RACE, CRIME, AND INSTITUTIONAL DESIGN

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I

INTRODUCTION

Minorities are gravely over-represented in every stage of the criminal process—from pedestrian and automobile stops, to searches and seizures, to arrests and convictions, to incarceration and capital punishment.[1] This Symposium provides a timely survey of the issue, with a particular focus on the importance of collecting data which addresses racial disproportionality. No one seems to doubt, least of all me, that gathering, analyzing, and disseminating statistical information will play a major role in any programmatic solution to America's racially skewed penal complex. But there are limits to this endeavor, since criminal justice information does no work by itself. While racial data can provide a snapshot of the current state of affairs, such information rarely satisfies questions of causation, and usually only sets the scene for normative theory.

Consider the issue of black[2] disproportionality, with statistical data confirming what is already obvious to anyone who has visited an urban courthouse or the affiliated prison. Any number of positive hypotheses seek to explain the overrepresentation of African Americans in the criminal process:

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1. *See, e.g.*, Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 LAW & CONTEMP. PROBS. 17 (Summer 2003); Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99 (Summer 2003); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71 (Summer 2003); Joseph E. Kennedy, *Drug Wars in Black and White*, 66 LAW & CONTEMP. PROBS. 151 (Summer 2003); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 219 (Summer 2003); *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 128–35 (1997).

2. Throughout this article, the terms "black" and "African American" will be used interchangeably, though I recognize that these words are not strictly synonymous. For instance, a recent immigrant from an African nation may be "black," but absent a change in citizenship, he would not be an "African American." Moreover, I will use the term "minority" to refer primarily to blacks, although the term might apply to any racial or ethnic group that has been disempowered in the process of law enforcement (e.g., Hispanic Americans). *Cf.* Lynette Clemetson, *Hispanics Now Largest Minority, Census Shows*, N.Y. TIMES, Jan. 22, 2003, at A1 (discussing new census figures demonstrating that Hispanics are largest minority group in U.S.).

the criminogenic influence of socio-economic deprivation in black neighborhoods;[3] the intense policing of open-air drug markets in predominantly minority inner-cities;[4] and even the disturbing claim that, for some reason, African Americans simply have a unique propensity toward crime.[5] Law enforcement apologists, with a little massaging, can convert these explanatory theories of racial disproportionality into normative justifications for the end result.[6]

In black communities,[7] however, the same statistics and perceived reality breed a different hypothesis, one of malignant cause-and-effect: African Americans are over-represented in the criminal justice system *precisely because of racial prejudice by law enforcement.* Whether this explanation is true or not is

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3. DAVID COLE, NO EQUAL JUSTICE 4–5 (1999) [hereinafter COLE, NO EQUAL]; JACK KATZ, SEDUCTIONS OF CRIME 154–63 (1988); KENNEDY, *supra* note 1, at 23–24. According to Elliot Currie, "there is now overwhelming evidence that inequality, extreme poverty, and social exclusion matter profoundly in shaping a society's experience of violent crime." ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 114 (1998). That experience, Currie maintains, is grounded in America's "new social Darwinism, the increasingly harsh attack on living standards and social supports, especially for the poor." *Id.* at 7.

4. *See, e.g.*, Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 556–57 (2000) [hereinafter Luna, *Principled Enforcement*]; Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1157 (2000) [hereinafter Luna, *Transparent Policing*]; William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 872–75 (2001); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1757 (1998).

5. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 458–59 (2000) (noting "temptation among law enforcement officers to simply 'play the base rates' by stopping minority suspects because minorities commit more crimes"); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 783–89, 800–01, 805–10 (1999) (discussing assumption of black criminality); John Derbyshire, *In Defense of Racial Profiling: Where is Our Common Sense?*, NAT'L. REV., Feb. 19, 2001, at 38 (arguing that racial profiling is empirically justified); *cf.* KATZ, *supra* note 3, at ch. 7 (discussing meaning of criminality for minority males).

6. For instance, some advocates have supported heightened drug enforcement in minority neighborhoods, greater punishment for crack versus powder cocaine, and loitering ordinances that target minority gang members as means of protecting law-abiding minority citizens and cleaning up their neighborhoods. *See, e.g.*, KENNEDY, *supra* note 1, at 301 (noting "about half" of the Congressional Black Caucus supported tough punishment for crack cocaine); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) [hereinafter Kahan & Meares, *Coming Crisis*] (arguing in favor of various discretionary policing techniques such as gang-loitering ordinances); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) (arguing that government may be "justified in penalizing possession of crack cocaine more harshly than possession of powdered cocaine notwithstanding the racial demographics that emerged from the operation of this sentencing scheme").

7. Admittedly, the word "community" is a loaded term. I have previously delineated community "by two components: geographic compactness and socio-economic homogeneity." Luna, *Transparent Policing*, *supra* note 4, at 1118 n.34. Here, however, I will use separate terms to distinguish two distinct but related concepts: By "community"—as in the *black* or *African-American* community—I am referring to a group of individuals defined by some shared characteristic or interest, such as race, ethnicity, or sexual orientation, where the group recognizes this defining attribute, presents ideas and arguments that are generally shared by individual members, and can thus nominally "speak" on behalf of these individuals (the NAACP might be a good example). A community may also be defined by geography, although as used here, the term does not *necessarily* incorporate spatial boundaries. When specifically referring to a named group within a meaningful geographic border, I will use the term "neighborhood" instead of "community." So, for instance, all African Americans in the greater Los Angeles metropolitan area might be part of L.A.'s "black community," but only those individuals living in a predominantly black residential area, like Watts, would be members of a "black neighborhood."

almost beside the point—in race relations, perceptions matter. Although some disparities, such as jury decision-making in capital punishment cases,[8] have relatively little to do with law enforcement, police officers still embody the initial contact between African Americans and the criminal justice system. To the extent law enforcement is seen as an occupying force in minority neighborhoods, with black citizens policed by white cops,[9] the police will tend to bear the brunt of local animosity that stems from racial disproportionality.

Moreover, statistics on black overrepresentation may simply corroborate the existence of various forms of official misconduct,[10] such as the unjustifiable use of force and methodical police harassment in public places, which are readily apparent to both victims and affected communities. "Each negative experience creates another building block in the Black folklore about police,"[11] notes Professor Kathryn Russell. The totality of these experiences contributes to the shared belief that law enforcement is fundamentally unfair and prejudiced against African Americans. Negative confrontations become "race-making situations,"[12] constructing what it means to be black through interaction with police—namely, second-class citizens under constant surveillance and subject to abusive enforcement. Given that blacks are often bound together through "linked fate"[13]—an evaluation of individual welfare based on the treatment of other African Americans and the race as a whole—the perceived abuses form a basis for racial solidarity against law enforcement.

The perception of official misconduct that breeds African-American distrust of law enforcement is not a figment of the black community's collective imagination, nor is it necessarily the result of a few isolated incidents of abuse com-

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8. Of course, police officers can indirectly *influence* jury decision-making during capital sentencing through, for instance, perjured testimony or evidence tampering.

9. KENNEDY, *supra* note 1 at 27; John Cloud, *What's Race Got to Do With It?*, TIME, July 30, 2001, at 47.

10. The terms "misconduct," "misbehavior," "wrongdoing," etc., will be used interchangeably in this article. They embody not only criminal behavior or violations of department regulations, but also unethical or immoral behavior that does not necessarily violate the law. *See* Michael J. Palmiotto, *Police Misconduct: What Is It?*, *in* POLICE MISCONDUCT: A READER FOR THE 21ST CENTURY 32 (Michael J. Palmiotto ed., 2001) [hereinafter POLICE MISCONDUCT]; MICHAEL J. PALMIOTTO, POLICING: CONCEPTS, STRATEGIES, AND CURRENT ISSUES IN AMERICAN POLICE FORCES 330 (1997). These terms necessarily include police beatings (i.e., assault and battery), unjustifiable shootings (i.e., attempted or completed homicide), perjury, bribery, extortion, and other crimes. Moreover, they incorporate vulgar, offensive, and racist language, rude and disrespectful behavior, and race-based decision-making, whether or not such actions constitute prosecutable offenses. As such, police misconduct (misbehavior, etc.) encompasses perceived and real violations of the public trust. In the words of former police chief Lee Brown, "it is critical that police . . . judge their own behavior on the following basis: 'Do my actions have the appearance of impropriety' rather than 'have I violated the law?'" Lee Brown, *Law Enforcement Execution on the Integrity and Ethics Challenge Facing the Profession*, *in* POLICE INTEGRITY 26 (Stephen J. Gaffigan & Phyllis P. McDonald eds., 1997).

11. KATHRYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 44 (1998).

12. *See, e.g.*, David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 420–29 (1994).

13. *See, e.g.*, MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 77 (1994) (discussing linked fate in African-American communities).

mitted by a handful of officers.[14]   Instead, police misconduct and poor minority relations are widespread in many departments, emanating from a systemic disorder within the institution of law enforcement.   Indirect evidence is provided by the verified claims of abuse by different cops, in different places, at different times.[15]   Moreover, official committees organized to review beleaguered law enforcement agencies, such as the Christopher Commission in Los Angeles and the Mollen Commission in New York City, have found organizational cultures[16] of abuse and corruption throughout those departments.[17]   Police officers that live by this culture of misconduct are hard to distinguish from modern gangsters,[18] since deviant cops, no less than urban street thugs, tend to exploit the underclass and, in particular, racial minorities.[19]   Needless to say, these officers

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14. David Cole, *The Color of Justice: Courts are Protecting, Rather than Helping to End, Racial Profiling by Police*, THE NATION, Oct. 11, 1999, at 14 (noting that racial prejudice is "not the work of a few 'bad apples' but a widespread, everyday phenomenon that will require systemic reform"); CLEMENS BARTOLLAS & LARRY D. HAHN, POLICING IN AMERICA 254–55, 262–63 (1999) (rejecting "rotten apple" theory); PETER NEYROUD & ALAN BECKLEY, POLICING, ETHICS AND HUMAN RIGHTS 156 (2001) (also rejecting "rotten apple" theory).

15. *See, e.g.*, Joseph D. McNamara, *When Cops Become the Gangsters*, L.A. TIMES, Sept. 21, 1999, at B7 ("[T]he number and similarity of police gangster crimes nationally indicate a crisis in American policing.").   Law enforcement misconduct against minorities appears to be an international phenomenon.   *See, e.g.*, PAUL CHEVIGNY, EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS 145–248 (1995) (reviewing police violence in Latin America and the Caribbean); NEYROUD & BECKLEY, *supra* note 14, at 13 ("Allegations of police mistreatment of minority communities are virtually universal and seem to have a set of stock characteristics.").

16. In this context, *culture* encompasses the assumptions, values, and norms that help define law enforcement and the meaning of membership, as well as the style and environment of policing.   *See, e.g.*, NEYROUD & BECKLEY, *supra* note 14, at 78; Laurie L. Levinson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 14 (2002).

17. *See* REPORT OF THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (1994), *reprinted in* 6 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894–1994 (Gabriel J. Chin ed., 1997); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter Christopher Commission]; s*ee also* BOARD OF INQUIRY, L.A. POLICE DEPARTMENT RAMPART AREA CORRUPTION INCIDENT: PUBLIC REPORT (2000) (report on the LAPD's Rampart scandal), *available at* http://www.lapdonline.org (last visited Mar. 4, 2003); Erwin Chemerinsky, *Policing the Criminal Justice System: An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001) (critiquing Board of Inquiry's Rampart report).

18. *See, e.g.*, David D. Dotson, *Cross the (Blue) Line*, L.A. TIMES, Sept. 26, 1999, at M1 (describing misbehavior of LAPD's CRASH Unit); James Forman, Jr., *Arrested Development: The Conservative Case Against Racial Profiling*, NEW REPUBLIC Sept. 10, 2001, at 24 (noting gang-like demeanor and actions of the New York City Police Department's Street Crimes Unit, which "adopted 'We Own the Night' as its motto, and some of its officers wore t-shirts emblazoned with the Hemingway quote: certainly there is no hunting like the hunting of man, and those who have hunted men long enough and liked it, never really care for anything else thereafter"); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAGAZINE, June 20, 1999, at 57, 64 ("[Los Angeles sheriff's] [d]eputies assigned to hard-core gang areas often tattoo themselves identically, very much like the gangs they fight.   It is the white deputies who do this, in the main, and civil rights activists have loudly accused the Sheriff's Department of harboring racist gangs, identifiable by the tattoos they wear.").

19. BARTOLLAS & HAHN, *supra* note 14, at 241–42; NEYROUD & BECKLEY, *supra* note 14, at 79; McNamara, *supra* note 15, at B7 ("Minorities tend to be the victims of the most grievous police crimes.")

are supposed to protect vulnerable citizens and not victimize them—a point that only adds insult to injury in black neighborhoods.[20]

The intermediate effects of this pathological environment are distrust between police and African Americans, a belief that officers are fundamentally unfair and prejudiced, and the perceived illegitimacy of law enforcement in black neighborhoods.[21] The ultimate consequences are many and troublesome, including increased criminality in affected neighborhoods and citizen reluctance to participate in the criminal process as the legitimacy of law and its enforcers are undermined to the point of near irrelevance.[22]

It is against this background that data collection is offered as a possible curative. Information in and of itself, no matter how powerful, cannot be expected to resolve the ill-will and intense distrust between police and black citizens. Data can only serve as a tool for constructing better police–community relationships when all parties work together pursuant to a blueprint for pro-social development. Without mutual goals and a coordinated plan for their fulfillment, it should come as no surprise when law enforcement rejects empirical data forwarded by African Americans, and vice versa. In the racially charged, dysfunctional conditions of many jurisdictions, law enforcement tends to view the black community as an obstacle and ignores claims of officer misconduct, while blacks do not trust cops, no matter what the numbers say.[23]

What is needed, I believe, is not reams of raw data but a response to the broader problem—the malignant distrust between African Americans and law enforcement, born of police misconduct and producing only more of the same. The solution lies in a reevaluation and redesign of the institution of law enforcement, aimed at both reducing misconduct and involving minorities in the process of police decision-making. By curtailing misbehavior, law enforcement

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20. It should be noted, however, that African-American police officers are also susceptible to race-based decision-making. *See, e.g.*, KENNETH MEEKS, DRIVING WHILE BLACK 63–69 (2000) (describing profiling incident involving black agents and quoting victim as saying: "Black men get stopped by white officers, but black officers stop black women."); Goldberg, *supra* note 18, at 55 ("'Which are worse?' [a black officer] asks [a group of African Americans]. 'White cops or black cops?' 'Black,' comes the reply, virtually in unison.")

21. *See, e.g.*, COLE, *supra* note 3, at 1–5, 10–12, 21–27, 169–79; KENNEDY, *supra* note 1, at x–xi ("[N]othing has poisoned race relations more than racially discriminatory policing pursuant to which blacks are watched, questioned, and detained more than others. . . . [T]he race line in policing creates cycles of resentment."); *id.* at 387 ("The legal doctrines that permit police to treat blackness as a mark of increased risk of criminality generates large pools of distrust, anger, and discord. Blacks are keenly aware that their constitutional protection against unwarranted police intrusion is of a decidedly inferior sort than the protection enjoyed by whites."); Luna, *Principled Enforcement*, *supra* note 4, at 556–62; Luna, *Transparent Policing*, *supra* note 4, at 1107, 1117–19, 1156–58, 1191–92.

22. COLE, *supra* note 3, at 10–12, 169–76; KENNEDY, *supra* note 1, at 4, 24–27, 153; Fagan & Davies, *supra* note 5, at 457–58, 499–500; Luna, *Principled Enforcement*, *supra* note 4, at 561; Luna, *Transparent Policing*, *supra* note 4, at 1119, 1159–60, 1162–63; Goldberg, *supra* note 18, at 55 (describing group of blacks who continue to smoke marijuana in front of police officers, to which an officer replies, "It's like there aren't any laws out here"); *cf.* KATZ, *supra* note 3, at ch. 7 (discussing meaning of criminality for minority males).

23. *See, e.g.*, Michael J. Sniffen, *Reno Targets Police Mistrust*, PITT. POST–GAZETTE, April 16, 1999, at A1 ("No matter what the data show, the perception of too many Americans is that police officers cannot be trusted.") (quoting Attorney General Janet Reno).

addresses the very reason for citizen distrust. And by incorporating the black community and affected neighborhoods into the decision-making process, law enforcement demonstrates its charge against officer misconduct and allows community members to participate in policy formation and review, creating a basis for trust between government and the governed.

This is not to suggest the irrelevance of data collection to indicia of racial profiling or other disturbing phenomena in law enforcement. On the contrary, as will be discussed later in this article, gathering, analyzing, and distributing police information is part and parcel of collaborative decision-making and the detection of officer misconduct.[24] But data collection is only part of any solution to the distrust and animosity between blacks and law enforcement. For instance, if empirical analysis reveals racial profiling but the relevant depart-ment ignores it or displays indifference, data collection by itself will only tend to increase hostility between police officers and African Americans. The source and rationale for gathering data also seem highly relevant. Data collection by a criminal defendant or civil rights plaintiff to be used in litigation against a par-ticular department is unlikely to spur better police–citizen relations.[25] In con-trast, non-adversarial empiricism in service of collaborative decision-making and a more trustworthy relationship can help avoid a statistical squabble. Rather than bickering about whether the data provide evidence of racial preju-dice, the trustworthy police department and the trusting community can move on to a more important question: What do we do now?

To be clear, the dysfunctional relationship between law enforcement and African Americans presents a Gordian knot of massive proportions, one that is unlikely to be unraveled with a discrete, singular solution, and is impossible to fully address in this short piece. In the following pages, however, I suggest a potential theoretical structure for future analysis of police–minority discontent, as well as an example of how it might apply in practice. Part II introduces the concept of institutional design as a framework for analyzing and improving law enforcement performance and community relations, and describes two policing theories aimed at reducing police misconduct and incorporating affected neigh-borhoods into the process of policy formation and review. Part III then offers a brief example of how the framework of institutional design might apply to a hypothetical police department.

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24. *See infra* Part III.

25. Of course, some individuals and groups may have no other choice but to litigate misconduct when facing a recalcitrant police department. *See infra* Part IV. Moreover, litigation occasionally leads to systematic change in law enforcement, although through the slow and often unreceptive court proc-ess rather than the relative expedience of police–citizen collaboration.

II

INSTITUTIONAL DESIGN

In recent years, there has been a renewed interest among social scientists in the role of institutions in society.[26] This revived curiosity with the design of institutions, sometimes referred to as the "new institutionalism" or "new constitutionalism," can be found in the schools of economics, political science, sociology, and their cognates.[27] These disciplines are not solely concerned with static analysis of how various institutions function or their impact on groups and individuals, but also with the ways in which institutions can be (re)designed to serve valuable social goals, both in themselves and as part of larger political regimes.[28] In other words, a theory of institutional design takes a "designer's perspective"[29] on how to improve the internal performance of a given institution as well as its external interaction with other institutions, collectives, or individuals.

Part of the contemporary interest in institutional design is grounded in a desire to recapture the wisdom of classic political theory, specifically that philosophical inquiry should have actual meaning and application in the real world.[30] For adherents to the new institutionalism, the "unhappy divorce" between theory and practice is particularly evident in American law schools. "There, students are taught the arts of close reading and rhetoric, and made to remember legal doctrine as propounded in legal cases," argue political scientists Stephen Elkin and Karol Sołtan, meaning that "[o]nly a few students emerge from their schooling as more than resourceful technicians."[31] Absent from legal education is an understanding of why and how political institutions are constituted, and, of equal importance, why and how they should be reformed.[32]

The current focus on institutional design is also a reaction to post-modernism and the battle-axe of deconstruction. The "masters of suspicion"[33]—Marx,

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26. David L. Weimer, *Institutional Design: Overview*, *in* INSTITUTIONAL DESIGN 2 (David L. Weimer ed., 1995).

27. *See* Robert E. Goodin, *Institutions and Their Design*, *in* THE THEORY OF INSTITUTIONAL DESIGN 1–20 (Robert E. Goodin ed., 1996); Weimer, *supra* note 26, at 2–4; *see generally* A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY (Stephen L. Elkin & Karol Edward Sołtan eds. 1993).

28. Stephen L. Elkin & Karol Edward Sołtan, *Preface*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at vii–viii [hereinafter Elkin & Sołtan, *Preface*]; Stephen L. Elkin, *Constitutionalism: Old and New*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 33–34 [hereinafter Elkin, *Old and New*]; Philip Pettit, *Institutional Design and Rational Choice*, *in* INSTITUTIONAL DESIGN, *supra* note 26, at 55; Karol Edward Sołtan, *What Is the New Constitutionalism*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 4, 16 [hereinafter Sołtan, *What Is*]; *Introduction to a New Constitutionalism*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 1–2; Weimer, *supra* note 26, at 2 .

29. Sołtan, *What Is*, *supra* note 28, at 4, 16.

30. Elkin & Sołtan, *Preface*, *supra* note 28, at vii.

31. *Id.*

32. This is not an entirely accurate criticism of legal education. Constitutional law and administrative law, for instance, arguably deal with the institutional design of the national government and administrative agencies, respectively.

33. *See* PAUL RICOEUR, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 32–36 (1970).

Nietzsche, Freud, and their modern disciples—demonstrated that much of what appears analytical and disinterested masks the hidden realities of power and domination. Through their constant questioning and criticism, deconstructing the very foundations of our social world, the post-modern skeptics sought to destroy the false consciousness that enveloped society. Today, however, the hermeneutics of suspicion seems to have run its course. The hidden underbelly of law, custom, and artifacts of the past has been exposed and, where appropriate, deemed a fraud and oppressor. Yet taken much further, post-modernism just becomes nihilism in drag. Institutional designers seem to be saying that they accept the post-modern critique, but now it is time to focus efforts on constructive endeavors.

An "institution" is nothing more than a "stable, valued, recurring pattern of behavior,"[34] but for present purposes, it specifically refers to an official entity empowered to prescribe and execute authoritative decisions.[35] In turn, "design" can be defined not only as constructing an entirely new institution but also the more common task of assessing an existing institution and making modifications to improve its performance.[36] "Institutional design," then, is the process of creating or modifying the rules and incentives of an official entity to achieve certain substantive ends, with the design process predicated on an understanding of the normative goals of a particular institution.[37] This morality guides both the assessment and modification of an institution and its agents—whether goals are sufficiently realized, and if not, the necessary changes for a better fit between ends and means.[38]

Setting normative goals for almost any public institution will present a highly contested endeavor, even more so when dealing with critical functions like law enforcement. Nonetheless, let me suggest a general objective that might guide the project of institutional design in the present setting: creating a more *democratic* police force. For the most part, we can all agree that democ-

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34. SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 12 (1968); s*ee also* Weimer, *supra* note 26, at 2–3, 5; Randall L. Calvert, *The Rational Choice Theory of Institutions: Implications for Design*, *in* INSTITUTIONAL DESIGN, *supra* note 26, at 63–64; John S. Dryzek, *The Informal Logic of Institutional Design*, *in* INSTITUTIONAL DESIGN, *supra* note 26, at 103–04; Goodin, *supra* note 27, at 19–24; Pettit, *supra* note 28, at 55.

35. An institution in this sense "deals with the control of the use of force within a society and the maintenance of internal and external peace of the boundaries of the society, as well as control of the mobilization of resources for the implementation of various goals and the articulation and setting up of certain goals for the collectivity." Shmuel N. Eisenstadt, *Social Institutions: The Concept*, *in* 14 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 410 (David L. Sills ed., 1968).

36. Goodin, *supra* note 27, at 30–34; Christine Lambert & Nick Oatley, *Governance, Institutional Capacity and Planning for Growth*, *in* URBAN GOVERNANCE, INSTITUTIONAL CAPACITY AND SOCIAL MILIEUX 126–27 (Göran Cars et al. eds., 2002); Pettit, *supra* note 28, at 55.

37. "A well-designed institution," philosopher Robert Goodin suggests, "would be one that is both internally consistent and externally in harmony with the rest of the social order in which it is set." Goodin, *supra* note 27, at 37.

38. Russell Hardin, *Institutional Morality*, in THE THEORY OF INSTITUTIONAL DESIGN, *supra* note 27, at 126–27.

racy is a good thing—or, at least, the best choice given the other options[39]—and still differ as to its proper meaning. But for present purposes, I will define and unpack the term as follows: Democracy is popular rule of government, typically through the election of representatives empowered to fulfill the will of the citizenry. A democratic state can have no other master than the people, since its very legitimacy is founded on consent of the governed.[40] This consensual or contractual vision of democracy presumes a give-and-take between government and citizen: The state is authorized to wield the power of coercive force, but always in service of the common good and only to the extent that official actions are ultimately accountable to the people.[41]

Among other things, however, modern democracy faces a pair of challenges, the first being interest pluralism. Contemporary western societies are not monolithic in values and viewpoints but instead contain an assortment of ideologies, forwarded by individuals and groups, each seeking to advance its own objectives and capture scarce resources.[42] The aggregation of plural interests and the allotment of public wealth tend to be made through majoritarian rule: If legislation is supported by a majority of elected representatives, for instance, the will of the people is supposedly fulfilled.[43] Yet pure majoritarianism has the potential to devolve into a method of oppression, where certain interest groups persecute unpopular minorities or use their sway over government to extract resources from the less powerful.[44]

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39. "Democracy is the worst form of Government," Winston Churchill once quipped, "except all those other forms that have been tried from time to time." THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 83 (Antony Jay ed., 2d ed. 2001) (from speech in the House of Commons, 11 November 1947).

40. JOHN KLEINIG, THE ETHICS OF POLICING 12–17 (1996) (discussing consent as basis for government legitimacy); Stephen L. Elkin, *Constitutionalism's Successor*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 130 [hereinafter Elkin, *Constitutionalism's Successor*]; *cf.* Luna, *Transparent Policing*, *supra* note 4, at 1121–31 (discussing the meaning of democracy in context of criminal justice).

41. U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 14 (1993) [hereinafter PRINCIPLES OF GOOD POLICING]("Today, the policing function is viewed increasingly in terms of the 'contractual' relationship with the people. That is, given the impact which law enforcement has on the community, police service delivery should be based on community needs, safety concerns, and on relentless enforcement of the law against criminals."); KLEINIG, *supra* note 40, at 209–29 (discussing different views of accountability); NEYROUD & BECKLEY, *supra* note 14, at 146–50 (similar); Luna, *Transparent Policing*, *supra* note 4, at 1121–31 (discussing democratic accountability in criminal justice).

42. John Ferejohn, *Instituting Deliberative Democracy*, *in* NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 79, 82–83 (2000); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234–38, 249–50 (1989) [hereinafter Rawls, *Overlapping Consensus*]; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–66, 770 (1997) [hereinafter Rawls, *Public Reason*]; Luna, *Transparent Policing*, *supra* note 4, at 1122–23; *see generally* Bernard Grofman & Robert Stockwell, Institutional Design in Plural Societies: Mitigating Ethnic Conflict and Fostering Stable Democracy (unpublished draft 2001), available at http://www.democ.uci.edu/democ/papers/ stock.htm (last visited Mar. 4, 2003).

43. Luna, *Transparent Policing*, *supra* note 4, at 1122.

44. *Id.* at 1122–23; Grofman & Stockwell, *supra* note 42.

The second challenge to democracy is the unavoidable reality of discretion.[45] The limits of language and the variability of context prevent lawmakers from anticipating and detailing the appropriate execution of their dictates in all potential scenarios. For this reason (and others[46]), law typically will be scripted at a level of generality, with executive agencies such as police departments empowered to determine the proper scope and means of enforcement.[47] But sweeping grants of discretion—the authority to choose between two or more courses of conduct[48]—tend to have troublesome consequences. With great latitude of action, state enforcers can become the law unto themselves. Absent limits or guidelines, they may be arbitrary or self-interested, without regard for concepts of right and common welfare.[49] Broad discretionary powers can even amount to a type of "serfdom," as Theodore Lowi has written, where law enforcement becomes a patron converting public policy into largesse for favored individuals or groups.[50]

These challenges can be addressed, however, by enriching the meaning of democracy. To begin with, democratic government need not be synonymous with majority rule. In fact, if democracy contemplates consent and empowerment of the people in furtherance of the common good, pure majoritarianism is a brutal, ineffective means of achieving this goal. Classic scholars recognized as much, distinguishing between *ochlocratia,* the mob-like rule of the majority, versus *democratia*, popular government pursuant to constitutional procedures.[51] The former places raw power directly in the hands of the multitude without the leavening force of virtuous representatives or countermajoritarian checks and balances, conceiving a government wholly subject to the uninhibited, often vacillating desires of the masses. In contrast, the latter understands democracy as consensual rule, that state actions that touch all ought to be supported by all,[52] and, conversely, actions that touch few ought to be accepted by those so affected.

Popular consent does not necessarily require nationwide unanimity or some heightened level of consensus for each and every policy decision. It can be accomplished by constituting substantive rights as part of the social compact,

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45. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 149; Luna, *Transparent Policing*, *supra* note 4, at 1132.

46*. See, e.g.*, Luna, *Transparent Policing*, *supra* note 4, at 1138–39 (noting arguments for intentional statutory vagueness).

47*. Id.* at 1108, 1138–39.

48*. Id.* at 1133.

49*. Id.* at 1108–20, 1144–48; Elkin, *Old and New*, *supra* note 28, at 22; Lowi, *supra* note 45, at 150–51.

50*. See* Lowi, *supra* note 45, at 150–51, 170–71; *see also* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979); THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY (1st ed. 1969).

51. Philip Pettit, *Democracy, Electoral and Contestatory*, *in* NOMOS XLII, *supra* note 42, at 139–40.

52*. Quod omnes tangit ab omnibus debet supportari*: "That which touches or concerns all ought to be supported by all." BLACK'S LAW DICTIONARY 1254 (6th ed. 1990).

protecting individuals and groups regardless of the wishes of the majority.[53] Obviously, government agents should respect both the people they police and the laws that they are charged to uphold, regardless of the individual or rule in question.[54] But consensual democracy is also furthered by establishing fair procedures that are transsubstantive in nature, assuring due process in the creation and enforcement of law.[55] Among other things, this process should provide a forum for discourse and deliberation by the people, not only because an opportunity to be heard seems a necessary corollary of consent, but because of the occasion that dialogue affords for persuasion and compromise.[56] Moreover, rules and procedures should be placed on the exercise of discretion, making the act of enforcement more law-like, more amenable to oversight, and more apt to be the product of popular consent.[57] Finally, law enforcement should be local to the maximum extent possible, recognizing the kernel of truth in American federalism that government closer to the people is more likely to serve the unique needs of a particular jurisdiction. More importantly, localized policing, accountable to the affected neighborhood, helps assure that discrepant enforcement is the product of consent rather than imposition.[58]

With this understanding of democracy and the goal of creating a more democratic police force—one based on, *inter alia*, participation of affected citizens and active opposition to officer misconduct—it is possible to construct a framework for implementing institutional design in the context of law enforcement. Relevant literature seems to suggest two strands or schools of thought for designing institutions, although this dual classification is sometimes less than

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53. Luna, *Transparent Policing*, *supra* note 4, at 1123.

54. *Cf.* Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

55. Ferejohn, *supra* note 42, at 77–79; Luna, *Principled Enforcement*, *supra* note 4, at 540–44, 562–625 (discussing importance of procedural justice and "transparency" in law enforcement); Rawls, *Overlapping Consensus*, *supra* note 42, at 244–45, 248–49 (discussing concept of overlapping consensus arrived at by just procedures).

56. Ferejohn, *supra* note 42, at 77–79; Rawls, *Public Reason*, *supra* note 42, at 771–73; Rawls, *Overlapping Consensus*, *supra* note 42, at 244 ("Other great values fall under the idea of free public reason, and are expressed in the guidelines for public inquiry and in the steps taken to secure that such inquiry is free and public, as well as informed and reasonable."); Luna, *Principled Enforcement*, *supra* note 4, at 575–89 (discussing importance of deliberation and opportunity to be heard); Luna, *Transparent Policing*, *supra* note 4, at 1154–94 (discussing need for transparency and deliberative interaction between government and governed).

57. *See* LON L. FULLER, THE MORALITY OF LAW 39, 81–91 (1964) (discussing rule of law's requirement that law on the books and law in action not diverge); Elkin, *Old and New*, *supra* note 28, at 23; Pettit, *supra* note 51, at 129; Luna, *Principled Enforcement*, *supra* note 4, at 540–44 (discussing Fuller's conception of the rule of law).

58. *See, e.g.*, Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.–C.L. L. REV. 461, 475–78, 494–95 (2001); *cf.* Grofman & Stockwell, *supra* note 42.

explicit.[59] The first strand draws upon theories of economics, sociology, and cognitive psychology, and is concerned with the causes of individual and group action.[60] As applied to institutional design of law enforcement, the objective is to determine potential rationales for police misconduct and methods for limiting such behavior. For lack of a better name, this approach will be referred to as "behavioral policing" theory. The second strand is grounded in moral and political philosophy (as well as social psychology, to the extent that it provides an empirical basis for relevant theoretical judgments).[61] Application of this approach to law enforcement, which I have previously labeled "transparent policing,"[62] focuses on the predicates of legitimate state action and the means of increasing the legitimacy of law enforcement in distrustful, disaffected communities.

A. Behavioral Policing

According to Professor Sołtan, "[i]nstitutional design must take into account the basic limits of human nature: the human tendency toward error and fallibility, the strength of self-interest against the public good, the power of passions against reason."[63] An appropriate starting point to examine human cognition and behavior is the classic "Chicago School" of legal analysis—often referred to as "law and economics"—founded in the concepts of rational actors, agency costs, and economic efficiency. This approach assumes that individuals are rational, that choices among various options will be self-interested with an eye

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59. Sołtan, *What Is*, *supra* note 28, at 5, 13–16 (noting two "ways of locating this new constitutionalism"); *Introduction to a New Constitutionalism*, *supra* note 28, at 2 (noting "two principal strands of constitutionalist thinking"); *cf.* Jerry L. Mashaw, *Deconstructing Debate, Reconstructing Law*, 87 CORNELL L. REV. 682 (2002) (describing two ideological perspectives, "idealists" and "realists").

60*. See, e.g.*, Sołtan, *What Is*, *supra* note 28, at 13–16 (discussing themes of institutional design concerned with human motivations and behavior). This strand roughly comports with the "realist" camp of administrative law: "The realist approach attempts to understand how private interests are aggregated to produce discrete legal results. The realist researcher inquires into the material interests and strategic behavior of individuals, firms, and groups, and seeks to understand how interests and decision rules combine to yield administrative decisions." Mashaw, *supra* note 59, at 684. Institutional design from "the realist's perspective" would be aimed at creating "a set of control mechanisms" against undesirable behavior. *Id.* at 683.

61*. See, e.g.*, *Introduction to a New Constitutionalism*, *supra* note 28, at 2 (mentioning "strand of constitutionalist thinking" that "takes its bearing from a perceived need to limit the arbitrary exercise of political power"). This strand seems consistent with the "idealist" camp of administrative law:

> The idealists understand governmental organization as a process by which public values are converted into legislative norms which are then realized through administrative implementation. . . . [T]he idealist sees the job of legal institutional design as one of maintaining open debate and civic equality. The basic idea is simply to make government responsive to the wishes of the electorate within a legal culture that establishes certain constitutional fundamentals, fundamentals that focus attention on citizenship and the protection of individual liberties. . . . When designing administrative institutions, the idealist is primarily interested in assuring . . . transparency in administrative processes, and the accountability of administrative decisionmaking to all who are either benefited or burdened by administrative action.

Mashaw, *supra* note 59, at 683–84.

62*. See generally* Luna, *Transparent Policing*, *supra* note 4. A better label might be "deliberative policing" theory, but I will nonetheless adhere to my previous convention.

63. Sołtan, *What Is*, *supra* note 28, at 14.

toward increasing personal utility.[64] Because organizations are necessarily composed of individuals, an agency cost is created: Employees (agents) will tend to maximize their own self-interest, often to the detriment of the institution or those it is intended to benefit (principals).[65]

"Public choice" theory—a sub-discipline integrating economics and political science—accepts the rational-actor paradigm and associated organizational costs, and contemplates the use of institutional design to create an incentive structure that prevents or restricts self-interested conduct by individuals within the institution.[66] The goal of public choice theory is to use various instruments to control employee behavior and thereby maximize the aggregate social benefit from the institution[67]—in the present case, limiting police misconduct. Assuming economic rationality, an officer might misbehave for direct personal gain, like taking a bribe, or for indirect benefit, such as suspicionless searches in pursuit of contraband and arrests, believing that such behavior will eventually lead to promotion.

Given the underlying economic assumptions, deterrence serves as the primary means of channeling behavior, where the level of punishment assigned to misconduct acts as a "price" subject to an enforcement discount rate.[68] The expected penalty, in turn, is a function of two variables: the level of punishment and the chance of getting caught. A rational actor will weigh the discounted punishment against other opportunities and will then choose the course of conduct that maximizes his personal utility. Institutional design can therefore

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64. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (5th ed. 1998) ("[E]conomics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his "self-interest."); *see also* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976) ("[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets."). Economic analysis is not necessarily blind to irrational conduct but instead assumes that any deviations from the rational actor model are random in nature and therefore cancel each other out in the long run. *But see* text accompanying *infra* note 80.

65. Goodin, *supra* note 27, at 12.

66. *See* James W. Caesar, *Reconstructing Political Science*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 49–54; Elkin, *Old and New*, *supra* note 28, at 27–31; Sołtan, *What Is*, *supra* note 28, at 9–12; Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1281–82 (2001); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 551–552, 562–63 (2002). *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK (Dennis C. Mueller ed., 1997); MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

67. This "social efficiency" analysis involves calculating individual gains and losses from a given policy, aggregating these costs and benefits by relevant population, and then comparing the resulting state of affairs to social conditions under some other policy choice. *See* Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. 1987, 1987 (1996).

68. *Cf.* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 349 (1997) [hereinafter Kahan, *Social Influence*] ("Individuals commit crimes, this account predicts, when the expected utility of law-breaking exceeds the expected disutility of punishment.").

influence police behavior by: (1) increasing the punishment for officer miscon-
duct, or (2) increasing the probability of detection through enhanced
surveillance and oversight. Despite the prevalence of deterrence-based pun-
ishment regimes, institutional design might also influence the rational police
officer through an award system, providing some type of incentive for model
behavior. In theory, at least, increases in salary or the chance of promotion
should impact an officer's choices in favor of pro-social behavior.[69] In addition,
individuals might be rewarded for exposing police misconduct (whistleblowing),
which augments deterrence by increasing the probability that such misconduct
will be revealed in the first place. Finally, if police abuses are the unintended
consequence of performance standards, such as the number of seizures or
arrests, administrators can simply change the evaluation methodology by elimi-
nating or de-emphasizing such criteria.

Economic-based theories like public choice have their advantages, as Pro-
fessor Lawrence Lessig has noted: "The virtue of economics is its economy. Its
sparse ontology. Its simplicity. With a few blocks, it aims to build the world."[70]
But the clean lines of this approach also serve as its major drawback. Econom-
ics is thin; its rendition of human behavior fails to pick up systematic inefficien-
cies and apparent irrationality in the real world.[71] Two relatively new fields of
legal study have attempted to compensate for the limitations intrinsic in pure
economic analysis.

The first approach, sometimes referred to as "behavioral law and econom-
ics," co-opts the findings of cognitive psychology and suggests that individuals
suffer from certain intellectual boundaries—bounded rationality,[72] bounded
willpower,[73] and bounded self-interest.[74] Put simply, people do not always

69. *Cf.* Tracey L. Meares, *Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 852 (1995) (offering a "proposal to influence and struc-ture a prosecutor's discretion and to limit prosecutorial misconduct through financial incentives").

70. Lawrence Lessig, *Social Meanings and Social Norms*, 144 U. PA. L. REV. 2181, 2181 (1998).

71. *See, e.g.*, Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Eco-nomic Theory*, 6 PHIL. & PUB. AFF. 317, 317–22 (1977) (criticizing rationality assumption of classic eco-nomics). *See also* Caesar, *supra* note 66, at 52–53; Elkin, *Old and New*, *supra* note 28, at 29–31; Goodin, *supra* note 27, at 17; Sołtan, *What Is*, *supra* note 28, at 15–16; Rachlinski & Farina, *supra* note 66, at 552–53, 563.

72. The following are examples of biases and heuristics that result in "bounded rationality." (1) *Availability*: Individuals estimate the probability of a particular outcome based on the mental "avail-ability" of the same or similar incidents—in other words, "how easily such instances come to mind." Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1518 (1998). (2) *Representativeness*: People tend to evaluate a particular event based on its representation of some other event, providing "a mental shortcut by which causes are treated as resembling their effects." Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 706 (1999). (3) *Case-Based Heuristics*: Individuals often make deci-sions through less-than-rigorous case analogies. They "make assessments on the basis of previous cases rather than through particularized assessments of relevant costs and benefits." Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1189–90 (1997).

73. The following are examples of biases and heuristics which result in "bounded willpower." (1) *Motivational Distortions*: People are often motivated by addictions, habits, and other myopic behavior that conflicts with rational self-interest, where "the preferences are endogenous to the act of consump-tion and [the] short-term costs of altering behavior may be overvalued when compared with the long-term gains." Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129,

pursue their own economically defined benefit. Instead, they adopt biases and heuristics in their everyday life, and are often influenced by "cascades" of information, regardless of accuracy.[75] Humans are smart animals, but animals nonetheless, possessing faulty memories and limited computational abilities.[76] To overcome this bounded rationality, people utilize rules-of-thumb and mental shortcuts when faced with difficult decisions or unwieldy informational input.[77] Individuals also display constraints on personal willpower, frequently acting in ways that are clearly at odds with their long-term welfare.[78] People can be tempted by some opportunity or addicted to a particular course of conduct, and they may maintain a myopic approach to certain issues. Most interestingly, individuals do not necessarily act in their own self-interest; they "are both nicer and (when they are not treated fairly) more spiteful than the agents postulated by [economic] theory."[79]

The goal of behavioral law and economics is to discern those biases and heuristics that effect the process of decision-making. Empirical work suggests that certain cognitive phenomena are systematic in nature rather than the random pattern of "mistakes" assumed by classic law and economics.[80] For instance, psychologists have traced racial prejudice to the brain's dependence on schema or organizing principles, with race serving as a cue for decision-

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1139 (1986). (2) *Hyperbolic Discount Rates*: Individuals often ignore or systematically underestimate future costs. In other words, "[f]uture risks and rewards are discounted more heavily than standard economic analysis would indicate, suggesting a bias toward consumption and against deferred gratification." Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1505 (1998).

74. The following are examples of biases and heuristics which result in "bounded self-interest." (1) *Fairness and Spitefulness*: Individuals want to be seen as fair even if it leaves them worse off from a utility maximizing viewpoint. For example, "people will not necessarily accept all bargains that benefit them. They may reject a bargain they perceive to be unfair, even at some cost to themselves." Jennifer Arlen, *The Future of Behavioral Law and Economics*, 51 VAND. L. REV. 1765, 1775 (1998). Conversely, individuals are often spiteful when they feel unfairly treated and may take vengeance regardless of economic cost. *See, e.g.*, Jolls, Sunstein & Thaler, *supra* note 72, at 1495–96. (2) *Civic Responsibility*: People sometimes make choices depending on what hat they wear, citizen versus consumer. For example, "citizens may seek to implement individual and collective aspirations in political behavior but not in private consumption. . . . People may, in their capacity as political actors, attempt to promote altruistic or other-regarding goals, which diverge from the self-interested preferences sometimes characteristic of markets." Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 960 (1996) [hereinafter Sunstein, *Social Norms*].

75. The availability heuristic often produces "cascade effects," where "expressed perceptions trigger social responses that make these perceptions appear increasingly plausible through their rising availability in public discourse." Kuran & Sunstein, *supra* note 72, at 685. As a particular perception becomes more available to the general population, more people will tend to adopt that perception regardless of accuracy. In turn, "an informational cascade occurs when people with little personal information on a particular matter base their own beliefs on the apparent beliefs of others." *Id.* at 685–86. When people reiterate a particular understanding of events, others will tend to accept its veracity and jump on the information bandwagon.

76. Jolls, Sunstein & Thaler, *supra* note 72, at 1477; Rachlinski & Farina, *supra* note 66, at 555–58.

77. Rachlinski & Farina, *supra* note 66, at 555–56.

78. Jolls, Sunstein & Thaler, *supra* note 72, at 1479.

79. *Id.*

80. Rachlinski & Farina, *supra* note 66, at 555–58.

making.[81] Although care must be taken in extrapolating from such findings and crafting solutions,[82] some general prescriptions would seem to have relevance for institutional design in law enforcement. To begin with, police might establish an intensive screening process to cull those potential employees who suffer from unacceptable forms of cognitive limitation,[83] such as overt (or even latent) racial prejudice. Those individuals who survive a cognitional vetting might then be placed through a training program particularly geared toward revealing biases or heuristics that adversely affect the duties of policing.[84] Availability, representativeness, and case-based heuristics,[85] for example, might lead an officer to assume the criminality or dangerousness of an individual based on inaccurate cues, such as race or socio-economic status. In addition, police departments might set rules to counter those mental shortcuts that are either inaccurate or against public policy,[86] thereby forcing the officer to consciously recognize both the potential bias and the contradictory rule.

Cognitive screening is also important for the process of job assignment and promotion, helping to determine those individuals who have the disposition and level of expertise needed for a particular position.[87] Law enforcement agents who are terrific beat cops will not necessarily make great supervisors and vice versa, while an individual's temperament may simply be inappropriate for a given jurisdiction or type of police work. Regardless of position or proficiency, cognitive errors may still persist, and for this, relevant literature seems to suggest that a constant process of review and evaluation offers the best solution. To the extent possible, data should be collected and analyzed on an ongoing basis, forcing law enforcement to reexamine its judgements and make appropriate corrections.[88] Likewise, overconfidence in a particular policy by police administrators can be checked by institutionalized "devil's advocacy," with an appointed individual or group required to present opposing viewpoints.[89] The strongest check on cognitive errors in the present context, however, is public participation and external oversight of law enforcement. "Having to assess the force of criticisms coming from a variety of perspectives, and craft a persuasive response to those criticisms," suggest Professors Jeffrey Rachlinski and Cynthia

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81. SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 132–33 (2d ed. 1991); Rachlinski & Farina, *supra* note 66, at 556.

82. Biases, heuristics, and cascades can be exceptionally useful in theory, explaining a good deal of otherwise economically irrational behavior. Nonetheless, their application to the real world remains uncertain and somewhat treacherous. *See* Arlen, *supra* note 74, at 1768–69, 1777; Langevoort, *supra* note 73, at 1520–23. Behavioral law and economics can only make (highly) educated guesses at the likely outcomes.

83. Philosopher Philip Pettit has referred to this as a "screen" of the "complier-centered strategy" for institutional design. Pettit, *supra* note 28, at 58–59.

84. Rachlinski & Farina, *supra* note 66, at 558–61, 610–11.

85*. See supra* notes 72–74.

86. Rachlinski & Farina, *supra* note 66, at 561–62.

87. Pettit, *supra* note 28, at 58–59; Rachlinski & Farina, *supra* note 66, at 561–62.

88. Rachlinski & Farina, *supra* note 66, at 592–93, 596–600.

89*. Id.* at 561–62.

Farina, "helps an agency to step outside of the decision-making process."[90] When the issue is police legitimacy and misconduct, there are no better critics than affected community members and their representatives.

A second supplement to the classic Chicago School employs a hybrid of economic and sociological theory. Pure economic analysis, grounded in methodological individualism,[91] largely ignores powerful social influences and the human pursuit of status.[92] An alternative approach—referred to as "law and social norms" or "the New Chicago School"[93]—rejects traditional scholarship's legal-centric view that law is the only restraint on conduct worthy of study.[94] As a practical matter, society can control behavior in any number of ways. The legal command is one option, of course, but it can be ineffective, counterproductive, or simply oppressive when considered in isolation. For these reasons, social norm advocates tend to look beyond the law for effective regulation, with official pronouncements often serving as complements or stimulation for nonlegal sources of authority.[95]

As acknowledged by its supporters, the law and social norms approach faces various unresolved issues—most notably, the appropriate definition of "norm."[96] But for present purposes, norms can be defined as generally fol-

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90. *Id.* at 588–89.

91. *See* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL. STUD. 537, 539 (1998) [hereinafter Ellickson, *Law and Economics*] (critiquing pure economic analysis and defining methodological individualism as "the assumption that individuals are the only agents of human action").

92. *See, e.g.*, *id.*; *see also* Kahan, *Social Influence*, *supra* note 68, at 350–51; Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 610 (1998); Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 726 (1998). There are, of course, drawbacks to the introduction of "messy" sociology into "clean" economics. Richard Posner reminds scholars that "too many bells and whistles will stop the analytic engine in its track." Richard A. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.–KENT L. REV. 57, 62 (1989). Judge Posner, however, does not reject outright the possibility of non-economic variables but instead argues that a "commitment to a relatively simple economic model, one that does not supply a facile explanation for regularity (or peculiarity) in human behavior, forces the analyst to think hard before discarding the possibility that the behavior under scrutiny may indeed be rational in a straightforward sense." *Id.*

93. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661 (1998) [hereinafter Lessig, *New Chicago School*]. For discussion of the rise and status of social norm scholarship, *see* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 343–46 (1997) [hereinafter McAdams, *Origin, Development*] and Ellickson, *Law and Economics*, *supra* note 91, at 542–43, 546–49. *Cf.* Lessig, *The New Chicago School*, *supra* at 673–74 (suggesting that there may be first- and second-generation norm theories); Ellickson, *Law and Economics*, *supra* note 91, at 549 (noting "that the school's relative confidence in state norm-shaping is not universally shared"); *The New Chicago School: Myth or Reality?*, 5 U. CHI. L. SCH. ROUNDTABLE 1 (1998) (questioning whether the New Chicago School is more myth than reality).

94. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 137–55 (1991).

95. *See* Lessig, *New Chicago School*, *supra* note 91, at 672; Ellickson, *Law and Economics*, *supra* note 91, at 548; *see also* McAdams, *Origin, Development*, *supra* note 93, at 340.

96. "The concept of a 'norm' is slippery," Professor Eric Posner suggests, "and scholars use it in different ways; a defect shared by all writings on this subject." Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996). "Part of the problem is that the word 'norm' is used to describe many different kinds of phenomena. This might just be because the concept of 'norm' is intrinsically slippery in a way that the concept of, say, 'statute' is not." *Id.* at 1743; *see also*

lowed, nonlegal obligations. They are spurred not by official coercion but by an internal appreciation of duty, an external fear of social reprobation, or both. Laws can support existing norms and even foster new ones, but the primary source of compliance is extra-legal. Norms, therefore, are informal obligations backed by informal sanctions of society or self.[97] Of particular importance are the social norms of one's peer group, which influence individual behavior through the human pursuit of social acceptance.[98] Individuals naturally seek the esteem and affection of those who are most significant in their lives. Although the "New Chicago School" may be of recent vintage, the significance of social approval is not—Adam Smith recognized as much almost a quarter of a millennium ago.[99]

The most prominent application of the law and social norms approach to criminal justice is Professor Dan Kahan's "social influence conception of deterrence."[100] Consistent with standard norm theory, Kahan argues that an individual's perception of peer beliefs, values, and conduct will affect his own behavior. In other words, what other people say and do will have *social influence* on an individual's actions. For instance, "individuals are much more likely to commit crimes when they perceive that criminal activity is widespread."[101] Law can alter these perceptions through its *social meaning*, expressing a neighborhood's attitude toward criminal behavior. By cracking down on prostitutes, pimps, pushers, gang-bangers, and other clear signs of disorder, criminal law can change the disposition of onlookers: Crime, even petty crime, is unacceptable in this neighborhood.[102] Such public disorder has an anti-social influence on residents who witness pandering and drug exchanges in their front yards. The solution, Kahan suggests, is to drive manifest criminality from public view in a sort of *out-of-sight, out-of-mind* approach to policing.

McAdams, *Origin, Development, supra* note 93, at 350, 376; Richard H. McAdams, *Accounting for Norms*, 1997 WIS. L. REV. 625, 634–35. "It is worrisome that the new norms scholars do not agree on basic terms, not to mention analytic frameworks," Professor Robert Ellickson notes. "The waters are so muddy that many writers on norms feel compelled to start by proffering their own definition of *norm*." Ellickson, *Law and Economics, supra* note 91, at 549.

97. Or at least this is a definition that will work for present purposes. *See* Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997) (offering a similar definition).

98. Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 ETHICS 725, 762 (1990).

99. According to Smith:

Nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren. She taught him to feel pleasure in their favorable, and pain in their unfavorable regard. She rendered their approbation most flattering and most agreeable to him for its own sake; and their disapprobation most mortifying and most offensive.

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 115 (David Daiches Raphael & Alec Lawrence Macfie eds., Liberty Classics 1982) (1759).

100. Kahan, *Social Influence, supra* note 68, at 351.

101. *Id.* at 350.

102. *See id.* at 351.

To be clear, Professor Kahan's scholarship in this area has been exception-ally controversial.[103] But putting aside substantial criticism, could his "social influence conception of deterrence" apply to police misconduct? Consider the following redaction:

> [Police] are much more likely to commit [misconduct] when they perceive that [such] activity is widespread. In that circumstance, they are likely to infer that the risk of being caught for [misconduct] is low. They might also conclude that relatively little stigma or reputational cost attaches to being [abusive]; indeed, if [mis]behavior is common among their peers, they may even view such activity as status enhancing. Finally, in a community in which [misconduct] is perceived to be rampant, [police] are less likely to form moral aversions to [such misconduct].[104]

This interpretation certainly comports with the apparent causes of law enforce-ment misconduct in minority neighborhoods, such as deviant police sub-cultures and the gang-like nature of some police units.[105]

If we accept norm theory and the social influence conception of deterrence (or at least its application to law enforcers), a number of strategies might inhibit police abuses. First and foremost, administrators and external oversight agen-cies could implement a crackdown on even low-level misconduct, sending the message that there is no such thing as an acceptable or trivial abuse of power. This signal might also be spread throughout the department by broadly pub-lishing the officer's name, misconduct, and resulting punishment. Broadcasting this information both in police circles *and in public* is consistent with one of Professor Kahan's favorite topics—"shaming penalties."[106] These sanctions might work on a number of levels: they "convey condemnation in dramatic and unequivocal terms";[107] they reaffirm the primacy of ethical policing and the social bond of "good cops"; and they draw upon the typical law enforcement agent's strong aversion to being labeled a thug and criminal. Finally, adminis-trators might break up troublesome police units with a history of abuse. Not unlike anti-loitering ordinances that disperse public gatherings of gang mem-

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103. *See, e.g.*, Bernard H. 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 (1998); *see also* Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215; David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); Toni Massaro, *The Gang's Not Here*, 2 GREEN BAG 2D 25 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order–Maintenance Policing*, 89 J. CRIM. L. & CRIMINLOGY 775 (1999); Michael Tonry, *Rethinking Unthinkable Punish-ment Policies in America*, 46 UCLA L. REV. 1751 (1999). *But see* Dan M. Kahan, *Unthinkable Misrep-resentations: A Response to Tonry*, 46 UCLA L. REV. 1933 (1999) (responding to criticism).

104. Kahan, *Social Influence*, *supra* note 68, at 350. The original quote contained the words "crime," "criminal," and "criminality."

105. *See supra* notes 17 & 18.

106. *See, e.g.*, Kahan, *Social Influence*, *supra* note 68, at 384–85; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

107. Kahan, *Social Influence*, *supra* note 68, at 350.

bers,[108] disbanding groups of officers with a propensity for abusive behavior interferes with the norms of police misconduct.

B. Transparent Policing

As mentioned previously, the second strand of institutional design theory is founded upon moral and political philosophy. In particular, design advocates contend that institutions established within constitutional democracies should be committed to discourse and deliberation. They must have a "deliberative core,"[109] serving as "communit[ies] of inquiry,"[110] always recognizing that "[d]eliberation is the lifeblood of democratic politics."[111] Such an understanding identifies democracy in general and institutional design in particular with a process of intelligent adaptation, reflecting upon experience and deliberating on the future.[112] It is also seen as a component of public education, positioning citizens in relation to one another as decision-makers through reasoned discourse.[113] This all seems fairly abstract, and it is—but as suggested earlier, the entire project of institutional design argues that philosophy need not be as distant from practical reality as is often presumed. Moral and political theorizing can be, in the words of philosopher William Galston, "the collective effort of preparing ourselves to recognize what is worthy of our assent."[114]

In previous works, I have attempted to partially bridge this gap, crafting relevant principles of moral and political philosophy that can then be applied to the practice of law enforcement.[115] This approach, which I call "transparent policing," essentially contends that affected citizens should be able to observe and scrutinize the judgments of law enforcement, as well as their underlying rationales, and to have a say in the formation and reformulation of these decisions. In reaching this conclusion, my conception of transparency draws upon various theories, from procedural justice to civic republicanism, all with the goal of developing values or principles that can guide law enforcement. Although discussed elsewhere, the following will briefly describe the theoretical underpinnings and basic principles of transparent policing.

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108. *Cf.* Tracey L. Meares & Dan M. Kahan, *When Rights are Wrong: The Paradox of Unwanted Rights*, *in* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 15–17 (Tracey L. Meares & Dan M. Kahan eds., 1999); Kahan & Meares, *Coming Crisis*, *supra* note 6, at 1160; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 198.

109. Elkin, *Constitutionalism's Successor*, *supra* note 40, at 134.

110. Charles W. Anderson, *Pragmatic Liberalism, the Rule of Law, and the Pluralist Regime*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 106–07.

111. Ian Shapiro & Stephen Macedo, *Introduction*, *in* NOMOS XLII, *supra* note 42, at 2.

112. Anderson, *supra* note 110, at 106–07.

113. Elkin, *Constitutionalism's Successor*, *supra* note 40, at 137–38.

114.   WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 35 (1991).

115. *See generally*, Luna, *Principled Enforcement*, *supra* note 4; Luna, *Transparent Policing*, *supra* note 4.

1. Theoretical Underpinnings. The deontology of Immanuel Kant embodied the Enlightenment's central article of faith: The common man is capable of reflecting and deliberating on issues of public importance.[116] By rejecting the idea of the "noble lie"—that officials must necessarily deceive the citizenry to obtain its loyalty[117]—Kant provided support for the notion of open government.[118] In particular, he offered a "publicity" principle that required all actions affecting the rights of other individuals be capable of surviving public scrutiny.[119] This principle was a "maxim," a term that seems to incorporate not just the objective attributes of the action but also the motivation behind it.[120] Publicity, however, was a necessary but insufficient criterion of morality. Among other things, an action must be "universal" in the sense that the actor himself is willing to be subjected to its force.[121]

Some two centuries later, John Rawls attempted to expand upon Kantian ethics, as well as the idea of the social contract found in the writings of Locke and Rousseau, to counter the seemingly fatal objections to deontology and the dominance of utilitarianism.[122] Specifically, Rawls developed a model of "pure procedural justice," in which substantive outcomes are deemed just, not for their adherence to a comprehensive moral doctrine, but through a commitment to fair procedures by citizens who view one another as free and equal.[123] Decision-makers are situated in the hypothetical "original position," acting as trustees for the interests of other individuals, and then placed behind the "veil of ignorance," which precludes knowledge of their principals' individuating traits, such as race, sex, and age.[124] Rawls' rhetorical devices produce specific tenets of justice (for instance, the "equal liberty" and "difference" principles[125]), but other aspects of his proceduralism are particularly relevant in the present context. Like Kant, Rawls recognizes publicity as a condition of justice, roughly, that

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116. *See, e.g.*, IMMANUEL KANT, *An Answer to the Question: 'What is Enlightenment?'* (1784), *reprinted in* KANT: POLITICAL WRITINGS 54 (H. B. Nisbet trans., Hans Reiss ed., 1991).

117. *Cf.* NICCOLÒ MACHIAVELLI, THE PRINCE (George Bull, trans., Penguin Books 1961) (1532).

118. Admittedly, Kantian philosophy is an "experiment in pure reason" and not necessarily a standard for actual governance. David Luban, *The Publicity Principal*, *in* INSTITUTIONAL DESIGN, *supra* note 26, at 156.

119. *Id.* at 155–56.

120. *Id.* at 168–69.

121. *See id.* at 180–82; Rawls, *Public Reason*, *supra* note 42, at 769, n.16 (arguing that "ideally citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact" and noting that "[t]here is some resemblance between this criterion and Kant's principle"). This is only one of many potential formulations of Kant's "categorical imperative."

122. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 10 (rev. ed. 1999) [hereinafter RAWLS, THEORY OF JUSTICE]; Rawls, *Public Reason*, *supra* note 42, at 806–07.

123. RAWLS, THEORY OF JUSTICE, *supra* note 122, at 86; Luna, *Principled Enforcement*, *supra* note 4, at 580–82; Karol Edward Sołtan, *Generic Constitutionalism*, *in* A NEW CONSTITUTIONALISM, *supra* note 27, at 85–86.

124. RAWLS, THEORY OF JUSTICE, *supra* note 122, at 11–22, 136–42, 516–17; *see also* JOHN RAWLS, POLITICAL LIBERALISM 22–28 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

125. RAWLS, POLITICAL LIBERALISM, *supra* note 124, at 5–6, 291; RAWLS, THEORY OF JUSTICE, *supra* note 122, at 60–90, 150–61, 302–03.

decisions and their supporting rationales should be known or knowable to the citizenry.[126] This visibility of actions and justifications provides the material for interpersonal discourse on appropriate policy choices, which, in turn, "checks partiality and widens perspective."[127] When individuals are committed to the idea of public reason grounded in reciprocity—a willingness to justify one's position in terms reasonable to others, both substantively and procedurally—mutually acceptable resolutions become possible.[128] Given that even pluralistic societies maintain an overlapping consensus on certain conceptions of justice,[129] decision-makers can thus reach a "reflective equilibrium" on appropriate judgments through reasoned discourse and deliberation.[130]

As some have suggested, Jürgen Habermas "substantially perfects and completes the Kantian project undertaken by John Rawls."[131] In his book, *Between Facts and Norms*, Habermas provides an extensive theory of law and democracy in modern pluralistic societies, arguing that legal commands can no longer look to tradition or nature for their legitimacy.[132] Instead, "the democratic process bears the entire burden of legitimation" by means of public discussion. According to Habermas' "discourse principle," state action achieves normative validity when it is the product of rational dialogue by affected parties, each having an equal opportunity to present arguments and agreeing to be bound by superior reasons rather than self-interest.[133] The parties must also view themselves as both the author and addressee of an action, integrating reversibility of perspectives and a level of empathy in argumentation.[134] Eventually, discourse on government policy—repeated over time and committed to superior public reasoning—will lead individuals to acceptable resolutions, whether by confluence of opinion or fair compromise.[135]

Both Rawls and Habermas support the idea of "deliberative democracy": public decision-making by popular participation and disinterested discussion of the common good.[136] They converge on this point, however, from somewhat dis-

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126. RAWLS, POLITICAL LIBERALISM, *supra* note 125, at 66–71; RAWLS, THEORY OF JUSTICE, *supra* note 122, at 16, 133, 177–82, 454; Luban, *supra* note 118, at 180–82.

127. RAWLS, THEORY OF JUSTICE, *supra* note 122, at 358–59.

128. RAWLS, POLITICAL LIBERALISM, *supra* note 125, at 7, 10, 212–54.

129. *See generally* Rawls, *Overlapping Consensus*, *supra* note 42.

130. RAWLS, THEORY OF JUSTICE, *supra* note 122, at 20.

131. Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1166 (1995).

132. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 1–3, 8–9, 95, 98–99, 106–07, 113, 443, 448, 457–58 (William Rehg trans., 1996) [hereinafter HABERMAS, BETWEEN FACTS].

133. *Id.* at 107–09.

134. *Id.* at 6–7, 33, 414–15, 417, 449; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 122 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

135. HABERMAS, BETWEEN FACTS, *supra* note 132, at 108, 155–56, 165–67, 452; Pettit, *supra* note 28, at 84–85.

136. *See* HABERMAS, BETWEEN FACTS, *supra* note 132, chs. 7–8; Rawls, *Public Reason*, *supra* note 42, at 771–73.

tinct paths—liberalism for Rawls[137] versus radical democratic theory for Habermas.[138] The revival of republicanism provides yet another theoretical avenue leading to the deliberative conception of democracy.[139] Contemporary advocates argue that U.S. constitutional government was founded upon the republican tradition, with freedom and liberty achieved by the practice of citizenship.[140] This required both broad participation and subordination of personal interest to the general welfare, all with the goal of self-governance through the formation of popular will and its embodiment in state action.[141] Among others, Cass Sunstein has been particularly active in developing modern "civic republicanism."[142] In an influential article, Sunstein offers four basic principles of republican freedom: (1) full deliberation on political decisions, thereby limiting the influence of self-interest through public scrutiny; (2) equality among citizens, requiring equitable access to the political process as a means of overcoming disparities in power and participation; (3) a commitment to universalism, the idea that controversies often can be resolved through discourse and deliberation; and (4) an enriched notion of citizenship, understood as comprehensive rights to political participation.[143] Together, these principles stimulate deliberative democracy, Sunstein argues, encouraging broad involvement of civic-minded, co-equal citizens in the process of government decision-making.

Rawls, Habermas, and Sunstein offer moral theories of right and political theories of social legitimacy, occasionally overlapping on certain principles regardless of distinct origins or analytic development. Their relevant works[144] tend to be theoretical in the purest sense of the word: abstract, hypothetical, ideal. Yet despite the use of rhetoric rather than experiment, the principles upon which the scholars converge are nonetheless supported by empirical research. In particular, social psychologist Tom Tyler has extensively examined the relationship among procedural justice, perceived legitimacy, and compli-

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137. RAWLS, POLITICAL LIBERALISM, *supra* note 125; Rawls, *Public Reason*, *supra* note 42.

138. HABERMAS, BETWEEN FACTS, *supra* note 132, at 136, 237, 371, 471–72, 479–80.

139. For seminal articles on the "republican revival" in modern legal scholarship, see, for example, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword—Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Beyond*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*].

140. Luna, *Principled Enforcement*, *supra* note 4, at 585; R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1951 (1996).

141. Luna, *Principled Enforcement*, *supra* note 4, at 585.

142. *See, e.g.*, CASS R. SUNSTEIN, REPUBLIC.COM (2001); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH; Sunstein, *Beyond*, *supra* note 139; Sunstein, *Interest Groups*, *supra* note 139.

143. Sunstein, *Beyond*, *supra* note 139, at 1541–42, 1547–58.

144. It should be noted, however, that Professor Sunstein has also contributed to both the social norms and behavioral law and economics movements. *See, e.g.*, CASS R. SUNSTEIN, BEHAVIORAL LAW & ECONOMICS (2000); Cass R. Sunstein, *Social Norms*, *supra* note 74.

ance with the law.[145] Based on a review of scientific studies and his own experiments, Tyler proposes a two-step process, "with people's judgments about the justice or injustice of their experience affecting their views about the legitimacy of the authorities, and these views in turn shaping compliance with the law."[146] Somewhat surprisingly, substantive outcomes and their effects on personal self-interest (that is, distributive justice) were less influential than considerations of fair process on perceived legitimacy and resulting legal compliance.[147]

Tyler identified specific factors that affected individual assessments of procedural justice, including a number of values espoused by Kant, Rawls, Habermas, and Sunstein. Consistent with the publicity principle, people evaluate authority based on the quantity and quality of information they receive, both in terms of positive actions and normative justifications.[148] In turn, the values of participation and discourse were highly relevant, with individuals measuring procedural justice by the extent to which they were allowed to participate in the process and voice their concerns.[149] Finally, people expect that official decisions will be made in a neutral, unbiased manner based on objective information, a requirement loosely analogous to the demand for public reason over self-interest.[150]

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145. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) [hereinafter TYLER, WHY PEOPLE OBEY]; Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847 (1998); Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997) [hereinafter Tyler, *Citizen Discontent*]; Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

146. TYLER, WHY PEOPLE OBEY, *supra* note 145, at 6. Conversely, "[i]f people feel unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives." *Id.* at 108.

147. *See id.* at 97; Tyler & Mitchell, *supra* note 145, at 739–42.

148. *See, e.g.*, TYLER, WHY PEOPLE OBEY, *supra* note 145, at 159 ("Authorities can enhance the acceptance of their decisions by the way they present them to affected parties. The justifications that leaders offer for their actions seem to affect the responses . . . to the actions."); *see also id.* at 151, 153.

149. *See, e.g.*, *id.*, *supra* note 145, at 116–18, 126–34, 137, 147–50, 163; Tyler & Mitchell, *supra* note 145, at 751; Tyler, *Citizen Discontent*, *supra* note 145, at 887–89.

150. *See, e.g.*, TYLER, WHY PEOPLE OBEY, *supra* note 145, at 137; Tyler, *Citizen Discontent*, *supra* note 145, at 892; Tyler & Mitchell, *supra* note 145, at 786–88.

2. Basic Principles.   Drawing upon the aforementioned philosophical scholarship and supportive empirical research, it is possible to craft a small set of principles for transparent policing, a strategy for increasing perceived legitimacy by making law enforcement actions and intentions available to affected citizens and allowing them to participate in the decision-making process. I have previously articulated three such principles[151] and now add two more as essential (if not already implicit) corollaries: (1) visibility; (2) justification; (3) voice; (4) deliberation; and (5) revisability.

a. Visibility.   The first principle, visibility, demands that law enforcement policies and, to the extent possible, their actual implementation on the streets be available to the relevant community.[152] In practice, this means that programmatic resolutions by police administrators (for example, the decision to crack down on pandering near "Main Street") should usually be announced to the affected citizenry and that the discretionary actions of beat cops (for example, the decision to stop or use force against a particular individual) should be recorded for subsequent review by the public.

b. Justification.   The second principle, justification, is connected to the first—specifically, it requires an announced rationale for a given police policy or street-level decision.[153] For strategic plans, the justification may take the form of a criminological theory applied to a particular neighborhood, while discretionary actions by line officers typically will be based on the mustering of facts for individualized suspicion. Either way, the principles of visibility and justification are consistent with the Kantian publicity criterion and its modern reformulation by Rawls, as well as necessary prerequisites for informed deliberation in the theories of Habermas and Sunstein.[154] Needless to say, citizen discourse on public decisions seems impossible (or just downright silly) without general knowledge of state actions and their rationales.

c. Voice, deliberation, and revisability.   The remaining principles concern the process of law enforcement decision-making, with an emphasis on

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151. *See generally* Luna, *Transparent Policing*, *supra* note 4 (setting out principles of visibility, justification, and voice).

152. For example, according to one government report:

> The police department . . . is not an entity unto itself. Rather, it is a part of government and exists only for the purpose of serving the public to which it must be accountable. An important element of accountability is openness. Secrecy in police work is not only undesirable but unwarranted. Accountability also means being responsive to the problems and needs of citizens. Accountability means, in addition, managing police resources in the most cost-effective manner. It must be remembered that the power to police comes from the consent of those being policed.

PRINCIPLES OF GOOD POLICING, *supra* note 41, at 3; *see also* FULLER, *supra* note 57, at 39, 43–44, 49–51 (discussing requirement that government rules be publicly known or knowable)."

153. Elkin, *Constitutionalism's Successor*, *supra* note 40, at 137–38; Luban, *supra* note 118, at 154–96; Luna, *Principled Enforcement*, *supra* note 4, at 580–89; Luna, *Transparent Policing*, *supra* note 4, at 1164–65; Pettit, *supra* note 51, at 130.

154. Luna, *Principled Enforcement*, *supra* note 4, at 580–89.

public involvement and legitimation. What I have termed "voice" is the ability of affected individuals and groups to participate in the process of policy formulation and the review of specific actions, allowing their concerns to be aired and genuinely considered by law enforcement.[155] This seems nothing less than an indispensable element of Habermas' discourse theory and Sunstein's conception of republican freedom, grounded as they are in broad participation and dialogue.[156] The principle of "deliberation," in turn, is concerned with the substance of debate and the rationale for action, that the arguments in favor of and ultimately supporting a police policy fit within the general domain of social welfare. Reducing residential burglaries in the vicinity seems appropriate, but not appeasing voters outside of the neighborhood or limiting one's own chances of being nabbed for drug dealing. As such, the goal of deliberation roughly corresponds to public reason and civic-minded argument over pure self-interest.[157] The final principle, "revisability," might simply be assumed from the foregoing—that whatever decisions are reached by police-citizen discussion should be subject to revision. Nonetheless, it seems important enough to be made explicit, given the inexorable reality that the judgments of fallible beings can be well-intentioned and yet terribly flawed in practice. Revisability requires an ongoing review of police policies and, if necessary, their revision based on experience.

III

AN EXAMPLE OF INSTITUTIONAL DESIGN IN LAW ENFORCEMENT

What has been sketched to this point is a two-part framework for institutional design of a more democratic police force, with the first strand concerned with potential rationales for officer misconduct and methods of limiting such behavior, and the second strand focused on the predicates of legitimate government and the means of increasing the perceived legitimacy of law enforcement. As applied to distrustful, antagonistic relations between police and African Americans, the goal is to: (1) decrease police misconduct through behavioral–cognitive modification, thereby increasing the trustworthiness of law enforcement; and (2) increase the basis for trust and legitimacy by allowing affected neighborhoods to observe and participate in the process of police decision-making. Admittedly, there are limits to what institutional design can do in this context. Even the best-designed police department cannot solve the socio-

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155. Anderson, *supra* note 110, at 106–07; Elkin, *Constitutionalism's Successor*, *supra* note 40, at 137–38; Ferejohn, *supra* note 42, at 97–98; Kim, *supra* note 58, at 494–95; Luna, *Principled Enforcement*, *supra* note 4, at 580–89; Rainey & Rehg, *supra* note 140, at 1951–52, 1956–72; Rawls, *Public Reason*, *supra* note 42 at 771–73; Shapiro & Macedo, *supra* note 111, at 1–2.

156. Luna, *Principled Enforcement*, *supra* note 4, at 582–87.

157. *Id.* at 585–89; Elkin, *Constitutionalism's Successor*, *supra* note 40, at 134; Ferejohn, *supra* note 42, at 75–79; Shapiro & Macedo, *supra* note 111, at 2. Admittedly, public reason-based deliberation will often lead to policies that serve personal self-interest, such as reducing the odds that one's home will be burgled. The difference is the focus and scope of argumentation, reaching a conclusion that serves the welfare of the neighborhood in which an individual happens to be a member versus argument grounded in pure self-interest irrespective of the effects on one's neighbors.

economic deprivation of poor, urban minorities. The framework also makes some fundamental but questionable assumptions, namely, that a given police department and affected neighborhood are willing to work together *and* that sufficient resources exist to implement any proposals. Finally, it seems unrealistic to believe that misconduct can be totally eliminated from large police departments,[158] while complete transparency in law enforcement appears just as infeasible.[159] In law enforcement, like life in general, the only absolute is that there are no absolutes.

But for present purposes, assume the existence of necessary resources and a basic desire by the relevant police force and African-American community to improve their relations, as well as a recognition, for example, that law enforcement cannot (directly) improve rotten schools, that some information cannot be readily turned over to the public, and that misconduct can be (greatly) reduced but not eliminated in sizeable agencies.   Imagine, for instance, a poor, urban, largely black neighborhood, caught between the street crime and violence of private thugs and the harassment and physical abuse of beat cops. For whatever reason, the local police department comes to appreciate the wrongfulness of not only the former private criminality but also the latter public misconduct. Now, the currently distrustful neighborhood and the apparently illegitimate law enforcement agency have both the will and means to build a trustworthy relationship premised on popular consent and official legitimacy. Given this hypothetical, the framework of institutional design might suggest a number of thematic and programmatic changes:

1. Modernized management. The management style typified by Frank Rizzo in Philadelphia and Daryl Gates in Los Angeles[160]—insular, authoritarian,

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158. Robert J. McCormack, *Police Perceptions and the Norming of Institutional Corruption*, *in* POLICE MISCONDUCT, *supra* note 10, at 106.

159. Nonetheless, reasonable people can understand the need for reasonable exceptions to open government as long as the exception is strictly justified and limited in scope.

> There are, of course, exceptions to full transparency. Top-secret issues of national security are not openly debated in Congress. Law enforcement is frequently mum on the details of ongoing criminal investigations or when an individual's safety might be jeopardized by disclosure. Moreover, discussions in judicial chambers are generally not subject to public observation. Yet purposeful opaqueness in certain, well-defined scenarios is not necessarily inconsistent with optimal government transparency. The substance of ongoing investigations are not divulged to the public, for example, because full disclosure tends to frustrate the very purpose of the investigation—uncovering criminality, determining guilt, and requiring offenders to account for their actions.

Luna, *Transparent Policing*, *supra* note 4, at 1165; *see also* FULLER, THE MORALITY OF LAW, *supra* note 57, at 91–92 ("[I]t is always unfortunate when any act of government must be concealed from the public and thus shielded from public criticism. But there are times when we must bow to grim necessity.").

160. *See, e.g.*, BARTOLLAS & HAHN, *supra* note 14, at 241–42 ("Two of the best examples of chiefs' promoting a subculture of violence was the long reign of Daryl F. Gates as police chief of the Los Angeles Police Department and Frank Rizzo who was both chief of police and mayor of Philadelphia."); SKOLNICK & FYFE, *supra* note 14, at 134–45 (discussing insular police leadership of Frank Rizzo in Philadelphia, Harold Breier in Milwaukee, and Daryl Gates in Los Angeles); Chevigny, *supra* note 15, at 37–57 (discussing LAPD under Daryl Gates); Ronald J. Ostrow, *Casual Drug Users Should Be Shot, Gates Says*, L.A. TIMES, Sept. 6, 1990, at A1 (quoting Chief Gates as testifying before the

ruthless—poses an enormous barrier to better police-minority relations. In departments that have espoused this approach, positive change must begin at the top with an emphasis on ethics and integrity over efficiency and force, flowing down from the chief to rank-and-file officers.[161] Police management may, in fact, adopt an entirely different philosophy akin to those employed in modern corporations, such as "total quality management" ("TQM").[162] Instead of concentrating solely on production numbers (for example, arrests),[163] a TQM approach would focus on employees (police officers), clients (citizens), team-work, and feedback in determining the appropriate ends and means of polic-ing.[164]

    2. Open systems. The adoption of TQM or a similar management style is consistent with an "open systems" approach to law enforcement, with police leadership actively soliciting input from external sources, most notably, affected neighborhoods and their members.[165] Insular police forces composed of like-minded individuals will tend to experience "groupthink"—a monolithic per-spective on law enforcement and the neighborhoods they patrol.[166] In contrast, an open system will seek broad stakeholder participation to facilitate the flow of intelligence between police and citizenry, thereby creating a "learning organization" rather than a static bureaucracy.[167] Transparent law enforcement would make a habit of gathering relevant information, such as collecting data on pedestrian and automobile stops,[168] videotaping police-citizen confrontations and custodial interrogation,[169] and employing crime mapping technology to illus-

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Senate Judiciary Committee that casual drug users "ought to be taken out and shot" because "we're in a war" and even casual drug use is "treason").

    161. *See, e.g.*, BARTOLLAS & HAHN, *supra* note 14, at 102–03; STEPHEN J. GAFFIGAN & PHYLLIS P. MCDONALD, POLICE INTEGRITY: PUBLIC SERVICE WITH HONOR 47–49, 86–89 (1997); James D. Sewell, *The Police Officer's Ethical Use of Force*, *in* POLICE MISCONDUCT, *supra* note 10, at 194–95.

    162. BARTOLLAS & HAHN, *supra* note 14, at 89–93; DAVID C. COUPER & SABINE H. LOBITZ, QUALITY POLICING: THE MADISON EXPERIENCE (1991) (chronicling the experiences of the Madison Police Department in implementing a "TQM" approach to policing); RAYMOND G. HUNT & JOHN M. MAGENAU, POWER AND THE POLICE CHIEF: AN INSTITUTIONAL AND ORGANIZATIONAL ANALYSIS 127 (1993); PALMIOTTO, POLICING, *supra* note 10, at 132–37.

    163. SKOLNICK & FYFE, *supra* note 14, at 125 ("To use Herman Goldstein's term, the police are locked in a *means/ends syndrome*, in which they tell us how often they employ the tools they have been provided to achieve their goals rather than whether the goals themselves have been achieved.")

    164. BARTOLLAS & HAHN, *supra* note 14, at 92–93; HUNT & MAGENAU, *supra* note 163, at 127; PALMIOTTO, *supra* note 10, at 132–37.

    165. BARTOLLAS & HAHN, *supra* note 14, at 85; PALMIOTTO, *supra* note 10, at 122.

    166. SKOLNICK & FYFE, *supra* note 14, at 241.

    167. BARTOLLAS & HAHN, *supra* note 14, at 85; NEYROUD & BECKLEY, *supra* note 14, at 184–85; Lambert & Oatley, *supra* note 36, at 126–27.

    168*. See, e.g.*, Consent Decree, United States v. New Jersey, Civ. No. 99–5970 (MLC), (D.N.J. 1999), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm (consent decree requiring data collection on race of motorists searched) (last visited Mar. 18, 2003); Fagan & Davies, *supra* note 5, at 501–03 (arguing for data collection); Luna, *Transparent Policing*, *supra* note 4, at 1170; David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 242–43, 261–63 (2001) (presenting arguments in favor of data collection).

    169*. See, e.g.*, *End Racial Profiling Speech by U.S. Senator Jon Corzine: Introducing S. 989, the "End Racial Profiling Act,"* 26 SETON HALL LEGIS. J. 55, 60 (2001) (describing federal anti-profiling

trate and analyze the occurrence of crime and deployment of police resources.[170] In turn, departments would provide this information and other important materials to affected neighborhoods and communities, whether in media distributions, through public forums, or by answering individual requests.[171]

3. Collaborative decision-making. The circulation of information and ideas also provides the basis for various means of cooperative decision-making by police and private citizens. For instance, "community policing" encourages direct contact and partnership between patrol officers and residents in setting local priorities and solving neighborhood problems. Likewise, the concept of a civilian advisory board suggests that police leaders should obtain the input and assent of citizen representatives when analyzing law enforcement policies that significantly affect a neighborhood and its members.[172] Along these lines, I have discussed elsewhere the idea of a collaborative rulemaking process that would create principles to guide vice enforcement in poor minority neighborhoods.[173] Whatever the mechanism, decision-making through police-citizen collaboration results in a movement from the *golden rule*—"treat others as you would like to be treated yourself"—to the so-called *platinum rule*: "treat others as they want to be treated."[174]

4. Improved recruitment. The platinum rule might influence recruitment as well, creating a police force cognizant of the needs and demands of the relevant neighborhood. To the extent possible, recruitment efforts should focus on college-educated individuals, given that a body of scholarship suggests that such recruits outperform their peers.[175] In particular, it has been argued that higher education teaches weighty concepts like liberty and democracy, imparts problem-solving techniques and interpersonal skills, and exposes individuals to different cultures and racial backgrounds, all of which decrease the prospect of

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bill that helps police departments purchase videotape equipment) [hereinafter *Corzine Speech*]; Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 560 (2001) (noting New Jersey campaign to install video cameras in all police cars).

   170. Luna, *Transparent Policing*, *supra* note 4, at 1170–93.

   171. According to one government report:

     An area of policy that goes hand-in-hand with police accountability and police-community relations is the law enforcement agency's approach to release of public information. It should be recognized that the news media serve as a major source of information about the police and their activities. As such, the media play a key role in developing citizens' views of the police. Given this important media role, it is difficult to understand why so many police agencies fail to develop a public information policy and a relationship with the media based on mutual respect and trust. . . . Misinformed community members may . . . form erroneous perceptions of the police and their actions. Police officials must provide sufficient information and detail to accurately explain an incident.

PRINCIPLES OF GOOD POLICING, *supra* note 41, at 12–13.

   172*. See, e.g.*, COLE, *supra* note 3, at 54 (calling for citizen commissions to examine racial disparities); NEYROUD & BECKLEY, *supra* note 14, at 151–54 (discussing citizen advisory board); Kim, *supra* note 58 (proposing civilian advisory councils).

   173. Luna, *Principled Enforcement*, *supra* note 4, at 603–23.

   174. NEYROUD & BECKLEY, *supra* note 14, at 164.

   175. McCormack, *supra* note 158, at 105.

police misconduct.[176] Of course, successful hiring of better educated or skilled individuals, who are likely to have other job opportunities, will require a higher pay scale and scholarship opportunities akin to those employed by the armed forces.[177] In addition, law enforcement can greatly benefit from recruiting African Americans, not only for the broader perspective that diversity brings to a department, but also for the symbolic value to black neighborhoods that might otherwise perceive the police as lily-white oppressors in the mold of Jim Crow.[178] Finally, the hiring process should incorporate an extensive battery of tests for psychological deficiencies, vetting those individuals with strong indicia of racial prejudice, violent tendencies, or other traits unsuitable for police work.[179]

  5. *Enhanced training.* The importance of officer instruction in checking misconduct cannot be underestimated,[180] both for new recruits at the police academy and as in-service training for veterans.[181] Instruction should include a heavy emphasis on the use of force and the determination of individualized suspicion, issues that heighten minority animosity toward law enforcement.[182] Extensive, realistic drills, possibly with high-tech simulators on the use of lethal force, can help prevent deadly confrontations attributable to inexperience or

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  176. PALMIOTTO, *supra* note 10, at 258–62; Michael J. Palmiotto, *Can Police Recruiting Control Police Misconduct?*, *in* POLICE MISCONDUCT, *supra* note 10, at 350–51; Lipper, *supra* note 169, at 560.

  177. MEEKS, *supra* note 20, at 171 (noting national crime bill to help police departments hire better educated officers); SKOLNICK & FYFE, *supra* note 14, at 261–66 (arguing for the creation of a police cadet corps and other programs to increase educated personnel); Jacob H. Fries, *Disappointed by Raises, Officers Praise Their Union*, N.Y. TIMES, Sept. 6, 2002 (noting low pay for NYPD officers); Richard Lezin Jones, *Study of Police Recruiting Cites Discipline and Academic Faults*, N.Y. TIMES, Dec. 28, 2001 (noting need for salary increase for police).

  178. *See, e.g.*, SKOLNICK & FYFE, *supra* note 14, at 239–41 (arguing for diversity in police force); Galvin, *supra* note 14, at A14 (President Clinton calling for recruitment of more minority officers, saying "Police departments ought to reflect the diversity of the communities they serve."); *How Would You Fix the State Police?*, STAR–LEDGER (Newark N.J.), Oct. 3, 1999, at 1 (quoting minority police officer who notes that, "[a]s members of the minority community, we are an indispensable resource to the rebuilding of trust and confidence" in law enforcement).

  179. PALMIOTTO, *supra* note 10, at 253; NEYROUD & BECKLEY, *supra* note 14, at 172–74; Christopher Commission, *supra* note 17, at A12; Eugene Kane, *Police Are Key*, MILWAUKEE J. & SENTINEL, Feb. 1, 2001, at B1 (noting desire of police commission "to weed out bad cops with psychological testing").

  180. NEYROUD & BECKLEY, *supra* note 14, at 175–83; PALMIOTTO, POLICING, *supra* note 10, at 262–71; Sewell, *supra* note 161, at 191–93; Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 826–30 (1999); JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 53, *available at* http://www.civilrights.org/publications/cj/ (last visited Apr. 29, 2003).

  181. BARTOLLAS & HAHN, *supra* note 14, at 273–74; NEYROUD & BECKLEY, *supra* note 14, at 218; Sewell, *supra* note 161, at 193; *End Racial Profiling Speech*, *supra* note 269, at 60 (noting that federal anti-profiling bill will "help pay for programs dealing with advanced training" of law enforcement).

  182. BARTOLLAS & HAHN, *supra* note 14, at 247 (discussing high-tech training on the use of force); PRINCIPLES OF GOOD POLICING, *supra* note 41, at 21–25; Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 417, 433–35, 436 (2001) (noting improved police behavior through training on individualized suspicion).

rash responses.[183] The latter problem—identifying potential criminals—will
require more than a mini-course on criminal procedure doctrine. Police must
also be trained on standards of professional integrity and ethics, and compelled
to examine the moral justification and consequences of their actions.[184] More-
over, officers should be instructed on the complexities of culture, ethnicity, and
race, particularly as they pertain to the neighborhoods they police.[185] Recent
recruits and department veterans alike should come to understand the history
of racial subjugation, much of it at the hands of police, as well as the ongoing
meaning of law enforcement in minority communities. Police officers should be
forced to confront their own biases—such as the assumption of black criminal-
ity[186]—while learning the cues that are transmitted during police–citizen con-
frontations. Furthermore, law enforcement agents should be taught to appreci-
ate and practice the value of civility, given the substantial benefits from being
respectful and courteous in otherwise contentious circumstances.[187]

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183.   PALMIOTTO, *supra* note 10, at 212–14; Rebecca Leung, *The Fine Blue Line: Putting Police
Training Programs to the Test*, ABCNEWS.com, *available at* http://abcnews.go.com/sections/us/
DailyNews/police_training990405.html (last visited March 26, 2003).

184.   BARTOLLAS & HAHN, *supra* note 14, at 273–74 (training on police ethics); NEYROUD &
BECKLEY, *supra* note 14, at 181–83; MEEKS, *supra* note 20, at 171 (noting national crime bill to help
police departments expand police integrity and ethics training); Sewell, *supra* note 161, at 191–92. *See
generally*, JOHN P. CRANK & MICHAEL A. CALDERO, POLICE ETHICS: THE CORRUPTION OF NOBLE
CAUSE (2000); EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING (3d ed. 1996);
DEBBIE J. GOODMAN, ENFORCING ETHICS: A SCENARIO-BASED WORKBOOK FOR POLICE AND
CORRECTIONS RECRUITS AND OFFICERS (1998); LARRY F. JETMORE, THE PATH OF THE WARRIOR:
AN ETHICAL GUIDE TO PERSONAL & PROFESSIONAL DEVELOPMENT IN THE FIELD OF CRIMINAL
JUSTICE (2d ed. 1999); JOHN R. JONES & DANIEL P. CARLSON, REPUTABLE CONDUCT: ETHICAL
ISSUES IN POLICING AND CORRECTIONS (2d ed. 2001).

185.   *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN
COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION—VOLUME V: THE LOS ANGELES
REPORT (1999) (report recommending more cultural sensitivity training for police officers); Christo-
pher Commission, *supra* note 17, at A12; Anthony C. Thompson, *Stopping the Usual Suspects: Race and
the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1008–12 (1999); Al Martinez, *The Thin Blue Line*, L.A.
TIMES, Jan. 16, 2000 at A1 (describing training program for police offered by the Simon Wiesenthal
Museum of Tolerance).

186.   For instance, the executive director of the ACLU, Ira Glasser, offered an evocative analogy
undermining the assumption of black criminality:

> Most players in the NBA are black. But if you were trying to get a team together, you
> wouldn't go out in the street and round up random African Americans. Most jazz musicians
> are black. But if you went to hire a band, you wouldn't go out in the street and round up
> random blacks and ask them if they played the saxophone. It wouldn't be a good way to find
> what you wanted. It's a very simple, logical fallacy. The fact that most drug dealers are X
> does not mean that most X are drug dealers.

Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 712–13 (2000).

187.   *See, e.g.*, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2169–76 (2002)
(noting advantages from respectful police behavior); Leung, *supra* note 183 (discussing police training
on courtesy); Benjamin Y. Lowe, *FBI Agent Says Charges of Racial Profiling of Arabs, Muslims are
Legitimate*, KNIGHT RIDDER/TRIB. SERVICE, Sept. 6, 2002 (discussing cultural awareness seminar for
law enforcement and quoting federal agent as saying, "Being respectful and courteous goes a long way
toward building a relationship" and quoting spokeswoman for Council on American–Islamic Relations
as saying, "People are a lot more willing to help when they feel the people investigating them are not
biased and have at least some understanding of the community").

6. Performance standards and culture.   Certain quantitative measures of police performance only tend to exacerbate the perception of harassment among African Americans. Instead of evaluating law enforcement, both individually and collectively, by traditional standards such as arrests and seizures, "police performance measures should focus on a new model of policing that emphasizes [law enforcement's] charge to do justice, promote secure communities, restore crime victims, and promote noncriminal options."[188] Although more difficult to collect, qualitative criteria—such as citizen complaints or, conversely, commendations by neighborhood residents—often provide a better picture of officer performance consistent with the platinum rule.[189] Moreover, law enforcement should promulgate rules and standards intended to guide individual behavior on the beat, including flat bans on particular conduct such as racial profiling,[190] regulations on common police activities like car stops,[191] and codes of ethics that provide overarching principles of good policing.[192]   Improved behavior and reduced misconduct also may be achieved by interfering with antisocial police cultures. For example, breaking up troublesome units or rotating officers within specialized groups may prevent the formation of deviant cliques.[193]

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188. Geoffrey P. Alpert & Mark H. Moore, *Measuring Police Performance in the New Paradigm of Policing*, *in* PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 109, 111 (1993), *quoted in* BARTOLLAS & HAHN, *supra* note 14, at 346. *See* Joseph D. McNamara, *Beyond Good Cop, Bad Cop*, L.A. TIMES, Nov. 21, 1999, at M2 ("Voluminous arrests . . . are not ends in themselves. They are only tools a police department needs to serve the community."); Lori Montgomery, *New Police Policies Aim to Discourage Racial Profiling*, WASH. POST, June 28, 2001, at A1 (noting cancellation of police award system based on drug arrests).

189*. See* NEYROUD & BECKLEY, *supra* note 14, at 217; Alpert & Moore, *supra* note 188.

190. SKOLNICK & FYFE, *supra* note 14, at 180, 188–89 (detailing success of NYPD Police Commissioner Patrick Murphy's flat rule against policing for victimless crimes without a citizen complaint); David Cole, *Pervasive Racial Profiling is Abundantly Evident and a Barrier to Equal Justice*, INSIGHT ON THE NEWS, July 19, 1999, at 24 ("[G]overnment officials must make absolutely clear that racial profiling is unacceptable. Some police chiefs have said so, but others have tolerated the practice through their silence. As long as the practice is not clearly condemned, police will continue to do it because they are affected by the same stereotypes that affect us all."); Hernan Rozemberg, *Racial-Profile Policy Goal of Napolitano*, ARIZ. REPUB., Nov. 13, 2000, at B1, B7 (state attorney general and police chiefs banning racial profiling).

191. MEEKS, *supra* note 20, at 213–17 (describing specific procedures for car stops by New Jersey State Police); Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 LAW & PSYCHOL. REV. 127, 137 (2000) (calling on police departments to develop regulations limiting officer discretion during traffic stops); KLEINIG, *supra* note 40, at 222–23 (advocating administrative rule-making by police); Rozemberg, *supra* note 190, at B1 (detailing attorney general's request that every police department have a policy and procedures for traffic stops).

192.   BARTOLLAS & HAHN, *supra* note 14, at 273; KLEINIG, *supra* note 40, at 234–55 (discussing police codes of ethics); NEYROUD & BECKLEY, *supra* note 14, at 23–27, 189–98, 218; SKOLNICK & FYFE, *supra* note 14, at 241–50; PRINCIPLES OF GOOD POLICING, *supra* note 41, at 2–4; David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUMAN RIGHTS 2, 4 (Summer 1999) (calling on police leadership to ban racial profiling).

193. Dotson, *supra* note 18, at M1 (advocating breaking up rogue police units and rotating officers); Jim Newton et. al, *LAPD Condemned by Its Own Inquiry*, L.A. TIMES, Mar. 1, 2000, at A1 (noting recommendation "calling for mandatory rotations in certain sensitive units" in LAPD); Christopher Commission, *supra* note 17, at A12.

7. Empathy creation. A sense of empathy can be the cornerstone of better relations between law enforcement and minority citizens. Requiring officers to live in the areas they patrol, for instance, may increase the level of respect and compassion for neighborhood residents.[194] Another idea involves radical federalism or localism, placing control of law enforcement in the affected neighborhood *regardless* of political boundaries.[195] Officer misconduct, or at least the failure to remedy it, stems in part from police departments that are practically accountable only to the larger polity rather than the neighborhoods that directly suffer the abuses. By making police jurisdiction and political accountability coextensive with the rough boundaries of minority neighborhoods, law enforcement must answer to those touched by misconduct. In turn, public empathy for the difficulties of police work can be fostered by "citizen police academies" that teach local residents about the operations of law enforcement, such as dispatching police units, making traffic stops, and investigating crime scenes.[196] These academies also would generate sources of volunteers or "para-police" employees—individuals who take on various law enforcement-related tasks—thereby releasing officers to perform their core duties while establishing another connection between police and minority communities.[197] A final promising means of creating empathy is through the mediation of grievances between officers and citizens.[198] Drawing upon the extensive literature on alternative dispute resolution and the growing field of restorative justice, a number of mediation programs are "designed to resolve citizen complaints against the police through face-to-face meetings between the complainant and the police

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194. *See, e.g.*, MEEKS, *supra* note 20, at 203 ("A solution to this particular problem is to require that inner-city police officers live in inner-city neighborhoods. Otherwise, . . . the continued practice of inner-city police officers living in white suburban communities makes them seem like a U.S. military force occupying a foreign country.").

195. NEYROUD & BECKLEY, *supra* note 14, at 151–54, 217; Grofman & Stockwell, *supra* note 42; Kim, *supra* note 58, at 462–63, 509–25 (calling for local or community control of policing); Luna, *Principled Enforcement*, *supra* note 4, at 587–89 (discussing Sunstein's idea of "deliberative enclaves").

> [T]he data show that police forces that win the respect of high-crime communities reduce crime at least as much as those that simply bust heads. Look at San Diego. During the 1990s San Diego police divided the city into small residential units. (According a local captain, "We basically threw out the original beat boundaries. We went to the community and said, 'Where do you think your neighborhood boundaries really begin and end?'") They assigned officers to those specific beats, engaged community leaders in an ongoing dialogue about how to solve various problems, and developed a corps of 1,200 citizen volunteers who became eyes and ears for the police.

Forman, *supra* note 18, at 24.

196. MEEKS, *supra* note 20, at 171 (noting national crime bill to help establish citizen police academies); PALMIOTTO, *supra* note 10, at 375–76; Galvin, *supra* note 14, at A14 (noting President Clinton's call for a nationwide program of citizen police academies); Leung, *supra* note 183 (describing citizen police academy).

197. PALMIOTTO, *supra* note 10, at 375–76. *See also* SKOLNICK & FYFE, *supra* note 14, at 261–66 (discussing creation of police cadet corps).

198. *See, e.g.*, Vivian Berger, *Civilians Versus Police: Mediation Can Help to Bridge the Divide*, NEGOTIATION J. 211 (July 2000); Samuel Walker & Carol Archbold, *Mediating Citizen Complaints Against the Police: An Exploratory Study*, 2000 J. DISP. RESOL. 231 (2000).

officer with a neutral third party serving as mediator or facilitator."[199]   Although far from a panacea, these programs help clarify actions and justifications in individual cases, allow both sides to express their concerns and emotions, and tend to generate mutual understanding between the officer and citizen.[200]

   8.   Improved oversight and discipline.   As suggested earlier, law enforcement can control and limit police deviance, but complete elimination may be impossible.[201]   What is needed, then, is a proactive system to detect misconduct and hold the relevant officers responsible.   Departments should implement early warning systems to alert supervisors of potential trouble, including, for instance, periodic psychological testing of all officers[202] and constant review of policing statistics, looking for individual and group trends that might indicate misconduct.[203]   Law enforcement must also protect the sources of information on police deviance, encouraging officers to reveal misconduct by their colleagues—possibly through a financial or promotion-based incentive scheme—as well as preventing retaliation against whistleblowers by shielding identities, offering departmental transfers, and establishing other prophylactics.[204]   The so-called "code of silence"[205] among police officers can be partially perforated by making supervisors directly responsible for the wrongdoing under their watch

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   199.   Walker & Archbold, *supra* note 198, at 234.

   200.   Berger, *supra* note 198, at 218–19, 231–32; Walker & Archbold, *supra* note 198, at 238–41.

   201.   This does not mean, however, that police departments should not strive to eradicate misbehavior as a normative goal.   Whether practical or not, "zero tolerance" policies can have important symbolic value.

   202.   BARTOLLAS & HAHN, *supra* note 14, at 245–46; Kane, *supra* note 179, at B1 (noting desire of police commission "to weed out bad cops with psychological testing"); Christopher Commission, *supra* note 17, at A12.

   203.   *See, e.g.*, BARTOLLAS & HAHN, *supra* note 14, at 98–99, 245–46; *End Racial Profiling Speech*, *supra* note 169, at 68–69 (describing federal anti-profiling bill that would fund "[d]evelopment and acquisition of early warning systems and other feedback systems that help identify officers or units of officers engaged in or at risk of racial profiling or other misconduct, including the technology to support such systems"); Livingston, *Police Reform*, *supra* note 181, at 836–41 (discussing early warning systems); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 360–61, 365 (2001) (discussing early warning systems); Sewell, *supra* note 161, at 193–94; Skolnick & Caplovitz, *supra* note 183, at 431–32 (arguing for data collection and analysis to ascertain problem officers).

   204.   MEEKS, *supra* note 20, at 209 (citing Senator Charles Schumer as supporting whistleblower's protection policy); Scott Glover & Matt Lait, *2 Officials Urge Stronger Civilian Control of LAPD*, L.A. TIMES, Mar. 7, 2000, at A1 (noting proposal to give officers departmental amnesty for reporting misconduct); Matt Lait & Scott Glover, *Secrecy Offered to Informers in Rampart Probe*, L.A. TIMES, Mar. 29, 2000, at A1 (discussing L.A. District Attorney's offer of confidentiality to police officers who witnessed misconduct); McNamara, *supra* note 189, at M2 ("If officers police themselves, all the right objectives can be achieved.   Toward that end, department management must encourage and protect cops with the courage to stop and report wrongdoing by their colleagues."); Ana Mendieta, *Jackson Praises Officers for Filing Suit*, CHI. SUN–TIMES, Jan. 16, 2000, at 3 (discussing police officers who came forward with allegations of racial profiling).

   205.   *See, e.g.*, Gabriel J. Chin & Scott C. Wells, *The Blue Wall of Silence as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) (describing the "blue wall of silence" as "an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer"); Luna, *Transparent Policing*, *supra* note 4, at 1114 n.14 (citing the "code" or "blue wall" of silence).

even if they were unaware of the behavior, thus creating a strong incentive for police leadership to turn in deviant cops *and* actively oversee and review the actions of subordinates.[206] Likewise, law enforcement should reevaluate and, if necessary, improve the citizen complaint process.[207] Potential intimidation might be diminished by placing the site for filing grievances outside of the police department, for example, or having nonuniformed employees take and investigate the complaints. Citizens should also be made aware of the timing, progression, and ultimate resolution of their grievances. Once a claim has been made, a democratically constituted, wholly autonomous, and fully resourced citizen review board should instigate a probe through independent investigators and a properly conferred power of subpoena. In the end, the board should be able to reach factual conclusions and appropriate discipline short of criminal punishment, including the termination of culpable officers. When the police misconduct constitutes a crime, however, the offending agents should be prosecuted; to do otherwise is to create a double standard for law enforcement that only increases citizen distrust and animosity.[208] Moreover, effective and trustworthy prosecution may require an independent state attorney staffed with her own investigative forces.[209] But however an officer is punished, by prosecution and/or departmental discipline, his name and misdeed should circulate throughout the agency and be made available to the public.[210]

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Collectively, these suggested changes attempt to utilize institutional design and the theories of behavioral and transparent policing to improve the relation-

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206. *See, e.g.*, BARTOLLAS & HAHN, *supra* note 14, at 98–99; NEYROUD & BECKLEY, *supra* note 14, at 158; SKOLNICK & FYFE, *supra* note 14, at 192 (advocating punishing supervisors for misconduct by subordinate officers); Rudovsky, *supra* note 204, at 296, 365; *End Racial Profiling Speech*, *supra* note 169, at 60 ("help to establish management systems to ensure that supervisors are held accountable for the conduct of subordinates").

207. Consent Decree, *supra* note 168, (requiring 24-hour, toll-free telephone number for citizen complaints about police); Livingston, *supra* note 181, at 830–36; *Corzine Speech*, *supra* note 169, at 59–60 (noting that federal anti-profiling bill would "put in place procedures to receive and investigate complaints alleging racial profiling"); Sniffen, *supra* note 23, at A1 (noting Attorney General Reno's call for police departments to create a complaint system that eliminates citizen fear); Rozemberg, *supra* note 190, at B1, B5 (quoting Tucson police chief that some citizens did not know they could file complaints); *cf.* ROBERT DAVIS & PEDRO MATEU-GELABERT, RESPECTFUL AND EFFECTIVE POLICING: TWO EXAMPLES FROM THE SOUTH BRONX (Mar. 1999), *at* http://vera.org/publication_pdf/respectful_policing.pdf (last visited Apr. 4, 2003) (discussing successes of police precincts that made reducing civilian complaints a priority).

208. CHEVIGNY, *supra* note 15, at 98–101; SKOLNICK & FYFE, *supra* note 14, at 195–98; Francis X. Clines, *Officer Charged in Killing That Roiled Cincinnati*, N.Y. TIMES, May 8, 2001, at A16.

209. *Panel Urges Remedies to Abuses by Police*, N.Y. TIMES, Nov. 4, 2000, at A18 (describing U.S. Commission on Civil Rights calls for the creation of a special prosecutor to investigate claims of police misconduct).

210. MEEKS, *supra* note 20, at 208–09; Lisa Fingeret, *Activists Urge Greater Police Accountability*, CHI. TRIB., Jan. 20, 2000, at 1 (quoting black community activist as saying: "Why should we continue to allow white racist officers to come into our community and beat our [people] and not know who they are? We have to identify who they are."); McCormack, *supra* note 158, at 106–07; *Blame Extends Past LAPD*, L.A. TIMES, Sept. 26, 1999, at M4 (arguing for broader dissemination of information about police misconduct).

ship between law enforcement and African Americans, with the goal of a more trustworthy, legitimate, and democratic police force. Consistent with the law-and-economics/public-choice approach, the incentive structure for law enforcement in the hypothetical department has been modified, starting with qualitative performance criteria that downplay arrests and seizures—thereby minimizing reward-driven police abuses—and focusing instead on citizen satisfaction and standards of ethical behavior. Moreover, both variables in the deterrence equation have been altered. The cost of misconduct has been increased, demanding discipline or termination for wrongdoing and possibly criminal prosecution of deviant cops. In turn, the chance of detection has been heightened through constant review of policing data, a more citizen-friendly complaint system, and the creation of personal incentives for supervisors and whistleblowers to expose misconduct.

Using the insight of behavioral law and economics, the conversion to a neighborhood-oriented, open-system management style attempts to overcome institutional blind-spots that hinder good police–citizen relations. Collaborative decision-making mechanisms, such as civilian policy or review boards, incorporate external viewpoints that help check problematic biases and heuristics of police leadership. Likewise, the hiring and promotion of minority officers brings an important perspective to an otherwise uniform police force, thereby challenging racial and cultural assumptions. An improved recruiting operation also tries to cull individuals with serious cognitive deficiencies that might lead to, for instance, race-based policing or unnecessary violence, while an early warning system hopes to reveal potential indicators of abusive behavior by current agents. The training process then drills appropriate responses to repeat scenarios, reducing dependence on erroneous mental shortcuts, and formulates rules and standards that are intended to guide law enforcement in general, again limiting the reliance on faulty heuristics. Moreover, an enhanced instruction program challenges individuals to reexamine their belief systems, educating officers on the historical use of law enforcement to oppress minorities and the empirical fallacies of race-based presumptions.[211]

The described changes recognize the importance of social norms analysis as well. By cracking down on even low-level police abuses and publicizing the same, law enforcement undermines the culture of misconduct and raises the level of socially influenced deterrence. In fact, police chiefs can serve as "norm entrepreneurs,"[212] denouncing officer wrongdoing, signaling law enforcement's swift and severe response to such behavior, and possibly creating a "cascade

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211. For instance, training might include the reading and discussion of Professor Randall Kennedy's *Race, Crime, and the Law*, particularly its excellent treatment of the history of racial prejudice by law enforcement. KENNEDY, *supra* note 1; *see also* Dinitia Smith, *Scottsboro 70 Years Later, Still Notorious, Still Painful*, N.Y. TIMES, Mar. 29, 2001, at E1 (describing wrongful conviction of the "Scottsboro boys").

212. Sunstein, *Social Norms*, *supra* note 74, at 929–30.

effect,"[213] with the norm against police misconduct flowing throughout the department. A deviant police culture can also be abated by breaking up units with a history of abuse and rotating assignments to prevent the formation of rogue cliques.   Conversely, increasing the presence of black officers and requiring cops to live in the neighborhoods they police can help improve the cultural milieu, inculcating an appreciation of minority perspectives and a general interest in community well-being.

Finally, the values of transparent policing theory are integrated into the institutional (re)design of this hypothetical police department. An open-system management style is premised on the visibility of its actions, allowing external voices to be heard and revising policies based on experience. For instance, collecting data on traffic and pedestrian stops, videotaping police–citizen interactions, and releasing information on officer misconduct all enhance the visibility of law enforcement to concerned individuals and groups. Radical localism tries to realize the platinum rule and democratic consent, ensuring that actions affecting a given neighborhood are approved by its members. Other techniques of empathy creation—such as citizen police academies and complaint mediation programs—widen viewpoints and improve civic-minded deliberation. In addition, collaborative decision-making methods like community policing and civilian policy boards provide an opportunity for citizens to air their concerns and ideas, for an appropriate resolution to be reached through deliberation, and for the decision to be subject to ongoing review.

IV

CONCLUSION

Admittedly, many details need to be worked out in applying the framework of institutional design, as the above example is crafted at a relatively high level of generality. Moreover, the propriety and applicability of principles culled from abstract theory are always debatable. Kant's philosophy, after all, is an "experiment in pure reason"[214] rather than a set of precepts for real-life implementation—and the same can be said for Rawl's theory of pure procedural justice. In turn, Habermas' writing is dense[215] and somewhat utopian, although his discourse theory at least incorporates some practical considerations. But as far as possible prescriptions go, there are clear advantages to a less aggressive, non-racist, conscientious police force, acting with the consent of the affected citizenry and pursuant to an open, deliberative decision-making process. With

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213. *See* note 75, *supra*; *see also* Cass R. Sunstein, *Selective Fatalism*, 27 J. LEGAL STUD. 799, 805 (1998); Sunstein, *Social Norms*, *supra* note 74, at 909.

214. *See supra* note 118.

215. *See, e.g.*, Mitchell Aboulafia, *Law Professors Read Habermas*, 76 DENV. U. L. REV. 943, 943 (1999) ("The law professors having little familiarity with Habermas and his progenitors often found his work needlessly obtuse and riddled with unfamiliar intellectual byways. The theoreticians present found themselves taxed by having to explain and defend the importance of various ruminations that appear important only to distinction-obsessed philosophical types."). For a satirical take on Habermas' incomprehensibility, *see* Daniel W. Skubik, *Book Review*, 44 FED. LAW. 59, 59–61 (Feb. 1997).

institutional design providing the framework, I am hopeful that the specifics can be worked out in the context of a particular police department and minority neighborhood. The framework might even have implications beyond law enforcement, such as the institutional (re)design of prosecutor's offices, corrections agencies, and courtroom practices like bail setting and sentencing. As this Symposium has made clear, racial disparities exist throughout the criminal process, which, in turn, are amenable to empirical analysis. The framework would simply incorporate the affinity for data collection into a broader program of transparency and behavioral modification for the relevant institution.

It must be conceded, however, that the premises underlying the hypothetical police department and black neighborhood will not hold in many cases. Assuming the necessary resources to carry out a full-scale program of institutional design is a rather large assumption, and one that will prove false in many areas. And regardless of obvious benefits from cooperation, some departments and communities will continue to point fingers and cast aspersions at one another. The Rizzo–Gates style of insularity and recalcitrance to change all but forecloses the possibility of implementing institutional design and instead calls for sometimes futile, always uphill actions: legislative proposals, civil rights lawsuits, public protests, federal intervention, and so on. Even if these adversarial approaches produce only minor changes within an obstinate police department, there may be no other options for black neighborhoods and their representatives. Like the historical experience of non-violent advocacy for civil rights, both in the United States and elsewhere, sometimes change must occur by painfully small steps over long periods of time.

But however achieved, there is a need to reexamine the institution of law enforcement and its relationship with communities of color. The problem is not racial profiling, or police perjury, or lethal force, but rather all of these issues at once and, in particular, the institutional sources of officer misconduct. Severed from the underlying concern of dysfunctional police–minority relations, band-aid solutions for particular manifestations of misconduct can dissipate over time or become equally meaningless as other problems emerge. Real, large-scale reform must begin and end with the institution of law enforcement and its relationship with the people it serves.