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**NOTE:** Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils

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**SUMMARY:**

... Perhaps even more significantly, racial discrimination in law enforcement--or even the perception thereof--risks reinforcing grave mistrust of the police in minority communities and undermining the very legitimacy of police authority. ... Civilian oversight schemes, which commonly take the form of civilian review boards, are external mechanisms established for handling citizen complaints about police officer misconduct. ... Civilian review agencies would pass along the information raised in civilian complaints to the civilian advisory council, so that civilians and police could then debate the ends and means of policing in relation to specific issues raised by the complaints. ... Accordingly, whereas civilian review agency members would be appointed, advisory council members would be elected. ... Through a membership of community representatives that have been elected by preference voting methods, civilian advisory councils would maintain accessibility to the public, responsiveness to popular demands, and accountability for their decisions, all of which would advance democratic principles and thereby enhance the legitimacy of community consent to local policing. ... *b. Description of Civilian Advisory Council Operations* ... Community policing, however, often focuses at a very local, neighborhood level, whereas advisory councils would operate on a police-department-wide basis. ... Community policing units, for example, could forward information obtained at beat meetings to the larger civilian advisory council. ... Community and local policing by nature must mediate competing demands and should ideally pay due regard to minority concerns. ...

**TEXT:**

[\*461] INTRODUCTION

The law presently grants police officers considerable discretionary authority. This power constitutes both an essential law enforcement tool and a potential means for executing unfair and discriminatory practices. n1 Recent media and political attention directed at issues like racial profiling n2 underscores an increasing awareness among courts, commentators, and the public of the problems associated with expansive police discretion, particularly with respect to the treatment of racial minorities. n3 [\*462] In addition to the specific incidents of police brutality and excessive force that occasion public indignation, n4 problematic police practices include the selective enforcement of laws in ways that disproportionately burden minorities. n5 Perhaps even more significantly, racial discrimination in law enforcement--or even the perception thereof--risks reinforcing grave mistrust of the police in minority communities and undermining the very legitimacy of police authority. n6

To the extent that judicial intervention under the present state of the law inadequately addresses the troubling consequences of police discretion, some members of affected communities, scholars, and other observers have advocated various forms of community control as alternative means for improving police accountability and police-community relations. n7 Community control models like civilian oversight agencies and community policing programs implicate a theory of community consent, in that both constitute methods by which communities delineate the parameters of acceptable and desirable police practices. If community consent is to serve as an acceptable basis for legitimizing local policing, this fundamental "community" element must offer some assurance of democratically representing community interests. Community consent as currently practiced, however, might maintain--if not exacerbate--the disproportionate harms that abuses of police discretion inflict on racial minorities and the poor, since present approaches can allow overpowering majorities or select individuals to direct police practices without adequate consideration for those most affected by these practices. A genuine [\*463] community consent model should promote representation of these often-excluded perspectives.

This Note offers a variation and potential improvement on existing community control models through two measures: reinforcement of civilian review boards and the creation of civilian advisory councils whose members are elected through preference voting methods to ensure proportional representation. Part I provides an overview of civilian oversight and community policing as alternative strategies for addressing problematic police practices. Part II raises several critiques of existing community consent models, taking note of both the merits and shortcomings of political process theory as a rationale for legitimizing community consent to local policing. Part III proposes bifurcating the structure of community involvement into supervisory and advisory roles through the creation of civilian review agencies and civilian advisory councils, respectively. Finally, this Note concludes that a democratically elected and sufficiently representative advisory council is critically important for ensuring effective and legitimate community consent models with respect to local policing.

## I. OVERVIEW: CIVILIAN OVERSIGHT AND COMMUNITY POLICING AS STRATEGIES FOR ADDRESSING PROBLEMATIC POLICE PRACTICES

Judicial regulation and litigation-based remedies have had limited success in correcting problematic police practices. To address the dangers of abusive and discriminatory law enforcement, community involvement in the policing process is aimed at making policing more effective and responsive to community concerns through measures such as civilian oversight and police-community partnerships. Both models implicate community consent as a means for legitimizing local policing practices.

### *A. The Limits of Judicial Regulation and Other Litigation-Based Remedies to Address the problems of Police Discretion*

#### *1. The Problems of Police Discretion*

Given the limitations of law enforcement resources, the need to prioritize policing goals, and the impossibility of legislating every move that a police officer might make, society has little choice but to entrust the police with a certain amount of discretionary authority. n8 Police discretion [\*464] involves the power to choose between two or more

courses of conduct in a particular set of circumstances. Because legislators cannot anticipate the range of situations that police may face, they often draft criminal laws of broad scope, leaving room for police to exercise discretion regarding the enforcement of these laws. Laws with broad coverage, when coupled with discretionary police authority to enforce them, ensure that criminal sanctions will be available for the occasions when they would be appropriate to control and prevent crime. Police discretion also benefits communities by allowing police to respond flexibly to community needs and concerns as well as to local preferences about the nature of police intervention. n9

As an essential law enforcement tool, discretion helps police officers to protect people by enforcing laws and maintaining order, but this discretionary authority also threatens to undermine people's civil rights and civil liberties in the process. This risk occurs in part because discretion grants potentially dangerous latitude for police officers to act in ways that evince discriminatory effects, if not outright discriminatory motives. n10 Even if police officers are not consciously motivated by malice, the combination of a legislative tendency toward overcriminalization and the practical impossibility of apprehending all offenders means that law enforcement agents must selectively enforce criminal laws. n11 These circumstances, which heighten police discretion, in turn increase the risk that police officers will resort to using race as a proxy for criminal propensity. n12

[\*465] The risk of discriminatory or otherwise harmful exercises of police powers is especially salient today, given the recent resurgence in order-maintenance policing. Order-maintenance policing refers to law enforcement strategies that direct attention to relatively low-level offenses such as loitering, juvenile curfews, vagrancy, aggressive panhandling, public drunkenness, vandalism, and littering. n13 Incorporating social norm theory with deterrence principles, the "broken windows" rationale for order-maintenance policing suggests that maintaining public order serves an important police function because it reduces the social conditions that lead to the incidence of more serious crimes. n14

The definition of and enforcement of laws against low-level offenses as part of order-maintenance strategies grant police officers broad authority that exacerbates the risks attendant to police discretion. Although order-maintenance strategies ostensibly serve to reduce fear of crime in neighborhoods and maintain order, police officers often employ their authority to make arrests afforded by laws defining low-level offenses, [\*466] combined with their discretion to enforce these laws selectively, to uncover evidence of more serious crimes. n15 In other words, some police officers regard order-maintenance policing as simply another tool for aggressive law enforcement. n16 Individuals who are stopped and searched on the grounds of minor offenses but are not arrested nonetheless may suffer due to harms arising from factors like the invasion of privacy and humiliation of being publicly singled out. n17 When police use the order-maintenance strategy as an excuse for conducting arrests, the individual suffers even greater harms, n18 and when low-level offenses are not prosecuted, the arrestee usually loses the opportunity to raise constitutional [\*467] claims that would have been available in the course of criminal proceedings. n19 Discretionary enforcement for low-level offenses thus grants police officers extensive latitude in a manner that heightens the potential for arbitrariness and discrimination.

Perhaps most significantly, to the extent that order-maintenance policing disproportionately subjects minorities and minority neighborhoods to more aggressive enforcement, this policing strategy implies that a separate and unequal set of rules respecting privacy applies to people of color. n20 Signs of racial discrimination have already generated grave distrust of law enforcement in many minority communities, leading to ongoing tensions between police and minorities. n21 The risk of racial discrimination in the exercise of police discretion alone does not necessarily account for the existing racial disparities and inequities in the criminal justice system as a whole. n22 Yet, the problems associated with discriminatory [\*468] uses of police discretion are critical because they contribute to the lack of trust and the perception of injustice in law enforcement administration. In so doing, they undermine the very legitimacy of police authority, not only with respect to affected minorities but also regarding the police as a societal institution generally. n23

## *2. The Limits of Judicial Regulation and Other Litigation-Based Remedies*

It is difficult for courts to control police discretion, largely because of the low visibility of such discretion and the wide latitude that the law currently grants to police. The Supreme Court's Fourth Amendment jurisprudence, for instance, vests police with significant street-level discretion that is virtually unregulated. n24 This lack of judicial oversight occurs largely because of the broad meanings the courts have given to concepts such as probable cause and reasonable suspicion, which grant police significant authority to make on-the-spot judgments about whether to stop, search, and arrest individuals, all without prior judicial authorization. n25

Various attempts to check broad police discretion or to address police discrimination and harassment have yielded only moderate success, given the present state of the law. Legal challenges on grounds that a [\*469] particular law is unconstitutionally vague, for example, seem somewhat useful in confining the expansive reach of certain laws, but vagueness doctrine fails to place adequate constraints on police discretion generally, particularly in contexts that do not involve excessively vague laws. n26 When discriminatory or otherwise harassing or abusive practices are the real problem with broad police discretion, a plaintiff might seek remedies in litigation to redress the harmful effects of discretionary police conduct that judicial intervention fails to regulate directly. These harms include the unfairness that arbitrary enforcement entails as well as the risk of racial profiling and targeting. Much like vagueness doctrine, legal challenges to address some of these harmful effects, through civil rights litigation, constitutional claims, or criminal prosecutions against wayward police, also face limitations with respect to their ability to reform problematic police practices. n27

#### *a. Vagueness Doctrine*

Vagueness doctrine purportedly sets limits on police discretion by striking laws that fail both to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" and to establish guidelines for enforcement that are sufficiently concrete so as not to "encourage arbitrary and discriminatory [law] enforcement." n28 Yet, vagueness doctrine itself operates as an imprecise measure, often yielding inconsistent results with respect to similar types of laws. n29 Because vagueness claims to target procedural issues and not substantive concerns about whether police officers should be enforcing certain laws, public order laws that are worded in terms sufficiently precise to withstand vagueness challenges can augment the scope of police authority by achieving specificity through overly inclusive definitions of criminal conduct. A very specific and detailed criminal statute might cover many different actions, thereby broadening police discretion because the police can selectively choose which particular offenders to apprehend. n30

[\*470] Vagueness doctrine therefore does not meaningfully or adequately constrain police discretion, particularly since the law generally grants police officers practically unregulated discretion in areas such as probable cause and reasonable suspicion determinations. As Professor Debra Livingston observes, "Elimination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system." n31 Moreover, the Supreme Court has held that police may rely pretextually on any traffic violation to stop persons for other reasons. n32 Under similar reasoning, courts could uphold the use of pretextual stops in street encounters for low-level offenses. Whether broadly or narrowly defined, many public order laws are sufficiently specific to withstand vagueness challenges; when commonly violated, they easily lend themselves to pretextual use. In sum, these rules essentially allow the police to approach and investigate people for any reason, or for practically no reason at all; the officer's discretion is largely unregulated.

#### *b. Civil Rights Litigation*

Legal remedies for harmful police practices include actions under § 1983, a civil rights provision allowing for monetary damages or injunctive relief. n33 Civil actions for damages under this statute have limited capacity to serve as a meaningful deterrent, particularly in situations involving a lack of evidence of excessive and unwarranted force by the police. Furthermore, defenses such as state sovereign immunity and qualified immunity shield government entities from liability for the actions of their police departments, rendering § 1983 largely ineffectual in providing financial incentives for police departments to reform their practices. n34 [\*471] Similarly, it appears unlikely that actions for

injunctive relief can deliver adequate vindication for harmful practices; the equitable standing doctrine requires that a plaintiff seeking injunctive relief demonstrate a likelihood that he will be injured again by the unconstitutional practice he is challenging, not just that someone else will likely be injured in the future by such practices. n35 Moreover, relief is available only if the plaintiff makes a showing of a substantial risk of irreparable injury. n36

*c. Constitutional Claims*

When racial profiling constitutes the principal harm arising from broad police discretion, a claimant could attempt to seek redress under the Fourth Amendment or the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has yet to issue a definitive ruling as to the constitutionality of racial profiling practices, however, and a claimant pursuing such a claim would likely face considerable challenges.

With Fourth Amendment claims, for example, the Supreme Court has held that when police make pretextual use of minor traffic violations to search vehicles for drugs, there is no constitutional violation. n37 Even if the officer takes the suspect's race into account, the officer's subjective intent is irrelevant as long as his actions are objectively reasonable. n38 In other words, it may be permissible for the police to use race as a factor, as long as race is not the sole or dominant consideration prompting disparate treatment. n39 As a result, a defendant would have the onerous and daunting task of showing that the police officer acted because of the victim's race and that the officer's actions were both unreasonable and harmful.

[\*472] In the equal protection context, a claimant might argue that the police deliberately engaged in racial discrimination. n40 Such claims are often precluded, however, by the difficulty of proving the requisite discriminatory intent. Absent proof of intentional racial discrimination by the police, a claimant might refer to law enforcement policies that expressly classify individuals on the basis of race to prove an equal protection violation. n41 Alternatively, a claimant may show that the police have applied a facially neutral law or policy in a discriminatory manner, n42 or that a facially neutral law or policy has had a racially disproportionate impact and was motivated by racial bias. n43 In response, police might seek to justify the use of race as reasonably related to efficient law enforcement strategies, rationalizing racial profiling on the grounds that race correlates with the likelihood of criminal conduct. n44 Even if the government could show some rational basis for using race as a proxy for criminal propensity, however, this would not make it acceptable. Equal protection doctrine respecting race does not allow the government to engage in racial classifications on a mere showing of rationality; rather, the government must show that its classification is narrowly tailored to serve a compelling state interest. n45

[\*473] A plaintiff thus might be able to show that police practices have violated the Equal Protection Clause. Courts might face limitations, however, in fashioning equal protection remedies that sufficiently deter police misconduct. n46 Some scholars have proposed that courts use remedies traditionally associated with Fourth Amendment claims to address equal protection violations in the criminal context. n47 Remedies like exclusion, reversal, or dismissal will not be as helpful, however, for individuals who do not face criminal proceedings--that is, when police stop or arrest an individual, but the government does not choose to prosecute him. n48

*d. Additional Limitations on Litigation-Based Remedies*

Under present circumstances, individuals generally have little power to effect meaningful change in harmful police practices and policies through the legal system, whether in civil litigation or through criminal prosecutions against police officers. In addition to the aforementioned issues, civil litigation addressing either racial profiling or other harms would probably not cause enough of an impact to advance positive, systemic [\*474] reform. Complainants often are unwilling or unable to initiate civil lawsuits against the police due to lack of personal funds, scarcity of corroborating witnesses, and the small likelihood of receiving sizeable recovery in damages. n49 Criminal prosecutions or administrative disciplinary proceedings against police officers for abuses arising in specific incidents might improve police accountability but usually do not induce departmental reform in police policies. n50 Criminal prosecutions tend to guard against breaches of the outer limits of permissible conduct, in that they are invoked in only the most egregious

cases, rather than checking those police practices that might not constitute outright violations of the criminal law but are nonetheless problematic. Furthermore, even when charges are brought, successful criminal prosecutions of police officers for police misconduct are rare. n51

*e. Violent Crime Control and Law Enforcement Act*

The Violent Crime Control and Law Enforcement Act of 1994 n52 presents another possible tool for correcting problematic police policies, n53 although to date it has yielded limited results. Operating somewhat like an oversight mechanism, the statute authorizes the Attorney General to uncover unconstitutional police patterns or practices and file suit to enjoin police departments from engaging in such improper activities. n54 It gives the Justice Department a central role in holding police departments accountable for upholding constitutional norms. n55 Although it may be too early to evaluate the real effectiveness of this statute, many observers deem the Justice Department's actions thus far to be insufficient, and others have speculated that this underenforcement may be due in part to [\*475] political and financial constraints on the Justice Department. n56 Moreover, it is uncertain whether federal oversight and centralization of control over police practices would effectuate meaningful changes in local police departments. This uncertainty is due not only to the inefficiencies characteristically associated with large government bureaucracies, but also to the limited ability of the federal government to utilize local knowledge to improve local police departments.

*f. Comment on the Ongoing Value of Recourse to the Courts*

Although this section has described the inadequacies of judicial regulation and litigation-based remedies with respect to the reform of problematic police practices, it does not imply that people should give up on the courts. Rather, this discussion is meant to illustrate, in abbreviated form, how the current state of the law--whether relating to civil rights, criminal procedure, or otherwise--limits the ability of courts to redress all the harms stemming from police actions. The legal rules governing these areas of civil rights and criminal procedure need to be strengthened and enhanced; ideally, they should provide more effective and practical safeguards against the real risks of harmful police practices. n57 It is unclear, however, how soon the current Supreme Court would advance these changes, if at all. The models for community involvement in local policing offered in this Note should not substitute for improvements in criminal procedure and civil rights laws. Rather, these proposals offer an interim, alternative recommendation.

*B. The Use of Civilian Oversight and Community Policing to Address Harmful or Ineffective Local Policing*

Given the limitations of judicial regulation and litigation-based remedies, community activists, scholars, members of urban communities, racial minorities, and other observers have advocated community control as an alternative means of addressing problematic police practices. n58 The [\*476] basic models for both civilian oversight and community policing represent mechanisms by which communities might exert control over the police, not only with respect to harmful practices but also with respect to the establishment of local policing priorities. As examples of community control, civilian oversight and community policing are both rooted in a theory of community consent under which communities have a say in the definition of police practices. The concepts of police accountability and community participation underlying these models ostensibly bolster police legitimacy while reducing tension between minorities and the police.

*1. Civilian Oversight as Community Control: Civilian Review Agencies*

Civilian oversight schemes, which commonly take the form of civilian review boards, are external mechanisms established for handling citizen complaints about police officer misconduct. They are considered to be external mechanisms because they typically include, to varying degrees, procedures outside the physical and organizational confines of the police force; accountability to an autonomous official or body; and the involvement of non-police personnel. n59

Although civilian oversight systems are generally external to the police force, they do not follow any uniform design; civilian review agencies vary widely in their composition, jurisdiction, and authority. They can be established

by city ordinance, state statute, voter referendum, mayoral executive order, or police chief administrative order. n60 Some civilian review agencies consist entirely of civilians, whereas others involve a combination of police officers and civilians. n61 A majority of review agencies are city or county agencies separate from law enforcement entities, but a few operate as committees within police departments. n62 Review agencies may conduct their own investigations into complaints using either civilians or sworn police officers, or their scope may be limited [\*477] to reviewing the investigative work done by the police department. n63 Some panels have jurisdiction over all allegations, whereas others are limited to allegations of physical or verbal abuse. n64 Most citizen review entities are authorized only to recommend disciplinary action to the police chief executive, not to impose disciplinary action directly. n65 Many bodies, however, may bring misconduct to light on their own initiative, examine systemic problems, or recommend changes in a police department's policy, rules, and practices. n66 Finally, about half of all civilian review agencies can conduct public hearings on individual complaints and publish information on their activities, in publications such as annual reports about the status of civilian complaints and their resolution. n67

Several cities first implemented civilian review boards in the late 1950s and early 1960s in response to concerns raised by community groups and residents that the police would not properly investigate and address allegations of misconduct by one of their own. n68 In other words, many believed that the police could not be trusted to police themselves. n69 Particularly at the height of the civil rights struggle, minority communities pressed for civilian review boards as an antidote for police misconduct. By late 1994, a majority of large cities, as well as an ever-increasing [\*478] number of small cities, had adopted some form of external review of the police. n70

External review enhances police legitimacy in large part because it facilitates and improves police accountability to communities. n71 When many people perceive that internal review within the police department lacks reliability with respect to fairness and effectiveness, external review becomes necessary to maintain the credibility of the complaints process, which symbolizes the integrity of the police as an institution. Civilian oversight thus serves as a corrective response to both the real and the perceived inequities of internal police discipline. Moreover, because civilian complaints arise from people's actual experience with the police, these complaints convey a realistic sense of what does or does not constitute acceptable police conduct. External to the hierarchical accountability that has traditionally characterized police discipline and management, civilian review boards demonstrate a move toward a style of policing that is marked by more democratic accountability. n72 This evolution in law-enforcement administration also reflects the changing nature of political philosophies underlying how people view and accept governmental authority, and illustrates an emerging emphasis on the importance of local self-government. n73 These ideologies regarding democratic accountability and local self-government become especially important for groups who are often themselves the targets of police attention and for whom perceived police legitimacy is already weak. n74

[\*479] 2. *Community Policing as Community Control: Police-Community Partnerships*

Community policing takes various forms and involves many different elements. These elements include problem-solving partnerships between police and communities, renewed emphasis on community support as a source of justification and legitimation for police actions, and more decentralized decisionmaking with respect to the definition and execution of local police priorities. n75 Conceptualized alternately as a type of operational programming, a set of administrative reforms, and a policing style, n76 community policing encompasses a broad range of ideas and strategic innovations.

As a policing philosophy, community policing generally reflects a shift from traditional police professionalism toward enhanced police-community reciprocity. n77 The traditional professionalism had arisen during the reform era in the late nineteenth and early twentieth centuries, when reformers sought to insulate the police from the corrupting influence of local politics. n78 Accordingly, reformers introduced civil service systems to diminish political influence over hiring and firing of officers, and police chiefs employed centralized command-and-control management that utilized military-style discipline within the police organization. n79 Increasingly, criminal law and police professionalism became more important than neighborhood or political ties for legitimating police authority. Police focused more on crime control and measuring performance by crime statistics and arrest rates than on facilitating the

provision of social services and order maintenance. n80 The reform era thus led to greater autonomy of the police organization, centralized control within it, and reconceptualization of police officers as law enforcement agents focused on serious crimes. n81 As crime began to rise dramatically in the 1960s, however, an increased fear of crime and an eroding sense of confidence in the police led many to begin casting doubt on the merits of [\*480] professionalized policing. n82 Moreover, academic research raised questions about the efficacy and assumptions of reform ideology and strategies. n83 Finally, the reform era promoted an increasing distance between police and communities, which engendered a deep mistrust of the police, especially in minority communities. n84 Over time, the movement toward community policing gained increasing momentum. n85

In contrast to the reform-era style of reactive, crime-control centered, professional policing, community policing today involves preventive problem-solving strategies and enhanced police-community partnerships. The problem-solving orientation has broadened the police mission, moving from enforcement of criminal laws in response to isolated incidents toward development of the most effective means for dealing with a multitude of troublesome situations. For example, a community policing initiative might experiment with new strategies like implementing foot patrols to make police a more visible presence in the neighborhood. n86 The rise in order-maintenance tactics in part reflects this preventive orientation, whereby police have focused increasingly on seeking solutions to problems associated with neighborhood disorder to reduce crime and promote a sense of security. n87 Problem-oriented policing is thus more proactive, allowing line officers and relatively low-ranking supervisors to exercise more initiative and discretion in carrying out the strategies appropriate to manage or even solve particular community problems.

In formulating these initiatives, police look to the community for broad authorization at the neighborhood level. n88 Officers deal regularly with uncertainty arising both from the ambiguous nature of the laws that [\*481] they are called upon to enforce and from a community's disparate interpretations regarding the level of order that officers should maintain, variables that render police work particularly difficult. n89 As community policing and order-maintenance philosophies enable police to act increasingly as organizers and managers of social controls in communities, local policing becomes more of a proactive tool. Many believe that the law alone should not constitute sufficient authorization for police to assume such a critically influential role. Accordingly, police officers meet with community members not only to learn from their local knowledge about the most pressing problems in the neighborhood but also to obtain their implicit authorization to act on such problems through enforcement and order-maintenance tactics. n90 Community policing in this way encourages greater reciprocity between citizens and police, ideally facilitating innovative, community-friendly, and effective policing.

Although community policing is more a theory about improving the provision of police services than an alternative means for constraining police misconduct, it does broaden notions of police accountability by incorporating community interests and concerns into the police decisionmaking process. Community policing thus presents another level at which communities can hold police accountable for their actions. In his study of the community policing efforts in Seattle, William Lyons identifies the potential for communities to subject those forms of police power exercised in their neighborhoods that ordinarily allow for less accountability to a more democratic form of social control through critical public scrutiny. The problem-solving focus of community policing makes it easier for communities and police departments to evaluate the extent to which officers' efforts have met community demands. n91

As community policing allows communities to play a greater role in identifying and setting local police priorities, police and civilians mutually participate as partners in guiding and influencing policies on police-related matters. This partnership ideally facilitates a shared understanding that clarifies each party's expectations of the other regarding what constitutes appropriate law enforcement and order maintenance. n92 [\*482] Moreover, to the extent that communities can become involved in participatory management and power sharing, new police-community relationships will enhance civilian involvement in problem-solving, community self-defense, and empowerment. n93 Community policing thus allows politics, in the sense of police responsiveness and accountability to the community, to reemerge as a basis for police legitimacy. n94

## II. CRITIQUES OF THE COMMUNITY CONSENT PREMISE

The civilian oversight and community policing models described above have been employed in part as a means for checking problematic uses of police discretion and improving police accountability. As forms of community control over the police, both models signify ways in which communities influence and thereby implicitly consent to local policing, which in turn legitimizes police practices and policies. As the following sections explore, however, the premise of community consent itself remains vulnerable to criticism due to the constricted meaning given to "community" with respect to interest representation and the limitations on community participation in critical decisionmaking. The extent to which community consent legitimizes local policing practices will depend largely on how community control models address these considerations.

*A. Who Speaks for "The Community" in Local Policing Matters?*

In both civilian oversight and community policing, the degree to which community involvement broadly reflects the general community and constitutes actual participation that impacts police activities tends to be limited. "Community participation," in these contexts, often mobilizes only a small segment of the community population. n95 The actions and opinions of this small segment may validate local police practices for the community as a whole at the risk of exacerbating minority oppression or falling short of imposing any significant control over the police.

Membership in civilian review agencies is typically established by mayoral appointment, subject to the approval of municipal councils. n96 [\*483] Whereas minority communities have criticized this method for not being inclusive enough, patrol officers and police administrators have complained that appointments are too politicized. n97 In some cases, police officials or police associations are responsible for selecting the board members of civilian review agencies. Given this mode of selection, civilians sitting on these boards can sometimes be overly sympathetic or partial to the police perspective. n98 Furthermore, with a few exceptions, the civilian role on review boards is usually limited to processing complaints and making recommendations. n99 It is a stretch to characterize the civilian role in this context as broad community participation in critical decisionmaking about local policing.

Similarly, when developing community policing initiatives, police frequently meet and work with select community members and groups like civic associations, tenant organizations, businesses, churches, and other issue-oriented groups. n100 These groups tend to be politically organized, and their members and representatives are more likely than others to attend forums organized by the police. n101 Police therefore end up relying on self-appointed representatives to identify problems and concerns [\*484] for the rest of the community. n102 Even when police create opportunities for participation through general invitations to community policing events, it often becomes difficult to encourage everyone to get involved, particularly given the hostilities between police and certain minority communities. n103 Other reasons related to safety and convenience may also contribute to this lack of participation. n104 Moreover, those groups that are disproportionately subjected to the aggressive enforcement of order-maintenance laws, such as the homeless or young black men, often face social and political alienation from mainstream power, making them unlikely to participate in any effective way in the political process. n105 In general, community policing tends to empower those who want more policing at the expense of others who may justifiably need more control over the police. n106

In some cases, police might limit community participation to the provision of crime surveillance information, which police then use to focus their crime-fighting activities. n107 Rather than empowering communities to advance their interests, community policing under this model simply enhances the police response to crime and disorder. n108 In other cases, police might choose to publicize their work with a particularly cooperative private citizens' group as a police-community partnership, thus shielding themselves from more critical public scrutiny. By appropriating the community policing rhetoric in this way, police departments employ a public relations facade that accommodates the needs of the police bureaucracy more than it serves as a democratic vehicle for police responsiveness to community concerns. n109

[\*485] Implementing a variety of potentially contestable initiatives in the name of community policing heightens the risk of discriminatory law enforcement and inappropriate police intrusions into private lives. n110 Because certain

order-maintenance strategies informally delegate the power to define community standards regarding prohibited conduct to only select community members and police officers themselves, community policing initiatives that endorse such tactics may facilitate the repression of political, cultural, or sexual outsiders in a manner inconsistent with democratic theory. n111 Discretionary police authority seems most problematic precisely when it "permits law enforcement to target those whose complaints are least likely to be heard by the rest of the community." n112

Allowing a select few to "speak for" the whole community seems problematic enough, but even more troubling is the possibility that community consent to local policing might allow a majority of a given community to authorize police practices for everyone else when those practices could end up oppressing those in the minority. n113 One cannot assume that a ruling majority will sufficiently protect the interests of those in the minority, in large part because those groups' objectives and perspectives may differ. n114 The situation becomes even more complicated if a small [\*486] portion of the population is responsible for committing a majority of the crime. n115 The majority's interest in maintaining law and order often leads to disproportionate burdens on those in this minority. n116 As long as members of a majority of the public agree with the end result--feeling safe in their neighborhoods, for example--they might not be as concerned with the risks taken to accomplish this result, especially when they are not too burdened by the process. n117

As the issues related to "community spokespeople" and majority-minority tensions demonstrate, it is difficult to capture just what "community" means with respect to community control and consent to local policing. The concept of community itself remains imprecise. In the context of decisions about policing issues, should community be defined primarily with respect to geography, such as by neighborhoods? Or would race and ethnicity be more appropriate, insofar as they are relevant to how one relates with the police? n118 Not everyone in a given neighborhood shares the same interests. Police can cause significant harm in places where there are tensions if they even inadvertently contribute to the perception that they have taken sides. Moreover, when residents in a given community choose to invite more aggressive police tactics in response to high-crime conditions in their neighborhood, this quick-fix solution often bears hidden costs for others who come along later and have not been involved in the decisionmaking process. This allows a transient majority to make provisional decisions, the effects of which could persist indefinitely. n119 Even within communities defined by race or ethnicity, diverse [\*487] points of view may abound. The notion that all blacks, for example, share the same opinion about policing issues tends to be misguided. As Professor Richard Brooks has pointed out, while urban minorities seek protection from criminals, they are also largely the victims of police harassment and abuse, so they remain wary of the police, resulting in the tension within these neighborhoods between the goals of controlling crime and controlling police discretion. n120

The notion that any one community, however defined, can express a single, unified position on policing issues seems rather naive, for communities very rarely speak with one voice. n121 Moreover, too much reliance on a vaguely conceptualized theory of "community consent" risks ignoring the minority interests that exist within minority communities. n122 Consider, for example, the controversial gang-loitering ordinance at issue in *City of Chicago v. Morales*. n123 Professors Dan Kahan and Tracey Meares argue that courts should have upheld the ordinance because it had been legitimized through the consent of Chicago's inner-city minority communities. n124 Yet numerous observers challenged this claim, questioning the extent to which most inner-city residents actually endorsed the ordinance. n125 At city council hearings, some black aldermen argued that [\*488] the ordinance hurt the interests of their constituents, declaring that the law was drafted to protect the white community at the expense of innocent blacks; at the same time, other black aldermen representing high-crime, predominantly minority wards supported the ordinance. n126 Residents challenging the ordinance in court and others supporting it lived in the same inner-city neighborhoods. Similarly, grass-roots organizations representing minority inner-city residents that regularly confront gang violence in Chicago fell on both sides of the issue. n127

#### *B. To What Extent Can Community Consent Legitimize Local Policing Practices?*

Arguably, communities should have a say in how they are policed, particularly in neighborhoods beleaguered by crime. Indeed, some have asserted that high-crime conditions warrant heightened law enforcement efforts. n128

Professor Randall Kennedy, for example, suggests that "the [\*489] principal injury suffered [by blacks] in relation to criminal matters is not overenforcement but underenforcement of the laws." n129 Given that blacks are disproportionately victimized by crime, n130 Kennedy indicates that blacks could argue that they are not equally protected from crime and that measures like order-maintenance policing actually help correct the underenforcement of criminal laws in black neighborhoods. n131 Similarly, proponents of an "urban frustration" argument promote heightened criminal sanctions and expanded police discretion in urban minority communities, reasoning that a majority of law-abiding residents in those communities welcome or should welcome disparate law enforcement policies, even at the expense of certain civil liberties. n132 Kahan and Meares have proposed that some law enforcement measures, even contestable ones that seem to infringe on individuals' constitutional rights, may actually be liberty-enhancing to the extent that they counteract the negative social influences of criminal activities. In other words, when roving gang problems threaten security in inner-city neighborhoods, law enforcement intervention in fact improves public safety and thereby restores some degree of liberty for inner-city residents. n133

Circumstances preceding passage of the gang-loitering ordinance at issue in *Morales* appear to corroborate this claim. Prior to enacting the ordinance, the Chicago City Council conducted public hearings at which numerous residents and witnesses testified about the damage that gang activity had caused in their neighborhoods, including various forms of criminal activity such as drug dealing, drive-by shootings, vandalism, and intimidation. n134 Rampant gang activity had transformed these innercity neighborhoods into urban war zones, instilling terror in residents and essentially relegating them to the status of prisoners in their own homes. n135 School children were so afraid to leave their homes on account [\*490] of gang violence that the Chicago public schools, in an effort to curb plummeting attendance, had to hire dozens of adults to escort them to school. n136 Within one four-day period, police recorded more than three hundred gunfire incidents in two housing projects. n137 The number of gang-related homicides also increased dramatically around this time. n138 The total effects of gang activity--the drive-by shootings, fighting, open-air drug dealing, and pervasive intimidation--have prompted some residents and observers to characterize the reality of life in these inner-city neighborhoods as so entirely alien and separate from mainstream society as to constitute "The Other America." n139

Debate surrounding the ordinance at issue in *Morales* challenged the extent to which residents of neighborhoods themselves should decide on how much policing they would be willing to accept. n140 Some residents in high-crime Chicago neighborhoods had indicated that they were so terrorized that they would be willing to forego their own constitutional rights to allow for more aggressive law enforcement strategies such as mass, warrantless building searches of public housing projects and broad loitering ordinances. n141 Remarking on how many inner-city residents in Chicago felt they were prisoners in their own homes, Justice Scalia, dissenting in *Morales*, observed that the "minor limitation upon the free state of nature that this prophylactic arrangement [i.e., the loitering ordinance] imposed upon all Chicagoans seemed . . . a small price to pay for liberation of their streets." n142 According to Professor Livingston, in this era of preventive policing, communities may elect to address order-maintenance [\*491] concerns, and to the extent that they are legitimately concerned with enhancing the quality of life in their neighborhoods they should be allowed to develop innovative approaches and enlist the assistance of police in doing so. n143

In addition to proposing that members of inner-city communities be allowed to choose increased law enforcement, some have argued that communities should be permitted to negotiate the extent to which constitutional rights preserve a reasonable balance between individual liberty and public safety. n144 Applying a political process theory of judicial review to constitutional rights in criminal procedure, Kahan and Meares outline a burden-sharing model that is focused more on process than on substance or outcome in its conception of constitutional rights. n145 According to the burden-sharing model, if the coercive effects of a particular policy fall on a powerless minority, courts must independently assess its constitutionality. n146 When a community has internalized these coercive effects, however, courts should defer to the political process with respect to whether the balance between liberty and order is reasonable or appropriate. n147 Kahan and Meares maintain that the "willingness of the majority to bear a particular burden suggests that the policy in question doesn't embody the political undervaluation of liberty that 'rights' are meant to prevent." n148 If the burden of a particular law enforcement policy falls unequally on someone other than the average

citizen, they reason, courts should defer to lawmakers only to the extent that minority groups have access to a political process that is sufficiently attentive to that burdened party's interests. n149

According to Kahan and Meares, the Supreme Court had developed much of constitutional criminal procedure law, which is in part aimed at restricting discretionary law enforcement authority, to address institutionalized racism. However, since minority groups are no longer politically powerless, n150 according to Kahan and Meares' theory, strict applications [\*492] of constitutional protections are no longer necessary. n151 Claiming that constitutional limits on police discretion that were originally adopted to protect the black community now run counter to that community's interests, Kahan and Meares conclude that courts should recognize the competence of inner-city communities to control law enforcement and to make rational judgments about the costs and benefits of a particular law enforcement policy. n152 As examples, the authors cite juvenile curfew laws, Chicago's loitering ordinance, and the Chicago Housing Authority's former building search policy, which allowed for mass searches of public housing units without probable cause. n153 According to Kahan and Meares, these measures illustrate the capacity of inner-city residents to impose meaningful political controls over police conduct and symbolize the empowerment of their neighborhoods. n154

Kahan and Meares's burden-sharing approach to criminal procedure has been widely criticized. n155 Professor David Cole, for example, points [\*493] out that constraints on police discretion are preserved as constitutional rights precisely because of the understanding that "the political process will not adequately protect the interests of those targeted by the police. If the political process were sufficient, constitutional protections would be unnecessary." n156 Moreover, to the extent that the burden-sharing theory endorses differential policing, the Constitution does not support a sliding-scale approach to fundamental rights--constitutional rights cannot mean one thing to blacks in certain neighborhoods and quite another to whites elsewhere.

Although political process theory should not be employed to diminish the level of constitutional protections given to select groups, the concept of differential policing itself calls for further consideration. On the one hand, constitutional rights for individuals should not be sacrificed to community interests, even when those interests seek to improve community safety and quality-of-life. On the other hand, as discussed above, communities should be allowed to voice their policing preferences, especially when serious high-crime conditions appear to warrant greater law enforcement. The real problem is that a tactic like order-maintenance policing may constitute both a needed crime prevention measure and an overly aggressive police tactic that targets minority populations unfairly. Kahan and Meares assert that "the continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police," n157 but this tenuous weighing of risks misses the point. Residents in high-crime neighborhoods should not have to choose between victimization by criminals or by the police. Ideally, residents should exercise some control over the likelihood that either event will occur.

As long as the law leaves police with considerable unregulated discretion, communities should be able to negotiate for themselves what constitutes legitimate and desirable police action within these bounds. Communities may not trade away their constitutional rights in the hope that more aggressive law enforcement will enhance their liberty in terms of improved personal safety; a group cannot and should not waive the rights of its individual members, even when the gesture is well intentioned. [\*494] Yet, constitutional rights currently acknowledged by the Supreme Court offer limited protections, and judicial constraints on police discretion only reach so far. n158 Beyond these recognized limits, communities should have a say in setting the rules and standards applicable to police practices. Some people might desire constraints on police discretion that extend beyond what constitutional rights currently afford, whereas others might be more willing to accept a waiver of those enhanced protections in the name of public safety and order. The latter choice would be permissible as long as that waiver did not interfere with established constitutional rights. The relative merits of either of these positions aside, n159 what is most important is how communities are involved in making the critical decisions about balancing liberty and safety within the bounds of police discretion.

Police may be enforcing criminal statutes enacted by democratically elected legislators, but the exercise of their discretion in doing so is not necessarily legitimate unless such discretion is subject to democratic community controls

and thereby authorized through community consent. As Erik Luna observes, the ideals "of democratic rule and individual liberty require . . . that discretionary judgments and actions be open to the electorate . . . and subject to democratic mechanisms for change [so that] harmful abuses of discretion can be dealt with through legal and political recourse," thus keeping the necessity of discretion compatible "with the democratic prerequisite of popular accountability." n160 For the theorists whom Luna cites, "consent grounded in public trust provides the very basis for governmental authority." n161 When the government has this legitimacy, its decisions are given deference and its commands obeyed because the state has the right to demand compliance. n162 Similarly, the legitimacy [\*495] of police authority is based on consent grounded in public trust. Police and communities can develop this consent and trust by sharing information and power in a manner that gives communities a real voice and influence in the decisionmaking process. n163

Civilian oversight and the collaborative aspect of community policing have the potential to achieve the public trust and consent needed to bolster the legitimacy of local police authority. Allowing communities to monitor the police through civilian oversight structures would open the police force system, facilitating public accountability and rendering police authority more consistent with democratic principles. Allowing communities to participate in and direct the decisionmaking process concerning local policing through civilian advisory councils n164 would give communities the opportunity to share power and exert influence in a more democratic system. n165 Both civilian oversight and civilian advisory models thus would advance meaningful community control as a basis for grounding police legitimacy in implied community consent.

Given the constrained meaning of "community" in the community control models explored in previous sections, the arrangement for community involvement discussed below would not seem fair unless community participation in these circumstances could give some assurance of democratically representing broad community interests. According to political process theory, it is more reasonable to accept community control as a form of consent to local policing as long as minorities are represented in the decisionmaking process. The proposal for civilian advisory councils with elected memberships described in Part III offers one possible [\*496] way to advance minority representation and obtain democratically achieved consent.

### III. PROPOSAL FOR REVISIONING COMMUNITY INVOLVEMENT TO SUPPORT COMMUNITY CONSENT AS A MEANS FOR LEGITIMIZING POLICING PRACTICES

The following sections propose revised models for civilian review agencies and civilian advisory councils that offer a more fair and effective means for subjecting otherwise underregulated police discretion to community control. As a two-part approach for improving police accountability and responsiveness, the civilian review agencies and civilian advisory councils described below embody the supervisory and advisory aspects, respectively, of community involvement in local policing. Subjecting police policies and practices to meaningful community influence in this way helps to legitimize local policing more consistently with democratic principles of broad interest representation and political empowerment through participatory, critical decisionmaking.

#### *A. Bifurcate the Structure of Community Involvement into Supervisory and Advisory Roles*

The proposal offered in this Note differs from other recognized community control models in that it formally structures community involvement into separate, specialized supervisory and advisory functions. Existing practices of community control generally fall into two separate forms by default: review boards and community policing projects. The models proposed in this Note, however, offer significant structural and functional advantages over the default options. Specifically, by formally structuring the civilian role into two separate yet interrelated components, this organizational specialization is likely to enhance qualities of impartiality and representativeness, as well as improve coordination between the reactive and proactive aspects of community involvement in local policing. n166

There is a need for communities both to monitor and to collaborate with the police to develop the most fair and effective rules and standards for law enforcement practice. Community involvement in local policing, therefore,

includes supervisory and advisory roles that are complementary yet distinct. Civilian participants in the community control process who review allegations of police misconduct should not also serve as zealous advocates for community interests. The impartiality required for [\*497] the former task would threaten and be threatened by the quality of representative advocacy needed for the latter. Accordingly, the structure of community involvement in local policing should be bifurcated into civilian review agencies and civilian advisory councils that work cooperatively in some respects but remain separate entities.

*B. Community as Supervisor--Reformulate Civilian Review Agencies as Impartial Investigators, Adjudicators, and Arbiters*

*1. General Philosophy and Objectives*

Civilian review agencies should serve primarily as processing centers and adjudicative tribunals for civilian complaints against the police. In this capacity, review agencies would seek to satisfy individual complainants and to assist police administrations in monitoring the conduct of their officers. Civilian review agencies would be neither pro-police nor anti-police, but would fulfill a "checks and balances" function to curtail police abuses and thereby enhance police legitimacy. n167 Accordingly, review agencies should remain nonpartisan, operationally independent, and functionally autonomous both from police entities and civilian advocacy groups.

*2. Brief Outline Description of Civilian Review Agency Model*

The following proposal for a civilian review agency model offers one way to balance authority between police departments and civilian oversight agencies with respect to the handling of civilian complaints against the police. n168 Currently, most civilian review agencies split the [\*498] difference by allowing citizens to participate in the investigation of complaints but vesting police executives with the final authority over decisions concerning disciplinary action. n169 The following model does the reverse; it allows police departments to retain some measure of responsibility over the initial investigations, but civilian boards hold the power to make final decisions regarding the disposition of complaints and disciplinary consequences. This arrangement offers a more efficient way to conduct proper investigations without sacrificing the level of authority that civilian agencies need to exert meaningful control.

Under this model, the civilian agency would conduct an initial assessment of all complaints to determine whether a complaint should be dismissed, sent to informal resolution, or investigated further. Usually, police investigators would conduct the initial investigation into the complaint unless it raised a more serious allegation involving bodily injury or corruption, in which case the agency would refer the matter directly to professional civilian investigators within the agency. Throughout the investigation, the civilian agency would retain the ability to monitor the quality of police investigative work and order civilian investigators to reinvestigate cases as needed.

Upon completion of the investigation, an agency review board would adjudicate the complaint through a public hearing that, in many ways, resembles a judicial tribunal. The board would then report its findings to the complainant, subject officer, and police department, along with its orders for disciplinary action or other measures intended to resolve the relevant issues. Finally, civilian review agencies would maintain records on the status and disposition of complaints, both for police management purposes and for consideration by the civilian advisory council. The next sections describe each of these components in further detail.

*3. Intake and Preliminary Review Procedures*

Although they are not exactly complainant-centered, civilian review agencies should remain accessible to the public. Indeed, this accessibility is critical to any review agency's success, so agencies should take measures to encourage full civilian participation in the process. Many potential complainants have indicated that they did not file complaints either out of fear of retaliation or because of a sense of futility arising out of a belief that the police department's internal affairs unit would not respond. n170 The intake procedure in this proposed model therefore would [\*499] allow complaints to be accepted by mail, telephone, or in person at a review agency office that would be

physically separate from police headquarters and precinct stations. These options would reduce the likelihood that fear or inconvenience might deter prospective complainants. If civilians chose to file their complaints at the police station instead, these complaints would be forwarded to the review agency. Moreover, review agencies would attempt to increase awareness of their role through publicizing their function and the complaint process by creating publications and by conducting outreach to local community organizations. In so doing, review agencies would also retain resources for handling potential cultural barriers, taking steps such as publicity campaigns in other languages and keeping translators on call to make the complaint process more responsive and accessible. Complaints would include any matter presented by an officer's conduct that a civilian feels is wrong or inappropriate. n171

Upon receipt of all complaints, review agencies would conduct a preliminary review to assess whether a complaint warrants dismissal, informal resolution, or further investigation. Complainants would be able to appeal dismissals to an appeals board within the review agency. n172 Informal resolution would be mediated by agency staff members who have been trained in dispute resolution and would involve bringing the complainant and subject officer together to discuss what happened, ideally to reach some level of conciliation. n173 If the complaint did proceed to full investigation, the agency would decide whether police or civilian investigators should handle the complaint as an initial matter. n174 This case-entry [\*500] screening should facilitate the quick and effective processing of complaints. n175

#### *4. Investigation*

If sent for further investigation, a complaint would be investigated by the police, by civilians, or possibly by a combination of both. Police investigators would be officers trained in conducting these investigations who come from a precinct other than the one in which the subject officer works. Civilian investigators would be professionals with forensic training and experience. n176 These investigators would be employed directly by the review agency, not the police, and the investigative and disciplinary units within the review agency would remain separate. n177 Sensitive cases like those involving serious bodily injury, corruption, or otherwise highprofile issues would go directly to the civilian investigators, whereas the police investigators would handle the other complaints. If a complainant were to appeal the police department's investigative findings, the civilian agency would determine whether the appeal had sufficient merit to send the matter to civilian investigators for reinvestigation. n178

[\*501] Dividing the investigation of complaints in this way would promote efficiency, reduce the time and costs spent by the civilian agency, and expedite the process in general. Moreover, keeping both the police and civilians involved in the investigative process would make it easier for police departments and the public to accept the external review system as a whole. n179

#### *5. Tribunal Proceedings*

Upon completion of the investigation, an agency review board would adjudicate the complaint through a hearing that in many ways resembles a judicial tribunal. n180 Hearings would be conducted by a review panel consisting of one, three, five, or seven civilians (depending on the nature of the case) from the review agency. This panel would direct the hearing, make findings of fact, and issue orders for disposition.

The establishment of various powers within the civilian review agencies--including the review panels--to compel police cooperation [\*502] would be critical to their success. n181 For example, under the review agency's authority, officers could be ordered to give statements regarding actions taken during the course of their employment, and any failure to do so would constitute a basis either for the officer's dismissal or for disciplinary proceedings. n182 In addition, police departments could be ordered to respond promptly to any and all reasonable requests for information, to participate in evidentiary hearings, and to provide access to data and records as requested. n183 Civilian agencies would exercise this independent authority through the same legal provisions that established the agencies themselves. n184

The review hearing would provide the opportunity for both sides to debate the disputed facts and offer any alternative explanations for what occurred. n185 As an example of an affirmative defense, an officer might demonstrate that he acted in accordance with the rules, regulations, and training of his police department. Given the adversarial nature of the review proceeding, ideally both sides would be allowed to obtain some [\*503] form of representation. n186 The subject officer would usually be represented by union representatives. n187 Complainants could retain their own legal representation. n188 Alternatively, a system much like a local prosecuting office could be established within the civilian agency itself. n189

In making its findings, the review panel should use clear and convincing evidence as the standard of proof. n190 Using this standard, the panel either could sustain the complaint or find the officer exonerated. If the panel sustained the complaint, it would then formulate a written report describing its findings of fact and issuing its orders for the disposition of the complaint. The panel would provide copies of its report to the complainant, subject officer, and police department executive.

#### *6. Disposition of Complaints Through Informal Resolution, Disciplinary Action, or Other Responses*

Upon concluding the hearing and making its findings, the civilian review panel could issue orders for disposition of the complaint in any number of ways. The panel might direct, for example, that the subject officer and complainant undergo some form of conciliation. When appropriate, the panel might also order that the officer attend counseling or training or receive some form of additional supervision. Alternatively, the panel might impose disciplinary measures on the officer directly. Particularly since promotions, transfers, pay increases, and bonuses are largely governed by civil service regulations and union contracts, disciplinary actions are crucial to deterring poor officer performance and thereby bringing about reform of problematic police practices. n191 The review board's disciplinary authority may be somewhat tempered due to a [\*504] subsequent mandatory arbitration period, n192 but it still represents a significant form of civilian control over the police.

Although it is rare for external review agencies rather than police executives to exercise final authority over police discipline, some existing systems do grant civilians this ability. n193 Allowing civilians to hold this power over the police remains an exceptional concept, however, since it appears to transfer key command functions from the domain of police management to civilians who are relatively less informed about the day-to-day realities of a police officer's job. At both the executive level and the line-officer level, police departments may understandably resent and resist such a radical form of civilian involvement in police affairs. n194 To facilitate police cooperation with the external review system, the model proposed in this Note allows the police to participate in the investigation of complaints n195 and to serve in a consulting capacity n196 throughout the review process. Maintaining police participation in the functioning of [\*505] civilian review agencies in these ways would help make police departments more amenable to accepting the review agencies' outcomes. n197

#### *7. Management of Information*

Review agencies would be able to use information provided by civilian complaints not only for disciplining officers retroactively but also for inducing changes proactively. Although complaints often cannot be resolved due to a lack of sufficient evidence, n198 it is possible that police departments could utilize the information provided by civilian complaints as a valuable source of police management information. For example, consider the early warning systems implemented in Pittsburgh, Pennsylvania, and Steubenville, Ohio. n199 Under these systems, when a relatively small portion of officers in a department amasses a disproportionate share of misconduct allegations, use of force reports, and other indicia of adversarial civilian encounters, police supervisors can use this information to determine whether there is a need for retraining, counseling, or reassignment. These measures fall short of disciplinary penalties but may still serve to correct the harmful conduct or practices. n200 The Pittsburgh and Steubenville early warning systems also maintain information about routine police encounters like searches, arrests, and traffic stops. This type of information provides a more comprehensive picture of police activities and thus could improve police supervisors' ability to assess the risk of officer misconduct and to fashion the appropriate managerial response. n201

[\*506] Finally, in addition to its findings and orders, the civilian review board may offer suggestions for improvement in police policies to the civilian advisory council. n202 The advisory council would use this information to identify specific areas in a police department's operations that need improvement, n203 and civilian complaints thus could serve as a means for critical reexamination of police organizational policies and practices. n204 Examination and processing of complaints would not only delineate the limits of satisfactory law enforcement, but would also offer a potential launching pad for systemic reform. Civilian review agencies would pass along the information raised in civilian complaints to the civilian advisory council, so that civilians and police could then debate the ends and means of policing in relation to specific issues raised by the complaints. While civilian review agencies essentially adjudicate individual complaints, civilian advisory councils would take up the next step, in part by using the issues generated by civilian complaints to clarify the community's stance as to the appropriate police response to crime and disorder. n205

#### *8. Review Agency Membership*

Members of civilian review agencies should be selected by the office of the mayor, subject to approval by the local city or town council. Although there has been moderate movement toward direct popular accountability through elected review boards, n206 others oppose the election of civilian review boards, maintaining that the appointment process acts as a screening device and ensures a better quality panel. n207 Selecting review board members through appointment would also serve to enhance the impartiality and competence of civilian review agencies, the qualities perhaps most important for these agencies to possess.

Members of civilian review agencies must remain impartial, for they are essentially serving as adjudicators of allegations against the police. In the Milwaukee Fire and Police Commission, for example, the civilian board members have considerable powers, including the final authority to [\*507] impose discipline directly on police officers and chiefs. n208 They function in theory much like appellate courts, and, accordingly, they have been described as impartial arbiters rather than advocates for civilians. n209 As impartial adjudicators, civilian review agencies must maintain independence from both police departments and civilian advocates. The Police Complaints Authority ("PCA") of Victoria, Australia, for example, attempted to sift out pro-police and anti-police elements from the applicant pool during its interview process. n210 Similarly, the city ordinance establishing policies and procedures of operations for the Citizens Appeal Board in Dayton, Ohio, specifies that board members must be impartial. More specifically, if a matter arises in which a board member feels his personal interests may influence his ability to hear an issue or case in an impartial manner, that board member must give notice of this conflict of interest and be excused from duties on that case. n211 Impartiality in this context, of course, refers to fairness in the complaints review process and does not necessarily require an evenly balanced distribution of outcomes. n212 Selecting review agency members would likely be more effective than popular election for ensuring that agency members are impartial. n213

In addition to being impartial, civilian review agencies must be competent to perform the range of duties expected of them. The investigative staff must possess the requisite forensic skills and experience in investigations. With respect to the processing and disposition of complaints, [\*508] it would be helpful to have members with legal backgrounds or experience. Although civilians are as capable of making judgements about the propriety of police action as they are about the guilt of defendants in criminal trials, n214 members with legal backgrounds can contribute their legal skills and training to the adjudicative process. n215 Finally, civilian review agencies should include members with some law enforcement background and experience as advisors or consultants. n216 The presence of such members would help not only to make the review system more acceptable to police departments but also to broaden and deepen the extent to which review agencies assess a given case. n217 Selecting review agency members by appointment would likely be more effective than popular election for ensuring the review agency's competence in these areas. n218

This revised model for civilian review agencies does much to address concerns about the limited civilian role in decisions concerning local policing. n219 The review agencies proposed in this section grant civilians considerable authority to monitor the police, whether in supervising the complaint investigation and overseeing the process or in acting as the final authority regarding disposition of complaints and imposition of discipline. The lack of broad representativeness becomes less an issue in the context of revised civilian review agencies, because these review

agencies would no longer be expected to serve as the only forum for voicing community interests regarding local policing. Rather, the civilian advisory councils, described in the next section, would assume that role. Civilians in review agencies would specialize in serving as impartial arbiters of allegations against the police, whereas civilians on advisory councils would serve as advocates to represent community interests. Accordingly, [\*509] whereas civilian review agency members would be appointed, advisory council members would be elected.

*C. Community as Advisor--Create Civilian Advisory Councils as Democratically Elected Representatives Serving Community Interests*

*1. The Role of Civilian Advisory Councils*

*a. General Philosophy and Objectives*

Civilian advisory councils primarily would promote civilian participation in the development and implementation of local police policy. By including civilians directly in critical decisions affecting police-related matters, advisory councils would bolster principles of democratic governance, in large part because they would open the system to community input and thus allow for public scrutiny of policing decisions and justifications. n220 Empowering civilians by giving them a voice in the decisionmaking process thus would offer a more democratic means for controlling police discretion and would have the potential to improve trust in police-community relationships. n221 Through a membership of community representatives that have been elected by preference voting methods, civilian advisory councils would maintain accessibility to the public, responsiveness to popular demands, and accountability for their decisions, n222 all of which would advance democratic principles and thereby enhance the legitimacy of community consent to local policing.

*b. Description of Civilian Advisory Council Operations*

Advisory councils would operate much like a city council or local school board, though they would concentrate exclusively on policing issues. n223 Civilians on advisory councils would have the authority to issue [\*510] police department regulations, articulate enforcement policies, and participate in selecting and directing police superintendents. Much like the power that civilians on review panels have regarding disciplinary action, advisory councils would retain the authority to direct what police departments should do in certain circumstances, rather than simply offering recommendations. As a formal structure for incorporating civilian input into the process of administrative rulemaking and general policy development, advisory councils would enable community representatives to collaborate with the police in formulating guidelines to govern the ends and means of local policing.

The extent to which civilian advisory councils would actually exert effective control over the police would depend upon the means by which they could enforce their directives and the particular aspects of local policing that they would seek to address. Not all types of police discretion are readily amenable to enforceable rules or standards of conduct. One could characterize local law enforcement as involving two types of discretion, which this Note will refer to as "practical discretion" and "priority discretion." Practical discretion refers to the day-to-day procedures and practices that police officers execute in the field. Police officers exercise practical discretion when they assess the conditions that constitute reasonable suspicion or probable cause in a given situation, and when they conduct duties such as those relating to searches and arrests. Priority discretion involves the ways in which police decide which laws they will be most concerned about enforcing. Police departments exercise priority discretion by choosing how vigorously or consistently they will enforce, for example, ordinances against offenses like jaywalking, loitering, or bicycle riding on sidewalks. The control that civilian advisory councils could exert over local police would depend in part on the type of discretion at issue.

Advisory councils would direct local police regarding the exercise of practical discretion through rules and regulations governing local police practices such as the procedures for conducting searches and arrests, specifying the appropriate protocol for officers to follow. The San Francisco Office of Citizen Complaints ("OCC"), for example,

persuaded the San Francisco police to implement an OCC-formulated policy about proper police responses to high-speed pursuits n224 and successfully lobbied for the training of officers in appropriate crowd-control techniques. n225 [\*511] When preparing to enforce the gang-loitering ordinance in Chicago, the Chicago Police Department consulted with community leaders and residents in promulgating specific regulations concerning the neighborhoods in which officers would enforce the ordinance and in specifying the criteria by which officers would evaluate whether someone was "reasonably believed to be a gang member" under the ordinance. n226 Similarly, after conducting investigations and public hearings on complaints of discrimination resulting from the use of a police department "gang list," the Denver Public Safety Review Commission forwarded its list of concerns and recommendations to the police department. n227 The department subsequently reviewed its gang list, reevaluated the criteria being used to identify alleged gang members, and ultimately reduced the size of the list. n228 Rules would also regulate other aspects of officer conduct, including, for example, prohibiting the use of racial slurs. The primary advantage of such rules and regulations lies in their practical enforceability as well as the clear guidance they provide for officers in the field. In consultation with police management, advisory councils would develop and issue suitable police department rules and regulations, revising them periodically as needed. n229

With respect to priority discretion and certain other elements of practical discretion, advisory councils would influence local police through enforcement policies and guidelines rather than controlling them directly through rules. This happens in part because not all aspects of practical discretion and priority discretion lend themselves to regulation through enforceable rules. The very nature of reasonable suspicion and probable cause determinations, for instance, tend to elude specification into useful rules of general applicability. n230 Similarly, priority discretion involves decisions regarding the enforcement of laws that are themselves rules, and the setting of these enforcement priorities implicates many diverse, ongoing considerations in ways not readily amenable to regulation through rules. To address issues that communities may have regarding these aspects of police discretion, advisory councils would formulate [\*512] enforcement policies for local police in consultation with police management and their community constituents. The San Francisco OCC, for example, persuaded the police chief to issue a directive suspending enforcement of traffic code provisions that officers had been employing to target and harass panhandlers. n231 In Boston, police consult with citizens on city-wide strategic planning issues, allowing teams in each police district to set local priorities. n232 The captain of the Dorchester precinct gives his neighborhood advisory council significant credit as a "governing" influence, allowing them to identify problems, raise issues about police service, and serve as a sounding board for decisions respecting police operations in the district. n233 If patterns of local stop-and-frisk practices raise racial profiling concerns, advisory councils might direct police departments to implement data collection systems, diversity training for line officers, or other possible solutions. Although the counsel and policies that civilian advisory councils provide might not have the same enforceability as rules or regulations, they could still be effective in enabling communities to articulate their various concerns formally. Moreover, advisory councils would participate in selecting police superintendents and could thereby exercise some control over the degree to which the police department, at least at the executive level, would be willing to cooperate with community directives. n234

In many ways, civilian advisory councils would approximate the functions of community policing initiatives. Community policing, however, often focuses at a very local, neighborhood level, whereas advisory councils would operate on a police-department-wide basis. Civilian advisory councils would enhance, rather than supplant, the work of community policing partnerships, in part by integrating their ideas and strategies.

The localized design of many community policing initiatives offers an advantage in the degree to which the decentralized power structures [\*513] enable residents and other actors to utilize their local knowledge in designing solutions to fit their individual circumstances. The Chicago Alternative Policing Strategy ("CAPS"), for example, has organized its community policing efforts around police beats, which usually encompass several city blocks. n235 CAPS relies extensively on neighborhoods to define the focus of police activities through regular, open meetings at which residents and officers identify community-specific problems and formulate appropriate solutions. n236

Advisory councils would allow various community policing initiatives to retain many of the benefits of their localized orientation. For instance, neighborhood-based police-community partnerships are perhaps better positioned

than city-based councils to utilize neighborhood resources to devise comprehensive solutions for local problems. These neighborhood resources might include community organizations, local businesses, government or nonprofit agencies, and other service providers. n237 Along these lines, Professor Robert Trojanowicz has proposed a model of Neighborhood Community Policing Centers or Community Resource Centers that would bring neighborhood police officers and social service agencies together in addressing community problems with local resources and outreach. n238

Rather than replacing localized community policing initiatives, civilian advisory councils would coordinate multiple community-based efforts, facilitating the sharing of locally developed knowledge n239 and preserving the advantages of local resources. Advisory councils would maintain accessibility to the public by encouraging open communication. Community policing units, for example, could forward information obtained at beat meetings to the larger civilian advisory council. Residents could also communicate directly with the community representatives who [\*514] serve on these advisory councils. Finally, advisory councils could hold regular meetings open to the public to facilitate public debate on the issues. n240

### *c. The Importance of Police Involvement*

Valid concerns exist about how advisory councils would enforce community objectives so that police would be willing to accept and act upon community direction. As police departments become less characterized by command-and-control management, n241 new community controls embraced by police executives might not necessarily translate into compliance and support from all the rank-and-file officers who are working in the field every day. Some research has indicated, for instance, that patrol officers are particularly opposed to new community policing initiatives because the initiatives redefine the officers' roles and change how they perform their duties. n242 Suspecting that civilian involvement constitutes micromanagement by uninformed outsiders, police often resist it.

Given these potential obstacles, police participation in reform efforts is critical. Threats of litigation, liability, and bureaucratic rules and regulations alone will not necessarily compel police officers to take reform seriously. Rather, an emphasis on disciplinary measures and adversarial proceedings risks leaving line officers resentful and defensive instead of invested in implementing positive changes. n243 As Professor Livingston has noted, police reform should involve "not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere." n244 Accordingly, police departments must be included as agents in [\*515] the systems for change, so that both police management and line officers advance the process of implementing meaningful reform. n245 Within civilian advisory councils, therefore, police management would participate as nonvoting members. Their participation would ensure that community debate on policing issues remains critically informed by a realistic police perspective as to the limits and capabilities of the local police force.

## *2. The Need for Elected Community Representatives*

### *a. General Philosophies Respecting Broad Representation and Political Process Theory*

Though police and community involvement are both essential for developing and implementing effective reforms in local policing, the extent to which "community" in this context actually enables real access and participation in the reform process will determine whether such measures can fairly legitimize community consent to local policing practices. As discussed in the previous section, the need for broad community interest representation is more important for civilian advisory councils than it is for review agencies because advisory councils embody the primary forum for voicing community preferences and concerns about local policing. As the principal structures enabling local governance of the police, civilian advisory councils must therefore ensure broad and meaningful access and participation for affected community populations to remain consistent with democratic principles.

Accordingly, models for advisory councils should seek to advance broad political empowerment by designating seats on the councils as elected positions that are obtained through preference voting methods. Although this

arrangement for elected community representatives may seem to reproduce the problem of permitting only a few individuals to speak on behalf of the rest of the community, these individuals will have actually been chosen by people in the community themselves; community representatives on advisory councils will have been designated specifically to serve as representatives for their constituents and will remain electorally accountable. Preference voting methods help to ensure proportional representation, so that representatives on advisory councils most fairly and accurately reflect the preferences and interests of the [\*516] general electorate. As political process theory implies, it would seem more reasonable to accept community control as a legitimate form of consent to local policing as long as minorities are not excluded from or marginalized in the decisionmaking process.

*b. Obstacles to Broad Political Empowerment in the Present Systems*

As noted previously, many scholars have cautioned that reliance on communities to control police discretion will not suffice to protect minority interests because the present systems tend to marginalize minority concerns. n246 No community speaks with a single voice. Particularly when communities are defined solely by reference to geography, they can scarcely avoid diversity in the values and preferences of their members. Resolution in pluralistic democracies thus requires elected officials to aggregate identified interests to facilitate negotiation and compromise among the various needs within a given community, n247 and local policing itself entails the moderation of competing demands for liberty and security. Under most democratic systems of governance, however, majority interests tend to overwhelm minority concerns. To the extent that majority-rule schemes characterize community control over the police, these community control models cannot provide a reliable tool for protecting the interests of the least powerful minorities--those who will most likely be the subject of police interventions.

Majority rule can deteriorate too easily into a "tyranny of the majority" under which controlling interest groups oppress disfavored minorities. Professor Lani Guinier describes how current voting systems, with their "winner-take-all" element, tend to exacerbate this effect by allowing an advantaged majority to exercise disproportionate power. n248 Among a voting population in which blacks constitute a minority, for example, the minority group simply will not have the sheer numbers to exert much control over the election outcome. Even when the creation of single-member majority black voting districts allows at least one or a few minority representatives to be elected, this basically recreates the phenomenon of minorities being overwhelmed by a ruling majority. At city and county government levels, for example, studies of small group interaction suggest that small decisionmaking bodies often ignore minority views, [\*517] especially when rules governing the decisionmaking process do not require members of the majority to secure minority support. n249

In addition to the danger that a majority of the community will define the terms of acceptable policing for everyone else such that the brunt of the burden falls on those in the minority, there is also the danger that an influential but constricted minority will commandeer the terms of the discussion. Many community policing initiatives, for example, tend to credit institutions like neighborhood associations, businesses, churches, and other local power brokers as speaking for the community, when these institutions are likely to be heavily shaped by the distribution of power, wealth, and status within their domain and do not necessarily reflect the values and concerns of the broader community. n250 Professor Dorothy Roberts notes that "without a mechanism for fair representation, there is a grave danger that neighborhood groups holding a minority view will become the self-proclaimed voice of the community." n251

*c. Interest Representation and Alternative Voting Systems as a Means for Advancing Fair Representation of Community Interests*

The real problem, then, becomes the issue of identifying the actual needs and interests of a given community. n252 Community policing initiatives tend to equate the concept of community with geographically or racially defined groups. Kahan and Meares, for example, declare that the loitering ordinance in Chicago had the support of "the Black community," n253 and many community policing models are organized around units of physical space, such as police beats or neighborhoods. This line of reasoning conflates the conceptualization of community with interest, yielding the implicit assumption that certain groups are defined as communities in large part because they share the same interests.

Yet, interests are not always geographically or racially defined. n254 Not everyone who [\*518] lives in the same neighborhood and not everyone who is of the same race will agree on what constitutes the most appropriate police response to a specific problem.

To advance a democratic scheme of elected government for a pluralistic society, representatives of the various interests within such a society should discern and acknowledge the existence of intragroup differences, allowing individuals to convey their own preferences and ideas. In this context, the concept of interest representation could offer a more effective tool for identifying and expressing the particular needs and preferences found in a given diverse community. n255 By ensuring proportional representation through alternative voting schemes, these interests are better and more fairly reflected in the elected body.

Alternative systems like preference voting and cumulative voting methods invite strategic voting by politically cohesive groups as a means of giving appropriate consideration to minority interests. n256 Specifically, preference voting refers to an alternative voting scheme that improves the ability of cohesive minority groups to elect candidates, thus alleviating the winner-take-all element of traditional voting systems. n257 Under this system, n258 the voter ranks as many candidates as she wishes in preferential order. Candidates are elected through a series of vote counting and reassigning. In the first round, seats go to candidates who obtained more than a certain minimum number n259 of first-choice votes, and their "excess" [\*519] votes (number of votes above the minimum) then go to remaining candidates according to the voters' second-choice selections. The second round repeats this process of seating candidates on the basis of first-choice votes that exceed the minimum quota and subsequently reassigning votes; if no candidates meet this minimum quota, the lowest vote-getter is disqualified, and her votes are reassigned. This process of successive vote counting and reassigning continues until all the seats are filled. Some proponents of preference voting contend that preference voting allows cohesive minority groups to elect even two or three candidates of their choice. n260

#### *d. Advantages of Proportional Representation and Alternative Voting Schemes*

An alternative voting scheme like preference voting has several advantages in comparison with traditional majority-rule voting systems. These benefits, as explored briefly below, include enhanced legitimacy in electoral results due to the more accurate representation of diverse interests; improved community participation in the political process as well as heightened deliberation and education of voters about the issues; and decreased risk of minority exploitation or marginalization. Although these advantages would not necessarily, and, indeed, could not completely resolve all of the difficult issues relating to the fair representation of community interests in policing, they do offer a potential improvement on present circumstances.

Because preference voting effectuates proportional representation, it tends to produce results that constitute a more accurate reflection of the popular will and thereby enhances the legitimacy of the electoral process. Even if advisory councils employ traditional majority-rule voting methods at the decisionmaking level, employing preference voting at the electoral level would still result in the governing body representing more voters; for decisions at the policy level, a simple majority of votes on the advisory council would thus represent more voters. Moreover, the alternative voting system decreases the likelihood that minority voters would be marginalized, since the system makes it easier for cohesive minority interest groups to elect candidates who are receptive to and supportive of their concerns.

Furthermore, this more complex, interest-oriented voting system would promote greater coalition building and enhanced voter participation. At the electoral level, preference voting would mobilize voters into actively participating and investing in the political process. By allowing less well-known candidates and parties to gain seats and preventing dominant groups from sweeping elections, alternative voting schemes [\*520] tend both to offer voters more choices and to increase competition. n261 Because electoral success in such a voting scheme depends on high voter turnout, candidates would likely find it necessary to engage voter interest and participation in the election by developing substantive programs and proposals that emphasize differences between the candidates. In this context, political organizations might educate and mobilize voters, particularly with respect to minority interests. n262 The aggregate

increase in the substantive content of campaigns would facilitate the self-identification of interest constituencies by heightening voter political awareness and participation. Moreover, the basic premise of interest representation means that, to serve their constituents, elected representatives would need to work actively to advocate the interests they were elected to promote. n263 An alternative voting system would thus get voters more involved in the political process, because they would have a greater incentive to monitor their issues agenda. n264 These aspects of a preference voting [\*521] scheme would benefit communities greatly in how they identify and develop their preferences and interests and would mediate competing demands regarding local policing issues. With respect to controversial, yet arguably beneficial, law enforcement measures like order-maintenance policing strategies, the increased policy discussion and debates would be particularly helpful in illuminating the various viewpoints within communities.

Critics might note that even if elected representatives on civilian advisory councils represented more minority interests than most municipal councils typically do, those minority-sympathetic representatives still might be overpowered at the decisionmaking level if a greater number of representatives were sympathetic to majority interests. Assuming that civilian advisory councils used traditional majority rule for voting on policies, this possibility risks exacerbating minority exploitation through a guise of democratic legitimacy. To address this concern, civilian advisory councils should also employ alternative voting methods at the decisionmaking level. In so doing, they would encourage the identification and mobilization of multiple interests as well as foster constructive coalition building. Council rules could require, for example, a supermajority vote on issues of importance to the majority or a minority veto on critical minority issues. n265 Advisory councils could also employ cumulative voting on issues by linking votes on multiple projects over a period of time and a series of proposals. n266 Linking votes on several issues in this way would allow both weighted and split issue voting. These voting methods would encourage council representatives to form practical coalitions on various issues and interests. n267

In the alternative, Guinier suggests restructuring the decisionmaking process on the model of jury deliberations to facilitate open communication, meaningful deliberation, and the forging of consensus. n268 Consensus in this context would not require uniform ideology. Rather, participants would be more likely to cooperate with decisions that they did not endorse very strongly, as long as they had reached satisfactory results for their own proposals through this process in the past. n269 Decisionmaking in advisory councils thus becomes empowering because, as Guinier observes, participants are motivated both by "a sense of collective responsibility in the outcome" and the likelihood of "an individual opportunity to succeed a fair proportion of the time." n270 This deliberative, consensus-oriented [\*522] model would promote innovation because it would encourage the forging of positive-sum solutions that incorporate multiple view-points. n271

Community representation on civilian advisory councils would signify one way in which community interests could be incorporated into the development of police policies and practices in a meaningful way. Political empowerment theories indicate that democratic institutions should provide equal opportunities to influence political decisions and outcomes for both individuals and groups. n272 According to Guinier, the "formal ability to express the intensity of constituent preferences and to bargain or deliberate accordingly" n273 represents a "crucial characteristic of effective minority representation in collective decisionmaking." n274 Community and local policing by nature must mediate competing demands and should ideally pay due regard to minority concerns. By opening the decisionmaking system to the general population and enabling opportunities both for meaningful access and for participation in this process through the election of community representatives on policymaking bodies, civilian advisory councils would lessen the danger that crucial decisions about policing will be imposed upon everybody by an overly influential majority or a falsely self-proclaimed community voice. Electing representatives onto civilian advisory councils through preference voting thus would bolster the legitimacy of negotiating community consent to local policing through these councils.

*e. Comments Regarding the Special Justification for Proportional Representation with Respect to Communities and Policing*

Proportional representation is especially important for civilian advisory councils because it provides an additional

safeguard against the dangers of majority oppression, which presents particularly salient risks in the context of law enforcement. Poor urban communities largely consisting of racial and ethnic minorities that most often are targeted and victimized by harassing and abusive police practices would face tremendous difficulty in rallying the support and political clout of other communities whose members are not facing the same kinds of problems. n275 [\*523] Moreover, racial minorities usually constitute a statistical minority of the voting population in a given district. Consider again the example of the Chicago loitering ordinance. Although this ordinance was passed by a predominantly white city council, relatively few white Chicagoans risked being arrested under the ordinance--the law applied almost exclusively to minorities by the very terms of its definition. n276 Some observers have asserted that it was unfair for officials elected by predominantly white districts to enact an ordinance that disproportionately threatened the liberty of minority community members in this way. n277

Given these circumstances, civilian advisory councils constitute a special case for preference voting because they are directly concerned with local policing issues. Although members of most state and local forms of representative government are presently elected through more traditional, majority-rule voting methods, local representative bodies that specifically govern the police are fundamentally different from representative bodies that make state and local laws. This difference is significant, due to the contrast between allowing a local lawmaker to pass a law with which minority voters disagree and allowing a local police officer to stop, frisk, and even arrest those minority voters regularly. Under the current state of the law, police enjoy relatively unfettered discretion. To check the marginalization of minorities that could flow from abuse of this discretion, systems for community control of the police should maximize the degree to which they promote democratic ideals and broad political empowerment theories. Particularly because of the risk that traditional majority rule or misconceptions about community preferences will subject members of disfavored populations to aggressive and intrusive police tactics, it is especially important that community control over and consent to local policing incorporate as fair and accurate a reflection of community interests as possible. Accordingly, civilian advisory councils ideally should advance proportional representation theories through preference voting systems.

In many respects, the aforementioned reasons for implementing proportional representation on civilian advisory councils should also apply to other forms of representative government. Other countries use preference voting for their elections, n278 but in the United States, preference voting is rarely used, and, when used at all, this voting scheme is limited to city council and local community school board elections. n279 Given the current political climate and the low likelihood of universal reform in voting rights, it might not be politically feasible or realistic to expect that alternative voting systems will soon attain prominence with respect to the [\*524] operations of representative governing entities. It is possible, however, that civilian advisory councils could offer an experimental ground for incremental reform; proportional representation could start with civilian advisory councils as a first step for establishing alternative voting systems elsewhere.

Even if civilian advisory councils directing and influencing the police consisted of community representatives who had been elected through traditional majority-rule, rather than preference voting methods, one might contend that this would at least be better than a scenario in which advisory councils did not exist at all, because then communities would have even less voice in how they are policed. Yet, majority-rule elections still risk allowing majority interests to overpower minority-sympathetic representatives on advisory councils. This in turn could exacerbate minority exploitation by local police practices, because supporters of these practices could then insulate these practices from critical scrutiny by maintaining that they had been authorized through a purportedly democratic and legitimate process.

Implementing the proposed models for community control and consent without ensuring proportional representation on advisory councils through preference voting elections would not completely eviscerate the effectiveness of community control over local police. A lack of proportional representation on advisory councils would, however, threaten to recreate some of the very same troubling issues relating to questionable legitimacy and possibly unfair democratic representation that these proposals sought to address in the first place.

## CONCLUSION

Civilian review agencies and proportional representation on civilian advisory councils would not provide a panacea for all possible ills associated with the police, nor would they transform racial inequities in the criminal justice system generally. With respect to the harms that people experience due to problematic police practices, however, until changes in criminal procedure and civil rights law render the courts able to provide more adequate remedies, the concept of community control over the police presents another option for reform that merits further consideration.

The models for community consent and control over local policing presented in this Note offer a potential improvement on the current situation. By expanding the opportunities for communities to participate in the critical decisionmaking process respecting police-related issues, these models heighten the influence that community-directed entities can bring to bear on the activities of local police forces. Moreover, proportional representation on the proposed civilian advisory councils strengthens the extent to which this community influence constitutes a fair reflection of diverse interests. As long as the police continue to exert discretionary [\*525] power over people's lives in significant ways, the very legitimacy of police authority depends upon the extent to which this discretionary power is open to democratic mechanisms for accountability and change, especially for racial minorities and those individuals whom the police most directly and powerfully affect.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law  
Section 1983 Actions  
Law Enforcement Officials  
General Overview  
Constitutional Law  
Equal Protection  
Scope of Protection  
Estate, Gift & Trust Law  
Community Property  
General Overview

### FOOTNOTES:

n1 See discussion *infra* Part I.A.1.

n2 Racial profiling refers to the law enforcement practice of using race as a proxy for criminal behavior or as an indicator of criminal propensity, whereby police officers and other law enforcement officials take the race of potential suspects into account when deciding whom to stop for questioning or searching. See Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 30, 30-35.

n3 See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 131-33 (2000) (Stevens, J., concurring in part and dissenting in part) (discussing justifiable fears of minority citizens "that contact with the police can itself be dangerous" even when the person is entirely innocent of any wrongdoing, and citing several studies documenting both the incidence of racial profiling and perceptions thereof among racial minorities); Tracey Maclin, "Black and Blue Encounters"--Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 251 (1991) (providing examples of encounters between black males and police officers in Boston); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997) (arguing that *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny have encouraged discriminatory police practices against blacks); William Jefferson Clinton, *Erasing America's Color Lines*, N.Y. TIMES, Jan. 14, 2001, § 4, at 17 (declaring that racial profiling exists and advocating enactment of a federal law prohibiting the practice); Dana Milbank, *Bush Considers Move Against Racial Profiling*, WASH. POST, Feb. 10, 2001, at A7; Sophia A. Nelson & Brian W. Jones, "Racial Profiling" is Bad Policing, WALL ST. J., June 2, 1999, at A26; David Segal, *ABA Opposes Racial Profiling; Police Urged to Stop Disproportionately Targeting Minorities*, WASH. POST, Aug. 11, 1999, at A3 (reporting the declared position of the American Bar Association against the police practice of racial profiling); Governor George W. Bush and Vice President Albert Gore, Jr., Presidential Debate (Oct. 11, 2000) (transcript available at 2000 WL 1508226) (each candidate describing the practice of racial profiling as a critical civil rights issue and

vowing to address it if he were elected President).

n4 *E.g.*, Joseph P. Fried, *Protests May Disrupt Louima Trial, Lawyers Say*, N.Y. TIMES, Mar. 29, 1999, at B4 (describing how daily demonstrations were planned outside the courthouse where jury selection began in the trial of four police officers charged with brutalizing Abner Louima, a black man, at a New York City police station); Editorial, *The Message of the Diallo Protests*, N.Y. TIMES, Feb. 29, 2000, at A20 (describing how thousands of marchers demonstrated in New York City to protest the acquittal of four police officers who had gunned down Amadou Diallo, an unarmed black man, in his own doorway).

n5 *See infra* notes 12, 20.

n6 *E.g.*, Bennett L. Gershman, *Use of Race in "Stop-and-Frisk": Stereotypical Beliefs Linger, but How Far Can the Police Go?*, N.Y. ST. B.A. J., Apr. 2000, at 42 n.5 (citing a 1996 study by the Joint Center for Political and Economic Studies that found nearly half of all blacks surveyed considered police brutality and harassment a "serious problem" in their own community); *see also* Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42. Carter reports the results of a 1998 survey of American Bar Association and National Bar Association lawyers in which more than half of the black lawyers surveyed responded that racial bias exists in the justice system "very much," while nearly a third of white lawyers responded that there is "very little" bias in the system. *Id.* at 42-43. Two-thirds of the black lawyers also reported that they had witnessed racial bias in the justice system in the past three years, whereas more than eighty percent of white lawyers said they had not. *Id.* For further discussion of this point, *see infra* notes 12 and 162.

n7 *See* discussion *infra* Part I.B.

n8 Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 143; Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1263 (2000).

n9 David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1065 (1999); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 652 (1997) (asserting that police discretion may actually enhance police responsiveness to community needs).

n10 Cognizant of these risks, the Supreme Court in the past has cautioned against relatively standardless policing discretion. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (indicating that the conduct of police officers should be judged against a reasonableness standard).

n11 *See, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2006 (1998) ("Indeed, the nature of the substantive law virtually guarantees a level of discretion that fosters arbitrary, and perhaps discriminatory, enforcement."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1138-39 (2000).

n12 For discussion of the racial profiling issue in law enforcement, *see, for example*, Cole, *supra* note 9, at 1074-77, citing racial disparities in statistics relating to incarceration for drug offenses, treatment of juveniles,

bus and train sweeps, and traffic stops. *See also* Gershman, *supra* note 6; Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Kennedy, *supra* note 2, at 33; David Kocieniewski, *U.S. Will Monitor New Jersey Police on Race Profiling*, N.Y. TIMES, Dec. 23, 1999, at B1 (describing how a New Jersey state court's 1996 finding of disproportionate traffic stops of minority motorists led the U.S. Department of Justice to initiate actions to monitor the New Jersey State Police); OFFICE OF THE N.Y. STATE ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES (1999), available at [http://www.oag.state.ny.us/press/reports/stop\\_frisk/stop\\_frisk.html](http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html) (last visited Apr. 15, 2001). The New York State Attorney General's office investigation showed that blacks were six times more likely than whites to be stopped on the street by police, and that Hispanics were over four times more likely to be stopped than whites, during a fourteen-month period in 1998-1999. The investigation also found that in many such stops, the police lacked a sufficient factual basis to justify the action, and the targeted individuals' race apparently affected the police officers' decisions to make such stops.

n13 *E.g.*, Waldeck, *supra* note 8, at 1273-74 (describing New York City's "quality-of-life" initiative).

n14 Criminologists James Q. Wilson and George L. Kelling are widely credited with originating the "broken windows" hypothesis, which asserts that eliminating the visible signs of public disorder deters the commission of more serious crimes. According to this theory, public disorder left unchecked signals to individuals who are inclined to commit lawless behavior in a given community that such lawlessness generally will be tolerated. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31 ("One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."). Building upon this premise, social norm theorists have argued that perceptions of community norms regarding orderliness and what constitutes acceptable behavior influence whether individuals will choose to commit crimes, because such decisions depend not only on the calculated risk of getting caught, but also on the individual's understanding of whether his action would be sanctioned according to prevailing social norms. These theorists also submit that perceived public disorder tends to discourage law-abiding residents from investing resources and personal effort in their community, thus further contributing to the breakdown of community social controls. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 370-71 (1997). The application of this theory has been widely credited for causing a notable decline in crime rates. *E.g.*, Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292-95 (1998) (briefly summarizing some of the media coverage regarding the positive effects of order-maintenance policing).

Some scholars, however, have disputed the theoretical underpinnings of the broken windows theory, contending that the categories of orderly and disorderly are not fixed truths that predate the policing strategy, but rather, that such categories are realities themselves shaped by the aggressive policy of misdemeanor arrests. In facilitating such a policy, order-maintenance policing itself essentially "criminalizes more people." *Id.* at 297, 342. Harcourt also disputes whether existing evidence supports the claim that reducing public disorder deters more serious crime, and thus calls into question whether such claims justify order-maintenance policing strategies. *Id.* at 295.

n15 Harcourt, *supra* note 14, at 340--42 (describing how the quality-of-life strategy in New York City enhanced the surveillance powers of the police because it was used in part to conduct arrests on the basis of minor offenses and run checks of the records and fingerprints of arrestees to apprehend individuals with prior warrants or those carrying handguns); Debra Livingston, *Police Patrol, Judicial Integrity, and the Limits of Judicial Control*, 72 ST. JOHN'S L. REV. 1353, 1354 (1998) ("In the words of one former Deputy Police

Commissioner, enforcement of quality-of-life ordinances is important because it causes people to leave their guns at home 'because they know they might get stopped.');

Waldeck, *supra* note 8, at 1263-71 (describing the police occupational subculture, which is typically oriented toward law enforcement and crime control rather than service provision, and acts on an "us" versus "them" mentality). Waldeck observes that order-maintenance policing advances officers' crime-fighting image, because officers can use stop-and-frisks or arrests for minor misdemeanors to get "the big collar." *Id.* at 1279.

n16 *See, e.g., Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (recognizing that stop-and-frisks of "youths or minority group members [may be] 'motivated by the officers' perceived need to maintain the power image of the beat officer'" (citation omitted)); Harcourt, *supra* note 14, at 377-78 (observing that New York City's quality-of-life initiative and "zero-tolerance" policy has coincided with a sharp increase in complaints of police brutality and other police misconduct); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 814--15 (1999) (noting that civilian complaints of police abuse in New York City rose almost forty percent since 1993, around the time that New York first implemented its quality-of-life initiative).

n17 *See Illinois v. Wardlow*, 528 U.S. 119, 131-33 (2000) (Stevens, J., concurring in part and dissenting in part) (discussing justifiable fears of minority citizens with respect to police contact, given the historical context of police-minority relations, and observing that "contact with the police can itself be dangerous" even when the person is entirely innocent of any wrongdoing); Roberts, *supra* note 16, at 814 (describing how the Street Crime Unit in New York City stopped and frisked approximately 45,000 people in 1997 and 1998, but made only 9500 arrests); William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1218 (1998) (describing how police stops cause harms resulting from the intrusion into personal privacy, the risk of physical violence or abuse, and the "targeting harm" or injury suffered for being singled out by the police and treated publicly as a criminal suspect, especially when this implicates racial discrimination).

n18 The arrests result in harms that include the loss of privacy associated with investigative stops and searches incident to arrests, the loss of personal freedom of movement and freedom of association, and the associated public stigma of being implicated in criminal wrongdoing. Arrests also cause disruptive personal effects on the individual's economic condition and social relationships. An arrest record hurts that individual's employment prospects, and any parole or probation record has an aggravating effect on the disposition of future criminal charges. *See United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring) ("Custodial arrest is the significant intrusion of state power into the privacy of one's person."); Surrell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 60-64 (2000); Harcourt, *supra* note 14, at 381.

n19 Brady, *supra* note 18, at 7-8, 31 (citing reports that most arrests are for low-level offenses). Brady notes that a considerable number of arrests do not result in prosecutions and asserts that it is unreasonable within the meaning of the Fourth Amendment for the government to arrest individuals when it lacks the contemporaneous intention or ability to prosecute those individuals for the offenses charged, particularly since the individual never receives the opportunity to raise related constitutional claims through a subsequent trial or criminal proceeding. *Id.* Police actions unrelated to evidence gathering, which could encompass a majority of everyday police activities and street encounters, are essentially impervious to the exclusionary rule. *Terry*, 392 U.S. at 17 n.14 (noting that "the abusive practices which play a major, though by no means exclusive, role in creating this friction [between police and minority communities] are not susceptible of control by means of the exclusionary rule"). Arrests on charges that will not be prosecuted are problematic because officers might be using the arrest to serve other law enforcement or unrelated interests. *See Brady, supra* note 18, at 26.

n20 Harcourt, *supra* note 14, at 382 (noting that the decision to arrest for order-maintenance misdemeanors has resulted in the arrest of a number of minorities disproportionate to their ratio in the general population); Roberts, *supra* note 16, at 779-80 (questioning whether order-maintenance policing causes more harm than benefit to black communities, and contending that the gang-loitering ordinance at issue in *City of Chicago v. Morales*, 527 U.S. 41 (1999), codified and exacerbated racist presumptions of black criminality, perpetuating race-based law enforcement); Waldeck, *supra* note 8, at 1286 (declaring that this would create the "perception of two systems of criminal law enforcement: one in which people are free to go about their daily business . . . and another where being a young black or Hispanic male in the inner city means being subjected to routine stops and searches by the police").

n21 *E.g.*, *Terry*, 392 U.S. at 14 n.11 (acknowledging the fact that harassment of minorities presented an especially sensitive issue in the context of standardless police discretion because of the history of police harassment in minority communities); Luna, *supra* note 11, at 1156-57 (describing studies in which large numbers of those blacks surveyed believe that the police are racially biased, give low ratings to the honesty and ethical standards of law enforcement, have little to no confidence in police, are dissatisfied with police service, and live with the fear that police will stop and arrest them despite their innocence). Consider also how the cumulative, aggregate effects of the injuries repeatedly inflicted on individual minorities add up to larger societal harms. *E.g.*, Maclin, *supra* note 12, at 1278 (observing that "modern police methods . . . target black men and others for arbitrary and discretionary intrusions," thus essentially relegating minorities, especially blacks, to second-class status).

n22 *See, e.g.*, David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547 (1995); Samuel L. Myers, Jr., *Racial Disparity in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

n23 *See infra* text accompanying notes 160-162.

n24 Even attempts at further elaboration of police procedure in street encounters have yielded little success. *See Terry*, 392 U.S. at 12 (stressing that the Court was "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street"); Livingston, *supra* note 15, at 1355-56 (observing the limitations of New York's elaborate procedural framework governing street encounters and discussing how the interaction between substantive and procedural law limits the ability of courts to regulate street encounters between police and individual pedestrians).

n25 *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (observing that the determination of reasonable suspicion must be based on the police officer's "common sense judgments and inferences about human behavior"); *Terry*, 392 U.S. at 30. Because a court's inquiry occurs after an arrest has been made, it is easier for officers to offer plausible ex post justifications for their actions, especially if their search has uncovered evidence of criminal activity by the defendant.

The Supreme Court has found that many police-citizen encounters are consensual. *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429 (1991) (finding no seizure where two officers, one of whom was carrying a gun in a zipper pouch, boarded a bus at an interim stop, stood over a passenger at the back of the bus, then asked for and received consent to search the passenger's luggage). Moreover, police may conduct consent searches without giving individuals any warning of their right to say no. *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) ("It would be . . . unrealistic to require police officers to always inform detainees that they are free to go before a

consent to search may be deemed voluntary"); *Schneekloth v. Bustamonte*, 412 U.S. 218, 234 (1973) (declining to hold that the "voluntariness" of giving consent to a search requires proof of the knowledge of the right to refuse).

n26 See discussion *infra* Part I.A.2.a.

n27 See discussion *infra* Part I.A.2.b to .e.

n28 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *City of Chicago v. Morales*, 527 U.S. 41, 60-64 (1999) (invalidating ordinance on the ground that it granted too much discretion to police, thus creating undue risk that it would be arbitrarily employed); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-62, 168-71 (1972) (invalidating vagrancy ordinance as unconstitutionally vague).

n29 *Livingston*, *supra* note 9, at 605 (observing that vagueness challenges to various public order laws, like juvenile curfew, drug, and gang-loitering ordinances, have produced inconsistent results in various jurisdictions); see also Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1166-67 (1998) (citing examples of loitering injunctions and curfews that have withstood judicial review).

n30 Angela L. Clark, *City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety*, 31 LOY. U. CHI. L.J. 113, 147 (1999); *Livingston*, *supra* note 8, at 147. *Livingston* contends that many of the low-level offenses being enforced through order-maintenance policing are activities about which communities are legitimately concerned. *Livingston*, *supra* note 15, at 1355. Accordingly, *Livingston* claims that courts should not employ aggressive use of facial vagueness doctrine to invalidate public order laws, in part because this could impair creative and positive solutions developed in the context of community and problem-oriented policing. *Livingston*, *supra* note 9, at 667.

n31 *Livingston*, *supra* note 9, at 593 (quoting Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985)). Similarly, Tracey Meares compares police discretion to a balloon filled with air: "Pressing in on the balloon in one area simply displaces air to another." Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 701 (1998).

n32 *Whren v. United States*, 517 U.S. 806, 812-13 (1996).

n33 42 U.S.C. § 1983 (1994).

n34 *City of Los Angeles v. Lyons*, 461 U.S. 95, 112-13 (1983) (declining to hold city financially liable for life-threatening arrest practice that involved a choke-hold without provocation during traffic stop); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (concluding that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents" under respondeat superior, and indicating that to recover damages from a municipality, a plaintiff must prove that the municipality actually approved or adopted the challenged custom or practice); *Brady*, *supra* note 18, at 70-72 (describing the defenses available under § 1983, including state sovereign immunity, which renders states immune to monetary liability, as well as a doctrine of qualified immunity that seems to apply presumptively to the actions of individual law enforcement

officers with respect to the governmental bodies that employ them).

n35 *Lyons*, 461 U.S. at 105-06.

n36 *Id.* at 111-12.

n37 *Whren*, 517 U.S. at 812-13.

n38 *Id.*; see also *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1553 (2001) ("We have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."). The *Atwater* Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense such as a seatbelt violation, even where the violation is ultimately punishable only by a fine. *Id.* at 1541-43. The Court's deference to police discretion applies with respect street encounters as well as vehicle stops. See *Terry v. Ohio*, 392 U.S. 1, 27-30 (1968) (ruling that officer's objectively reasonable belief or suspicion regarding the occurrence of criminal activity or the likelihood that the individual being searched is armed and dangerous justifies a stop-and-frisk under the Fourth Amendment).

n39 See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 148 (1997).

n40 See *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963) (finding that police officer's command for black defendants to leave city park, which had been given with the intent to enforce racial discrimination, violated equal protection).

n41 See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (reviewing government practice that employed remedial race-based preferences in awarding government contracts, and indicating that all racial classifications imposed by governmental actors must be reviewed under strict scrutiny).

n42 See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding purposeful racial discrimination in administration of a facially neutral law where city granted permits to operate laundries in wooden buildings to all but one of the non-Chinese applicants, but to none of approximately 200 Chinese applicants).

n43 See *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."). A number of scholars have proposed that a claim based on statistical evidence showing racially disproportionate impact in traffic stops and street stop-and-frisks holds promise. *E.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 501-02 (2000) (describing the increasing significance of data collection and statistics on police stops with respect to the problem of racial profiling). *But see* *United States v. Armstrong*, 517 U.S. 456, 469-70 (1996) (ruling that statistical evidence showing that blacks are more likely to be charged with drug crimes than whites is insufficient to obtain discovery to prove a claim of racially selective prosecution, and indicating that defendant must make some threshold showing drawing comparisons with other similarly situated suspects).

n44 *Cf.* *United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n.17 (1976) (upholding vehicle stop,

interrogation, and search at a highway checkpoint near Mexican-U.S. border based in part on motorist's apparent Mexican ancestry); *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975) (condoning police stop of individual who appeared to be "out of place" given his race and the racial makeup of the neighborhood in which he was found); KENNEDY, *supra* note 39, at 13, 22-23 (noting that a large proportion of crimes such as aggravated assault, robbery, rape, and murder are committed by blacks, and citing studies indicating that blacks commit more street crime than whites relative to their percentage of the general population).

n45 *Adarand*, 515 U.S. at 227 ("All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

n46 In *Whren v. United States*, 517 U.S. 806 (1996), the Court seems to imply that in the context of criminal cases, equal protection doctrine might offer a potential basis for challenging racial profiling practices. *Id.* at 813 ("The Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."). Yet, it is unclear what form a judicially constructed remedy for an equal protection violation in the criminal context would take. *Cf. Armstrong*, 517 U.S. at 461 n.2 ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of . . . race.").

n47 See Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1110-14, 1135-41 (2000) (advocating the creation of an equal protection exclusionary rule that would apply when law enforcement engages in racial discrimination and arguing that this remedy should apply with broad scope, so that it would reach "beyond the parameters of Fourth Amendment privacy interests to encompass any situation in which law enforcement exploits a citizen's race to obtain evidence"); Karlan, *supra* note 11, at 2004 (contending that "the exclusionary rule, a traditional criminal procedure remedy, may often be superior to traditional equal protection remedies for remedying equal protection violations in the criminal procedure context").

n48 See discussion *supra* note 18. For criminal defendants who raise equal protection claims in the course of criminal proceedings against them, it is also possible that courts would be reluctant to apply remedies that seem overinclusive in response to the harm. *Cf. Karlan, supra* note 11, at 2005, 2011. Professor Karlan explains that *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that the Equal Protection Clause forbids prosecutors from peremptorily challenging black jurors on account of their race, "reveals a problem similar to the one posed by *Whren*: namely, the difficulties that arise when we use the criminal adjudication process to vindicate equal protection rights that extend beyond those of criminal defendants." Karlan, *supra* note 11, at 2005. She argues that "courts have responded to the stringency of the remedial scheme [i.e., reversals as a remedy for successful *Batson* claims] by implicitly restricting the underlying right." *Id.*

n49 Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505, 511 (1994).

n50 PAUL CHEVIGNY, *EDGE OF THE KNIFE* 99-101 (1995) (noting that criminal prosecutions of police are unlikely to have any effect on police practices when police managers do not agree with the decisions to prosecute); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983*

*Municipal Liability*, 80 B.U. L. REV. 17, 19 (2000); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 (1999).

n51 David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 499 (1992) (observing that "prosecutors do not like prosecuting fellow law enforcement officers (with whom they work on a day to day basis)" and noting that victims in such cases are often more readily subject to having their testimony impeached, in part because they are frequently poor and have an unusual lifestyle or criminal record, and that juries are more inclined to give the benefit of the doubt to police officers in assessing witness credibility).

n52 Pub. L. No. 103-322, 108 Stat. 2071 (codified as amended at 42 U.S.C. §§ 13701-14223 (1994)).

n53 *See* 42 U.S.C. § 14141 (1994).

n54 *Id.* § 14141(b).

n55 Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1404 (2000).

n56 *See id.* at 1388, 1409-12 (arguing for amending the statute to include a "deputation" provision, so that the Justice Department might authorize private citizens to bring suits for injunctive relief as a means of reinventing structural reform litigation in the context of policing).

n57 For further discussion on the need for enhanced criminal procedure laws, see, for example, William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995), positing that current criminal procedure law, which emphasizes privacy, tends to obscure the more serious harms attendant to police misconduct that result not from information disclosure but from the use of force by the police. Professor Stuntz argues that criminal procedure should be oriented less toward guarding privacy and more toward rectifying police officers' use of force and coercion. He contends that this change in criminal procedure law would square with other constitutional doctrines and better protect the interests that most people value highly.

n58 *E.g.*, Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 554 (1997) (commenting on the increasing lack of judicial assistance in addressing racial discrimination by police in making pretextual traffic stops, and advocating for civilian review agencies vested with the power to investigate and address the problems associated with pretextual stops); Livingston, *supra* note 8, at 201 (asserting that police departments should adopt community control measures that open up police discretion to monitoring and reasonably constrain the scope of police authority and contending that this more realistic approach would promote police accountability better than having courts apply vagueness doctrine blindly in ways that deny police legitimate authority to address community problems).

n59 Andrew J. Goldsmith, *Introduction*, in COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW 1, 6 (Andrew J. Goldsmith ed., 1991) [hereinafter COMPLAINTS AGAINST THE POLICE].

n60 SAMUEL WALKER, *CITIZEN REVIEW RESOURCE MANUAL* 6 (1995) (defining "citizen" review, which is used interchangeably with "civilian" review).

n61 A large majority of civilian review agencies involve multimember boards; however, approximately ten percent are organized under a single director. *Id.* at 7.

n62 *Id.*

n63 The literature typically uses a four-class scheme to describe the spectrum of review agencies. Under this scheme, "class one" review agencies enjoy the greatest independence, with non-sworn personnel handling the complaint receipt, initial fact-finding, investigative report review, and disciplinary recommendation processes. Class one structures are the most common among America's fifty largest cities. In "class two" bodies, sworn police officers investigate citizen complaints, and civilians or a board consisting at least partly of civilians review the officer's report and recommend action to a law enforcement executive. Class two agencies are most common among cities of all sizes. In "class three" systems, the police department investigates and reviews citizen complaints, and the police department's internal affairs unit recommends action to a chief executive. Appeals can be made to a board containing at least some civilian members, which then can recommend a different outcome to the chief executive. Finally, "class four" systems, which are the least common, have auditor systems for reviewing citizen complaints; auditors serve only to review the police department's internal complaint review procedures and to recommend changes in those procedures where necessary. *Id.* at 9-10 (citing SAMUEL WALKER AND VIC W. BUMPHUS, *CIVILIAN REVIEW OF THE POLICE: A NATIONAL SURVEY OF THE 50 LARGEST CITIES* (1991)).

n64 *Id.* at 7.

n65 *Id.* at 12.

n66 *Id.* at 8-9.

n67 *Id.* at 14-15.

n68 Moreover, because some police supervisors are hesitant to second guess a fellow officer, administrative procedures for handling civilian complaints within police department internal affairs offices may not be very effective. Werner E. Petterson, *Police Accountability and Civilian Oversight of Policing: An American Perspective*, in *COMPLAINTS AGAINST THE POLICE*, *supra* note 59, at 259, 267-68.

n69 It is also possible to correlate the rise of civilian review boards with the emphasis on community that has characterized the community policing movement. *See* Jones, *supra* note 49, at 506 (identifying the shift in philosophy toward more community-oriented policing as a primary impetus behind the resurgence of civilian review boards).

n70 WALKER, *supra* note 60, at 4; Hecker, *supra* note 58, at 593.

n71 See JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 225 (1993) ("Civilian oversight of police . . . is grounded in a democratic theory of representation and participation.").

Civilian review boards have faced criticisms, however, for being underfunded, understaffed, and sometimes closed to the public. The ACLU, for example, has criticized civilian oversight bodies for being too constrained in terms of their statutory authority to review alleged misconduct and for lacking adequate resources to conduct their oversight duties. Hecker, *supra* note 58, at 596-97.

n72 See Goldsmith, *supra* note 59, at 2-3 (discussing the significance of civilian oversight in the context of changing conceptions about the democratic governance of public institutions and democratic participation in public bureaucracies).

n73 See Richard J. Terrill, *Civilian Oversight of the Police Complaints Process in the United States: Concerns, Developments, and More Concerns*, in COMPLAINTS AGAINST THE POLICE, *supra* note 59, at 291, 296 (suggesting that each citizen should have the opportunity to become actively involved in the conduct of government, and that as many governmental services as possible should be based administratively at the local level).

n74 David H. Bayley, *Preface*, in COMPLAINTS AGAINST THE POLICE, *supra* note 59, at v, ix (describing civilian review as serving a demonstrative political function that is crucial to police in multiethnic democracies); Hecker, *supra* note 58, at 604 (describing external review's enhancement of the perceived legitimacy of police practices, particularly in minority communities).

n75 Livingston, *supra* note 9, at 572-78; Waldeck, *supra* note 8, at 1260-63.

n76 Mark H. Moore, *Research Synthesis and Police Implications*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES 285, 290 (Dennis P. Rosenbaum ed., 1994).

n77 Cole, *supra* note 9, at 1063-64; Livingston, *supra* note 9, at 565-66 (citing George L. Kelling & Mark H. Moore, *From Political Reform to Community: The Evolving Strategy of Police*, in COMMUNITY POLICING: RHETORIC OR REALITY 239 (Jack R. Greene & Stephen D. Mastrofski eds., 1988)); Waldeck, *supra* note 8, at 1260-63.

n78 Livingston, *supra* note 9, at 566. Before these efforts, municipal police had been closely tied to local politics and political leaders, such that the police basically functioned as "adjuncts to local political machines." *Id.*

n79 *Id.*

n80 *Id.*

n81 *Id.* at 567. Particularly with the introduction of the patrol car, two-way radio, and telephone, police objectives centered around retrospective investigation of serious offenses, as rapid response to 911 calls and

radio dispatch increasingly consumed routine police work. *Id.*

n82 *Id.* at 568.

n83 *Id.* at 569.

n84 Following the urban riots of 1964-1968, the National Advisory Commission on Civil Disorders (also known as the Kerner Commission) reported on the "deep hostility between police and ghetto communities" as a primary cause of the riots and urban disorders. The Kerner Commission cited various police practices that contributed to hostile relations between police and blacks in inner cities, including roving task forces that conducted intensive, and often indiscriminate, street stops and searches in high-crime districts. In addition to their experiences with hostile and abusive police conduct in their communities, inner-city residents also believed that police did not give their neighborhoods adequate protection; that police tolerated illicit activities like drug activity, prostitution, and street violence in inner-city minority neighborhoods that they would not permit elsewhere; and that police treated complaints and calls for help from such neighborhoods with less urgency. *Id.* at 571 (citing NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 157 (1968)).

n85 For discussions regarding the effectiveness of community policing, see generally Wesley G. Skogan, *The Impact of Community Policing on Neighborhood Residents*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES, *supra* note 76, at 167.

n86 Livingston, *supra* note 9, at 563. In the Chicago community policing program, for example, police and communities worked together and learned how to go to Housing Court to get the city to tear down a vacant building that was being used as a crack house. Harvey Simon, *The Chicago Alternative Policing Strategy (CAPS): Activism and Apathy in Englewood* 14-15 (1998) (unpublished manuscript, on file with the author).

n87 Livingston, *supra* note 9, at 563.

n88 *Id.* at 564.

n89 *Cf.* Petterson, *supra* note 68, at 273 (describing police actions as proceeding on problematic moral authority because a moral consensus is rarely widespread or common in an economically dynamic and socially heterogeneous society).

n90 John E. Eck & Dennis P. Rosenbaum, *The New Police Order: Effectiveness, Equity, and Efficiency in Community Policing*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES, *supra* note 76, at 3, 15 (suggesting that police officers meet with community members to gain their acquiescence to police actions so that officers can then carry out enforcement actions that might otherwise be unacceptable).

n91 WILLIAM LYONS, THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH 4, 10, 48 (1999).

n92 Petterson, *supra* note 68, at 259, 265-66. Professor Livingston has proposed that political and administrative measures, such as enhancing police-community reciprocity in working partnerships and increasing neighborhood involvement in the identification of policing problems, be used to manage police discretion. Livingston, *supra* note 9.

n93 Eck & Rosenbaum, *supra* note 90, at 3, 12.

n94 Livingston, *supra* note 9, at 654.

n95 Michael E. Buerger, *The Limits of Community*, in *THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES*, *supra* note 76, at 270, 270-71.

n96 WALKER, *supra* note 60. Of all thirty-three examples of civilian review boards for which Walker provides information, none has an elected membership; all review board members are appointed. Any variations on this selection scheme tend not to open up the process to any semblance of popular election. The Metropolitan Dade County Independent Review Panel, for example, requests the submission of names of three candidates from five community organizations: the Dade County Association of Chiefs of Police, the Dade County Bar Association, the Dade County League of Women Voters, the Dade County Community Relations Board, and the Dade County Community Action Agency. Terrill, *supra* note 73, at 311-14. The Board of County Commissioners then selects one candidate from each community group for appointment to the panel. The sixth member of the board is selected by the County Manager. If a case is serious enough to warrant full investigation, three additional members are selected by the Board of County Commissioners--two from the community affected by the incident and one representative from the bargaining unit of the accused employee. A full-time executive director, appointed by the Chief Judge of Dade County, coordinates the work of the panel. *Id.*

n97 Jones, *supra* note 49, at 509, 511-12 (commenting that if the process of selecting review board members becomes too narrow, the goal of having review boards that are representative of the community as a whole will be defeated).

n98 Livingston, *supra* note 9, at 666. In Toronto, for example, the police commission and police association are allowed to nominate one-third of the civilians sitting on the boards of inquiry. Clare Lewis, *Police Complaints in Metropolitan Toronto: Perspectives of the Public Complaints Commissioner*, in *COMPLAINTS AGAINST THE POLICE*, *supra* note 59, at 153, 162. Other arrangements render civilian review agencies even less independent from police influence. In the Chicago Office of Professional Standards, for example, the Chief Administrator and office staff are all civilians who are under the administrative direction of the police superintendent's office. Terrill, *supra* note 73, at 309-11.

n99 *See generally* WALKER, *supra* note 60; *COMPLAINTS AGAINST THE POLICE*, *supra* note 59.

n100 *E.g.*, ROBERT TROJANOWICZ ET AL., *COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE* 299-300 (2d ed. 1998) (describing the San Diego Problem Analysis Advisory Committee and the Norfolk Support Services Committee, both of which bring police together with agencies, organizations, and businesses in the community to discuss neighborhood problems, thus deriving community participation in both settings from organizational constituencies). For the Neighborhood Advisory Council for the Dorchester policing precinct in Boston, the civilian members are heads of major neighborhood associations, representatives

of prominent community institutions like the local university, and other "citizen stakeholders." Evan S. Reynolds, *Neighborhood Policing in Boston: A Dorchester Case Study* 9-10 (Apr. 30, 1999) (unpublished manuscript, on file with the author).

n101 Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 ST. JOHN'S L. REV. 1367, 1372-73 (1998).

n102 See TROJANOWICZ ET AL., *supra* note 100, at 195 (cautioning that community group priorities may not coincide with the priorities of the neighborhood as a whole, and that the group's members may not be representative of all the individuals who would be affected by the proposed solution). Trojanowicz states that any new community policing effort must start first with face-to-face meetings with "*average citizens*, not just so-called *community leaders*," and that initiatives must come from the community itself, rather than from police or elites that desire to impose their vision of community onto a neighborhood. *Id.* at 75.

n103 Susan Sadd & Randolph Grinc, *Innovative Neighborhood Oriented Policing: An Evaluation of Community Policing Programs in Eight Cities*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES, *supra* note 76, at 27, 44-49.

n104 *Id.* at 35 (describing how attendance at some community meetings in New York usually consisted of the same few residents; others did not attend in part due to fear of retaliation by drug dealers and gang members).

n105 Many of the men targeted by gang-loitering ordinances, for example, cannot vote because of their age or criminal record. Coombs, *supra* note 101, at 1372.

n106 LYONS, *supra* note 91, at 54.

n107 Advisory committees in Chicago's CAPS program consist of neighborhood residents who work closely with police personnel. Committee members do not really control police operations, however; instead, they direct police as to where to target their efforts, such as by pointing out concentrations of criminal activity like drug dealing in the committee members' neighborhoods. Simon, *supra* note 86, at 16, 24, 26, 28, 35, 52.

n108 See Buerger, *supra* note 95, at 270-71.

n109 LYONS, *supra* note 91, at 23, 51. In his study of the South Seattle Crime Prevention Council ("SSCPC"), for example, Lyons describes how the community partnership utilized in that particular community policing effort employed a limited conception of community. Membership on the SSCPC, which had been established as a police-community partnership, was by invitation only; the council consisted mostly of small business owners who set the agenda according to their business interests. Other community activists--and even some police officers--criticized the SSCPC for exhibiting a bias toward white business owners, in large part because the council worked with the police department primarily to protect their commercial property rather than to advance community concerns about police accountability with respect to issues of police misconduct. *Id.* at 136-37. Moreover, regular SSCPC meetings were not widely publicized. In spite of these concerns, the Seattle Police Department credited and recognized the SSCPC as speaking with the voice of the community and

allowed its dealings with the SSCPC to serve as the standard for police responsiveness to the community. The claim of a community partnership with the SSCPC allowed the Seattle police to expand their power under the guise of community policing through new legislation and existing laws. These efforts resulted in the adoption of a criminal trespass program, a civil abatement program, and a drug traffic loitering ordinance. *Id.* at 142-45. Because the SSCPC sought a more responsive and cooperative police department to pursue its select business interests, it maintained a membership that was less representative of the community and less willing and able to criticize the police and push for reforms. *Id.* at 138-39.

n110 Livingston, *supra* note 9, at 577-78.

n111 Harcourt, *supra* note 14, at 299, 384.

n112 Cole, *supra* note 9, at 1082-83. As Justice Douglas observed, it would be naive to defer to a community's approval of loitering and vagrancy laws to justify their legitimacy, because those arrested under such laws would typically come from minority groups who lack sufficient political clout or prestige to protect themselves. William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 13 (1960).

n113 Roberts, *supra* note 16, at 779-80 (declaring that the Chicago gang-loitering ordinance "entrenched the racialized division of Americans into the presumptively lawless whose liberties deserve little protection and the presumptively law-abiding who are entitled to rule over them").

n114 See LYONS, *supra* note 91, at 80-84 (describing one community activist's observations that majority-interest political pressures kept crime restricted to certain inner-city minority neighborhoods in part because property owners benefited from secondary drug money, and in part because middle and upper-middle class residents who patronized drug and sex markets did not want them shut down entirely, but preferred to keep the crime out of their own, wealthier neighborhoods).

n115 See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 115 (1999) (Thomas, J., dissenting) (recounting the observation of a Chicago resident that only one or two percent of city residents were keeping the other ninety-eight percent essentially imprisoned in their homes).

n116 Roberts, *supra* note 16, at 785; see also *id.* at 801 (criticizing social influence theories of deterrence for creating a false dichotomy between law-abiding citizens and lawless citizens to the effect that the state deprives the liberties of the supposedly lawless citizens to protect the freedom of law-abiding citizens).

n117 LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 362-63 (1993) (describing a "sausage theory" of law and order: "so long as the taste is good and the results are right, we would just as soon stay out of the kitchen and not know what went into the sausage"). Of course, the real issue should be seeking more equitable means for achieving the desired public safety in ways that do not burden certain groups disproportionately. As Professor Roberts points out, "White citizens expect police to protect their neighborhoods from crime without infringing their freedom to travel on public streets or to be safe from arrest because of the way they look. Black citizens deserve no less." Roberts, *supra* note 16, at 835.

n118 See TROJANOWICZ ET AL., *supra* note 100, at 62-66 (describing the difficulty of defining

"community" as a sociological concept); Coombs, *supra* note 101, at 1373; Luna, *supra* note 11, at 1118 n.34 (noting that "community, in and of itself, lacks an *a priori* relationship to any geopolitical division despite the modern propensity to understand community in political terms," and delineating the concept by geographic compactness and socioeconomic homogeneity).

n119 This concern persists even with the possibility of sunset provisions that require legislatures to reexamine a law after a reasonable time period to determine whether the public order problems targeted by the law have dissipated. Livingston, *supra* note 9, at 670.

n120 Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1223 (2000). Professor Brooks presents results from survey data of perceptions concerning the police and the legal system to draw inferences about the alleged desire for differential and discretionary law enforcement among blacks. Among other things, Brooks's survey data shows that while a majority of blacks believe that the American legal system treats blacks unfairly, poor blacks are more inclined than wealthier blacks to believe that the legal system is fair, but at the same time, poor blacks are also more likely to believe that the police behave "just like another gang." *Id.* at 1224 (suggesting such results indicate that poor blacks may welcome heightened enforcement, but not by means of expanding police discretion). Brooks cautions that these findings, much like anecdotally offered premises, should not be given misleading weight in policy debates, but rather should highlight the need for further empirical research and investigation into the assumptions underlying the current debate regarding asymmetric, differential law enforcement in urban minority communities. *Id.* at 1226.

n121 Livingston, *supra* note 9, at 656.

n122 Cole, *supra* note 9, at 1062.

n123 527 U.S. 41 (1999). The Chicago gang-loitering ordinance criminalized loitering in public with a person that a police officer reasonably believed to be a criminal street gang member, and authorized police first to order loiterers to move on and then, if the move-on order was not obeyed, to make arrests. *Id.* at 47 (citing CHI., ILL., MUN. CODE § 8-4-015 (1992)).

n124 See Tracey L. Meares & Dan Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245.

n125 Roberts, *supra* note 16, at 822-23 (noting the wide range of contending opinions regarding the ordinance, including viewpoints among various community groups and city council representatives that supposedly represented minority interests, and citing a newspaper article that described the city council proceedings as "one of the most heated and emotional council debates in recent memory") (citation omitted). Roberts further notes that academics, activists, and residents of all backgrounds took both sides of the issue. *Id.*

In the face of such facts, Kahan and Meares claim that the dissent evidenced by healthy and vigorous debate at city council meetings regarding the loitering policy could be interpreted as a good sign of group deliberation and collective decisionmaking rather than an indication that a majority eventually overwhelmed and overruled a minority. Meares & Kahan, *supra* note 124, at 251 nn.25-26. Along these lines, Kahan and Meares posit a "linked fate" theory, which claims that residents of inner-city communities are somehow able to represent those who would be targeted by the ordinance, even when the voices of those being targeted are not heard, because

they share a "linked fate" with them through ties of family and friendship. Kahan & Meares, *supra* note 29, at 1165. In other words, residents who support policing measures that target their friends and family are purportedly acting in their friends' and families' best interests. Under this reasoning, Kahan and Meares also assert that inner-city community members would prefer greater policing discretion both because it allows for a more closely tailored response to local crime problems and because it may be a preferable alternative to draconian penalties for more severe crimes. *Id.* at 1163-66; *see also* Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong*, in *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES* 3, 27 (Joshua Cohen & Joel Rogers eds., 1999) [hereinafter Meares & Kahan, *When Rights Are Wrong*] (suggesting that community residents may recognize the possibility that those children whom police cannot order off the streets today could be the same children police will be taking to jail tomorrow).

n126 Livingston, *supra* note 8, at 150; Meares & Kahan, *supra* note 124, at 247-50 & nn.8-24.

n127 Cole, *supra* note 9, at 1086-87.

n128 Professor Akhil Amar has said, for example, that "serious crimes and serious needs can justify more serious searches and seizures." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 802 (1994). This premise has been used in part to rationalize the expansion of law enforcement powers and the attendant restriction of Fourth Amendment protections recognized by the Supreme Court. Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 28 (1994).

Under this reasoning, heightened law enforcement powers would not apply equally to all neighborhoods. Criminal activity, especially gang-related violence, tends to be concentrated in certain geographic areas. For example, one study of Chicago gangs found that, from 1987 to 1990, the rate of crime related to gang activity in the two most dangerous parts of Chicago was seventy-six times the rate for the two safest areas. Livingston, *supra* note 8, at 148. Greater law enforcement measures thus might result in differential policing across neighborhoods. Certain constitutional standards, such as those governing reasonable suspicion for stop-and-frisk, for example, appear to have assumed a contextualized meaning. *See Illinois v. Wardlow*, 528 U.S. 119 (2000) (ruling that defendant's unprovoked flight from officers in high-crime neighborhood supported reasonable suspicion that justified *Terry* stop).

n129 KENNEDY, *supra* note 39, at 19.

n130 *Id.* at 11, 19 (citing a U.S. Department of Justice survey report indicating a higher rate of victimization by violent crime for blacks than for whites at nearly every income level).

n131 *Id.* at 10 (implying that youth curfews and aggressive crackdown measures on gangs, such as anti-loitering ordinances, are actually more helpful than harmful to black communities).

n132 *See* Brooks, *supra* note 120, at 1222-23. Professor Brooks describes such arguments, characterizing them as the "urban frustration" theory, and then criticizes that theory since there is no broad-based evidence showing that blacks in high-crime neighborhoods are willing to support increased police discretion and harsher sanctions in exchange for safer neighborhoods. Brooks also cites survey data that reveal little or no association between citizen support for the police and the fear of being victimized by crime. *Id.*

n133 Kahan & Meares, *supra* note 29, at 1168-69. *But see* Roberts, *supra* note 16, at 819 (contesting the premise of heightened law enforcement as a form of black liberation).

n134 *Morales*, 527 U.S. at 100-01 (Thomas, J., dissenting) (recounting testimony of residents before the Chicago City Council).

n135 *Id.*

n136 Michael Martinez, *Parents Paid to Walk Line Between Gangs and School*, CHI. TRIB., Jan. 21, 1998, at 1.

n137 Meares & Kahan, *When Rights Are Wrong*, *supra* note 125, at 4.

n138 Livingston, *supra* note 8, at 148.

n139 *E.g.*, ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (Anchor Books 1992); *cf.* LeALAN JONES & LLOYD NEWMAN, *OUR AMERICA: LIFE AND DEATH ON THE SOUTH SIDE OF CHICAGO* (1997).

n140 Roberts has pointed out that there are no democratic processes currently available that would empower black communities to determine for themselves the reality regarding criminal procedure rights. Roberts, *supra* note 16, at 821-22, 825-26. Roberts observes further that in the case of the Chicago gang-loitering ordinance, there was no systematic way to ensure that the predominantly black neighborhood organizations ratifying the ordinance represented a majority of the inner-city residents; no one polled the citizens, and such a poll would not have provided a reliable indication of community opinion. *Id.* at 825-26.

n141 *See* Meares & Kahan, *When Rights Are Wrong*, *supra* note 125, at 15-16; *Morales*, 527 U.S. at 99-101 (Thomas, J., dissenting).

n142 *Morales*, 527 U.S. at 74 (Scalia, J., dissenting). Even good intentions, however, can be dangerous to individual rights. As Justice Brandeis wrote, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting); *see* Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 807 (1998) (quoting *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (quoting Justice Brandeis's *Olmstead* dissent)).

n143 Livingston, *supra* note 9, at 551 (maintaining that communities should not be prevented from employing an amalgam of civil, criminal, and administrative law to authorize police to perform order-maintenance tasks, as long as the public order laws are not facially aimed at rendering some people outsiders to the community but instead are directed at setting behavioral standards in the general interest of the community's public life). As Wilson and Kelling put it, "Should police activity on the street be shaped, in important ways, by the standards of the neighborhood rather than by the rules of the state?" *Id.* at 560 (quoting Wilson & Kelling, *supra* note 14, at 38).

n144 *E.g.*, *Morales*, 527 U.S. at 74 (Scalia, J., dissenting) (asserting that it is within a citizen's rights to decide whether it is worth restricting some of her freedom to eliminate the problems that plague her community).

n145 Kahan & Meares, *supra* note 29, at 1171-72.

n146 *Id.*

n147 *Id.*

n148 *Id.*; *see also id.* (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)).

n149 *Id.* at 1173.

n150 Kahan and Meares declare that discrete and insular groups that had been isolated and overly burdened in the past are no longer politically powerless. To support this claim, they cite, among other things, changes wrought by the Voting Rights Act, the civil rights era, increased black voter turnout, the election of more black elected officials, and greater minority representation in police departments. *Id.* at 1160-63.

n151 Responding to the view that constitutional rights should correct for failures of the democratic process to take into account the interests and views of blacks, the authors characterize the 1960s conceptions of constitutional rights in criminal procedure as arising out of the Warren Court's suspicion of democratic politics ("community distrust") and skepticism of policing discretion. Meares & Kahan, *When Rights Are Wrong*, *supra* note 125, at 8-9; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 205. Now that inner-city minorities have more influence in municipal bodies and state legislatures, the authors contend, they are adopting the very discretionary police tactics that were once used to suppress them. Kahan & Meares, *supra* note 29, at 1163-64.

n152 Kahan & Meares, *supra* note 29, at 1176-77.

n153 *Id.* at 1177-80.

n154 *Id.* at 1178-79.

n155 *E.g.*, Cole, *supra* note 9, at 1063. Cole criticizes Kahan and Meares for failing to account adequately for the importance of legitimacy in effective law enforcement and for the threat that untrammelled discretion poses to the law's legitimacy, especially when discretion invites stereotyped judgments. He also contends that Kahan and Meares have overestimated the extent to which constitutional criminal procedure now restricts police discretion and underestimated the continuing threat of racial discrimination in the administration of criminal justice. *See also* Alan M. Dershowitz, *Rights and Interests*, in *URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES*, *supra* note 125, at 33, 36 (observing that Kahan and Meares fail to note the public-private distinction, and stating that "this [constitutionally derived] conception of rights grows out of a fundamental lesson of history: that in the long run, abuses by the state are far more dangerous to liberty and

democracy than individual criminal conduct"); Carol S. Steiker, *More Wrong Than Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES, *supra* note 125, at 49, 50-51 (observing that it is "ridiculous to suggest that inner-city residents would affirmatively choose to trade away their civil liberties," given the lack of realistic alternatives, and likening the purported consent of minority communities accepting more intrusive policing tactics to the predicament of a desperate swimmer who is drowning in a lake: "In dire straits, and with limited options, they will grasp at any rope, no matter how steep the price"); *id.* at 56 (characterizing Fourth Amendment protections as "indispensable freedoms" that are essentially inalienable); Jeremy Waldron, *Inalienable Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES, *supra* note 125, at 76, 78-80 (drawing a critical distinction between the voluntary waiver of individual rights in specific instances and the wholesale abandonment of such rights generally, and arguing that in the latter situation, the consent of a majority of individuals in a particular community does not have the same weight).

n156 Cole, *supra* note 9, at 1060. Especially in the criminal justice system, which marshals the full power of the state against the individual, constitutional rights protect individuals and frustrate majoritarian desires. As widely noted, "rights are trumps held by individuals' that defeat the demands of the collective." Luna, *supra* note 11, at 1123 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977)).

n157 Kahan & Meares, *supra* note 29, at 1166; *see also* KENNEDY, *supra* note 39, at 20 (implying that blacks "suffer more from the criminal acts of [other blacks] than they do from the racist misconduct of white police officers").

n158 *See* discussion *supra* Part I.A.2.

n159 Rather than attempting to take a normative position as to how the balance between individual liberty rights and community safety interests should ultimately be struck, this Note focuses more on the *process* by which communities deliberate and collaborate with the police in achieving this balance. A prescription for how Chicago should deal with its gang problem (e.g., whether it should adhere to its revised loitering ordinance and how it should limit police discretion) remains a topic for more comprehensive exploration in another paper.

n160 Luna, *supra* note 11, at 1108.

n161 *Id.* at 1159; *see also id.* at 1158-59 nn.205-06 (citing RODERICK M. KRAMER & TOM R. TYLER, TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 3-5 (1996); BARBARA A. MISZTAL, TRUST IN MODERN SOCIETIES: THE SEARCH FOR THE BASES OF SOCIAL ORDER 26-28 (1996) (discussing Hobbes and Locke); ADAM SELIGMAN, THE PROBLEM OF TRUST 14-16 (1997) (noting the importance of trust in the work of Locke, Hume, and Kant)).

n162 *Id.* at 1161. As Professor Waldeck points out, "One cannot endorse the social norms approach to deterrence without placing tremendous faith in a police department's ability to interpret and enforce norms, or in a community's ability to correct a police force whose interpretation is misguided." Waldeck, *supra* note 8, at 1257. Open-ended, unchecked police discretion, when combined with a community's mistrust of the government and its agents, undermines the legitimacy of the law, which in turn reduces public compliance with legal commands. Resentful of officers, individuals may be less willing to cooperate with the criminal justice system and may consequently refuse to provide information to the police, testify as witnesses, or convict as jurors. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677,

679 (1995). Professor Butler advocates that black jurors engage in racially selective jury nullification, primarily in cases involving victimless crimes like drug offenses, to balance the racial scales with respect to imprisonment. This proposal acts much like a form of affirmative action in law enforcement, a race-conscious remedy designed to correct the racial imbalance of blacks involved in the criminal justice system. *See also* Cole, *supra* note 9, at 1063, 1092 (pointing out that to do community policing well, police need to be vested with substantial discretion, but that, at the same time, the very vesting of discretion may undermine the law's effectiveness to the extent that it fosters the appearance or reality of discrimination and thus robs the law of its legitimacy); KENNEDY, *supra* note 39, at 27; Meares, *supra* note 31, at 679-80 (demonstrating that compliance with the law is strongly related to a citizen's perception of the legitimacy of government, and that experience-based assessments of both distributive and procedural fairness, such as with respect to race and the administration of criminal justice, matter a great deal to perceptions of legitimacy and compliance (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64-73 (1990))).

n163 *See* Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 869-72 (1998) ("People have been found to value the opportunity to express their views to decision makers in and of itself.").

n164 For a discussion of these councils, see *infra* Part III.C.

n165 Professor Livingston argues that police discretion in quality-of-life enforcement can be made more firmly subject to meaningful democratic control by cultivating an increased reciprocity between police and communities, through devices such as political and administrative controls upon police practices. Livingston, *supra* note 9.

n166 *See infra* Part III.B.7 (discussing how civilian review agencies would share information generated through complaints with civilian advisory councils to reform problematic practices).

n167 Terrill describes this element as key to accountability and a long-standing feature in the democratic process. Terrill, *supra* note 73, at 314-19.

n168 This model incorporates some suggestions made by other authors and also draws upon certain elements found in existing agencies. *See, e.g.*, Petterson, *supra* note 68, at 280-83 (making recommendations based on Toronto's Office of Public Complaints Commissioner and Cleveland's Police Review Board). The ACLU has also made such recommendations and has identified ten principles for an effective civilian review board: (1) independence (power to conduct hearings, subpoena witnesses, and report findings and recommendations to the public); (2) investigatory power (authority to investigate incidents independently and issue findings on complaints); (3) mandatory police cooperation (complete access to police witnesses and documents through legal mandate or subpoena power); (4) adequate funding; (5) hearings (essential for resolving credibility questions and enhancing public confidence in the process); (6) community diversity (broad representation of community being served); (7) policy recommendations (civilian oversight can note problem policies and provide forum for developing reforms); (8) statistical analysis (public reports can detail trends in allegations, and early warning systems can identify officers who are the subjects of unusually numerous complaints); (9) separate offices (housed away from police headquarters to maintain independence and credibility with public); (10) disciplinary role (civilian review boards should be considered in determining appropriate disciplinary action). AM. CIVIL LIBERTIES UNION, FIGHTING POLICE ABUSE: A COMMUNITY ACTION MANUAL (1997), [http://www.aclu.org/library/fighting\\_police\\_abuse.html](http://www.aclu.org/library/fighting_police_abuse.html)

[hereinafter ACLU, FIGHTING POLICE ABUSE].

n169 See Petterson, *supra* note 68, at 279.

n170 Jones, *supra* note 49, at 509-10 (describing how complainants often fail to file complaints out of fear of appearing at the local precinct where the officer accused of wrongdoing is assigned, timidity, inability to express their problems adequately, unawareness of complaint procedures, or the sense that their complaints will not be handled properly). Studies have indicated that police tend to discourage citizen complaints by acting hostile when complaints are filed, showing lack of objectivity in the investigation, failing to provide formal adversary hearings, and being unwilling to impose meaningful discipline on officers found guilty of misconduct. *Id.*

n171 The Office of the Public Complaints Commissioner in Toronto, for example, does not restrict civilian complaints to claims of excessive use of force or racial bias alone, but instead remains open to claims of minor discourtesy, racial slurs, and other conduct. Lewis, *supra* note 98, at 158.

n172 Consider, for example, the Minneapolis Civilian Police Review Authority, which has such an appeals structure. BD. OF DIRS. OF THE MINNEAPOLIS CIVILIAN REVIEW AUTH., MINNEAPOLIS CIVILIAN POLICE REVIEW AUTHORITY ADMINISTRATIVE RULES (1990), *reprinted in* WALKER, *supra* note 60 [hereinafter MINNEAPOLIS REVIEW AUTHORITY].

n173 With the Police Complaint Authority ("PCA") in England, the system for informal resolution allows the agency to dispense with minor cases quickly and cheaply. A key feature of this particular system is that police officers face no risk of disciplinary action if they agree to participate; they can admit misconduct or apologize to the complainant without their statements being admissible as evidence against them or being placed on their personnel record. Mike Maguire, *Complaints Against the Police: The British Experience*, in COMPLAINTS AGAINST THE POLICE, *supra* note 59, at 177, 185.

n174 See, for example, Chicago's Office of Professional Standards and San Francisco's Office of Citizen Complaints, where all complaints are directed to the civilian agency. The agency appraises whether the police department or civilian investigators should handle the complaint and then sends the complaint to the appropriate agency. Petterson, *supra* note 68, at 278; *see also* MINNEAPOLIS REVIEW AUTHORITY, *supra* note 172 (providing the administrative rules for the Minneapolis Civilian Police Review Authority).

n175 In his study of police complaints in England, Maguire has observed that a significant number of complaints involved situations in which the complainant only sought an explanation or a simple apology for an officer's conduct, in which case it would not be necessary to spend the time and resources to launch a full investigation. Maguire, *supra* note 173, at 191. In his study of the Milwaukee board, Jones observes that over fifty percent of cases that reach conciliation are resolved at that point, in large part because many complainants only need an explanation of the policies or an apology from the accused officer to satisfy their grievance. *See* Jones, *supra* note 49, at 515. In addition, a number of complaints are filed by malicious or disturbed individuals to harass or gain attention. These baseless allegations would best be handled by dismissal. To the extent possible, civilian review agencies should not waste time conducting a complete investigation of every complaint filed.

n176 For an example of another review agency that employs its own investigators, see the Detroit Board of Police Commissioners. All of its staff members are under the direction of the board; the police chief has no authority over them. *See* CITY OF DETROIT CHARTER § 7-1104, *reprinted in* WALKER, *supra* note 60 [hereinafter DETROIT CHARTER].

n177 The Police Complaint Authority in England, for example, is divided into separate investigative and disciplinary divisions. *See* Maguire, *supra* note 173, at 183. In the Toronto Office of the Public Complaints Commissioner, although the Public Complaint Investigation Bureau is part of the police force, it is a separate unit created by legislation and deals only with public complaints. Lewis, *supra* note 98, at 158.

n178 Accordingly, to improve civilian confidence in police investigations, investigators should include explanations of the steps taken in the investigation and the reasons for a particular finding in a detailed report issued to the complainant. Another system that allows civilian investigators to conduct reinvestigations is the "inquiry review" process of the Detroit Board of Police Commissioners, which allows for a second investigation in response to complainant requests regarding complaint investigations that police have already completed. The board can order reinvestigation due to errors or omissions in the original investigation, but not simply because the complainant was dissatisfied with the outcome. *See* Terrill, *supra* note 73, at 306-08. Similarly, the Toronto Office of the Public Complaints Commissioner may order civilian investigation in cases involving unusual circumstances as well as reinvestigations when the complainant is dissatisfied with actions taken by the police. *See* Lewis, *supra* note 98, at 157-64.

n179 Because the investigation and handling of complaints requires cooperation from within the police force, some observers contend that complete independence of civilian agencies in their investigations and in their review of complaints is not possible. *See* Andrew J. Goldsmith, *External Review and Self-Regulation, in COMPLAINTS AGAINST THE POLICE*, *supra* note 59, at 32, 34 (discussing the concern shared by many police officers that lay involvement in police affairs would result in a lack of appreciation for the nature of police work and the problems that police face, as well as exacerbate the hazard of vindictive and vexatious civilian complainants); *see also* Bayley, *supra* note 74, at vii-viii (describing how allowing police to become involved and participate in the creation of civilian review boards would be preferable to having external review systems "crammed down [the police's] throats"). Other research shows that a system has rarely been successful if the police force is completely denied an opportunity to respond to complaints. SIDNEY LINDEN, *CREATION AND RESPONSIBILITY OF TORONTO'S PUBLIC COMPLAINT COMMISSIONER 8 (1987)*, *reprinted in* Petterson, *supra* note 68, at 280. Reiner has speculated that it would be difficult to have external non-officers conducting investigations, given their probable lack of forensic experience and expertise. He has noted further that a "blue code of silence" would be even more of an impediment to outsiders than it would be to internal investigators, because police would be even less willing to cooperate. Robert Reiner, *Multiple Realities, Divided Worlds: Chief Constables' Perspectives on the Police Complaints System, in COMPLAINTS AGAINST THE POLICE*, *supra* note 59, at 212, 216-17, 221, 224. Similarly, Jones has commented that a primary weakness of the Milwaukee model is that it eliminates any sworn police personnel from the investigation process. Jones, *supra* note 49, at 517. Observers criticized the Toronto system for allowing police to conduct the initial investigation, because they believe police could manipulate the process to the detriment of complainants with respect to the advice given to complainants as well as the time taken and the diligence employed in conducting investigations. Legislators decided, however, that initial police investigations were necessary as a means of giving police a stake in the system, thereby encouraging their acceptance of the system and preserving an important management role for them. Lewis, *supra* note 98, at 157-64.

n180 *See* Jones, *supra* note 49, at 505 (describing civilian review boards as functioning in theory like

appellate courts). Most of the formulation of tribunal proceedings provided in this Note follows the specifications for evidentiary hearings set out in the administrative rules for the Minneapolis Civilian Police Review Authority. *See* MINNEAPOLIS REVIEW AUTHORITY, *supra* note 172.

n181 Without subpoena power, for instance, it would be highly difficult for civilian investigators to proceed. *See, e.g.*, Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 221 (1998) (describing how the police officers' union in Denver advised its members not to honor subpoenas issued by the city's civilian review board; a Denver County judge upheld the board's subpoena power, stating that without such powers the commission would be "gutted").

n182 Although police cooperation remains a key issue throughout the complaints review process, civilian review boards often have been frustrated by police unresponsiveness. To address these issues, the civilian oversight agency in Berkeley, California, has made appearing before civilian oversight agencies a mandatory condition of a police officer's employment. *See* Petterson, *supra* note 68, at 279.

In consideration for the rights of the police officer, however, any statements given during or for such proceedings, where they are compelled as a condition of employment, cannot be used against him in a subsequent criminal trial (except for perjury). *E.g.*, *Caruso v. Civilian Complaint Review Bd.*, 602 N.Y.S.2d 487 (Sup. Ct. 1993) (holding that use immunity automatically applies when police officers are compelled, upon threat of dismissal, to testify before the city's civilian review board about matters relating to their public employment, and indicating that officers' compelled responses may not be used against them in a subsequent criminal prosecution).

n183 For example, the Detroit board, which conducts its own investigations, can enforce a subpoena or order for production of evidence by imposing penalties upon application to another court. DETROIT CHARTER, *supra* note 176.

n184 Without legal standing, the efficacy and long-term stability of these oversight schemes would be threatened. In Philadelphia, for example, an early civilian review board that had been established by mayoral order over the objections of the city council was disassembled soon thereafter in the face of heightened political and public pressures organized by police association efforts. Terrill, *supra* note 73, at 297-300. An oversight scheme must gain approval through a formal legal process to obtain its authority. The Milwaukee board, for example, is established by the Milwaukee city charter and in Wisconsin state statutes. Jones, *supra* note 49, at 512-13.

n185 At this review hearing, both sides would have the right to present oral or documentary evidence, submit rebuttal evidence, and conduct cross-examinations of witnesses. The hearing panel could admit all evidence that has probative value, including reliable hearsay if it is the type of evidence on which reasonable persons are accustomed to rely in conducting their serious affairs. The hearing panel would exclude any evidence that is incompetent, irrelevant, immaterial, or unduly repetitious.

n186 About one-third of citizen review procedures studied (twenty-one out of sixty-six) allow for legal representation for the police officer, the complainant, or both. WALKER, *supra* note 60, at 13.

n187 Jones, *supra* note 49, at 517-18.

n188 Jones proposes that the agency compile a list of volunteer lawyers willing to perform such representation on a pro bono basis, much like court-appointed legal representation in criminal defense matters or legal services. *See id.* at 518.

n189 Consider the Minneapolis Executive Director, who acts much like a local prosecutor in that it is the Director and the subject officer who appear before the review panel in adversarial proceedings; the complainant may not be present during the evidentiary hearing, except when testifying as a witness. *See* MINNEAPOLIS REVIEW AUTHORITY, *supra* note 172.

n190 Some review agencies use a "beyond a reasonable doubt" formulation as their standard of proof, thus likening the hearing to a criminal trial. *E.g.*, Jones, *supra* note 49, at 515 (describing standard of proof for proceedings before the Milwaukee board). Commentators have argued, however, that this standard should be less demanding because the review hearing is more analogous to a professional employment discipline system than a criminal trial. *See, e.g.*, Lewis, *supra* note 98, at 160.

n191 *See* Iris, *supra* note 181, at 218-19.

n192 Even when civilian review agencies make direct decisions about the disciplinary consequences for individual cases, the ultimate outcome may differ from the agency's disposition due to arbitration. As unions represent an increasing number of police officers, collective bargaining agreements typically include provisions for the arbitration of grievances. Thus, disciplinary actions often may be subject to an arbitrator's jurisdiction. *See id.* at 224 (including examples of instances in which arbitrators' decisions essentially overturned disciplinary actions imposed by police executives, thereby inflaming public controversy). Iris claims that the appeal mechanism is a crucial factor in a review agency's impact; for a disciplinary system to be effective, it needs to be perceived unambiguously as one capable of making decisions that withstand challenges. *See id.* at 218, 222 (asserting that the issue of police accountability should not focus so much on debating the merits of internal versus civilian investigations, but on the actual result in light of arbitrators' decisions that can affect and even overturn disciplinary measures imposed on officers). In his study of arbitrators' reviews of disciplinary actions in the Chicago police department, Iris questions whether the results are arbitrary. If so, this unpredictability would undermine the ability to discipline (or threaten to discipline) police as a mechanism for reforming police practices. *See id.* at 240-44.

n193 The Detroit board, for example, acts as the final authority in imposing or reviewing police employee discipline (although it does so in consultation with the police chief). *See* Terrill, *supra* note 73, at 307. The Milwaukee Fire and Police Commission has the authority to impose sanctions and change policies directly. The Commission can discipline, promote, prevent promotions, and order the chief to do what the board deems appropriate. It has the ultimate authority to displace the chief and actually operate the police department, and it alone can decide cases and impose discipline. Jones, *supra* note 49, at 517.

n194 Moreover, some members of the non-police public may be uncomfortable with leaving these matters in the hands of civilians who might not be as knowledgeable about how to conduct investigations or who might not understand police culture. To ensure public confidence in the external review process, the model proposed in this Note involves both police officers and civilians (with the requisite forensics experience and training) in conducting the investigations into civilian complaints. *See supra* Part III.B.4; *infra* Part III.B.8. The proposed model also keeps the police involved as consultants to ensure that civilian review authorities are guided by an informed perspective on the demands and realities of a police officer's job. *See infra* Part III.B.8.

n195 *See supra* note 179 and accompanying text.

n196 *See infra* notes 216-218 and accompanying text.

n197 *See infra* notes 243-245 and accompanying text.

n198 Livingston, *supra* note 50, at 846-47. Usually the complainant and officer were the only ones present at the incident, so allegations are difficult to prove. *See* Maguire, *supra* note 173, at 196. As a result, many complaints remain unsubstantiated due to lack of evidence rather than poor investigation or a department's unwillingness to impose discipline.

n199 Livingston, *supra* note 50, at 847-49.

n200 *Id.* Recognizing that a small percentage of officers in any department tend to generate a disproportionate share of civilian complaints, some civilian review boards already consider an officer's prior record when recommending disciplinary action, special training, or new assignments for officers with recurring problems. WALKER, *supra* note 60, at 14.

n201 Several authors have advocated for police departments to keep statistics and other records about their daily activities. *E.g.*, TROJANOWICZ ET AL., *supra* note 100, at 194. Trojanowicz describes a version of crime mapping used in the Chicago Police Department that generates graphs, maps, and reports using crime data from both police and civilians, the latter of whom obtain information through a nonprofit organization composed of many local community groups. The Chicago police collect data regarding both quality-of-life concerns (e.g., youth loitering, abandoned buildings, noisy parties) and crime concerns about which police often lack good intelligence (e.g., gang and narcotics activity). *Id.*; *see also* Hecker, *supra* note 58, at 602-03; Livingston, *supra* note 50, at 847-49; Luna, *supra* note 11, at 1171-94 (describing another geographic information system that records, among other information, data about calls for service, crime incidents, and arrests, marking specifically their spatial locations on a detailed map that could enable police and policy managers to draw conclusions about spatial patterns in crime incidence and law enforcement deployment).

n202 *See infra* Part III.C.

n203 As Bayley has observed, research on police accountability has generally accepted and operated on certain assumptions, including that police cannot be trusted to police themselves; that civilian review is critical to the legitimacy of the police; and that complaints should be examined for recurrent problems in police operations that would signal the need for changes in policy. Bayley, *supra* note 74, at ix-x.

n204 In England, the police used some of the findings and statements of the Police Complaint Authority as a source of information for implementing changes in policies. The PCA, for example, recommended that individual officers make themselves more easily identifiable when wearing riot gear and that officers use caution to avoid tightening handcuffs excessively. Maguire, *supra* note 173, at 193.

n205 *See* Petterson, *supra* note 68, at 273.

n206 Luna, *supra* note 11, at 1169 n.241.

n207 *Id.*

n208 Jones, *supra* note 49, at 517.

n209 *See id.* at 518.

n210 Some politicians and advocates for aggrieved individuals misunderstood the PCA's role, believing the PCA had to assume the validity of the complainant's assertions. In fact, the PCA discovered that a significant portion of complaints were made by disturbed or malicious people pursuing personal agendas, which generated a significant number of baseless allegations. Although many civilians sought legitimate redress from police misconduct, to an extent police also had to be protected against such spurious allegations. It was therefore essential that the PCA acted in a thoroughly neutral, nonpartisan manner. Ian Freckelton, *Shooting the Messenger: The Trial and Execution of the Victorian Police Complaints Authority*, in COMPLAINTS AGAINST THE POLICE, *supra* note 59, at 64, 94.

n211 DAYTON CITIZENS APPEAL BOARD POLICIES AND PROCEDURES OF OPERATION (1991), reprinted in WALKER, *supra* note 60 [hereinafter DAYTON APPEAL BOARD].

n212 In his study of arbitrators' decisions, Iris observes that some arbitrators frequently ruled in favor of management, while others split the outcome of their decisions fairly evenly. Iris raises the possibility that arbitrators might strongly internalize the norm of impartiality, and, in so doing, mistakenly hesitate to render decisions that support one side, for example, eighty percent of the time, for fear of being viewed as too partisan. Iris, *supra* note 181, at 241. Yet, in criminal bench trials, for instance, the fact that criminal defendants are usually found guilty does not mean that judges in those cases lack impartiality.

n213 It would be difficult to imagine ways in which candidates could run for positions on review agencies without somehow implying that they are either pro- or anti-police. Inevitably, some candidates might garner the endorsement of police associations, which would raise suspicions as to their impartiality. Local judges elected through popular vote, rather than selected by appointment, also face this challenge. Despite the fact that they are purportedly impartial, some judicial candidates may be rumored to be tough or soft on crime, for instance.

n214 Bayley, *supra* note 74, at x.

n215 Underscoring the significance of this type of knowledge, the civilian agency in Yonkers, New York, arranges for its agency members to attend a "Yonkers Civilian Police Academy" and a series of workshops on civil rights and civil liberties, focusing especially on issues pertaining to the rights of individuals during police encounters. YONKERS POLICE DEPT, POLICE PROFESSIONAL STANDARDS REVIEW COMMITTEE (1993), reprinted in WALKER, *supra* note 60.

n216 The Police Complaint Authority in England, for example, is assisted by a civil service staff and two police advisors. Maguire, *supra* note 173, at 183.

n217 Police often resist external review, especially when the process lacks input from the law enforcement community. For many police officers, the concept of civilian review is threatening because they feel that civilians will be second-guessing officers' actions and imposing discipline, even though civilians are outside the police subculture and do not understand the types of people and situations with which the police must routinely deal. Police often feel that it is difficult for civilians to understand the pressures and difficult situations under which officers operate. *Iris*, *supra* note 181, at 219.

n218 For example, the city manager of Dayton, Ohio, appoints the five voting members of that city's Citizens Appeal Board. The city ordinance creating the board specifies that at least one member shall be a representative of the legal community, and one shall be a former member of the law enforcement community. In addition, an assistant city manager and the chief of police shall serve as ex-officio, nonvoting members of the board. DAYTON APPEAL BOARD, *supra* note 211.

n219 *See supra* Part II.

n220 Luna refers to this concept as transparent policing. Luna, *supra* note 11, at 1164 ("As a program for accountable government, transparency demands high visibility in official decisionmaking. Comprehensive policies should be formulated in public fora, rather than in closed-door sessions, so that both lay citizens and experts can contribute to a healthy debate.").

n221 *Id.* at 1120.

n222 *See id.* at 1121 (identifying these characteristics as measures of successful democratic representatives).

n223 Designating community representatives who are responsible solely for overseeing and advising police would actually be better and more effective than political control via existing formal mechanisms like city councils or the mayor's office. Many politicians pursue other agendas and may therefore act on personal motivations that cause them to disclaim much of their responsibility for monitoring police operations. For instance, politicians may hesitate to impose any significant controls on police activities for fear of appearing soft on crime. Particularly since policing involves public safety risks, distance between politicians and the police may help the former to avoid blame when the latter become ensnared in controversy. Moreover, it is worth noting that many of the reform-era changes had been implemented to remedy the perceived corruption engendered by political control over the police. *See Livingston*, *supra* note 9, at 657.

n224 *See Hecker*, *supra* note 58, at 597 (citing THE CIVILIAN REVIEW OF POLICING: A CASE STUDY REPORT 14 (NYCLU Foundation ed., 1993)).

n225 *See S.F. OFFICE OF CITIZEN COMPLAINTS*, 1993 STATISTICAL REPORT, *reprinted in WALKER*, *supra* note 60. The ACLU also credits its Police Practices Project in San Francisco with inducing the police department to adopt "enlightened policies" regarding treatment of the homeless, use of "pain-holds" and batons, deployment of plainclothes officers at protests and demonstrations, and intelligence gathering, as well as preventing the adoption of an anti-loitering rule that would have made demonstrators financially liable for police costs. *See ACLU, FIGHTING POLICE ABUSE*, *supra* note 168.

n226 See Meares & Kahan, *supra* note 124, at 251-53 nn.27-34.

n227 This list consisted of individuals who were currently or likely to be involved in criminal activity and included the names of two of every three black males in Denver between ages twelve and twenty-four. Hecker, *supra* note 58, at 598.

n228 See CITY & COUNTY OF DENVER PUB. SAFETY REVIEW COMM'N, ANNUAL REPORT (1994), *reprinted in* WALKER, *supra* note 60; Hecker, *supra* note 58, at 598-99.

n229 For example, the Detroit civilian board establishes rules and regulations for the police department in consultation with the police chief, as does the civilian Police Board in Chicago. See Terrill, *supra* note 73, at 307-11. The Milwaukee board also has original rulemaking authority for both the police and fire departments, but it has delegated this authority to the respective chiefs of those departments. See Jones, *supra* note 49, at 512-16.

n230 See discussion *supra* Part I.A.2.

n231 See Hecker, *supra* note 58, at 597.

n232 The teams are led by district commanders, and membership is divided between officers and civilians. See Reynolds, *supra* note 100, at 3-4.

n233 See *id.* at 9-11. The precinct captain has compared himself to a chief executive officer and the council members to his board of directors. Although the precinct captain does not delegate complete control of his district to the council, he shares virtually all information with them, including budget information, overtime schedules, deployment plans, crime statistics, updates on the use of new officers, and the status and disposition of internal affairs complaints. See *id.*

n234 The civilian Chicago Police Board, for example, recruits and interviews candidates for the police superintendent position before submitting the names of three finalists to the mayor. See Terrill, *supra* note 73, at 309-11. At least in theory, communities already exert this sort of control over the selection of the police superintendent, since a popularly elected mayor usually appoints superintendents. Civilian advisory councils more directly facilitate popular accountability of police superintendents to the broader community, however, because representatives on advisory councils have been elected specifically for their ability to serve community interests regarding local policing, whereas people often elect mayors based on many other factors that are not limited to their stance on the police.

n235 The city consists of approximately 279 beats; the average beat includes 3600 households, or about 9500 residents. Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 426 n.77 (2000).

n236 Studies have identified, however, a real risk that the success of the CAPS strategy depends too heavily upon the police and resident personalities involved. Some beat meetings were very poorly attended or dominated by a vociferous few who sought to pursue personal disputes between neighbors rather than address neighborhood concerns. See *id.* at 428-29.

n237 See Waldeck, *supra* note 8, at 1307 (suggesting that police direct more attention toward partnerships with service agencies, so that police alone do not bear the brunt of community problem solving and may understand and resolve community problems more effectively). In Chicago, for example, advisory committees help district commanders "identify key issues, set broad priorities, verify problems and advise on solutions [that include] forming partnerships with community, business and government agencies." See Simon, *supra* note 86, at 8.

n238 TROJANOWICZ ET AL., *supra* note 100, at 290-93.

n239 Professors Michael Dorf and Charles Sabel have described this type of regional coordination and local collaboration, by which sub-units share information as to how each approached similar problems in their own jurisdiction, as a sort of "democratic experimentalism." Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998).

n240 The Police Review Commission of Berkeley, California, for example, holds regular, bimonthly meetings that are open to the public, at which representatives of community organizations can voice criticisms, make proposals, and introduce resolutions to review or reform specific police policies. See ACLU, FIGHTING POLICE ABUSE, *supra* note 168. In maintaining the philosophy of advisory councils as open systems, councils should publish regular newsletters or reports that inform the public about their activities and intentions.

n241 Consider, for example, how Seattle's precinct captains are portrayed as conduits of information rather than decisionmaking authorities. See LYONS, *supra* note 91, at 152. Boston's precinct captains, by contrast, hold more authority and demonstrate a devolution of power throughout the police force structure. See Reynolds, *supra* note 100, at 9-11.

n242 Sadd & Grinc, *supra* note 103, at 35-40 (describing how new community policing strategies require the restructuring of fundamental elements of policing, including the role of the patrol officer, as well as the forging of new working relationships with the public, both of which require the support of police personnel).

n243 See Livingston, *supra* note 50, at 849 (describing how the adversarial nature of § 14141 remedies, developed and imposed through forces that are entirely external to the police department, could undermine their efficacy in implementation).

n244 *Id.* at 848. Moreover, the occupational subculture that characterizes police departments generally tends to resist change, as many frustrated attempts to implement community policing initiatives have demonstrated. See generally Waldeck, *supra* note 8, at 1267.

n245 Livingston, *supra* note 50, at 848 ("External controls and accountability mechanisms (desirable as they are) cannot be expected to be effective unless police organizations are themselves involved in the process of control." (quoting DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 157 (1997))). For a discussion of other police activities and organizational changes that can be implemented to induce officers within police departments to support changes like new policing initiatives, see Deborah Lamm Weisel & John E. Eck, *Toward a Practical Approach to Organizational Change*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES, *supra* note 76, at 53.

n246 See, e.g., Stephen D. Mastrofski, *Community Policing as Reform: A Cautionary Tale*, in COMMUNITY POLICING: RHETORIC OR REALITY 47, 51 (Jack R. Greene & Stephen D. Mastrofski eds., 1988); Cole, *supra* note 9, at 1087 (citing David H. Bayley, *Community Policing: A Report from the Devil's Advocate*, in COMMUNITY POLICING: RHETORIC OR REALITY, *supra*, at 225, 237).

n247 See Luna, *supra* note 11, at 1122.

n248 Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991). Guinier contends that majority approval is legitimate only to the extent that the procedure is fair and allows each voter "an equal opportunity to influence legislative decisionmaking" or "a proportional stake in the legislative outcome." *Id.* at 1440-41.

n249 See *id.* at 1445.

n250 Mastrofski, *supra* note 246, at 51; Cole, *supra* note 9, at 1087 (citing David H. Bayley, *Community Policing: A Report from the Devil's Advocate*, in COMMUNITY POLICING: RHETORIC OR REALITY, *supra* note 246, at 225, 237).

n251 Roberts, *supra* note 16, at 826.

n252 See, e.g., *id.* at 832 (questioning whether political process theory could support community control over policing, considering that there is no secure means for determining black citizens' opinions about aggressive policing, let alone a democratic process for implementing them).

n253 E.g., Meares & Kahan, *When Rights Are Wrong*, *supra* note 125.

n254 Guinier points out that in the context of single-member majority black voting districts, which have been created ostensibly as a tool for black political empowerment, the districting strategy "excludes the possibility of representation for those whose interests are not defined by, or consistent with, those in the geographically defined district." Guinier, *supra* note 248, at 1451. She further observes that strategic voting, rather than race-conscious districting, "would allow dissenting blacks to cast their votes as they chose," rather than having to bolster the presumption that "all blacks will submerge their differences to present a monolithic front." *Id.* at 1470-71.

n255 *Id.* at 1461-62 (describing interests as the "self-identified . . . high salience needs, wants, and demands articulated by any politically cohesive group of voters").

n256 *Id.*

n257 Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 349 (1998) (citing examples of jurisdictions that, as a result of employing alternative electoral systems, experienced significant increases in racial and ethnic minority representation, in many instances leading to the first black or other minority electoral victory ever).

Various legal commentators and social science scholars have discussed the value of alternative electoral systems in providing electoral opportunities to politically disadvantaged minority groups. *See id.* at 335 nn.10-11.

At-large voting is often unfair because its winner-take-all element allows a bare majority to determine election outcomes. Racially polarized voting especially tends to overamplify the voting strength of the majority at the expense of the minority. Guinier, *supra* note 248, at 1429. The traditional winner-take-all form of at-large elections allows each voter to cast only one vote for each candidate up to the number of available seats and awards seats to candidates with the highest number of votes. Another approach uses large districts to elect several representatives through methods similar to at-large election procedures. Other variations on this theme exist. At-large voting schemes employ majority-rule techniques that often dilute minority voting strength whenever minority and majority groups vote differently, because majority groups tend to vote as a bloc and thereby fill all the available seats. As a result, majority groups are overrepresented in that they control a number of seats much greater than their share of the population. Mulroy, *supra*, at 336-37.

n258 The description that follows is taken from Mulroy's account. Mulroy, *supra* note 257, at 340-43.

n259 Also known as the "droop quota," this number refers to the total number of votes cast divided by the number of seats to be filled plus one, then added to one. Thus, where voters need to fill three seats, the minimum is one more than one-quarter of the overall vote. *Id.* at 342 n.42.

n260 *Id.*

n261 *Id.* at 350.

n262 Guinier, *supra* note 248, at 1464-67.

n263 *Id.* at 1471-76.

n264 A concern may arise that civilian advisory councils will not truly represent the community, especially those who are most burdened by aggressive policing, because not everyone can vote. Many black men, for example, are unable to vote because of their criminal record. Cole, *supra* note 9, at 1080 (indicating that nationwide, approximately thirteen percent of black men of voting age are disenfranchised as a result of criminal convictions; and noting that in Florida and Alabama, that figure is as high as one-third). Similarly, juveniles targeted by loitering ordinances will not be able to vote if they are under eighteen. Finally, it is questionable whether groups like the homeless or noncitizens will be able to obtain fair representation through the electoral process. TROJANOWICZ ET AL., *supra* note 100, at 236-60 (discussing issues relating to police work with groups who are often disenfranchised or otherwise not involved or well represented in the political system, such as juveniles, gangs, the homeless, and undocumented aliens). As a possible solution, public interest groups and service agencies in the community could serve as advocates for the best interests of disenfranchised groups. *Id.* at 251-52 (discussing how advocates for the homeless, for example, could work with police to develop policies that treat the homeless appropriately).

The risk that voters either will remain apathetic or will not make informed and educated decisions as to how they vote remains another concern. Consider, for example, the recent state elections in New Hampshire. Voters in Nashua elected Tom Alciere to the state House of Representatives, only to discover afterward that Alciere advocates, among other controversial views, killing police officers, abolishing compulsory education and the

drinking age, legalizing drugs, and committing violence against women. Amidst widespread outcry, Alciere resigned soon thereafter. Sally Jacobs, *After Political Storm, N.H. Ponders--Alciere Keeps Up His Fiery Messages*, BOSTON GLOBE, Jan. 12, 2001, at A1 ("The lesson here is that each voter in the state really needs to take a look at the people who are running," said House Majority Leader David Scanlan, the ranking Republican. "Don't just be passive about the names on the ballot. Look into it."). In Chicago, one of the prominent street gangs in the 1990s, the Gangster Disciples, organized their own political action committee called 21st Century V.O.T.E. ("Voices of Total Empowerment"), which mobilized black voters to elect state and local legislators sympathetic to the gang's influence. William S. Morris, *Spiritual Weakness Must Be Overcome*, DES MOINES REG., May 2, 1999, at 2; George Papajohn, *A Peek Behind Gang's Talk of Political Action*, CHI. TRIB., Oct. 2, 1994, at 1; *Gangster Disciples: Nation's Largest Gang-Run Drug Enterprise*, at <http://www.ndsn.org/SUMMER96/GDGANG.html> (last visited on Apr. 14, 2001); Steve Macko, *Feds Target Chicago Street Gang*, at <http://www.emergency.com/gd-feds.htm> (last visited on Apr. 14, 2001).

n265 Guinier, *supra* note 248, at 1502-03.

n266 *Id.*

n267 *Id.*

n268 *Id.* at 1475.

n269 *Id.*

n270 See LYONS, *supra* note 91, at 20 (arguing that legitimacy requires the empowerment of the oppressed, which allows them to define their own practices and ends).

n271 Guinier, *supra* note 248, at 1458-61.

n272 *Id.* at 1422-23. According to the political empowerment theory Guinier advances, the key goals of government are "authentic representation," "broad-based, sustained community participation," "structurally enforced reciprocity in bargaining or receptivity in deliberation," and "accountable policymaking." *Id.* at 1432.

n273 *Id.* at 1444.

n274 *Id.*

n275 Luna, *supra* note 11, at 1167 (noting how poor, urban, and largely minority communities often are embedded within much larger political units, making reform initiatives difficult to stimulate unless other constituents are similarly displeased and distrustful of police).

n276 Roberts, *supra* note 16, at 827-28.

n277 *Id.*

n278 Mulroy, *supra* note 257, at 341-42.

n279 *Id.*