2020/06/13/876640607/calls-for-reform-put-minneapolis-police-union-leader-in-hot-seat>.

²⁴¹ Brian Mogck, *A Proposal for Police Reform: Require Effective Accountability Measures in Police Union Contracts as a Condition of Tax-Exempt Status*, U. CHI. L. REV. ONLINE (Aug. 7, 2020), <https://lawreviewblog.uchicago.edu/2020/08/07/police-unions-mogck/> (discussing 26 U.S.C. § 501(i) (2018)).

D. Two Recent Troubling Developments

The aforementioned barriers to effective police accountability have a long history, but there are two recent developments that represent serious new threats to reform. First, the U.S. Department of Justice under the Trump Administration all but abdicated its responsibilities in facilitating police reform. Second, far too many police executives who have championed innovative reforms in their departments have either lost their jobs or resigned during recent periods of unrest. The following subsections explore these two phenomena in more detail.

1. *Decrease in 34 U.S.C. § 12601 (Formerly 42 U.S.C. § 14141) Oversight*

The Trump administration's abandonment of federal investigations and oversight authorized by 34 U.S.C. § 12601 is very troubling.²⁴² This statute gives the U.S. Attorney General the authority to initiate structural reform litigation against a police department to mandate the adoption of management, policy, and procedural reforms—via consent decree—when a department has been found to have engaged in “a ‘pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.’”²⁴³ Since 1997, the Special Litigation Section of Civil Rights Division has conducted nearly 70 formal investigations and entered into 40 reform agreements.²⁴⁴ The Trump administration moved quickly to greatly reduce the use of this statutory provision in federal investigations of local police departments, arguing that policing should be left to local authorities, and that the mechanism was applied overzealously by the Civil Rights Division under the Obama administration.²⁴⁵

²⁴² For a more in-depth discussion, see Stephen Rushin, *Police Reform During the Trump Administration*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/police-reform-during-the-trump-administration/>.

²⁴³ Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 493 (2008) (citing 42 U.S.C. § 14141 (2000)).

²⁴⁴ CIVIL RIGHTS DIV., *supra* note 94, at 3; see also *Conduct of Law Enforcement Agencies*, U.S. DEP'T JUSTICE (Sept. 14, 2017), <https://www.justice.gov/crt/conduct-law-enforcement-agencies>.

²⁴⁵ See Ed Pilkington, *Trump's Scrapping of Obama-Era Reforms Hinders Police Reform*, GUARDIAN (June 7, 2020, 4:00 PM), <https://www.theguardian.com/us-news/2020/jun/07/police-consent-decrees-trump-administration-oversight>. The Trump Administration has also fundamentally altered “collaborative reform,” a voluntary program developed during the Obama administration and managed by the Office of Community Oriented Policing Services. Steve Eder et al., *How Trump's Hands-Off Approach to Policing Is Frustrating Some Chiefs*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/trump-justice-department-police.html>. As originally conceived, the program “advances police reform by undertaking assessments of a law enforcement agency's operations, providing recommendations for reform, and assisting the agency in implementing those reforms.” CIVIL RIGHTS DIV., *supra* note 94, at 50. But in September 2017, “the Justice Department announced it would significantly scale back the program, known

Former Attorney General Jeff Sessions has drastically limited the ability of federal law enforcement officials to use court-enforced agreements to overhaul local police departments accused of abuses and civil rights violations, the Justice Department announced on Thursday. . . . The move means that the decrees, used aggressively by Obama-era Justice Department officials to fight police abuses, will be more difficult to enact.²⁴⁶

The shift away from federal oversight via 34 U.S.C. § 12601 continued under Attorney General William Barr, leading some critics to argue that the move has been “severely hampering efforts to heal the wounds of the police killing of George Floyd and the ongoing protests convulsing the country.”²⁴⁷

Though prior research on the long-term impact of consent decrees has been mixed,²⁴⁸ most policing and legal scholars view the mechanism as a vital component to effective police accountability.²⁴⁹ In his comprehensive review of Civil Rights Division work, Walker concluded, “[i]n the end, the DOJ pattern or practice program has achieved significant reforms in most of the departments where consent decrees or other settlements were achieved. . . . Most important, the program has defined the basic requirements for constitutional and bias-free policing, including a set of ‘best practices.’”²⁵⁰

The Trump administration’s decision to abandon federal oversight through 34 U.S.C. § 12601 short-circuited a critically important mechanism of external accountability that can impose necessary reforms on local police departments, thereby protecting the lives and constitutional rights of citizens.

as the collaborative reform initiative, and reorient it toward more hands-off ‘technical assistance.’” Eder et al., *supra*.

²⁴⁶ Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html>.

²⁴⁷ Pilkington, *supra* note 245.

²⁴⁸ Compare ROBERT C. DAVIS ET AL., FEDERAL INTERVENTION IN LOCAL POLICING: PITTSBURGH’S EXPERIENCE WITH A CONSENT DECREE 35 (2005) (reporting how successfully the consent decree process worked to improve policing in Pittsburgh), with Joshua M. Chanin, *Examining the Sustainability of Pattern or Practice Police Misconduct Reform*, 18 POLICE Q. 163, 163 (2014) (reporting that although consent decree reforms generate desirable outcomes during the period of oversight, “[s]ustaining these reforms after the settlement agreement is dissolved, however, has proved a challenge” for several cities, including Pittsburgh, PA; Washington, DC; and Cincinnati, OH).

²⁴⁹ See, e.g., Michael D. White et al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 45–60 (2016) (reporting success in curbing stop-and-frisk abuses in the wake of a court-supervised settlement agreement with the NYPD).

²⁵⁰ Samuel Walker, *Twenty Years of DOJ “Pattern or Practice” Investigations of Local Police: Achievements, Limitations, and Questions* 30 (Feb. 2017) (unpublished manuscript), <http://samuelwalker.net/wp-content/uploads/2017/02/DOJ-PP-Program-Feb24.docx>.

2. *The Loss of Effective Police Chiefs Who Are Agents of Change*

The second troubling trend for police accountability is the firing or resignation of innovative, widely respected police chiefs by city leaders. During the three-month period between June and August 2020, 14 chiefs resigned or were fired, including Erika Shields (Atlanta),²⁵¹ Jami Resch (Portland),²⁵² Carmen Best (Seattle),²⁵³ Chris Magnus (Tucson),²⁵⁴ and U. René Hall (Dallas).²⁵⁵ This troubling trend continued into the fall of 2020 with La'Ron Singletary (Rochester)²⁵⁶ and Sylvia Moir (Tempe).²⁵⁷ The aforementioned chiefs are highly regarded both inside and outside police circles, and it is noteworthy that many are either female, persons of color, or both.²⁵⁸ In some cases, the impetus for the leadership change was a controversial critical incident; in other cases, it has stemmed from criticism over handling of public protests or impending budget cuts.²⁵⁹ There is a long history of police chiefs being removed or resigning in the wake of controversial incidents, and oftentimes, the leadership change is warranted.²⁶⁰ Chiefs are responsible for the actions of their officers, and they should be held to account for misdeeds when they occur. But the

²⁵¹ Richard Fausset et al., *Atlanta Police Chief Resigns After Officer Shoots and Kills a Black Man*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/06/13/us/atlanta-police-shooting-rayshard-brooks.html>.

²⁵² Maxine Bernstein, *Jami Resch Steps Down as Portland Police Chief; Asks Chuck Lovell, African American Lieutenant, to Take Job*, OREGONIAN (June 8, 2020), <https://www.oregonlive.com/crime/2020/06/portland-chief-jami-resch-to-resign-african-american-lieutenant-chuck-lovell-to-be-named-chief-at-noon.html>.

²⁵³ Casey Martin, *Carmen Best, Seattle's Police Chief, Resigns After City Council Cuts Department Funds*, NPR (Aug. 12, 2020, 6:57 AM), <https://www.npr.org/2020/08/12/901605449/carmen-best-seattles-police-chief-resigns-after-city-council-cuts-department-fun>.

²⁵⁴ Tucson's city manager refused to accept Chief Magnus' resignation. Carol Ann Alaimo, *City Manager Says He Will Not Accept Resignation of Tucson Police Chief*, TUCSON.COM (June 26, 2020), https://tucson.com/news/local/city-manager-says-he-will-not-accept-resignation-of-tucson-police-chief/article_601840e1-0c19-5fc1-b67e-46ea3eabcaf2.html.

²⁵⁵ N'dea Yancey-Bragg, *More than a Dozen Police Chiefs Faced Backlash—and Left—After George Floyd's Death. Here's a List.*, USA TODAY (Sept. 9, 2020, 7:51 PM), <https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-death-police-chiefs-fired-resign-abruptly-retire-list/5755934002/>.

²⁵⁶ Shayna Jacobs & Tim Craig, *Rochester Police Chief, Other High-Ranking Officials Retire amid Inquiry into Man's Death in Custody*, WASH. POST (Sept. 8, 2020, 2:29 PM), <https://www.washingtonpost.com/nation/2020/09/08/rochester-police-resign/>.

²⁵⁷ Bree Burkitt & Paulina Pineda, *Tempe Police Chief Sylvia Moir Resigns, Will Leave Role in October*, ARIZ. REPUBLIC (Sept. 15, 2020, 6:22 PM), <https://www.azcentral.com/story/news/local/tempe-breaking/2020/09/15/tempe-police-chief-sylvia-moir-abruptly-resigns/5806567002/>.

²⁵⁸ Alan Greenblatt, *Police Chiefs Most Open to Reform Are the Ones Leaving*, GOVERNING (Aug. 17, 2020), <https://www.governing.com/now/Police-Chiefs-Most-Open-to-Reform-Are-the-Ones-Leaving.html>.

²⁵⁹ *Id.*

²⁶⁰ SKOLNICK & FYFE, *supra* note 14, at 184–86.

recent spate of firings and resignations is disconcerting because several of those chiefs have been ardent supporters of police reform.²⁶¹ As Johnson and Johnson note:

It is also vital that the voices of thoughtful public servants are not lost in this dialogue. Otherwise, we risk losing more law enforcement leaders like Seattle Police Chief Carmen Best, who cited “the overarching lack of respect for the officers, the men and women who work so hard, day in and day out,” as part of her decision to resign.²⁶²

Champions of police reform need to be protected from unwarranted political pressure that can build rapidly as a knee-jerk reaction to a controversial incident.

E. Legal Considerations

The law itself is a barrier to police reform. Scholars have offered numerous suggestions regarding the ways in which changes in the law can effect positive reforms in policing beyond the use of Section 12601.²⁶³ We will not rehash the details of these thoughtful ideas here, but rather direct readers to some of what we consider to be key proposals and the justifications for them. Our list of the most important legal reforms includes:

- Enacting federal and state legislation “conferring standing upon state attorneys general to sue to obtain equitable relief in federal court against police departments in their jurisdiction[s] to remedy and prevent violations of constitutional rights”;²⁶⁴
- Statutorily updating the framework for imposing municipal liability for police misconduct to go beyond “pattern and practice” lawsuits to include situations in which police departments fail to prevent reasonably foreseeable harms caused by the lack of policies that should be in place;²⁶⁵
- Abolishing qualified immunity for police in Section 1983 cases and dispensing with departmental indemnification of officers when they engage in unconstitutional acts, while also exploring the potential

²⁶¹ See *supra* notes 251–258 and accompanying text.

²⁶² Thaddeus Johnson & Natasha Johnson, *Why Defunding Police, Upping Social Budgets Alone Won't Work*, USA TODAY (Sept. 9, 2020, 9:24 AM), <https://www.usatoday.com/story/opinion/policing/2020/09/08/criminology-professor-former-cop-defunding-police-wont-work/5745784002/>.

²⁶³ See *supra* notes 242–250 and accompanying text.

²⁶⁴ Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1050 (2020).

²⁶⁵ Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 423–24 (2018).

for police officers to carry mandatory liability insurance so that judgments are not rendered uncollectable without taxpayer money underwriting them;²⁶⁶

- “Raising the [s]takes of Fourth Amendment [j]urisprudence”²⁶⁷ by overruling cases like *Whren v. United States*,²⁶⁸ *Virginia v. Moore*,²⁶⁹ *Atwater v. City of Lago Vista*,²⁷⁰ and *Utah v. Strieff*,²⁷¹ that have empowered lawbreaking by police;²⁷²
- Enacting legislation restricting police use of force in ways that reinforce *Tennessee v. Garner*,²⁷³ making clear that the so-called “21-foot rule” runs counter to it;²⁷⁴ and aligning with the law governing civilian use of force insofar as it must be *necessary* to achieve valid law enforcement goals, take into account de-escalation efforts and other pre-seizure conduct, and be subject to traditional rules of imperfect self-defense;²⁷⁵ and

²⁶⁶ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 938–43 (2014); Deborah Ramirez & Marcus Wraight, *The Dirty Secret Behind Qualified Immunity for Police*, BOS. GLOBE (June 10, 2020, 10:42 AM), <https://www.bostonglobe.com/2020/06/10/opinion/dirty-secret-behind-qualified-immunity-police/>. Admittedly, even if these steps were taken, there are numerous shortcomings to using § 1983 litigation to address police misconduct. See, e.g., Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504–11 (1993).

²⁶⁷ Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2139 (2017).

²⁶⁸ *Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding the constitutionality of pretextual stops without examining their racial underpinnings).

²⁶⁹ *Virginia v. Moore*, 553 U.S. 164, 167, 171 (2008) (upholding an arrest as reasonable under the Fourth Amendment despite the fact that underlying state law did not authorize an arrest, but rather the issuance of a citation, for the underlying offense).

²⁷⁰ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (upholding an arrest for failing to wear a seatbelt as a reasonable Fourth Amendment seizure).

²⁷¹ *Utah v. Strieff*, 136 S. Ct. 2056, 2059–60 (2016) (holding that an officer’s discovery of a valid, pre-existing arrest warrant attenuated the connection between an unlawful stop and the drug-related evidence seized from the defendant during a search incident to arrest, thereby cleansing such evidence of the stain of the fruit of the poisonous tree).

²⁷² Ayesha Bell Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1200–04 (2020).

²⁷³ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (prohibiting the use of deadly force to prevent the escape of a fleeing suspect who poses no immediate threat to the officer or others).

²⁷⁴ Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL’Y 53, 84–88 (2016).

²⁷⁵ Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 664–75 (2018).

- Making it a criminal offense for a police officer to knowingly fail to intervene against fellow officers using excessive force.²⁷⁶

We are keenly aware that it is all too easy to suggest bad precedents be overruled when the reality of the U.S. Supreme Court revisiting its role in contributing to lawlessness by police through the Court's Fourth Amendment jurisprudence is slim to none. Still, there are alternative paths to effect such reforms.

First, state courts should interpret their state constitutions to afford the protections that the U.S. Supreme Court has failed to provide to all civilians. New Mexico, for example, rejected *Whren* by prohibiting pretextual stops under its state constitution.²⁷⁷ The Oregon Supreme Court went so far as to hold that police violate the state constitutional ban on unreasonable searches and seizures by asking questions unrelated to the objective of a stop, including for consent to search.²⁷⁸ And courts

²⁷⁶ E.g., *Law Enforcement Misconduct*, U.S. DEP'T OF JUSTICE (July 6, 2020), <https://www.justice.gov/crt/law-enforcement-misconduct#intervene>; see also, e.g., *Salvato v. Miley*, 790 F.3d 1286, 1295 (11th Cir. 2015) (holding officer was not entitled to qualified immunity for failing to intervene when she witnessed a fellow officer using excessive force).

²⁷⁷ The court stated:

We do not accept the State's arguments that our constitution, which favors an examination into the reasonableness of officers' actions under the circumstances of each case, should disempower and disable the courts from examining whether an officer has an unconstitutional reason for making a stop. This would be an abdication of our judicial responsibility to meaningfully review police action, ferret out police perjury, weigh the evidence, and guard our citizens' privacy rights. We would in effect legitimize a charade, a mockery of the legal justifications we recognize for permitting the most common of police intrusions. This we will not do. We hold that pretextual traffic stops are not constitutionally reasonable in New Mexico.

State v. Ochoa, 206 P.3d 143, 155 (N.M. Ct. App. 2008).

Washington banned pretextual stops in 1990. *State v. Ladson*, 979 P.2d 833, 838 (Wash. 1999) ("Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason."). But the state retreated from that position somewhat in 2012. *State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012) (upholding "mixed-motive" stops). For a review of the effect this change in case law had on police behavior, see Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 653–56 (2021) (reporting that the change from *Ladson*'s ban on pretextual stops to *Arreola*'s acceptance of mixed-motive stops resulted in a statistically significant increase in traffic stops of drivers of color relative to White drivers). A lower court in Delaware also held that pretextual traffic stops violate the state's constitutional bar on unreasonable searches and seizures, when a stop is "made exclusively for the purpose of investigating an officer's hunch about some other offense," but the question has not yet been adjudicated at higher levels. *State v. Heath*, 929 A.2d 390, 402 (Del. Super. Ct. 2006).

²⁷⁸ *State v. Arreola-Botello*, 451 P.3d 939, 949–50 (Or. 2019).

in at least five states have ruled that their state constitutions provide more protections from warrantless arrests than the Fourth Amendment provides according to the decisions in *Atwater* and *Moore*.²⁷⁹

Second, to improve police legitimacy and community relations, police departments should adopt policies banning questionable search-and-seizure practices like pretextual stops and widespread use of arrest for nonviolent petty misdemeanors.²⁸⁰ Officers who violate such rules should be subjected to discipline.

We are also cognizant of the fact that political gridlock in Washington, D.C. makes it challenging to enact federal legislation aimed at police reform. The House of Representatives, for instance, passed the George Floyd Justice in Policing Act of 2020, which, if it were to become law, would incorporate a number of the aforementioned proposals.²⁸¹ But the Senate is unlikely to pass the bill.²⁸² However, city councils²⁸³ and state legislatures can enact laws curtailing a wide range of police actions. In the aftermath of George Floyd's murder, Iowa limited the use of chokeholds, mandated annual anti-bias and de-escalation training for law enforcement officers, and established protocols to prevent the subsequent hiring of police who had been fired for misconduct elsewhere.²⁸⁴ New York criminalized the use of chokeholds, increased public access to police misconduct records, and made it a misdemeanor to call 911 on a person of color when there is no reason to believe a

²⁷⁹ E.g., *State v. Askerooth*, 681 N.W.2d 353, 361–62 (Minn. 2004); *State v. Bayard*, 71 P.3d 498, 502 (Nev. 2003); *State v. Brown*, 792 N.E.2d 175, 177 (Ohio 2003); *State v. Bauer*, 36 P.3d 892, 895–96 (Mont. 2001); *State v. Bricker*, 134 P.3d 800, 804–08 (N.M. Ct. App. 2006).

²⁸⁰ CRIM. JUSTICE DEP'T, NAACP, PATHWAYS TO POLICE REFORM COMMUNITY MOBILIZATION TOOLKIT 7–8 (2016), <https://www.naacp.org/wp-content/uploads/2018/07/Toolkit.pdf>; MEGAN QUATTLEBAUM ET AL., PRINCIPLES OF PROCEDURALLY JUST POLICING 37–39 (2018), https://policingequity.org/images/pdfs-doc/reports/principles_of_procedurally_just_policing_report.pdf.

²⁸¹ George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2d Sess. 2020).

²⁸² Li Zhou & Ella Nilsen, *The House Just Passed a Sweeping Police Reform Bill*, VOX (June 25, 2020, 8:50 PM), <https://www.vox.com/2020/6/25/21303005/police-reform-bill-house-democrats-senate-republicans>.

²⁸³ See, e.g., David Stebbens, *Common Council Passes Police Reform Legislation 'Right to Know Act'*, DAILY ORANGE (Oct. 13, 2020, 11:19 PM), <http://dailyorange.com/2020/10/common-council-passes-police-reform-legislation-right-know-act/>; Justin Wise, *DC Council Passes Sweeping Police Reforms After George Floyd Protests*, HILL (June 9, 2020, 4:15 PM), <https://thehill.com/homenews/501902-dc-council-passes-sweeping-police-reforms-in-wake-of-george-floyd-protests>.

²⁸⁴ Veronica Stracqualursi, *Iowa Governor Signs Police Reform Bill that Was Passed in One Day*, CNN: POLITICS (June 12, 2020, 4:52 PM), <https://www.cnn.com/2020/06/12/politics/iowa-police-reform-bill-trnd/index.html>.

crime is in progress.²⁸⁵ Colorado similarly banned chokeholds, overhauled the state's use of force provisions, and in a first-of-a-kind move, created a private right of action to sue officers for acts of police violence.²⁸⁶ And Virginia targeted pretextual stops by enacting legislation banning traffic stops for a range of minor infractions.²⁸⁷ Virginia also adopted a sweeping police reform law that bans no-knock warrants, reduces the militarization of police, increases police officer training requirements, strengthens the officer decertification processes, and limits the use of neck restraints.²⁸⁸ In short, change is possible and the time is past due.

V. CONCLUSION

We have outlined eight guiding principles and eight strategies that should serve as the cornerstone of a police department's accountability plan. There is no single principle or strategy that is sufficient by itself. Rather, together they form a comprehensive portfolio that will position a department to avoid becoming the next Ferguson, Minneapolis, or Kenosha. While there may be other ingredients that add value to a department's accountability plan, we believe the pieces described here are the most critically important. We also highlighted what we believe are the primary impediments to effective police accountability, and we offered some thoughts on how to overcome them.

In many ways, it is discouraging to write this Article in 2020. As stated earlier, some of these principles and strategies have been in plain view for half a century. Police and legal scholars have been beating the same drum for decades, as have some police leaders. Nevertheless, we feel optimistic for three reasons.

First, policing has improved over the last 50 years. Of course, there is still much room for improvement; the deaths of Michael Brown, Tamir Rice, Freddy Gray, Walter Scott, George Floyd, Breonna Taylor, Jacob Blake, among many others, attest to that. But policing in 2020 is better than policing in 1960, 1970, 1990, and 2000. Though longitudinal data at the national level are not available, we believe

²⁸⁵ Barry Kamins, *New Legislation Implementing Police Reform in New York*, N.Y. L.J. (Aug. 3, 2020), <https://www.law.com/newyorklawjournal/2020/08/03/new-legislation-implementing-police-reform-in-new-york>; Matthew Krumholtz, *New York State Passes Sweeping Police Reform Agenda*, N.Y. ST. B. ASS'N (June 16, 2020), <https://nysba.org/new-york-state-passes-sweeping-police-reform-agenda/>.

²⁸⁶ Russell Berman, *The State Where Protests Have Already Forced Major Police Reform*, ATLANTIC (July 17, 2020), <https://www.theatlantic.com/politics/archive/2020/07/police-reform-law-colorado/614269/>.

²⁸⁷ H.B. 5029, 2020 Leg., 1st Spec. Sess. (Va. 2020).

²⁸⁸ S. 5030, 2020 Leg., 1st Spec. Sess. (Va. 2020); see Press Release, Ralph S. Northam, Virginia Governor, Governor Northam Signs Sweeping New Laws to Reform Policing in Virginia (Oct. 28, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/october/headline-861097-en.html>.

police shoot and kill fewer people now than 50 years ago.²⁸⁹ We also believe excessive use of force and other forms of misconduct occur less now than they did in the past,²⁹⁰ and the prospects for continued police reform remain promising.²⁹¹ Many police departments adhere to strategies that have a robust evidence base, such as problem-oriented and hot-spots policing.²⁹² The bottom line is that there has been substantial, albeit incremental improvement. For many, this progress is both mad-deningly slow and not nearly enough. We do not argue against that position; we agree wholeheartedly. But we do think it is important to recognize that things have gotten better and there is reason to believe further advancements are on the horizon, which leads us to our second reason for optimism.

Second, like Sam Walker, we think it is clear that the push for reform has reached a tipping point.²⁹³ In plain terms, this time feels different. The momentum for police reform is unprecedented. Following the shooting of Jacob Blake in Kenosha, Wisconsin, on August 23, 2020, professional athletes in basketball, football, baseball, tennis, and hockey boycotted their games.²⁹⁴ Protests occurred in hundreds

²⁸⁹ SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 31–32 (1993).

²⁹⁰ Robert J. Kane & Michael D. White, *Bad Cops: A Study of Career-Ending Misconduct Among New York City Police Officers*, 8 *CRIMINOLOGY & PUB. POL'Y* 737, 750 fig. 1 (2009) (showing that annual misconduct separations peaked in the mid-1980s and have been on decline since then); cf. Zara Abrams, *What Works to Reduce Police Brutality*, 51 *MONITOR ON PSYCHOL.* 30 (2020) (noting that although the public perception that police exercise their use-of-force powers appropriately has declined in the past five years, when police departments train their officers in de-escalation techniques and procedural justice interventions, use of force incidents decline). We note, however, that racial profiling continues despite efforts to curtail it. See, e.g., David A. Harris, *Racial Profiling, Past, Present, and Future?*, 34 *CRIM. JUST.* 10 (2020), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/.

²⁹¹ See generally Samuel Walker, *Not Dead Yet: The National Police Crisis, a New Conversation About Policing, and the Prospects for Accountability-Related Police Reform*, 2018 *U. ILL. L. REV.* 1777, 1777 (arguing that despite setback in the past few years, “the prospects for continued police reform efforts in the immediate future remain alive” because the crisis of legitimacy in U.S. policing spurred a “new conversation” that amounts to “a rough national consensus about needed police reforms”).

²⁹² Cody W. Telep & A. Johannes Bottema, *Adopt Evidence-Based Policing*, in *TRANSFORMING THE POLICE: THIRTEEN KEY REFORMS* 9, 11–12 (Charles M. Katz & Edward R. Maguire eds., 2020).

²⁹³ Walker, *supra* note 291, at 1790–99.

²⁹⁴ Marc Stein, *Led by N.B.A., Boycotts Disrupt Pro Sports in Wake of Blake Shooting*, *N.Y. TIMES* (Sept. 4, 2020), <https://www.nytimes.com/2020/08/26/sports/basketball/nba-boycott-bucks-magic-blake-shooting.html>.

of U.S. cities, some, like Portland, for more than 100 consecutive days.²⁹⁵ There are legislative reforms at the local, state, and federal level.²⁹⁶ These reforms have outlawed controversial police practices such as chokeholds and no-knock warrants.²⁹⁷ They call for an enhanced focus on de-escalation, require that officers report the misdeeds of their colleagues (duty to intervene), open police officer disciplinary records to public scrutiny, shift some non-crime functions away from the police, and in some cases, create independent agencies to investigate police use of force.²⁹⁸

There is also momentum within the police profession to institutionalize reforms. The International Association of Chiefs of Police released a “Policy Framework for Improved Community-Police Engagement,” which centers on seven key policy initiatives that reflect the principles and strategies identified here:

- Adoption of the National Consensus Policy on Use of Force (which includes a protect-life mandate, a focus on de-escalation, and a duty to intervene);
- Mandatory participation in the National Use of Force Database;
- Development of national standards for discipline and termination of officers;
- Creation of a police officer decertification database;
- Enhancement of police leadership and culture (“embracing procedural justice as a guiding principle that informs policies, practices, and training”);
- Implementation of improved recruitment, hiring, and promotion practices;

²⁹⁵ Artemis Moshtagian & Eric Levenson, *Portland Police Arrest Over 50 People on 100th Consecutive Night of Demonstrations*, CNN (Sept. 6, 2020, 5:09 PM), <https://www.cnn.com/2020/09/06/us/portland-protest-100-days/index.html>.

²⁹⁶ *Changes to Policing Policy in the States and 100 Largest Cities, 2020*, BALLOTPEDIA, https://ballotpedia.org/Changes_to_policing_policy_in_the_states_and_100_largest_cities_2020 (last visited May 26, 2021). At the time of this writing, opposing federal legislation developed by the Democrat-led House of Representatives and Republican-led Senate have both stalled. Michael Balsamo, *A Side-by-Side Look at Police Reform Bills in Congress*, AP NEWS (June 23, 2020), <https://apnews.com/article/cb459fa005a19b074f452ac1092b6d04>.

²⁹⁷ Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd>; *Changes to Policing Policy in the States and 100 Largest Cities, 2020*, *supra* note 296.

²⁹⁸ Li & Lodhi, *supra* note 297; *Changes to Policing Policy in the States and 100 Largest Cities, 2020*, *supra* note 296.

- Expansion of police agencies' ability to implement effective discipline (addressing the barriers sometimes imposed by unions and civil service contracts).²⁹⁹

Third, respected jurist Merrick Garland was confirmed by the U.S. Senate as the Attorney General shortly after the Biden administration assumed executive leadership of the United States.³⁰⁰ Garland “pledged to reinvigorate” the role of the U.S. Department of Justice in civil rights enforcement “and is expected to revive ‘pattern-or-practice’ inquiries into potential abuses by police departments” under Section 12601.³⁰¹

We acknowledge there is a long history of controversial police killings leading to failed efforts at police reform, as the barriers to effective accountability have been too strong in the past.³⁰² But the momentum for change seems overwhelming. The problems are known. The solutions are known. The barriers are breaking down, and the potential for meaningful reform to improve police accountability is greater now than ever before.

²⁹⁹ *IACP Policy Framework for Improved Community-Police Engagement*, INT’L ASS’N CHIEFS POLICE, <https://www.theiacp.org/sites/default/files/IACP%20Policy%20Framework%20for%20Improved%20Community-Police%20Engagement.pdf> (last visited May 26, 2021). Details about implementing these recommendations, as well as other key principles and strategies, such as adherence to the principles of unbiased, equitable treatment as outlined in the *Model Policy and Concepts & Issues* paper and adoption of an early identification system, can be found on the IACP website. See *Community-Police Engagement*, INT’L ASS’N CHIEFS POLICE (June 4, 2020), <https://www.theiacp.org/resources/document/community-police-engagement>.

³⁰⁰ Chris Strohm, *Merrick Garland Wins Senate Approval, Opening Biden Era at DOJ*, BLOOMBERG U.S. L. WEEK (Mar. 10, 2021, 11:47 AM), <https://news.bloomberglaw.com/us-law-week/bidens-pick-garland-is-confirmed-by-senate-as-attorney-general>.

³⁰¹ *Id.*

³⁰² For an examination of some of the most controversial police killings—those involving juvenile victims—and the attendant lack of police accountability, see Delores Jones-Brown et al., *Hernández v. Mesa and Police Liability for Youth Homicides Before and After the Death of Michael Brown*, 56 CRIM. L. BULL. 833, 834 (2020).