

Democratic Accountability and Policing

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Often when people talk about accountability in policing, they are focused on “back-end” accountability, which kicks in after something has gone wrong. What is needed in policing is accountability on the “front end”—which means that the public gets to have a say in what the rules for policing should be in the first place. Having front-end, democratic rules for policing helps to ensure that policing practices are consistent with community values and expectations, and can help build trust and legitimacy between the community and the police. This chapter makes the case for front-end accountability in policing, acknowledges some of the challenges to doing so, and highlights some possible models for bringing this sort of accountability about.

INTRODUCTION

There is a failure of accountability around policing, but it is not where most people think. When people talk about accountability in policing, they usually are referring to the back end. Something has happened, it is not what should have happened, and so someone must be held accountable. This is the sort of accountability that people envision when they talk about the need for officer discipline, or civilian review boards, or inspectors general, or judicial review. All of these mechanisms are aimed at addressing *misconduct*.¹

What policing is sorely lacking is accountability on the front end, *before* policing officials take action. Front-end accountability involves questions like: What should the rules be that govern policing? What even counts as misconduct? And what should the proper conduct have been in the first place? These sorts of questions we leave almost entirely to the police themselves to resolve. (And, to some minor degree, to the courts and the Constitution.) We exclude almost entirely the hallmark of accountability in democratic government—the people.

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1. See Rachel A. Harmon, “Legal Remedies for Police Misconduct,” in the present Volume.

Front-end, democratic, accountability is pervasive throughout the rest of executive government. Before the Environmental Protection Agency (EPA) announces new emission standards, it asks for public comment. If the local school board wants to change the bus route, it typically holds a hearing. And if a member of the public wants to read the school board's bylaws or learn about its policies, all she has to do is ask (or go to the school board's website). Although the precise mechanisms of democratic accountability vary across agencies and levels of government, they typically satisfy these four basic criteria:

- There are rules (or standards, or policies) in place *before* officials act.
- The rules are *transparent*, so all can know what they are.
- The rules are formulated with *public input*.
- To the extent possible, the rules are *rational*, in that they are designed to do more good than harm.

There are of, course, plenty of rules in policing. There are directives and general orders and constitutional rules. But what there is precious little of are *democratic* rules that meet the four criteria above.

The absence of front-end, democratic accountability in policing is troubling for at least two reasons. First, absent public input, there is a risk that the rules and policies that police officials adopt will not reflect community values or needs. Indeed, as we have seen time and again—on issues ranging from electronic surveillance to the use of military-grade equipment—when the people are given a voice in policing, policy shifts. In a democracy, that is cause for concern.

Second, democratic accountability is essential to agency legitimacy. In recent years, there has been a lot of talk about the legitimacy of policing, and about a loss of trust in the police. It is a simple fact that for any agency of government to do its job, it needs the support of the public. But people are less likely to support an agency over which they have little or no say—particularly if the agency has a huge impact on their lives.

To be clear, this brief, preliminary statement of the issue hides substantial nuance and complication, which we want to acknowledge at the outset. When we speak of “rules,” we intend that as a stand-in for rules, standards, policies, or other concrete approaches to policing. Given the nature of policing, some of the decisions that departments face—how best to deal with juvenile crime,² for example—may not be reducible to a fixed set of rules, but rather may involve a mix of priorities, programs, and targeted interventions. What matters is that

2. See generally Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

there is an opportunity for democratic engagement around the tactics and techniques the police employ, whatever the form the implemented policy takes. Similarly, when we talk about the “public” or the “community” in democratic policing, we recognize—of course—that in reality there are many communities and even within communities there rarely is one single community view. This undoubtedly poses a challenge to implementing democratic policing, but is not an argument in favor of the status quo.

What is important, at bottom, is that officials both in and out of law enforcement have recognized the need for greater democratic engagement around policing. In 2015, the President’s Task Force on 21st Century Policing issued a report that repeatedly called for policing agencies to involve community members in setting policies and priorities for policing.³ The International Association of Chiefs of Police likewise has recognized the importance of formally involving the public “in the business of the police department.”⁴

Unfortunately, bringing this sort of democratic governance to policing will not be an easy task. It requires a substantial culture shift within policing agencies. We also lack good models for what democratic engagement should look like. Whatever models are employed must be scalable to the vastly differing size of over 15,000 different law enforcement agencies and their communities. And they must operate in a way that enhances, and does not detract from, the public-safety function of policing. Democratic accountability should foster public safety, not jeopardize it.

To that end, we recommend:

- development of clear and comprehensive rules and policies on all aspects of policing that affect the rights and interests of the public, whatever the formality of those rules and policies;
- development, implementation, and evaluation of different models of police-community engagement over policing policy and practice;
- amendment of existing administrative procedure acts to make clear policing agencies are “agencies” within their ambit—and to clarify which policing activities should be subject to democratic processes; and

3. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

4. INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL POLICY SUMMIT ON COMMUNITY-POLICE RELATIONS 16 (2015), http://www.iacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf.

- funding and technical assistance—both from the Department of Justice and private organizations—to support agency adoption of mechanisms of front-end accountability.

I. HOW DEMOCRACY OPERATES AND WHY POLICING DIFFERS

Accountability in executive government has two halves: the front end and the back end. Front-end accountability—by which we mean that there are rules in place before officials act, which are transparent, and formulated with public input—further several important goals. (Keep in mind the broad way we are using the word “rules” here.) Rules ensure that agency conduct is the product of considered judgment as opposed to the ad hoc decisions of individual officials.⁵ This promotes consistency and reduces the risk of arbitrariness. Making rules public puts individuals on notice about how government officials intend to operate—so that they can adjust their own conduct accordingly, or complain if the rules are not what they should be. Public participation can improve the quality of rules by ensuring that officials have all of the information they need to make sensible policy. It also helps to make clear that government officials are, to the extent possible, responsive to the popular will.

Back-end accountability is aimed at making sure that those rules are followed, typically by imposing consequences either on the agency or its officers if they are not.⁶ If implemented properly, back-end accountability also can motivate agencies to develop better rules on the front end. But back-end accountability is unlikely to be effective unless the front-end rules are sufficiently clear and transparent so that officers and the public know what is expected. (One of the basic requirements of the rule of law is that officials can only be held responsible for violating rules of which they should have been aware.)

This dual model of governmental accountability is applied in many different ways throughout government. In its most elaborate form, there is legislation, often supplemented by administrative rulemaking, and followed by various back-end mechanisms such as auditing by an inspector general or judicial review for those affected by agency action. But in many parts of American government, these same principles are implemented more simply. At the local level, democratic input often is achieved through public hearings, and open-government and sunshine acts. Sometimes a simple town hall can provide input for decision-makers, indicating to them what course of action is preferable, and where caution is warranted.

5. For a discussion of the prospect of rules for prosecutorial discretion, see John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report.

6. See Harmon, *supra* note 1.

The important point, though, is that, by and large, government is open on the front end. Although we leave elected and appointed officials free (within bounds) to do their jobs and apply their expertise, there is a general recognition that those officials work for the public, that what they do should be transparent to the public, and that the public has regular and continuing opportunities (and, to some extent, obligation) to weigh in about how it is governed. In essence, the public (and not courts and constitutional law) determines in the first instance what is in bounds for those officials, and what is not.

A. THE LACK OF FRONT-END ACCOUNTABILITY IN POLICING

One of the reasons accountability is such a concern in policing today is because the existing mechanisms of accountability are focused primarily on the back end, with very little on the front end. Which is to say, existing mechanisms primarily are concerned with identifying and sanctioning misconduct. Yet, not only is it very difficult to impose meaningful back-end accountability if there is no clarity on the front end, but to focus almost single-mindedly on the back end misses everything important about the front end. The focus on misconduct ignores what the public thinks is rightful conduct in the first place. That is where attention is needed in policing.

To be clear, there are rules in policing. Policing officials would suggest they have too many rules. Policing agencies are governed by manuals, standard operating procedures, and general orders. They also must comply with constitutional rules formulated by courts. There even are some legislative rules. For example, the federal Electronic Communication Privacy Act provides a nationwide set of rules for collecting certain electronic communications,⁷ and a number of states have statutes governing matters ranging from interrogations to the use of drones.

But existing rules are, at best, a patchwork quilt. Police manuals often will cover a host of minutiae from how uniforms are buttoned to policies on paid time off, but have no policy on whether youths can be used as informants. Constitutional rules are supposed to set a floor for conduct; they do not even pretend to provide adequate guidance for policing policy, nor should they. State legislation—although important—is hardly comprehensive as to the many things policing agencies do.

What is needed is guidance *from the public* about how the police go about policing. To return to the point we made earlier, this will not always be through formal rules. Guidance may come in the form of generalized standards, or

7. 18 U.S.C. §§ 2510-2712.

statements about enforcement priorities, or programs developed in partnership with the community to address specific concerns. Some communities may want the police to focus on traffic enforcement; others may be concerned about drug markets. Some communities may have no objection to frequent surveillance in the form of license-plate readers or CCTV; others may have strong feelings against it.⁸ The point is that the police ought not to be making these decisions without input and direction from the public, for whom they work.

There are some few scattered examples of public participation in front-end policymaking. In Los Angeles, department policies are formulated by a civilian police commission, which holds public hearings before adopting new rules. Consent decrees between the Justice Department and several major city police departments—including Seattle’s, Cleveland’s, and Portland’s—have required the agencies to set up civilian police commissions to provide ongoing input into the reform process. A number of police departments also have set up more-informal advisory bodies to provide input on policy and practice.⁹ Some departments have worked closely with the public on problem-oriented policing, which is not necessarily the same as getting input on policing policy, but is a step in the right direction.

But despite these efforts, democratic policymaking in policing is the exception, not the norm. In many jurisdictions, the rules governing policing are not even available to the public. And there are few if any structured opportunities for public input into policing rules, policies, and tactics. Although police officials may hold community meetings to inform the public of recent crime trends (or ask for the community’s help in identifying public-safety issues of concern), they almost never involve the public in formulating the policies and practices that shape how public-safety problems are addressed. They don’t ask the public *how* it wants to be policed.

In making this point, we do not mean to suggest “the public” will have one set of views. Quite obviously, the questions around policing often are contentious, and fraught with disagreement. This is true on countless issues as diverse as the use of stop-and-frisk, when and how to deploy body cameras (and when the footage should be available to the public), and police use of social-media tracking. But this is true of many if not most areas of government. The fact of public disagreement hardly excuses the need for democratic engagement.

8. For a discussion of high-tech surveillance, see Christopher Slobogin, “Policing, Databases, and Surveillance,” in the present Volume.

9. *Citizen Advisory Boards*, CITY OF PHX., <https://www.phoenix.gov/police/neighborhood-resources/citizen-advisory-boards> (last visited Apr. 11, 2017).

Nor is it an answer to say that police are accountable on the front end because police chiefs serve at the pleasure of the mayor or city council (or because sheriffs are directly elected by the people). The problem with relying exclusively on electoral or chain-of-command accountability is that absent a strong push from the public, elected officials rarely have an incentive to involve themselves too closely in how policing occurs, in actually governing the police. And without transparency or public engagement around specific policies and practices, most members of the public simply are not aware of the practices that policing agencies or sheriffs adopt to address crime in their communities—and so are unlikely to give officials the push they need. Electoral accountability is accountability at wholesale, but as with other issues in government, the public's views should be welcome at retail—on specific tools, tactics and strategies that the police employ.

B. WHY IT MATTERS

The lack of front-end accountability contributes to many of the concerns that have been expressed about policing in recent years—both about specific policing practices, and about the loss of trust and legitimacy around policing in some communities.

For example, there is today a great deal of attention to the use of force by policing agencies, and in particular, about police shootings of unarmed civilians.¹⁰ After these shootings, there are calls for accountability, followed by disappointment when grand juries fail to indict the officers, or departments fail to impose serious discipline. But the criminal law usually is too blunt an instrument with which to achieve meaningful accountability. It has its place, to be sure, but it alone is not going to prevent troubling incidents from occurring. Oftentimes, department rules regarding use of force—binding front-end rules—are shockingly sparse. The primary standard in too many jurisdictions is the thin admonition from the Supreme Court in *Graham v. Connor* that the use of force at the moment it is employed must be “reasonable” under the totality of the circumstances.¹¹ The constitutional standard says nothing about what the officers should have done to try to avoid the need to use force in the first place—such as maintaining a safe distance from the suspect, or

10. See, e.g., L. Song Richardson, “Police Use of Force,” in the present Volume.

11. *Graham v. Connor*, 490 U.S. 386, 396 (1989); Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. (forthcoming 2017) (manuscript at 29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759.

employing de-escalation techniques. Nor do they address the training that officers should receive about how to deal with the mentally ill, who account for a disproportionate share of police shootings.

Similar concerns have arisen about law enforcement's use of various surveillance technologies, from location-tracking to aerial surveillance using drones or airplanes.¹² In Baltimore for example, there was a public outcry after it was reported that the police had for months been deploying aircraft-mounted cameras across the city in an effort to detect crime—without telling anyone outside the department, including the mayor.¹³ There have been similar examples in Compton, California, and in New York City.¹⁴ But despite these upheavals, there is little clarity about what is to be done. That is because there presently is no requirement that police officials obtain public approval prior to deploying new surveillance technologies—and with the exception of the Fourth Amendment's thin regulation of "searches" and "seizures," no formal rules on what the policies regarding the use of these technologies should be. Law enforcement officials are left on their own to make these decisions.

It is simply inconceivable that we would try to regulate a bureaucratic organization possessing such a complex and serious mission through the blunt instrument of constitutional law. We would not want constitutional law to be so intricate, nor so confining. Too often, courts step in wielding constitutional law because no one else has stepped up to draft sensible rules to govern a particular policing practice. But the fact that courts act as a backstop hardly excuses the failure to do the job in the first place.

The lack of public participation in formulating what rules there are also has had significant consequences for the relationship between the community and the police. Many have commented in recent years on the loss of legitimacy and trust in the police in some communities, particularly in communities that need to rely on police the most to combat crime.¹⁵ This is unsustainable.

12. See, e.g., Slobogin, *supra* note 8.

13. Yvonne Wenger, *Few in City Hall Knew About Baltimore Police Surveillance Program*, BALTIMORE SUN (Sep. 9, 2016), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-sun-investigates-who-knew-20160902-story.html>.

14. Conor Friedersdorf, *Eyes Over Compton: How Police Spied on a Whole City*, THE ATLANTIC (Apr. 21, 2014), <http://www.theatlantic.com/national/archive/2014/04/sheriffs-deputy-compares-drone-surveillance-of-compton-to-big-brother/360954/>; Conor Friedersdorf, *The NYPD is Using Mobile X-Ray Vans to Spy on Unknown Targets*, THE ATLANTIC (Oct. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/10/the-nypd-is-using-mobile-x-rays-to-spy-on-unknown-targets/411181/>.

15. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 3, at 9; INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 4, at 6.

Police officials cannot do their jobs without community support. They rely on the community to report crime when it occurs, and to help identify those responsible. They also rely in large part on voluntary compliance with the law. When community support is lacking, public safety suffers as a result.

There is a direct and demonstrable link between the absence of front-end accountability and the loss of trust in the police. Research consistently has shown that individuals are more likely to cooperate with the police if they perceive policing as legitimate—and that an essential component of legitimacy for all government institutions is voice.¹⁶ Although much of the recent focus on voice and legitimacy in policing has been on individual encounters between officers and civilians (often referred to as “procedural justice”), the same principles apply more broadly to the relationship between the community and the police. When community members are given a voice in setting policy, they are more likely to view the policies and the police themselves as legitimate—even if they disagree in part with some of the policy choices that police officials ultimately make.

C. HISTORICAL REASONS FOR THE LACK OF FRONT-END ACCOUNTABILITY

For virtually any other agency of government, we would not tolerate this lack of accountability on the front end. Why do we do so for policing? One answer is history.

For the first half of the 20th century, the principal goal of police reform had been to *isolate* policing from politics, not make it more accountable. Policing agencies as we know them today first came into being in America’s cities in the mid-19th century, and they very quickly became a part of corrupt urban machines. They also were badly mismanaged, and for the most part hopelessly ineffective. Beginning in the 1910s, a series of commissions and exposés drew attention to the problems of policing.¹⁷ They argued that if politics and

16. TRACEY L. MEARES & PETER NEYROUD, NAT’L INST. OF JUSTICE, NEW PERSPECTIVES IN POLICING BULLETIN: RIGHTFUL POLICING 5 (2015), <https://www.ncjrs.gov/pdffiles1/nij/248411.pdf>; see also LORRAINE MAZEROLLE ET AL., LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW (2013); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 344-45 (2011).

17. NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON POLICE 1-6 (1931); August Vollmer & Albert Schneider, *The School for Police as Planned at Berkeley*, 7 J. CRIM. L. & CRIMINOLOGY 877, 877 (1917).

incompetence was the problem, the solution was to “professionalize” policing and make it autonomous from the political establishment.¹⁸

Although well-intentioned, these reforms had unfortunate consequences for the relationship between the community and the police. Police had acquired some of the markers of professionalism—including more training, civil-service protection, and improved technology—but they also became increasingly isolated from the community in ways that bred mutual suspicion and distrust. Two presidential commissions in the 1960s, investigating (among other things) widespread urban rioting, concluded that police needed to be integrated more with their communities, and that communities needed to have greater say.¹⁹ For a variety of reasons, however, these reforms have been slow to take hold.

D. LEGAL REASONS FOR THE LACK OF FRONT-END ACCOUNTABILITY

There also is a technical legal reason that the activities of policing agencies have eluded democratic accountability. It is somewhat abstract, but it is important. Under most administrative procedure acts, agencies (and in most states, police are in fact considered agencies) are required to engage in public rulemaking only if their activities impose new obligations on the public or alter the public’s rights in some way. If the EPA wants to require factories to install better smoke screens, it must first go through notice and comment rulemaking. The same is true if a local licensing board wants to raise its fees, or change the licensing requirements in some way.

Policing typically is exempted from these rulemaking requirements because as a formal matter the police lack the authority to impose new burdens on people or change their rights. Police officials enforce the laws that legislatures adopt. And they are required to do so within the bounds of constitutional law. If they *violate* someone’s rights, that person can (at least theoretically) bring a lawsuit and seek damages in compensation. So, in theory at least, the police are not even empowered to do the sorts of things—alter rights and impose responsibilities—that trigger the requirement of obtaining public input.

18. SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* (1977).

19. THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>; U.S. NAT’L COMM’N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968).

The problem, however (and obviously), is that there is a big difference between theory and reality. In practice, policing tactics affect our rights regularly, and there is not always judicial recourse. Your data may be collected without your even knowing it, such as when a license-plate reader records your location at a particular time. Being stopped and frisked is a serious intrusion,²⁰ but most people lack the time and resource to take a wrongful stop to court. Taking this formal legal argument seriously would mean that if the government extracts a dollar from you, there must be serious process, but not so if it aims a gun at your head, installs malware on your computer to track your communications, or plants drones over your house. As a practical matter, much of modern-day policing, from stop-and-frisk to surveillance, affects people's rights in significant ways. And for much of this there is little effective judicial redress, for reasons running from harsh justiciability requirements to the fact that a certain amount of what the police do is secret. Front-end democratic participation in policing decisions is essential.

II. PRIOR ATTEMPTS TO BRING FRONT-END ACCOUNTABILITY TO POLICING

Beginning in the 1960s, there have been repeated efforts, both within the academy and among practitioners, to bring elements of front-end accountability to policing. Some of these efforts have focused primarily on the need for rules to guide officer decision-making. Others have focused more on the need to strengthen relationships between the community and the police through collaboration and voice. Only in recent years have there been any serious attempts to bring the traditional mechanisms of democratic accountability to policing.

A. THE RULEMAKING MOVEMENT

In the late 1960s and early 1970s, a number of prominent scholars and judges—responding in part to the concerns about policing described above—drew attention to the problem of police discretion, and called for greater rulemaking by the police. Some, like Professor Anthony Amsterdam and Judge Carl McGowan, had grown increasingly skeptical of the ability of courts to fashion sufficiently detailed rules to inform the sorts of decisions that police made each day.²¹ Others, like Professor Kenneth Culp Davis, saw parallels between discretion in policing and in other areas of executive government,

20. See, e.g., Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in the present Volume; see also Jeffrey Fagan, “Race and the New Policing,” in the present Volume; David A. Harris, “Racial Profiling,” in the present Volume.

21. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

and thus saw rulemaking—which had come into greater use by administrative agencies in this period—as a promising solution.²²

Also in this period, a number of organizations sponsored projects to develop model rules and policies for the police. The American Law Institute developed its *Model Code of Pre-Arrest Procedure*, and the American Bar Association issued its comprehensive *Standards Relating to the Urban Police Function*. The Texas Criminal Justice Council partnered with the International Association of Chiefs of Police (IACP) to issue model rules on key areas of policing. Professors at several universities—often working in partnership with law-enforcement agencies—also produced model rules.²³

But despite the best of intentions, not much came of these efforts. First, all of the projects were much more about rules than they were about democracy. All were drafted by lawyers and academics, and there was little or no public input into the endeavors. Some also were focused more on codifying existing (mostly constitutional) law, than on formulating much-needed policy on what policing should look like. Finally, policing agencies did not have much of an incentive to formally adopt these rules as policies—except sporadically “in response to a lawsuit, political pressure, or other emergency.”²⁴ In 1986, Samuel Walker observed that police rulemaking was a “patchwork phenomenon.”²⁵

22. KENNETH CULP DAVIS, *POLICE DISCRETION* (1977).

23. MODEL RULES: WARRANTLESS SEARCHES OF PERSONS AND PLACES (Project on Law Enforcement and Rulemaking 1974); SHELDON KRANTZ ET AL., *POLICE POLICYMAKING: THE BOSTON EXPERIENCE* (1979); FRED WILEMAN, *MODEL POLICY MANUAL FOR POLICE AGENCIES* (1976).

24. Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 363 (1986).

25. *Id.* A number of scholars continued to advocate for police rulemaking throughout the 1980s and 1990s. Some, like Wayne LaFave and Samuel Walker, echoed the prior scholarship by focusing on the need for agencies to formally adopt administrative rules to govern officer decisions about various practices including the use of force and surveillance. *Id.*; Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990). Others emphasized the need for more informal guidelines—drafted with community input—to govern the sorts of discretionary enforcement decisions that officers routinely faced when engaging in “order maintenance” policing. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197.

B. COMMUNITY POLICING AND “POWER SHARING”

One of the key requirements of front-end accountability—community involvement in agency decision-making—was picked up in the 1980s as a key component of what eventually came to be known as “community policing.” Although community policing has become a catch-all term for a variety of department programs and strategies—many of which have little to do with accountability—one of its core ideals is that the police and the community share jointly in the responsibility for providing public safety, and should work collaboratively to address community problems and concerns.

Perhaps the most influential statement on the need for community involvement in setting policy came from Houston Police Chief Lee Brown in a 1989 essay he wrote for the Harvard Executive Session on Policing. Brown emphasized that true community policing necessitated “power sharing” which he defined as community participation in decision-making processes around “strategic planning, tactic implementation, and policy development.”²⁶

The “power sharing” component of community policing, however, never really took hold. Although agencies introduced a variety of mechanisms to facilitate collaborative decision-making, including beat meetings and various community partnerships, most of these efforts were focused on identifying and addressing specific community problems—like speeding or blight—instead of dealing with broader questions of department policy and practice. As crime rates continued to climb through the 1980s and 1990s, the more collaborative vision of community policing also generally lost out to more-aggressive enforcement practices like “broken windows” or “order maintenance” policing that left much less room for community involvement.

C. AN EMERGING CONSENSUS

A new wave of scholars have in recent years renewed calls for administrative regulation for policing. Daphna Renan and Chris Slobogin, as well as the co-authors of this piece, Barry Friedman and Maria Ponomarenko, have argued in favor of treating policing agencies as just that—agencies—subject to the regular processes of administrative law.²⁷ John Rappaport has urged courts to

26. LEE P. BROWN, NAT’L INST. OF JUSTICE, COMMUNITY POLICING: A PRACTICAL GUIDE FOR POLICE OFFICERS 5–7 (1989), <https://www.ncjrs.gov/pdffiles1/nij/118001.pdf>.

27. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016). Andrew Crespo has dubbed these scholars the “New Administrativists.” See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2059 (2016).

use existing doctrines to nudge policing agencies toward greater use of internal rulemaking procedures. Sunita Patel and Samuel Walker have both lauded the “community engagement” provisions in Justice Department consent decrees.²⁸ And David Thacher has highlighted the ways in which focused deterrence programs—like Operation Ceasefire—incorporate principles of front-end accountability by establishing clear guidelines and enforcement priorities, providing “notice” to potential offenders of what to expect, and including community members in their development and implementation.²⁹

Some of these same ideas also were featured prominently in the Final Report issued in 2015 by the President’s Task Force on 21st Century Policing. The Task Force emphasized the need for “clear and comprehensive policies” on everything from the use of force to the handling of mass demonstrations to the conduct of searches and seizures to the adoption of new technologies.³⁰ The task force also urged agencies to develop a “culture of transparency” and “make all department policies available for public review.”³¹ Finally and most importantly, the Task Force repeatedly called for community participation in formulating policies and setting crime-fighting priorities.

The core insight that runs through much of this scholarship and commentary is that front-end engagement around policing policies and practices is essential not only to the legitimacy of policing, but also its effectiveness. The Task Force emphasized throughout its report the importance of police legitimacy to securing community cooperation and improving public safety. It also noted the many complex questions police departments face—particularly around the use of new technologies—that would benefit from comprehensive ex ante policymaking and thorough vetting with community groups.³² Similarly, in *Democratic Policing*, we highlighted numerous instances whereby increased public participation in police decision-making had resulted in the adoption of new crime-fighting strategies that improved both crime rates and community satisfaction.³³

28. Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOH Consent Decrees*, 51 WAKE FOREST L. REV. 793, 799 (2016); Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615.

29. David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533.

30. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 3, at 2, 32.

31. *Id.* at 13.

32. *Id.* at 31-33.

33. Friedman & Ponomarenko, *supra* note 27, at 1879-81.

III. ASSESSING THE MODELS OF FRONT-END ACCOUNTABILITY

Despite the growing consensus on the need for front-end accountability around policing, there are, unfortunately, few models of what this sort of accountability should look like, and a variety of obstacles to nationwide implementation. Many of the existing models—like the community police commissions established under Justice Department consent decrees—still are too new to know for sure how well they will fare in the long run. And although there are models from outside of policing, like notice-and-comment rulemaking, or open meetings, that may be brought to bear, these models may need to be adjusted in various ways to account for some of the differences between policing and other areas of government. Here we offer a preliminary overview of some of the key obstacles to front-end accountability, as well as the possible models for jurisdictions to consider.

A. CHALLENGES FOR DEMOCRATIC ACCOUNTABILITY

Some of the challenges for bringing front-end accountability to policing stem from the unique features of policing that distinguish it from other areas of government. For example, unlike school management or environmental regulation, policing inevitably requires some measure of secrecy. Too much transparency can make it easier for criminals to evade detection. The flip side, though, is that the public cannot provide meaningful input on policing policies unless it knows what those policies are.

In general, the need to keep certain information confidential should not impede front-end engagement with the public. For most aspects of policing—such as the conduct of searches and seizures, or the use of new technologies like license-plate readers and body-worn cameras—agencies can (and some do) make their policies available to the public without impeding public safety. Even for more sensitive aspects of policing—like the use of SWAT teams or confidential informants³⁴—agencies can disclose in general terms how these tactics are regulated so as to facilitate public engagement. The New Jersey Attorney General’s Office, for example, has issued detailed, public guidelines regarding the use of juvenile informants, including the steps that agencies must take to ensure their safety.³⁵ That said, there undoubtedly are some areas of policing where these sorts of lines will be harder to draw—and it may require some work on the part of agencies and elected officials to determine where the lines should be.

34. See generally Daniel Richman, “Informants and Cooperators,” in the present Volume.

35. N.J. STATE ATTORNEY GENERAL, NEW JERSEY LAW ENFORCEMENT OFFICERS’ REFERENCE MANUAL: HANDLING JUVENILE OFFENDERS OR JUVENILES INVOLVED IN A FAMILY CRISIS app. 10 (1997).

Another consideration concerns the question of expertise. In most areas of administrative government—from nuclear regulation to environmental policy—there are people outside of government, often in private industry, who have as much if not more expertise on the subject matter than the agencies themselves. This often is not the case when it comes to policing. Although academics, policy advocates, and community activists have important information and insights to bring to bear, they often lack the practical experience with policing necessary to assess how particular policies actually will work when deployed in the field.

Claims about expertise, however, provide no excuse for excluding the public from police policymaking. The public weighs in on many complicated issues, from health insurance to energy policy. It does mean that policing agencies need to take affirmative steps to educate community members about what they see as important considerations and tradeoffs, so as to facilitate a more informed exchange of views. Central to public input into policing is public education.

Relatedly, it is an unfortunate reality that some of the communities that are most policed—and are therefore the most in need of input about what policing should look like—also are the least well-organized to participate in democratic processes. As David Thacher and others have argued, one of the pitfalls of looking to the public to help shape policies and priorities is that not all members of the community are equally positioned to make their voices heard: “if police are responsive to the community groups that do organize, they run the risk of winding up with skewed priorities that benefit the better-off at the expense of the poor.”³⁶

In developing models of public engagement, agencies will need to take special care to ensure that they are hearing from all communities—which may involve taking affirmative steps to engage more-marginalized groups. There is not likely to be one single community view on policing issues, so policing policy should try to accommodate competing views. When competing views cannot be reconciled by the police, more-formal municipal or state decision-making may be required. (One advantage of policing, though, is that it is extremely localized, and so it may be possible to take fine-grained community views into account in developing policy.)

Two additional challenges reflect the simple fact that front-end accountability largely has been absent from policing—and so will require some changes within policing agencies to bring about. First, most agencies presently lack the

36. David Thacher, *Equity and Community Policing: A New View of Community Partnerships*, 20 CRIM. JUST. ETHICS 3, 3 (2001).

institutional capacity necessary to undertake broad-based public engagement over department policies and practices. Existing department policies often are quite long, and full of legal jargon. In order to solicit public input, agencies will need to find ways to present their policies or ideas to the public in ways that people actually can understand. Agencies also will need to develop mechanisms to reach out into the community—including communities that have not always worked closely with law enforcement. And they will need to have a process in place to aggregate and evaluate the feedback received, and then incorporate this information into the final policy.

Instituting front-end accountability also will require a significant cultural shift in policing, both among department leadership and the rank and file. Because policing largely has been insulated from this sort of democratic control, it will take time for officials to get used to the idea of asking the public for input into the way they do business. A particularly stark example of police skepticism toward civilian involvement is a statement issued by the Chicago Lodge of the Fraternal Order of Police after the Chicago Police Department released its draft use-of-force policy for public comment. The FOP wrote that the department's decision signaled that things had become "completely upside down when it comes to policing in Chicago.... [T]his latest attempt to extend the authorship of one of our General Orders to civilians certainly speaks to the unprecedented times that the Law Enforcement community faces in 2016."³⁷ Still, there have been promising signs in recent years that this sort of cultural change is possible.

B. MODELS OF FRONT-END ACCOUNTABILITY

Elsewhere in government, there are essentially three models of front-end accountability: the "legislative" model, the "agency" model, and the "board or commission" model. Under the legislative model, popularly elected officials—in federal or state legislatures, or municipal councils—draft the rules and regulations that agencies must follow. Under the agency model, the agency itself drafts new policies or regulations and then solicits public input. This is the model used by most state and federal agencies, like OSHA or the EPA. Under the board or commission model, an outside entity is tasked with engaging the public around the agency's policies and priorities. Sometimes these sorts of boards have formal governing authority. In most jurisdictions, for example, the school superintendent answers to a school board, which sets district policies and holds regular public hearings to gather community input on what the policies should be. But in many contexts, these boards are advisory. Municipal

37. Facebook Announcement (on file with authors).

governments often have more than a dozen councils and commissions tasked with making recommendations about specific policy areas—like housing, or libraries, or historical preservation—which the relevant governing body then takes into account in setting policy.

Although the legislative model has been used from time to time to set rules for policing—particularly around technology and electronic surveillance—it is unlikely that the legislative model alone can fully address the front-end accountability gap around policing. First, for reasons having to do with the particular configuration of interest groups and incentives around policing, legislatures generally have preferred to take a hands-off approach. Second, even if legislatures took more of an interest in policing, they typically lack both the time and expertise necessary to draft the sorts of detailed rules that departments need. A legislature might specify that all agencies that use body-worn cameras must ensure that cameras are turned on for certain categories of encounters. But a legislature is unlikely to get into the weeds of whether a sergeant or lieutenant should be responsible for reviewing footage—or what the precise consequences should be for officers who fail to turn the cameras on. Throughout the rest of government, we typically look to legislatures to set broad policy, and then look to agencies to craft more-detailed rules to bring these policies into effect. (That said, there unequivocally should be more legislative engagement around policing issues, particularly at the state level.)

The agency model has a number of advantages in the policing context. Although it would require policing agencies to build up some internal institutional capacity, it would not require the creation of an entirely new entity to do this sort of work. This model recognizes that policing agencies have considerable expertise that they can bring to bear both on drafting initial policies and incorporating public comments. It also may be more effective in promoting closer ties between the community and the police: by engaging community members directly around policies and practices, agencies can create a foundation for collaboration in other contexts as well. Finally, given the significant culture shift that this sort of engagement requires, policing agencies may be more willing to embrace front-end accountability if they retain some control over the process.

The main challenge with the agency-driven model is making sure that policing agencies actually solicit public input when developing new policies—and then incorporate the input into their decision-making processes. Elsewhere in government, there are a variety of mechanisms in place to ensure that public participation amounts to something more than window dressing. The

most common of these is judicial review. Under the federal (and most state) administrative procedure acts, agencies are required to go through notice-and-comment rulemaking before adopting new regulations—and then are required to address each of the comments received and explain how the comment is reflected in the final rule, or why the agency chose to go another way. Courts then review the record of comments and responses to ensure that the agency provides an adequate explanation of its final rule. Although the vast majority of rules or policies never are challenged in court, the availability of review ensures that agencies consider fully the comments they receive. State and local governments also encourage agency responsiveness in other ways—for example, by requiring agencies to submit final rules to legislative committees for review. Any serious model of agency-driven front-end accountability will need to have some analogous mechanisms in place to ensure that community input is given serious weight.

The other possible model, as we have said, involves setting up an independent board or commission to facilitate the community engagement component of front-end accountability. A number of jurisdictions have done so, either voluntarily or under agreement with the Department of Justice. With the exception of a very few commissions in the United States, like the Los Angeles Police Commission—which is responsible for reviewing and approving department policies—the vast majority of the existing entities are advisory in character.³⁸ Still other jurisdictions have set up civilian oversight entities that, while focused primarily on back-end review of specific incidents, are authorized to make policy recommendations as well. In these jurisdictions, it may be possible to leverage the resources of existing entities instead of setting up an entirely new board.

One advantage of the board or commission model is that it potentially can mitigate some of the concerns with agency responsiveness. Individuals who serve on such an entity are likely to be more motivated than the agency both to actively solicit public input on policies and practices, and to monitor the policymaking process to ensure that the agency actually responds to the input it receives. Of course, the degree to which an outside entity can serve this “watchdog” function depends on the scope of its authority, its resources, and its access to department decision-making processes. But even without formal authority, the board or commission potentially can nudge agencies to be more responsive to community concerns—and alert elected officials when the agency fails to do so.

38. For a discussion of the various commissions created under the Justice Department decrees, see Patel, *supra* note 28, at 816-67.

Still, experience across the country suggests that there are a number of challenges with this model as well. Because boards often are composed of volunteers, they may not have the time and resources necessary to conduct policy research and facilitate broad-based engagement. Paid support staff can help, but add to the expense. There also are complicated questions about the mechanisms through which members ought to be selected to ensure that they are viewed as credible intermediaries both by the policing agency and the community.³⁹

In sum, both the agency and board or commission models can—with some tinkering and adjustment—be adapted to facilitate front-end, democratic accountability in policing. What is needed is more research and experimentation to implement and improve upon these models and develop approaches to front-end accountability that are tailored to policing generally, as well as to the specific needs of particular jurisdictions.

RECOMMENDATIONS

There are challenges to bringing front-end accountability to policing, but then government is full of challenges. What is clear is that it no longer is appropriate to leave policing agencies free to make all their decisions as to how they will police without this sort of front-end democratic engagement. The following are recommendations for steps that jurisdictions can take to support these efforts and help get policing on a more democratic footing.

- 1. Where possible, develop clear and comprehensive rules and policies for policing.** Clear rules, adopted in advance of official action, are an essential component of democratic governance. Agencies should review their policy manuals to determine whether they provide sufficient guidance to officers about key enforcement decisions—for example, when to issue a summons or a warning, as opposed to making an arrest—as well as the use of various policing practices and technologies that implicate individual rights. Policies should go beyond legal platitudes—like reasonableness under the totality of the circumstances—and provide concrete and meaningful guidance on the many choices that officers face.
- 2. Develop models of police-community engagement.** As we have recognized throughout, not all policing decisions will take the form of formal rules or policies. But whether through formal rules or informal

39. Joanna Schwartz notes, for example, that some civilian oversight agencies “are criticized for being overly sympathetic to law enforcement, and others are criticized for being overly hostile”—and suggests that part of the difference may reflect the processes through which they are selected. Joanna Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 466.

strategic approaches, the public should have a voice. To this end, agencies should work with national law-enforcement organizations and academic practitioners to develop, implement, and evaluate models of democratic engagement around policing policies and practices.

3. **Amend existing administrative procedure acts to bring policing within their ambit.** States and municipalities can encourage the development of front-end accountability by amending administrative procedure acts to make clear that policing agencies are “agencies” within their ambit—and to set out clear guidelines for when policing activities should be subject to democratic processes. The existing tests for when public rulemaking is required—typically, when agencies impose binding obligations on the public or alter individual rights—largely exempt policing agencies from the procedural requirements of existing APAs. One approach would be to specify in advance the sorts of policies and practices that must be subjected to public input, including searches and seizures, the use of force, and the use of surveillance technologies.
4. **Provide funding and technical assistance to support agency implementation.** The Department of Justice, state criminal justice organizations, and private foundations should provide funding and technical assistance to help agencies and organizations that partner with them build up the institutional capacity necessary to facilitate community engagement around policing policies and practices. The COPS Office at the Department of Justice already supports some of this work both through grants under its Community Policing Development Program, and through technical assistance under its Critical Response and Collaborative Reform initiatives, and should continue these efforts. Private foundations also can be an important resource not only for jurisdictions looking to implement programs, but also for researchers who can evaluate and help improve upon existing models.