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"'The master's tools will never dismantle the master's house.' Who will?"[1]
Dr. Ruth Wilson Gilmore

Introduction

Policing is a pressing civil rights issue in our time. Policing, as Amna Akbar describes it, "advance[s] inequality through [its] distribution of violence and surveillance, death, and debt."[2] This is not a new phenomenon by any means—the same Civil Rights Movement activists who won the fight for equal access to schools and the ballot box went to rallies holding signs saying, "*We demand an end to police brutality now!*"[3] The signs may be old, but their calls to action have been answered across decades, when people took to the streets to demand justice for Rodney King, Amadou Diallo, Sean Bell, Eric Garner, Michael Brown, Freddy Gray, Alton Sterling, Philando Castile, George Floyd, Breonna Taylor, Jacob Blake, Tyre

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1. RUTH WILSON GILMORE, ABOLITION GEOGRAPHY 91 (2022) (quoting Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110–14 (2007)).

2. Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1786 (2020).

3. Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN (May 29, 2020), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/ [https://perma.cc/9PAW-GU9M].

Nichols, and far too many others.[4] The lack of accountability for police violence is a continuing struggle.

The number of police killings is higher in the United States than in England, Wales, Canada, and Australia.[5] Though police violence has been inflicted on white people, such as Daniel Shaver, it is overwhelmingly experienced by Black people, Indigenous people, and people of color, as just one part of the violence of the criminal legal system's project of mass incarceration.[6] Black people are about three times more likely to be killed by police than white people.[7] The distribution of the infliction of police violence is intersectional: it is racial as well as class-based violence.[8] It has historical roots in the control of the labor of enslaved and free Black people in the American South and the repression of organized labor

4. Linda Poon and Marie Patino, *Rodney King to Tyre Nichols: A Timeline of U.S. Police Protests*, BLOOMBERG NEWS (Jan. 30, 2023), https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality [https://perma.cc/7YGY-XHQG].

5. Paul J. Hirschfield, *Lethal Policing: Making Sense of American Exceptionalism*, 30 SOCIO. F. 1109, 1111–12 (2015).

6. Jeffery Robinson, *'You're Fucked': The Acquittal of Officer Brailsford and the Crisis of Police Impunity*, ACLU (Dec. 12, 2017), https://www.aclu.org/news/criminal-law-reform/youre-fucked-acquittal-officer-brailsford-and [https://perma.cc/3QE8-NNWT]; GBD 2019 Police Violence US Subnational Collaborators, *Fatal Police Violence by Race and State in the USA, 1980–2019: A Network Meta-regression*, 398 THE LANCET 1239, 1239 (2021) ("Systemic and direct racism, manifested in laws and policies as well as personal implicit biases, result in Black, Indigenous, and Hispanic Americans being the targets of police violence.").

7. Rahwa Haile, Tawandra Rowell-Cunsolo, Marie-Fatima Hyacinthe & Sirry Alang, *"We (still) charge genocide": A Systematic Review and Synthesis of the Direct and Indirect Health Consequences of Police Violence in the United States*, 322 SOC. SCI. & MED. 1, 3 (2023); *id.* at 4 ("[B]lack people in the United States are far more likely than white people to be killed, shot, severely injured by, and to experience physical and psychological violence by the police."); *People Shot to Death by the U.S. Police from 2017 to 2024, by Race,* STATISTA (2024), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ [https://perma.cc/KU68-VL5F].

8. Derecka Purnell, *The Cost of Doing Business*, 112 CAL. L. REV. 1107, 1125 (2024) (quoting JOHN A. HANNAH ET AL., UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT: JUSTICE 2–3 (1961)) ("The victims of lawlessness in law enforcement are usually those whose economic and social status afford little or no protective armor—the poor and racial minorities. Members of minority races, of course, are often prevented by discrimination in general from being anything but poor. So, while almost every case of unlawful official violence or discrimination studied by the Commission involved [Black] victims, it was not always clear whether the victim suffered because of his race or because of his lowly economic status. Indeed, racially patterned police misconduct and that directed against persons because they are poor and powerless are often indistinguishable. However, brutality of both types is usually a deprivation of equal protection of the laws and of direct concern to the Commission.").

in the American North.[9] Challenging and changing this reality of police violence is the central demand of the Movement for Black Lives, one of the largest protest campaigns in United States history.[10]

Past attempts to demand accountability for police violence through reform failed to meet expectations, as demonstrated in Minneapolis.[11] Minneapolis activists who demanded accountability from police over a decades-long movement considered it a "futile cycle."[12] On May 25, 2020, the failure of institutions to change

9. Ariama C. Long & Tandy Lau, *The Fight for Liberation: Modern Abolitionists Seek to End Police and Prisons*, AMSTERDAM NEWS (June 15, 2023), https://amsterdamnews.com/news/2023/06/15/the-fight-for-liberation-modern-abolitionists-seek-to-end-police-and-prisons/ [https://perma.cc/SPH7-FTJS]. Modern police forces have their origins in controlling labor, separate though convergent in the American South and North. JLI Vol. 39 Editorial Board, *Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic*, 39 J. L. & INEQ. 511, 517 (2021) ("Policing in the early United States followed two distinct but ultimately complementary approaches in the North and the South."). In the South, policing originated in slave patrols, and following emancipation, policing enforced a program of continued economic exploitation and special segregation. *Id.* at 519–20 (detailing how policing restricted the liberty of Black Americans in the United States following emancipation); *The Origins of Modern Day Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing [https://perma.cc/GE8P-WBMN]; ALEX S. VITALE, THE END OF POLICING 45–48 (2021). In the North, this manifested in private and public battalions violently repressing nonviolent strike actions by organized laborers. *Id.* at 40–45; Alex Gourevitch, *Police Work: The Centrality of Labor Repression in American Political History*, 13 PERSPS. ON POL., 762, 767 (2015) ("Strikes prompted the growth not just of the police but of a variegated repressive apparatus.").

10. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, NEW YORK TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/2R9Z-2M6H].

11. Purnell, *supra* note 8, at 1109–10 ("'[R]eform' discourse can overpromise and underdeliver, especially to Black families who have suffered police homicides. They may expect these legal reforms to yield 'justice,' and more specifically, to stop police killings. Their expectations can impact their legal pursuits, political demands, and even the political outcomes regarding police. Painfully, their hopes that singular statutes or doctrines can stop police killings weigh on their grief, health, and livelihoods."); *see* Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57 (2012); Michael Brenes, *Police Reform Doesn't Work*, BOSTON REVIEW (Apr. 26, 2021), https://www.bostonreview.net/articles/police-reform-doesnt-work/ [https://perma.cc/5ZW7-K92A]; Sam Levin, *'It's not about bad apples': How US Police Reforms Have Failed to Stop Brutality and Violence*, THE GUARDIAN (June 16, 2020), https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence [https://perma.cc/6KJL-4DH9].

12. Gordon Severson, *A History of Fatal Police Encounters in Minneapolis, 11 Cases Since 2010*, KARE 11 (May 26, 2020), https://www.kare11.com/article/news/local/minneapolis-police-fatal-encounters/89-

resulted in the violent killing of George Floyd by Minneapolis Police.[13] In George Floyd Square, a public memorial and community protest that still stands, activists temporarily closed the intersection of 38th and Chicago, declaring "no justice, no streets."[14] Protests occurred in cities across the country demanding justice for George Floyd and all others who suffered police violence.[15] The police who killed George Floyd were convicted of homicide and the Minneapolis Police Department is subject to a consent decree with the Minnesota Department of Human Rights and ongoing litigation with the Department of Justice.[16] States around the nation

660b1880-fd20-4bcf-adbc-85144d9c33e4 [https://perma.cc/BJ2F-6MPR]; Amudalat Ajasa & Lois Beckett, *Before Chauvin: Decades of Minneapolis Police Violence that Failed to Spark Reform*, THE GUARDIAN (Apr. 25, 2021), https://www.theguardian.com/us-news/2021/apr/25/minneapolis-police-incidents-promises-reform [https://perma.cc/68JL-2GAL]; MPD150, ENOUGH IS ENOUGH: A 150 YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT (2020), https://www.mpd150.com/wp-content/uploads/reports/report_2_uncompressed.pdf [https://perma.cc/K4QT-7MCW] (tracing the history of failures of reforming the Minneapolis Police Department). The MPD150 report includes a graphic illustrating the "futile cycle of police reform." In the aftermath of an unacceptable act of police violence, the public responds with outrage, protest, or calls for change. System actors sometimes respond with rhetoric of reform, but other times create substantive reforms with laudable intentions. That progress toward reform stops short or retreats as reforms are whittled away. The inevitable outcome of this cycle is another act of unacceptable police violence that reforms once again failed to prevent. The image below the graphic is titled "The Minneapolis Police Oversight Graveyard" and features five headstones, four for the previous civilian oversight agencies of the Minneapolis Police Department and one for the existing agency. *Id.* at 52.

13. Jamiles Lartey and Simone Weichselbaum, *Before George Floyd's Death, Minneapolis Police Failed to Adopt Reforms, Remove Bad Officers*, MARSHALL PROJECT (May 28, 2020) (detailing problematic Minneapolis Police policies), https://www.themarshallproject.org/2020/05/28/before-george-floyd-s-death-minneapolis-police-failed-to-adopt-reforms-remove-bad-officers [https://perma.cc/MH6P-V5KL].

14. Josh Cobb, Ngoc Bui, Matthew Alvarez, Emily Reese & Emily Bright, '*No Justice, No Streets': 4 Years After Murder, George Floyd Square Stands in Protest*, MPR NEWS (May 25, 2024), https://www.mprnews.org/story/2024/05/25/no-justice-no-streets-4-years-after-murder-george-floyd-square-stands-in-protest [https://perma.cc/NUM7-JWQA].

15. *How George Floyd's Death Became a Catalyst for Change*, NAT'L MUSEUM OF AFRICAN AM. HISTORY & CULTURE https://nmaahc.si.edu/explore/stories/how-george-floyds-death-became-catalyst-change [https://perma.cc/2RJQ-R22S].

16. Samantha Fischer, *3 Years Later: Where are the Ex-MPD Officers Convicted in George Floyd's 2020 Murder?*, KARE 11 (May 24, 2023), https://www.kare11.com/article/news/local/george-floyd/former-minneapolis-police-department-officers-convicted-in-george-floyds-murder-where-are-they-now/89-20bba151-5877-4d27-b1f4-be3da43fed37 [https://perma.cc/HS9P-8CGB]; *Court Approves Consent Decree Requiring Minneapolis, MPD to Implement Changes*, FOX 9 (July 13, 2023), https://www.fox9.com/news/court-approves-consent-decree-requiring-minneapolis-mpd-to-make-changes [https://perma.cc/6R24-TMXQ]; *Press Release: Justice Department Finds Civil Rights Violations by the Minneapolis Police*

enshrined community demands in legislative victories.[17] But not all the demands of this movement to prevent the repetition of this police violence were met. Efforts to transcend reform by abolishing the Minneapolis Police through a ballot initiative were unsuccessful.[18] However, the seeds of change did bring abolitionist imaginaries into reality through the unarmed non-police Behavioral Crisis Response program.[19] As Minneapolis activist and artist Ricardo Levins Morales observed, now is the time for critical reflection: "I liken the emergence of movements to an incoming tide and the first wave comes up the beach and recedes. . . . It's opportunity to look back and say, 'Well, what were the constraints of the landscape that caused the wave to crash?'"[20]

It is time to reflect on the potential, pitfalls, and promise of federal action to ensure accountability for police violence. Federal action offered a promising avenue to transcend failures in police reform at local and state levels. Under 34 U.S.C. § 12601 (formerly 42 USC § 14141, and hereinafter "pattern-or-practice litigation"), the Department of Justice is empowered to "obtain equitable and declaratory relief to eliminate" a "pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution

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Department and the City of Minneapolis, DEP'T OF JUST. (June 16, 2023), https://www.justice.gov/archives/opa/pr/justice-department-finds-civil-rights-violations-minneapolis-police-department-and-city [https://perma.cc/HM5Q-5Q68].

17. RAM SUBRAMANIAN & LEILY ARZY, BRENNAN CTR. FOR JUST. STATE POLICING REFORMS SINCE GEORGE FLOYD'S MURDER (2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/4YMP-KJJG].

18. Ernesto Londoño; *How 'Defund the Police' Failed*, NEW YORK TIMES (June 16, 2023), https://www.nytimes.com/2023/06/16/us/defund-police-minneapolis.html [https://perma.cc/NRP8-XVSF].

19. Jon Collins, *Minneapolis at Forefront of Alternatives to Policing, Mental Health Crisis Response*, MPR NEWS (Mar. 27, 2024), https://www.mprnews.org/story/2024/03/27/minneapolis-at-forefront-of-alternatives-to-policing-mental-health-crisis-response [https://perma.cc/5DBM-96RR]. Currently, 9% of calls for service are redirected to the Behavioral Crisis Response team, and over the next ten years that number is intended to increase to 20% of calls for service. Renée Cooper, *'Pleasantly Surprised': Minneapolis City Leaders React to Independent Public Safety Data Analysis*, KSTP (Nov. 23, 2024), https://kstp.com/kstp-news/top-news/pleasantly-surprised-minneapolis-city-leaders-react-to-independent-public-safety-data-analysis/ [https://perma.cc/CAZ3-59AQ]; *but see* Christopher Ingraham, *Four Years After George Floyd, Minnesota's Racial Gaps Remain Stark*, MINNESOTA REFORMER (May 23, 2024), https://minnesotareformer.com/2024/05/23/four-years-after-george-floyd-minnesotas-racial-gaps-remain-stark/ [https://perma.cc/SX6T-HTLJ] (detailing disparities between Black and White Minnesotans in graduation gaps, income, and homeownership that have experienced only modest improvements and noting that disparities in arrests and deaths of despair have increased).

20. Londoño, *supra* note 18.

or laws of the United States."[21] This law is a "critical pillar of civil rights legislation"[22] intended to "close [the] gap in the law" of police accountability.[23] In practice, pattern-or-practice litigation is a narrow mechanism whose use has been limited to a select few major cities. In those cities, pattern-or-practice litigation takes years with little change to show for it. Empirical research suggests that pattern-or-practice litigation generally has at best mixed results for reducing police killing, use of force, and racial disparities.[24]

In Part I, I explain that police violence presents a philosophical problem for law. Police violence is lawmaking. It undermines the normativity of law by destroying the normative communities of people affected. In so doing, it replicates the worst harms of our nation's history. To reify an order rooted in law, there must be substantive remedies in the form of guarantees of non-repetition and reparations as well as procedural remedies in the form of increasing democratic participation in shaping police policy.

In Part II, I outline the legal scheme of accountability for police violence in its totality. I survey and critically evaluate several legal channels for accountability. I conclude, as did the drafters of 34 U.S.C. § 12601, that the existing scheme of accountability for police violence is inadequate. I characterize this gap as a "grey hole" in

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21. 34 U.S.C. § 12601. Surprisingly, this provision is from the Violent Crime Control and Law Enforcement Act of 1994, a law better known for exacerbating rather than remedying the worst maladies of the criminal justice system. Uni Offer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis [https://perma.cc/76HM-6DTE].

22. Sigourney Norman, *Strengthening Section 14141: Using Pattern or Practice Investigations to End Violence Between Police and Communities*, 33 J. CIV. RTS. & ECON. DEV. 263, 266 (2019).

23. Eugene Kim, *Vindicating Civil Rights under 42 U.S.C. 14141: Guidance from Procedures in Complex Litigation*, 29 HASTINGS CONST. L. Q. 767, 769 (2002).

24. Li Sian Goh, *Going Local: Do Consent Decrees and Other Forms of Federal Intervention in Municipal Police Departments Reduce Police Killings?*, 37 JUST. Q. 900, 922–23 (2020) (studying the effect of pattern-or-practice litigation on police killings and concluding that DOJ investigations reduce police killings by 27% and using court-appointed monitors to oversee the implementation of settlements, consent decrees, or court judgments reduces police killings by 29.1%. In contrast, Goh finds that, when the DOJ only intervenes by providing a technical assistance letter, police killings increase by 85.7%. Notably, however, Goh notes that robustness checks revealed that "these results are relatively fragile"). *See generally* Rodney D. Green & Jillian Aldebron, *In Search of Police Accountability: Civilian Review Boards and Department of Justice Intervention*, 56 PHYLON 111 (2019) (examining quantitative data from Portland, the District of Columbia, and Cincinnati and finding neither civilian review boards nor DOJ intervention produced indicia of police accountability. These indicia were quantified as a decrease in volume of complaints and racial disparities in complaints, a lack of decrease in complaints involving use of force, and an increase in the percentage of allegations sustained).

law, which scholars have identified as a legal regime providing for insubstantial constraints that provide the illusion of legality.

In Part III, I overview 34 U.S.C. § 12601 as legislation and as administered. I outline its potential, pitfalls, and promise. Drawing on a historical case study of strategic voting rights litigation during the democratization of the Deep South, I demonstrate the power of federal action to overcome limitations in state and local government. Then, drawing on school desegregation litigation, I outline the importance of including community groups as intervenors to democratize litigation, which has not happened in pattern-or-practice litigation. I present the strategic advantages of moving to join in pattern-or-practice litigation, while also setting realistic expectations that doing so will have limitations.

In Part IV, I present a case study of Portland, Oregon. After the Portland Police Bureau killed Aaron Campbell, a Black man experiencing a mental health crisis, the gap in existing legal channels for accountability in Portland became evident. Movements called on the Department of Justice to investigate, and they responded. A broad coalition of community groups supported the Department of Justice's investigation by providing information and data. However, the Department of Justice excluded race from the ultimate litigation. In response, a coalition of community groups called the Albina Ministerial Alliance moved to join the litigation as intervenors. Their motion was blocked. While community groups were able to leverage their position to make important gains in accountability for police violence, as evidenced by the struggle against the infamous "48-hour rule," their exclusion was detrimental to the litigation.

I conclude by discussing the uncertainty for pattern-or-practice litigation in the United States and in Minneapolis. I recognize the unity of struggle against policing, mass incarceration, and bordering. I recognize work done historically and presently to challenge systems of policing at the international level. Acknowledging good reason to be pessimistic about the possibilities for change in this political moment, I echo Amna Akbar and Alex S. Vitale's call for us to continue building toward abolitionist futures.

I. Accountability for Police Violence is Necessary to Resolve a Normativity Crisis for Law

The modern conversation about policing is a conversation driven and dominated by images. The conversation around policing is a polarized one, and empirical research suggests this is due in large part to the construction of these images through media

framing.[25] Police have a "dual role" and, in addition to conducting law enforcement functions, frequently step in to fill the gaps of other social services.[26] On the one hand, police are members of their communities and play positive roles in the communities where they operate.[27] On the other hand, police damage the communities where they operate. People's disparate perspectives of police depend on their lived experiences and largely fall along racial and class lines. Policing therefore presents a semiotic double-image where one of these faces is more visible, and therefore more believable, to some individuals than others based on their race and class. One community may see only one image and reject the other.[28] The current public consciousness surrounding police violence may have less to do with an increase in police violence or a change in societal attitudes, and more to do with the proliferation of technologies that allow acts to be recorded and disseminated to people that may not otherwise have seen them.[29] In fact, the modern movement against police violence began with the widespread dissemination of George Holliday's video of the Los Angeles Police's violence against Rodney King, which is considered to be the first viral video of police violence.[30]

But police violence is not an aberration, it is the job. The law-enforcement-related tasks which are the *sine qua non* of policing involve some degree of violence or potential violence.[31] Micol Seigel has characterized policing as "violence work," where police are tasked with representing and distributing State violence through their labor.[32] The essence of police power comes from "suspended,"

25. *See, e.g.,* Kim Fridkin, Amanda Wintersieck, Jillian Courey & Joshua Thompson, *Race and Police Brutality: The Importance of Media Framing*, 11 INT'L J. OF COMM. 3394 (2017).

26. Clare Torrible, *Reconceptualising the Police Complaints Process as a Site of Contested Legitimacy Claims*, 28 POLICING & SOC'Y 464, 468 (2018).

27. *Id.* at 469.

28. *See* Akbar, *supra* note 2, at 1823 ("Policing and prisons mark people outside of the [larger political, economic, and social order] as undeserving of social provision or care.").

29. Kendal Harden, *Exposure to Police Brutality Allows for Transparency and Accountability of Law Enforcement*, 33 J. MARSHALL J. INFO. TECH. & PRIV. L. 75, 75–76 (2017) ("Thanks to the advancements in technology and valor of citizens, the public is finally able to understand the true severity of police brutality within the United States.").

30. Ryan Watson, *In the Wakes of Rodney King: Militant Evidence and Media Activism in the Age of Viral Black Death*, 84 THE VELVET LIGHT TRAP 34, 37 (2019).

31. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.").

32. MICOL SEIGEL, VIOLENCE WORK 11 (Duke Univ. Press 2018).

"latent," and "withheld" "*potential* violence."[33] Police are State actors imbued at a departmental and individual level with the power to enforce the laws of the State through violence.[34] With the promise of protecting its constituents from private violence, the State equips police with the instrumentalities to carry out such violence with the understanding that these instrumentalities can and will be used on its own constituents. Persuasion is supplanted by violence.[35]

The conversation about police accountability is a conversation about *whether* police violence is justified and, if so, *what* violence is justified. The latter conversation distinguishes *acceptable* police violence from *unacceptable* police violence. This threshold may be easily answered by reference to law: there is police violence that is authorized by law, and the rest is police violence that is committed under color of law. But as a matter of institutional legitimacy, legal justification provides only the mandate to use state-sanctioned violence.[36] The relationship to the community provides the organizational legitimacy for policing as an institution to be worthy of the power to use violence.[37] Accountability for police violence thus is a necessary aspect of the legal and institutional legitimacy of policing. Like Llewellyn's dueling canons, accountability is a contested space between police and the public in agonistic tension.[38]

When police violence is prohibited by law, accountability requires the reification of law through substantive guarantees of non-repetition. Police as individuals must be held to account for practices violating law or policy, but police violence cannot be reduced solely to individual "bad apples" upon whom blame entirely rests—civil rights problems in policing are the product of *systems* that produce the social conditions of police violence. Policing as an institution must make structural change. But policing as an institution must be accountable to affected communities not only when something goes wrong. Police policies and practices must be

33. *Id.* at 9 (emphasis in original).

34. Throughout this Article, the term "State" is capitalized to refer to a political entity that holds a monopoly on violence, distinct from the traditional usage of the uncapitalized term "state," which refers to subnational actors instead of the federal government. For example, Minnesota is a "state," but the United States is a "State."

35. William A. Westley, *Violence and the Police*, 59 AM. J. SOCIO. 34, 35 (1953).

36. Torrible, *supra* note 26, at 468.

37. *Id.*

38. *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (outlining Llewellyn's theory of dueling canons); Sunita Patel, *Toward Democratic Police Reform: A Vision for 'Community Engagement' Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 804 (2016) (defining agonism as adversarial engagement over differences with institutions in power).

the product of a meaningful, contested process involving the community that police are supposed to serve. At bottom, accountability for police violence requires de jure and de facto police authority that is answerable to the constituencies that employ police. This perspective of accountability is rooted in abolitionist literature but also finds support in reformist literature.[39]

Police violence is the expression of power. That power may be lawfully vested in the police by the State, reflecting the will of the electorate expressed through a democratic process (though its existence may itself limit that democratic process—more on this below). Or the police may abuse their vested power and breach external checks on their power with impunity. When police violence represents the expression of power separate from that of the State, the normative community no longer forms a critical pillar of law; instead, that pillar is replaced with an order of complete domination. This order of complete domination is disproportionately inflicted on lines of race and class and replicates the worst of this nation's history. To reify law and the promises of an order based on rule of law, there must be remedies. These remedies must be substantive remedies in the form of reparations and guarantees of non-repetition. But they must also include procedural remedies in the form of involving communities affected by police violence in the procedure of determining the scope of police practices through police policy.

A. Police Violence Undermines the Normativity of Law

Walter Benjamin stated bluntly that police violence is "lawmaking."[40] Police violence is State violence.[41] But for Benjamin, police are vested with the power not just to enforce legal ends but also to issue commands having the force of law on their own

39. Mariame Kaba, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose/ [https://perma.cc/3GVK-5DRM] ("This is not a problem of individually terrible officers rather it is a problem of a corrupt and oppressive policing system built on controlling and managing the marginalized while protecting property."); Philip Matthew Stinson, John Liederbach, Steven P. Lab & Steven L. Brewer, Jr., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, DEP'T. OF JUST. 191 (Jan. 2016) (unpublished technical report) (on file with Department of Justice) ("[T]he data show that police crime is not solely or even primarily the product of deviant or defective people; but rather, deviant or defective people who work within an occupational context that provides them unique and unprecedented opportunities to perpetrate crimes whether they are on or off-duty.").

40. WALTER BENJAMIN, SELECTED WRITINGS VOL. 1 1913–1926 243 (Marcus Bullock & Michael W. Jennings, eds., 1996).

41. SEIGEL, *supra* note 32, at 9 ("[P]olice are the human-scale expression of the state.").

authority.[42] Because of this, Benjamin says police power "is formless, like its nowhere-tangible, all-pervasive, ghostly presence in the life of civilized states."[43] In other words, police are vested with a large degree of *discretion* in their disposal of the state-given authority to conduct coercive acts. If not properly bounded by enforceable constraints, this authority is arbitrary and capricious.[44] Because police work, as Seigel observes, involves "*potential* violence," abuse of police power is not just consequential in individual instances.[45] Without accountability, the expression of police power through police violence becomes the articulation of the new rules regulating existence.

But can police violence be called law? H.L.A. Hart, the eminent scholar in the legal positivist tradition of jurisprudence philosophy, outlines three core components of the concept of law: that it is a content-independent, peremptory, and normative command.[46] *Content-independent* refers to the requirement that a command be followed simply because of the fact that it was issued.[47] You must follow the law, not because of a reason you have to follow it, but because it is law. *Peremptory* refers to the requirement that obedience be to the command, not to the will of the commander.[48] You must follow the letter of the law without further consideration, not waste time in search of its spirit.[49] *Normative* refers to social, moral, or rational reasons to conform with a command on its face simply because it was issued.[50] Normativity does not necessarily mean morality: though you have many reasons to follow the law (or not to follow it), you need not accept law as a reason unto itself to correctly understand its requirements.[51]

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42. Benjamin, *supra* note 40, at 242–43 ("[Police violence] is violence for legal ends (it includes the right of disposition), but with the simultaneous authority to decide these ends itself within wide limits (it includes the right of decree).").

43. *Id.* at 243.

44. Benjamin provides an example of police violence used pretextually when "interven[ing] 'for security reasons' in countless cases where no clear legal situation exists" or without any proffered legal authorization. *Id.*

45. SEIGEL, *supra* note 32, at 9.

46. H.L.A. HART, *Commands and Authoritative Legal Reasons, in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 254 (1982).

47. *Id.* at 253–54.

48. *Id.*

49. Where there are ambiguities in the statute, principles of statutory interpretation diverge on this premise, but we need not reach these interminable debates here.

50. Hart, *supra* note 46, at 256–57.

51. Brian H. Bix, *Kelsen, Hart, and Legal Normativity*, 34 REVUS: J. CONST. THEORY & PHIL. (2018).

Normativity must be understood sociologically. Normativity may be present in the alignment between the morality of a community and the law.[52] Normativity may not be present, and compliance with the law may merely result from the invisible coercive pressures that create compliance with a state, as Gramscian hegemony posits.[53] In our democratic society, law should normatively be obeyed because it is supposed to be based on consent: it is mandated by a democratically elected legislature that represents the will of the community. Law should normatively be obeyed because it is supposed to be an equalizing force under which might does not make right. Law should normatively be obeyed even when democratic processes fail, because we are supposed to have universal enforceable obligations enshrined in our state and federal constitutions as substantive rights. Importantly for the strictest definitions of normativity, the authority of law is supposed to be supreme and to exclusively possess the force of law. Police are therefore supposed to be obeyed not because they are *authorities* in and of themselves, but because they are *authorized* to act by law. Police violence thus locates the capacity to issue peremptory and content-independent commands not in the state through its laws, but in the police through their actions. Police violence represents the destruction of a normative community and the infliction of a new one of complete domination.

As Robert M. Cover observed, the legal system is "the practice of political violence."[54] After all, the etymology of "rule" is the Latin word for "straight stick."[55] Drawing on Elaine Scarry, Cover defines torture as "[t]he deliberate infliction of pain in order to destroy the victim's normative world and capacity to create shared realities[.]"[56] It is "designed to demonstrate the end of the normative world of the victim[.]"[57] The pain and fear of torture is directed toward crushing the victim's individual values and severing their ties to their

52. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

53. *See* Joseph A. Buttgieg, *The Contemporary Discourse on Civil Society: A Gramscian Critique*, 32 BOUNDARY 2, 33 (2005).

54. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606 n.15 (1986); *id.* at 1601 ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.").

55. ONLINE ETYMOLOGY DICTIONARY, *Rule*, https://www.etymonline.com/word/rule [https://perma.cc/XA5D-HPN4].

56. Cover, *supra* note 54, at 1603.

57. *Id.*

community.[58] Torture replaces this world with a logic of "complete domination[.]"[59] For the victim, torture does not communicate any moral content: "justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered."[60] Through punishment, the legal system inflicts pain on defendants who avoid it only by acquiescence. The purpose of this pain is to destroy and reform the defendant's moral world to be consistent with that of the legal system. Though judges are detached from this violence in experience, their opinions are "preconditions" and "implements" of it.[61] "[T]he interpretive commitments of officials are realized, indeed, in the flesh[]" and this infliction of pain "will always require the active or passive acquiescence of other judicial minds[.]"[62] In short, for Cover, the legal system is violence amounting to torture.[63]

A sociological case study of a police department during the 1950s shows how police violence is justified according to a code separate from that of law.[64] Police in the study believed that "private or group ends constitute a moral legitimation for violence which is equal *or superior* to the legitimation derived from the law" and that "the monopoly of violence delegated to the police, by the state" is a "personal resource to be used for personal and group ends."[65] Police violence was the product of interpretation—specifically, the individual officer's interpretation of their occupational experience and interests.[66] Rooted in experience with perpetrators of private violence, "police develop a justification for the use of violence[,]" viewing it "as good, as useful, and as their own[]" and "enlarge the area in which violence may be used."[67] In addition to using violence to apprehend individuals accused of serious crimes, such as felonies or sex crimes, police perceived that violence was justified when the victim had been exhibiting disrespect for the police.[68] In the latter cases, violence was employed

58. *Id.*
59. *Id.*
60. *Id.* at 1629.
61. *Id.* at 1608 ("The 'interpretations' or 'conversations' that are the preconditions for violent incarceration are themselves implements of violence."); *id.* at 1629.
62. Cover, *supra* note 54, at 1605, 1627.
63. *Id.* at 1603.
64. Westley, *supra* note 35, at 39.
65. *Id.*
66. *Id.* at 41.
67. *Id.*
68. *Id.* at 35–39.

as a corrective measure, as one officer said, "to set a man down, make him show a little respect."[69] Police presumed disrespect and threatened or employed corrective violence against communities of color and the poor.[70] While the study found that police violence was limited by personal beliefs and by fears of legal accountability and public reaction, in practice police reduced these limitations by refraining to punish their colleagues and refusing to condemn violence committed by their colleagues.[71]

Through physical and symbolic power, police violence inflicts devastating psychological consequences on the communities it affects.[72] This is due in part to the trauma of witnessing the infliction of pain on the body. It is the mind and body reacting to torture. The semiotic double-image magnifies the horror by creating a cognitive dissonance: the people who are supposed to help you are the same people who hurt someone. Furthermore, police violence is disproportionately visited upon the bodies of Black Americans and upon communities of color.[73] This lends further support to the conclusion that police violence is racialized, embedded within and replicative of the systems of racial domination and white Supremacy which have poisoned this nation since before its founding.[74] Understood in context, the normative order of police violence represents not merely an institution accumulating greater influence for itself, but a replication of systems of de facto and de jure structural racial discrimination, subjugation, and apartheid.

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69. *Id.* at 39.

70. Westley, *supra* note 35, at 40.

71. *Id.*

72. *See* Haile et al., *supra* note 7, at 4 (summarizing the devastating mental health consequences of police violence on victims, families, and communities).

73. *Id.* (describing direct consequences of police violence as well as indirect consequences of police violence as an "ecological exposure" and "vicarious and collective").

74. *See* Emmanual Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 CAL. L. REV. 755, 771 (2024) ("Policing has been and continues to be one of the mechanisms through which Whiteness (again, the range of social meanings that attach to White people) is fabricated. Policing's racial disparities reflect both negative police practices that denigrate Black people and other people of color and preferential treatment that elevates White people. In this way, policing fabricates and reinforces not only the negative social meanings of Blackness but also the positive social meanings of Whiteness. Put differently, White people benefit from racially disparate policing practices through both the quality of their individual policing experiences and the symbolic messages that such experiences communicate about the group.").

B. Police Violence Requires Accountability

Accountability for police violence is necessary to reassert the normativity of law and counteract the reactionary social forces to which it contributes. In addition to crushing the normative values of victims and their communities—as is absolutely true of forms of private violence—police violence strikes through the heart of the legal system. Under our Constitutional jurisprudence, individuals have fundamental rights. For those rights to be meaningful, they must be actionable and enforceable—they must have a remedy. When these rights are not enforced against those who are there to protect them, the result is a destruction of the normativity of law. When the State fails to reconstitute the boundaries of law by sanctioning police violence committed "under color of law," the State has accepted the actions of its agents done using the power it imbued them with. It is irrelevant whether that salutary neglect constitutes affirmative endorsement. There has been no effort to commit to non-repetition by word or act, and the perpetrator continues to be imbued with the authority of the State. Police violence committed "under color of law" becomes a distinction without a difference: all channels for accountability through the State have acquiesced to this violence. This strikes through the very heart of the concept of law. The current gap in accountability for police violence fails to resolve this problem. Without accountability, police violence under color of law *is law*.

Accountability for police violence requires substantive remedies. As Richard Rothstein articulates in his bold and radical theory of judicial review in *The Color of Law*, an infringement on a legal right warrants a remedy.[75] The question of what remedy is required necessitates consideration of substantive outcomes. Rothstein, in the spirit of popular Constitutionalism, locates the power to issue and implement such remedies in the people.[76] But accountability for police violence must go farther. It must be a total refutation of extreme domination and a reconstruction of the normative world of victims, their families, and their communities.

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75. RICHARD ROTHSTEIN, THE COLOR OF LAW XIV (Liveright Publ'g Corp. 2017) ("The core argument of this book is that African Americans were unconstitutionally denied the means and the right to integration in middle-class neighborhoods, and because this denial was state-sponsored, the nation is obligated to remedy it."); *id.* at XV ("As citizens in this democracy, we—all of us . . . bear a collective responsibility to enforce our Constitution and rectify past violations whose effects endure.").

76. *Id.* at XI ("There is generally no *judicial* remedy for a policy that the Supreme Court wrongheadedly approved. But this does not mean there is no constitutionally required remedy for such violations. It is up to the people, through our elected representatives, to enforce our Constitution by implementing the remedy.").

This is a difficult requirement, but one of utmost importance. The concept of a remedy under human rights law includes a duty to provide reparations for the harms that have been done so that impacted communities can heal.[77] In Chicago, victims of torture at the hands of officers under the direction of John Burge were promised reparations that model how this may look.[78] Police violence requires symbolic and material recompense. And police violence requires substantive guarantees of non-repetition and the infrastructure to make those guarantees credible.

In addition to substantive remedies, accountability for police violence requires that procedures be employed to make police as an institution answerable to the people against whom police violence will be employed. Jurisprudence philosophy holds that legal interpretation should be guided toward correcting for failures in democratic participation and securing minority rights.[79] In *Democracy and Distrust*, John Hart Ely argues for "a participation-oriented, representation-reinforcing approach to judicial review."[80] Ely interprets the often-discussed footnote 4 of *Carolene Products* as protecting and providing participation in political processes.[81] He interprets *McCulloch v. Maryland* to provide for a democratic requirement that representatives serve the "entirety of their constituencies without arbitrarily severing disfavored minorities[.]"[82] For Ely, courts should correct for failures in the democratic process and not substantive outcomes because courts do

77. Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) ("Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. . . . Reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.").

78. *See* Logan Jaffee, *The Nation's First Reparations Package to Survivors of Police Torture Included a Public Memorial. Survivors Are Still Waiting*, PROPUBLICA (July 3, 2020),
https://www.propublica.org/article/the-nations-first-reparations-package-to-survivors-of-police-torture-included-a-public-memorial-survivors-are-still-waiting#:~:text=The%20%245.5%20million%20reparations%20package,and%20the%20creation%20of%20a [https://perma.cc/4SS6-SR5Q].

79. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (Harvard Univ. Press 1980).

80. *Id.*

81. *Id.* at 77 ("[T]hey ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.").

82. *Id.* at 86.

not have the democratic mandate to do so.[83] Whether a specific act of police violence is tolerable is not an objective fact, but an artifact of *who* had the power to decide *how much* police violence is tolerable as well as *who* had the power to decide whether police violence *per se* is tolerable.[84] Legal police violence should therefore not be beyond scrutiny. Accountability requires communities affected by that violence to be included in the procedure of determining the justifiability of police violence.

But there is a question of whether even all this is enough to justify police violence *qua* violence. Political philosopher Robert Paul Wolff posits that the only justification for infringement upon individual autonomy by general authority is through genuinely democratic government, and perhaps only through direct democracy.[85] However, the State's deprivation of the liberty of some is in inherent tension with the notion of free expression for all in the political process. Scholars contend that populations under violence do not have the means or opportunity to provide genuine consent to that violence.[86] This structure presents a contradictory tension, revealing the limits of accountability in its social context.[87]

II. Accountability for Police Violence is a "Grey Hole" in Existing Law

Internal affairs divisions, legislatures, courts, prosecutors, employment sanctions, and civilian oversight bodies fail to provide legal pathways to accountability for police violence. Victims of police violence, families of victims of police violence, and communities that

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83. *Id.* at 8 ("The noninterpretivist would have politically unaccountable judges select and define the values to be placed beyond majority control . . . .").

84. Nickolas John James, *Law and Power: Ten Lessons from Foucault*, 30 BOND L. REV. 31, 39 (2018) (quoting MICHEL FOUCAULT, THE WILL TO KNOWLEDGE: THE HISTORY OF SEXUALITY 87 (vol. 1, 1998)) ("Law was not simply a weapon skillfully wielded by monarchs: it was the monarchic system's mode of manifestation and the form of its acceptability. In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.").

85. *See generally* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (Harper Torchbook 1970).

86. Akbar, *supra* note 2, at 1804 ("Fundamentally, the 'more democracy' frame fails to account for the anti-democratic nature of the carceral state. Police and prisons lock people out of formal political channels. Incarceration removes a person from their family and community and undermines their ability to engage in civic and social life. Governments deploy arrests and criminal records to deny people the right to vote, to participate in a jury, to find legal work, or to receive government benefits; arrests and criminal records can further create grounds for eviction, deportation, license suspension, and the loss of custodial rights.").

87. For a critical perspective of accountability, *see* PINKO COLLECTIVE, AFTER ACCOUNTABILITY: A CRITICAL GENEALOGY OF A CONCEPT (Haymarket Books, 2d ed. 2025).

police are duty-bound to serve and protect are therefore incapable of accessing accountability through law.[88] They do not comport with international standards.[89] This is what David Dyzenhaus calls a "grey hole," "a legal space in which there are some legal constraints on [government] action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases."[90] Such grey holes provide a "veneer of legality."[91]

In this Part, I discuss and evaluate several pieces of the legal mosaic of police accountability. Each Subpart critically evaluates how each legal regime responds to individual cases of police violence and implements structural change. This critical evaluation draws on existing empirical research that provides insight as to how each regime functions in practice. This review makes one thing clear of the disjointed and incoherent scheme of police regulation as it is now: the need for something else to transcend the procedural and substantive limitations of existing institutions and law.

A. Internal Accountability

Internal Affairs divisions have been widely criticized for failing to objectively investigate and unfairly dismissing civilian complaints due to pathologies such as group loyalty.[92] Indeed, the movement against police violence began in response to the failures of internal affairs divisions to provide any accountability to police perpetrators.[93]

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88. Human Rights Council, *International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement*, ¶28, U.N. Doc. A/HRC/54/CRP.7 (Sept. 26, 2023) [hereinafter UN Report].

89. *Id.*

90. David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2018 (2006). *See also* Alicia G. Solow-Niederman, *Algorithmic Grey Holes*, 5 J. L. & INNOVATION 116, 120–22 (2023) (outlining Dyzenhaus' theory).

91. Dyzenhaus, *supra* note 90, at 2040; *see also* Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1334 (2021) ("The dense network of state, county, and local laws governing those agencies produces a structure democratic in form, which in practice serves to insulate police from meaningful reforms.").

92. Tim Prenzler & Carol Ronken, *Models of Police Oversight: A Critique*, 11 POLICING & SOC'Y: INT'L J. 151, 157–59 (2001).

93. Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 279 (1994) (citing Rochelle Sharpe, *Policing Brutality: How Cops Beat the Rap*, GANNETT NEWS SERVICE (1992)) ("Los Angeles has no monopoly on ineffective civilian complaint systems.").

In modern times, confidence in Internal Affairs is lacking, and for good reason.[94] Empirical research suggests few citizen complaints are sustained.[95] Where internal mechanisms do sustain complaints, the deterrent effect is reduced by limited sanctions.[96] Consider that of 1,924 complaints against the Minneapolis Police Department from 2013 to 2019, about 60% resulted in no discipline, 35% resulted in coaching (a non-disciplinary measure per the Police manual) and only 2.7% resulted in any kind of disciplinary action.[97]

B. Judicial Accountability

There are two critical mechanisms for challenging police violence through judicial mechanisms. First, the exclusionary rule of the Fourth Amendment, which provides that all evidence collected in violation of a criminal defendant's constitutional rights must be excluded from a criminal proceeding brought against that defendant.[98] Second, the civil rights statute 42 U.S.C. § 1983, which provides that individuals whose Constitutional rights have been violated may seek civil remedies.[99] These legal devices were first created to remedy police violence on the basis of race.[100] But they are fundamentally inadequate at implementing change at a systematic level.[101] Indeed, Akbar states plainly that Fourth

94. Prenzler & Ronken, *supra* note 92, at 160 (citations omitted) (summarizing a survey of complainants to the Metropolitan Toronto Police finding that "over 70% did not feel confident with police investigating their complaint. At the end of the process, only 14% felt their complaint had been dealt with fairly, 35% believed police were biased in their handling of the complaint investigation and 15% claimed police did not look at all of the evidence").

95. William Terrill & Jason R. Ingram, *Citizen Complaints Against the Police: An Eight City Examination*, 19 POLICE Q. 150, 172 (2016) (conducting an empirical study of citizen complaints against the police in eight cities and concluding that "few citizen complaints were sustained, especially use of force allegations").

96. Prenzler & Ronken, *supra* note 92, at 156.

97. Max Nesterak & Tony Webster, *The Bad Cops: How Minneapolis Protects its Worst Police Officers Until It's Too Late*, MINNESOTA REFORMER (Dec. 15, 2020), https://minnesotareformer.com/2020/12/15/the-bad-cops-how-minneapolis-protects-its-worst-police-officers-until-its-too-late/ [https://perma.cc/L29R-76K6].

98. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

99. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1846, 1865–69 (2015).

100. Brandon Garrett & Christopher Slobogin, *The Law on Police Use of Force in the United States*, 21 GERMAN L.J. 1526, 1528–29 (2020).

101. Rachel A. Harmon, *Promoting Civil Rights through Proactive Policing Reform*, 62 STAN. L. REV. 1, 1 (2009) ("Yet traditional legal means for deterring misconduct, such as civil suits under § 1983 and the exclusionary rule, have proved inadequate to force departmental change.").

Amendment jurisprudence "facilitates, rather than constrains, police violence."[102]

i. The Exclusionary Rule

Though it is not typically thought of as a mechanism of police accountability, the exclusionary rule is a critical means of oversight of police practices and procedures.[103] The exclusionary rule is most prominently invoked in criminal proceedings.[104] Despite its broad influence on police procedure, this mechanism is not conducive to public buy-in. Community members with access to legal resources can step in only as *amicus curiae* and sometimes do.[105]

The exclusionary rule is permissive. The Fourth Amendment recognizes a proto-right to bodily autonomy in the form of the expectation of privacy and possessory interest in the person.[106] The analysis turns not on the bodily autonomy of the individual accused, but on the expectation of privacy or possessory interest in the location where the criminal evidence was discovered by search or seizure.[107] Additionally, judges are unprepared, if not unwilling, to reject evidence produced by unconstitutional police conduct.[108] Judges are provided an insufficient evidentiary basis to properly evaluate police conduct and procedures—after all, the criminal defendant is the one standing accused.[109] Selection bias means

102. Akbar, *supra* note 2, at 1790.

103. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (stating the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); *see also* Arizona v. Evans, 514 U.S. 1, 2 (1995) ("The exclusionary rule was historically designed as a means of deterring police misconduct.").

104. Brooks Holland, *The Exclusionary Rule as Punishment*, 36 RUTGERS L. REC. 38, 38 (2009) (defining the exclusionary rule as "the rule that evidence obtained in violation of a defendant's constitutional rights is inadmissible at trial").

105. *See Williams v. City of Chicago*, MACARTHUR JUST. CTR.: POLICE ABUSE, https://www.macarthurjustice.org/case/williams-v-city-of-chicago/ [https://perma.cc/4BKB-YQFC] ("MJC filed an amicus brief on behalf of community organizations Brighton Park Neighborhood Council, Lucy Parsons Labs, and Organized Communities Against Deportations, outlining its study's findings in support of a motion by the Cook County Public Defender that challenged the scientific validity of the ShotSpotter system's gunfire reports, which prosecutors have attempted to use as evidence in a criminal prosecution.").

106. *See* Katz v. United States, 389 U.S. 347 (1967).

107. Rakas v. Illinois, 439 U.S. 128, 143 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

108. Friedman & Ponomorenko, *supra* note 99, at 1891.

109. *See id.* at 1846–47, 1891.

suppression motion practice gives judges a distorted picture of the effectiveness of police tactics because judges see the cases where those tactics produced criminal evidence and not a complete picture of the true harmfulness of those tactics.[110]

Further, the exclusionary rule does not provide a path for racial justice. Direct evidence of racial pretext and metrics of racial disparities are *irrelevant* to a claim for relief brought under the exclusionary rule.[111] Police disproportionately stop people of color and disproportionately arrest people of color.[112] And as Paul Butler observed, "[i]t is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law."[113] The fact of the matter is, existing Fourth Amendment jurisprudence sanctifies the initial intrusions by police that disproportionately target Black Americans and can—and do—escalate into acts of devastating violence.[114]

But even when police engage in conduct that is recognized as unconstitutional, three main doctrines may foreclose remedy.[115] The first doctrine is the standing doctrine, which places unconstitutional police searches outside the reach of a passing guest in an apartment or passenger in a car.[116] The second doctrine is the attenuation doctrine, which allows courts to base a holding on a value judgment as to how directly the harm affected the defendant.[117] The third doctrine is the good faith doctrine, which immunizes police from mistakes in warrant affidavits and deprives

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110. *Id.* at 1866.

111. Whren v. United States, 517 U.S. 806, 813 (1996) (holding that probable cause is an objective standard and evidence of an officer's subjective motivations, including racial bias, are irrelevant to Fourth Amendment analysis).

112. Zach Huffman, *Systemic Inequality | Recasting the Exclusionary Rule's Net*, 89 FORDHAM L. REV. 99, 104–05 (2020).

113. Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR J. 75, 80 (2020).

114. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017) (detailing hypothetical situations in which police conduct that often escalates to acts of violence would be lawful under the Fourth Amendment).

115. *See* Friedman & Ponomorenko, *supra* note 99, at 1866.

116. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83 (1998) (holding that defendants who had spent two and a half hours in an apartment had no standing to challenge drug evidence seized in a warrantless search of that apartment); *see also* United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) (holding that a passenger had no standing to challenge drug evidence discovered in trunk of car); United States v. Campbell, 741 F.3d 251 (1st Cir. 2013) (holding that passengers had no standing to challenge the search of a glove box).

117. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

pending cases of the application of existing constitutional law.[118] Together, these doctrines create wide gaps in the law and give judges discretion in declining to penalize police for unconstitutional conduct by excluding evidence.

ii. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides for civil remedies to individuals whose constitutional rights are violated by state actors.[119] For victims of police violence, § 1983 actions are designed to compensate victims and their families through awards of compensatory damages and therefore deter police departments from unconstitutional conduct through financial incentives.[120] It is the "primary weapon used by civil rights lawyers to remedy police abuse."[121] It bears mentioning that § 1983 is an opportunity for victims and their families to contend that their harm *mattered*, their lives *mattered*, and the system must respond with a judgment that accurately reflects the high value of their harm or loss to our society.[122]

§ 1983 was enacted "during Reconstruction to provide individuals with a federal remedy for discriminatory treatment by state actors resisting segregation in the South."[123] § 1983 was passed as possibly the least controversial feature of the Ku Klux Klan Act and supported Congress' effort to respond to widespread violations of Constitutional rights by public and private actors in the Reconstruction South by giving newly freed Black citizens a Federal court remedy of first resort.[124] Actions were rare prior to

118. United States v. Leon, 468 U.S. 897 (1984); Herring v. United States, 555 U.S. 135 (2009).

119. 42 U.S.C. § 1983 (providing in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

120. Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504 (May 1993).

121. *Id.*

122. *See generally* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2018) (discussing the dilemmas of compensating victims' families by placing a dollar value on the victims of the 9/11 attacks).

123. Matthew J. Silveira, *An Unexpected Application Of 42 U.S.C. § 14141: Using Investigative Findings For § 1983 Litigation*, 52 UCLA L. REV. 601, 606–07 (2004).

124. MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 4 (6th ed. 2024).

Monroe v. Pape.[125] In *Monroe*, James Monroe sued the City of Chicago for violations of his Fourth Amendment rights when Chicago Police illegally broke into his house, forced him to stand naked in the living room, ransacked his house, arrested him, and held him for ten hours without contact with family, counsel, or a judge.[126] The Supreme Court held that prospective § 1983 plaintiffs need not exhaust state law remedies before bringing action in Federal court, and that state "action 'under color of' law' did not mean that the action itself was legal, but that the actor was 'clothed with the authority of state law.'"[127] In *Monell v. Department of Social Services*, the Supreme Court overturned *Monell* in part to hold that municipalities and local government units could be sued under § 1983 but could only be vicariously liable where the "execution of a government's policy or custom . . . inflicts the injury."[128]

But relief under § 1983 for victims of police violence is narrowed by qualified immunity. The doctrine of qualified immunity shields "officials from damages liability, even when they have violated the Constitution, if they have not violated 'clearly established law.'"[129] To overcome qualified immunity, a plaintiff must claim a violation of a Constitutional right, and that the right was clearly established at the time of the violation.[130] Since *Pearson v. Callahan*, it is more difficult for plaintiffs to assert as a matter of law that a right was "clearly established."[131] Courts can and do avoid setting a precedential basis for future cases by rejecting § 1983 claims solely on the basis that the law was not clearly

125. *Id.* at 7–15; Osagie K. Obasogie, *Section 1983 and Police Use of Force: Towards a Civil Justice Framework*, 112 CAL. L. REV. 1001, 1003 (2024) ("In light of this active participation in criminal behavior by police, prosecutors, local judges, and juries, § 1983 was meant to give newly freed Black citizens access to federal courts so that they could at least have a legal forum outside of indifferent (if not complicit) localities, where they could bring civil charges against public officials who violate their constitutional rights.").

126. Monroe v. Pape, 365 U.S. 167, 169 (1961).

127. Silveira, *supra* note 123, at 608 (citing *Monroe*, 365 U.S. at 183, 184, 187).

128. *Id.* at 608 (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)).

129. Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

130. Mitchell Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 597 (2020).

131. Colin Rolfs, *Qualified Immunity after Pearson v. Callahan*, 59 UCLA L. REV. 468, 474 (2011) (finding that in the aftermath of *Pearson v. Callahan* "[c]ircuit courts have begun to use the discretion granted by *Pearson* to avoid constitutional determinations far more than they did under the *Saucier* sequencing rule. District courts, on the other hand, are avoiding constitutional determinations at a level similar to the *Saucier* period").

established, without deciding whether plaintiffs' Constitutional rights were violated.[132] The burden of this doctrine on plaintiffs is most shockingly and most tragically displayed in *Castle Rock v. Gonzales*, where the Supreme Court affirmed the lower court's holding that police had qualified immunity against a grieving mother's § 1983 claim for compensation for the murder of her three daughters after police failed to investigate her ex-husband's violation of a restraining order despite her pleas for them to do so.[133]

Plaintiffs who get past a qualified immunity defense still have the deck stacked against them. Plaintiffs must demonstrate that police violence violated their Constitutional rights. For police violence, the standard established by *Graham v. Connor* is whether police conduct was that of a "reasonable officer on the scene."[134] The fact that police violated a person's Constitutional rights is not enough on its own; courts must balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake" and recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[135] Mitchell Zamoff has criticized this standard for being unfairly deferential to police because "juries deciding excessive force claims are routinely instructed to consider the uncertainties and stress of policing, as well as the conduct of the civilian who was harmed, but not the training and experience of the officers involved or their compliance with policies and procedures."[136]

In addition to qualified immunity, justiciability doctrine forecloses any possibility of plaintiffs accessing departmental guarantees of non-repetition as a remedy through injunctive relief.[137] This is the "most profound limitation on private civil rights police abuse litigation."[138] In *Rizzo v. Goode*, the Supreme Court drastically curtailed the availability of equitable remedies to

132. Eva Dickey, *Qualified Immunity under Section 1983: The Protective Veil of "Clearly Established"*, 96 CHI.-KENT L. REV. 247, 249 (2023) (citing Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. L. REV. 139, 141 (2009)).

133. Castle Rock v. Gonzalez, 545 U.S. 748 (2005).

134. Zamoff, *supra* note 130, at 599 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

135. *Id.* at 598–99 (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)).

136. *Id.* at 589–90.

137. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

138. Hoffman, *supra* note 120, at 1511.

victims of police violence in § 1983 litigation.[139] The lower court conducted twenty-one days of hearings and collected "a staggering amount of evidence" from thirty-six incidents of violence by Philadelphia Police.[140] The purpose of these efforts "was to lay a foundation for equitable intervention . . . because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers" that was "directed against minority citizens in particular and against all Philadelphia residents in general."[141] The lower court ordered a set of reforms.[142] In *Goode*, the Rehnquist Court applied standing and federalism doctrines to hold that a statistical pattern was not enough, § 1983 did not create a duty to prevent future Constitutional violations, and plaintiffs needed to show "direct responsibility" of the entire police force for the actions of individual police.[143] In *City of Los Angeles v. Lyons*, the Rehnquist Court rejected an effort brought by Mr. Adolph Lyons for injunctive relief against the Los Angeles Police Department's practice of chokeholds, which harmed him and disproportionately killed Black Angelenos.[144] In order to access injunctive relief, said the Rehnquist Court, plaintiff "would have had not only to allege that he would have another encounter with the police" but "make the incredible assertion (1) that *all* police officers in Los Angeles *always* choke any

139. Rizzo v. Goode, 423 U.S. 362 (1976).

140. *Id.* at 367.

141. *Id.* at 366–67.

142. *See id.* at 369–70.

143. *Id.* at 376.

144. City of Los Angeles v. Lyons, 461 U.S. 95 (1983). The facts of this case are horrific. *Id.* at 114–15 (Brennan, J., dissenting) (footnote omitted) ("Respondent Adolph Lyons is a 24-year-old [Black] male who resides in Los Angeles. According to the uncontradicted evidence in the record, at about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a pat-down search, Lyons dropped his hands, but he was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within five to ten seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him and continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released."); *id.* at 115 n.3 (Brennan, J., dissenting) ("Thus in a City where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds. In addition to his other allegations, Lyons alleged racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.").

citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized police officers to act in such manner."[145] This strips courts of the power to block police policy that is inconsistent with constitutional requirements, rendering them "limited to levying a toll for such systematic constitutional violations."[146]

Even without these legal restrictions, the deterrence logic of § 1983 judgments frequently falls flat.[147] In one expansive study, Joanna Schwartz found that "[l]aw enforcement officers employed by the forty-four largest jurisdictions in [her] study were personally responsible for just .02% of the over $730 million paid to plaintiffs in police misconduct suits between 2006 and 2011," and police in the thirty-seven small- and mid-sized departments paid nothing toward settlements and judgments.[148] This means that individual police officers are not deterred from engaging in violent conduct by the risk that they will be personally forced to pay the judgment resulting from that conduct because responsible governments often indemnify them from liability.[149] In many ways, this is a good thing for plaintiffs, because it means that plaintiffs receive the full value of their judgments.[150] However, departments that have the ability to pay are indemnified by those same governments, so departments do not have an incentive to protect their budgets by implementing policies that deter police violence—the money instead comes out of

145. *Id.* at 105–06 (emphasis in original).

146. Peter C. Douglas, City of Los Angeles v. Lyons: *How Supreme Court Jurisprudence of the Past Puts a Chokehold on Constitutional Rights in the Present*, 17 NW. J. L. & SOC. POL'Y 81, 133 (2021) (quoting *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting)).

147. Hoffman, *supra* note 120, at 1509 ("The civil remedies available under existing federal civil rights statutes, while essential tools in the struggle to contain police abuse, are not sufficient to achieve the pressing goals of police accountability and the prevention of police abuse.").

148. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014).

149. *Id.* at 953 (footnotes omitted) ("Although indemnification furthers § 1983's compensation goals, it frustrates § 1983's deterrence goals by limiting the impact of compensatory and punitive damages awards on individual officers. In most jurisdictions, officers can have no reasonable expectation that their misconduct will lead to financial sanctions. Lawsuits appear infrequently to have negative ramifications for officers' employment. And available evidence suggests that the threat of being sued does not significantly influence officer behavior.").

150. *Id.* at 952 ("Widespread indemnification facilitates § 1983's goal of compensating plaintiffs after a settlement or judgment in their favor . . . . Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated.").

the common fund.[151] But as Schwartz observed, the result of this indemnification is that "most governments are not taking aggressive enough action to investigate and discipline their officers and do not effectively manage their law enforcement agencies."[152]

C. Prosecutorial Accountability

Charging police violence as violent crime offers a tantalizing possibility to close the accountability gap. Prosecutors have substantial influence over police department conduct.[153] Where other systems fail, a "blue desk" prosecutor could step in to charge police violence as assault, battery, manslaughter, or homicide.[154]

However, criminal charges are rarely brought against police and convictions are even rarer.[155] Only 1.9% of police killings from 2013–2022 resulted in police officers being charged with a crime.[156] This is because prosecutors who bring charges against officers must overcome major obstacles. Prosecutors depend on the cooperation of

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151. *Id.* at 955.

152. *Id.* ("My study reveals, however, that governments are already absorbing the costs of individual officer liability. Despite this significant financial outlay—over $730 million from 2006 to 2011 in forty-four large jurisdictions and over $9.1 million during that same period in thirty-seven small and mid-sized jurisdictions—the general consensus is that most governments are not taking aggressive enough action to investigate and discipline their officers and do not effectively manage their law enforcement agencies."); *see also* Hoffman, *supra* note 120, at 1509 ("[C]ity officials may decide to pay the cost of damage awards instead of taking the politically unpopular steps necessary to remedy a pattern of police abuse. Politicians and police chiefs may prefer to blame civil rights lawyers and the courts for imposing these costs on the taxpayers.").

153. Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 900–01 (2020) ("[P]olice misconduct *needs* prosecutors to enable it. As such, to understand its prevalence and persistence on a national scale, one must examine how police and prosecutors are interdependent institutions that share culture, norms, resources, and goals.").

154. VITALE, *supra* note 9, at 23.

155. Alex Leeds Matthews, *The Shocking Numbers Behind Police Prosecutions*, U.S. NEWS (Apr. 30, 2021), https://www.usnews.com/news/national-news/articles/2021-04-30/the-shocking-numbers-behind-police-prosecutions [https://perma.cc/7PR2-X74T]; Martin Kaste, *Are More Police Officers Facing Prosecution? As the Data Shows, it's Complicated.*, NPR (Sept. 25, 2023), https://www.npr.org/2023/09/25/1201620935/are-more-police-officers-facing-prosecution-as-the-data-shows-its-complicated [https://perma.cc/EF2W-ARP9].

156. UN Report, *supra* note 88, at ¶ 68.Alex Leeds Matthews, *The Shocking Numbers Behind Police Prosecutions*, U.S. NEWS (Apr. 30, 2021), https://www.usnews.com/news/national-news/articles/2021-04-30/the-shocking-numbers-behind-police-prosecutions [https://perma.cc/7PR2-X74T]; Martin Kaste, *Are More Police Officers Facing Prosecution? As the Data Shows, it's Complicated.*, NPR (Sept. 25, 2023), https://www.npr.org/2023/09/25/1201620935/are-more-police-officers-facing-prosecution-as-the-data-shows-its-complicated [https://perma.cc/EF2W-ARP9].

police to gather the evidence necessary to pursue a charge or secure a conviction.[157] This dependence is an obstacle to prosecutors' capacities to collect evidence of police violence, and doing so risks damaging the relationship or reputation necessary for collecting evidence in this case and other cases.[158] Some have contended this relationship between prosecutors and police departments should be a disqualifying conflict of interest in police violence cases that requires independent counsel from outside the jurisdiction to take the case.[159] Others have called for victims to have direct access to grand juries to override any disincentives to prosecute police violence.[160] Line prosecutors who speak out about police misconduct in cases they are handling without blessing from their superiors are not protected by the First Amendment, placing them at risk of losing their jobs or being demoted.[161]

Criminal law has its limits. The substantive criminal law in most jurisdictions makes defenses more available to police defendants than other defendants.[162] And prosecutors can only prosecute individual officers. They have no mandate to require structural remedies where institutional culpability can be found. As is true of § 1983 litigation, prosecutors cannot require proactive measures to prevent violence before it happens. As Mary Cheh succinctly put it, "[c]riminal law can punish, and in some instances, deter police brutality, but it cannot of itself force fundamental

157. VITALE, *supra* note 9, at 18.

158. *Id.*; Marshall Miller, *Police Brutality*, 17 YALE L. & POL. REV. 149, 153 (1998).

159. *See* Trivedi & Gonzalez Van Cleve, *supra* note 153, at 930 ("[I]n cases where criminal prosecution of police officers for violence or other misconduct is appropriate, prosecutors should voluntarily—or be forced by law to—submit cases to independent counsel from outside the jurisdiction to cure the local conflict of interest this Article delineates."); *see also* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1488 (2016).

160. *See* Davis, *supra* note 93, at 296–98.

161. Garcetti v. Ceballos, 547 U.S. 410 (2006); *see also* Brief of Association of Deputy District Attorneys and California Prosecutors Association as Amici Curiae Supporting Respondent at 2, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473) (writing in support of Ceballos, a prosecutor who testified for the defense regarding potential police dishonesty in a warrant affidavit following the Rampart Scandal in the LAPD, and stating that Ceballos "reasonably concluded in good faith that ongoing prosecutions of criminal defendants were proceeding on the basis of false evidence and determined that the ethical duties that apply to him as a prosecutor licensed by the California bar required him to express this speech").

162. *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 641–64 (2018).

change in how a department is run, supervised, led, and made accountable."[163]

When charges are brought, they inherently place hope for accountability in the deployment of the criminal legal system, which is itself counterproductive to lasting change.[164] As Kate Levine has persuasively observed, pressing for fewer restrictions and harsher penalties for police defendants contradicts the abolitionist project of dismantling the violence of mass incarceration.[165] Police prosecution attempts to erase the systemic causes of police violence by prosecuting individual officers and replicating the racist pathologies endemic in the criminal legal system.[166] Prosecuting police reaffirms "the prominent role the criminal legal system is expected to play in righting societal wrongs, even in the minds of those who are generally aware of its brokenness."[167] Indeed, Levine theorizes that one reason the "defund the police" movement failed in Minneapolis is because it focused on the prosecution of Derek Chauvin instead of more robust structural solutions that would have resulted in less police violence overall.[168]

D. Legislative Accountability

State legislatures impose alarmingly few statutory boundaries on police departments.[169] The limits of police departments are defined by internal policies without public participation.[170] State and municipal governments require alarmingly little democratic oversight of policing.[171] Regulation and rulemaking concerning police conduct are "notably sparse."[172] Most police rules are

163. *Id.* at 638 (quoting Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 247, 247 (Geller & Toch eds., 1996)).

164. Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1003 (2021) ("[A] project to increase the harshness of the criminal legal system against police officers will, far from its proponents' goals, legitimize and increase the footprint of our current criminal legal system.").

165. Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1233 (2022).

166. Levine, *Police Prosecutions and Punitive Instincts*, *supra* note 164, at 1035.

167. *Id.* at 1043.

168. Levine, *The Progressive Love Affair with the Carceral State*, *supra* note 165, at 1236–37.

169. Friedman & Ponomorenko, *supra* note 99, at 1843–44.

170. *Id.* at 1845–46, 1857.

171. *Id.* at 1835.

172. *Id.* at 1831.

generated internally without democratic processes nor opportunity for public comment.[173]

State legislatures pass laws undermining oversight and accountability.[174] These laws are called "Law Enforcement Officers' Bills of Rights" (LEOBRs) and have been passed in seventeen states.[175] Provisions such as statutes of limitations on discipline and criminal penalties for civilian complaints limit accountability.[176] The seventeen states that have passed LEOBRs account for 54% of police shootings of civilians, 51% of police shootings of Black civilians, and 80% of police shootings of Latine civilians, suggesting

173. *Id.* at 1845–46.

174. One may object that these laws cannot present a democratic problem for policing because they were passed by a democratic process. Just as a community should have the capability to decide the scope of police authority, they should have the capability to cede that decision to the police departments that do the job. Indeed, some scholars have argued that criticisms of much of LEOBRs are misplaced—not all provisions that insulate officers from accountability are equal. Some of the procedural protections provided by LEOBRs for police suspected of misconduct are a *model* for the rights of defendants and accurate due process. Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1197 (2016). We need not reach here objections that can be made to the democratic character of such processes given the disenfranchisement of people with felony convictions, the outsized role of police unions in politics, and special problems of minority rights in first-past-the-post electoral systems. These laws need not uniformly be produced by undemocratic processes to be criticized because police are vested with the coercive force of the state. If this force is deployed arbitrarily or discriminatorily, principles fundamental to democratic participation such as freedom of speech, freedom of assembly, freedom of the press, rule of law, and the right to bodily autonomy may be denied. Democratic society is therefore under threat without systems in place to prevent arbitrary enforcement by providing meaningful oversight and accountability of police.

175. Richard Deshay Elliott, Impact of the Law Enforcement Officers' Bill of Rights on Police Transparency & Accountability 6 (Nov. 19, 2020), (Conference paper, S. Pol. Sci. Ass'n) (SSRN), https://ssrn.com/abstract=3690641 [https://perma.cc/L8EU-G54A].

176. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 PUB. INT. L.J. 185, 241 (2005) (finding that provisions in Law Enforcement Bills of Rights that impede police accountability include "(1) language that sets the scope of the LEOBORs too broadly, such that it might apply to routine supervisory activities; (2) formal waiting periods that delay investigations; (3) prohibitions on the use of non-sworn investigators in misconduct investigations; (4) pre-disciplinary hearings that include rank-and-file officers on the hearing board; and (5) statutes of limitations on the retention and use of data on officer misconduct"); *id.* at 236–37 (criticizing statutory limits on police discipline because "delays are often due to inadequate staffing of complaint investigation units, including both police internal affairs units and external civilian review boards" and concluding "[s]uch factors should not allow officers to avoid investigation and discipline"); *id.* at 238–41 (finding that "[i]mposing criminal penalties for filing false complaints raises potential First Amendment issues" and collateral impacts, and that "[l]imitations on the retention of citizen complaints and related information pose a barrier to one of the most important new police accountability mechanisms: Early Intervention Systems (EISs)").

that LEOBRs are "a detriment to police accountability and transparency to the general public."[177]

One reason why legislatures are unresponsive to community demands is the dominance of police unions in legislative politics.[178] Police unionism only became widespread as a reaction to the Civil Rights Movement.[179] Police unions adopted a militaristic culture rejecting police oversight and discipline as against the interests of their members.[180] Police unions have successfully lobbied for legislation such as LEOBRs and elected politicians supportive of their interests.[181] By contrast, civil society organizations' demands for accountability lacked the institutional longevity or the technical expertise to lobby for reforms and were not as effective in pressing for legislation representative of their interests.[182] In *The Toughest Beat*, Joshua Page articulates how the California Correctional Peace Officers Association pushed for laws that furthered mass incarceration by creating well-funded Political Action Committees and an office of professional lobbyists, becoming a major financial contributor to legislative and gubernatorial politicians from both parties in exchange for support for their positions, and aggressively attacking opposing views to effectively undermine reforms of the criminal justice system and push for legislation that expanded mass incarceration.[183] To be sure, public-sector unions should have the opportunity to represent the concerns of labor to legislators. The issue is not *per se* the existence of police unions that represent the interests of police officers, but that they perceive that impunity is in their interests and they have the influence to push that agenda

177. Elliot, *supra* note 175, at 14.

178. Davis, *supra* note 93, at 281–82.

179. Catherine Fisk & L. Song Richardson, *Police Unions*, 86 GEO. WASH. L. REV. 713, 736 (2017).

180. *Id.* at 744–46 (detailing how police unions were involved in legislative politics and resisted civilian oversight across cases, as well as how police unions criticized the Supreme Court, the Communist Party, the ACLU, reform-oriented chiefs, and civilian review boards).

181. Keenan & Walker, *supra* note 176, at 196 (2005) ("Unions not only secured collective bargaining agreements that contained many protections but also became a political force that helped to elect sympathetic public officials and to secure enactment of protective legislation, notably LEOBORs.").

182. *Id.* at 202 (footnote omitted) ("Public outrage over particular incidents of police misconduct is a blunt instrument that is rarely able to focus on the minutia of the disciplinary process. Public outrage is also fleeting, replaced by other concerns, and outlasted by the political power of police unions. As such, the decision-making process usually does not include a full, fair airing and balancing of all the interests of all the parties. Rather, the debate has been tilted toward the interests of unions and management.").

183. JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS' UNION IN CALIFORNIA 5, 10–14, 50–68, 76–80 (2011).

over the interests of the people to whom they are beholden to by their mandate.[184]

This inequality at the statehouse is compounded by two invidious forms of inequality at the ballot box: felony disenfranchisement and racial restrictions on voting rights. In forty-eight states, felony disenfranchisement laws deny people with felony convictions the ability to vote.[185] The result of these laws is that the people subjected to mass incarceration, the criminal legal system, and the police power are denied the democratic voice to advocate for change at the legislative level.[186] These laws disproportionately affect Black voters, disenfranchising six percent of the Black population nationwide and one in seven Black voters in Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming.[187] Further, voters of color are disenfranchised through racial gerrymandering and restrictions of access to the ballot box.[188] These inequalities are enhanced following *Shelby County v. Holder*, which gutted critical federal oversight of the Voting Rights Act in the Southern States.[189]

At the very least, police who commit acts of violence should be removed from their positions and the employee manual should set lines for what is permissible on the job. However, police are insulated from this form of accountability as well. In practice, even police who perpetrate an outsized share of high-profile incidents of

184. Patrick Brooks, *Black & Blue: Black Letter Law & Police Union Collective Bargaining Impede Reform*, 51 U. BALT. L. REV. 449, 454–55 (2022) (citations omitted) ("[P]roblems arise as these unions gain the financial, political, and statutory strength to protect their interests by resisting officer discipline and systemic reform."). *But see* Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1398–99 (2020) (arguing that opponents to police unions have not articulated what is wrong about police unions as opposed to other public unions and that anti-police union arguments for reform undermine abolitionist goals and further neoliberal and carceral ends).

185. Manoj Mate, *Felony Disenfranchisement and Voting Rights Restoration in the States*, 22 NEV. L.J. 967, 968 (2022) ("At its core, felony disenfranchisement in the United States is a manifestation of deep-seated structural discrimination within the US criminal justice system, and the utilization of that discrimination perpetuates exclusionary discrimination in voting and political systems.").

186. *Id.* at 970.

187. *Id.* at 968.

188. Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 269–86 (Winter 2018).

189. Shelby County v. Holder, 570 U.S. 529 (2013); Abhay P. Aneja & Carlos F. Avenancio-León, *Disenfranchisement and Economic Inequality*, 109 AEA PAPERS & PROC. 161 (2019).

violence are rarely removed or disciplined.[190] Blame for this may be directed at anti-accountability provisions in police union contracts. In negotiations with city governments, police unions push for the inclusion of anti-accountability provisions in collective bargaining agreements.[191] Even in states or cities that have not enacted LEOBRs, similar provisions are often included in police collective bargaining agreements.[192] These provisions foreclose accountability in the form of employment sanctions for officers' misconduct.[193]

The mechanisms by which police collective bargaining agreements impede accountability to the public is a developing body of research with strong empirical support. A historical analysis reveals a statistical association between the emergence of state-level collective bargaining rights for police unions and increases in deaths of people of color.[194] In "Police Union Contracts," Stephen Rushin identifies seven anti-accountability provisions endemic in present-day collective bargaining agreements.[195] Rushin concludes that "police union contracts may pose an underappreciated barrier to police reform" including consent decrees.[196] In Florida, quantitative evidence suggested an association between increased collective bargaining rights for police unions and increased police violence.[197] From 2014 to 2017, Campaign Zero compiled a database of police union contracts.[198] A quantitative study of those contracts by Abdul Nasser Rad established a statistical association between

190. Max Schanzenbach, *Policing the Police: Personnel Management and Police Misconduct*, 75 VAND. L. REV. 1523, 1567 (2022) ("[B]ad cops are a serious problem, are identifiable, and are rarely removed or disciplined.").

191. Fisk & Richardson, *supra* note 179, at 737.

192. *Id.*

193. Paige Fernandez, *Police Unions Should Never Undermine Constitutional Policing*, ACLU (May 15, 2019) ("Time and again, we witness transformative advances on use of force and biased police and civilian oversight, just to have them undermined behind the closed doors of collective bargaining with police unions. Indeed, historically in the U.S., police union contract negotiations have been used as vehicles for rolling back accountability, transparency, and civilian oversight. In doing so they have further damaged relationships with community members, whom the police are meant to serve.").

194. JAMEIN CUNNINGHAM, DONNA FEIR & ROB GILLEZEAU, IZA DP NO. 14208 COLLECTIVE BARGAINING RIGHTS, POLICING, AND CIVILIAN DEATHS 18 (IZA Inst. of Lab. Econ. Ed., 2021).

195. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1220 (2017).

196. *Id.* at 1243.

197. Dhammika Dharmapala, Richard H. McAdams & John Rappaport, The Effect of Collective Bargaining Rights on Law Enforcement: Evidence from Florida 33, (U. Chi. L. Sch., Chi. Unbound, Pub. L. & Legal Theory Paper Series, Working Paper No. 655, 2018).

198. Fisk & Richardson, *supra* note 179, at 749.

an index of twelve anti-accountability provisions and police violence.[199]

E. Civilian Accountability

Civilian oversight bodies are intended to fill the "oversight gap" left by state and municipal institutions.[200] They exist in an overwhelming majority of American cities.[201] These bodies seem to have the strongest potential for correcting for the democratic failures in policing and providing responsive mechanisms to challenge police misconduct.[202] In practice, however, "oversight bodies have failed to foster community trust in police departments."[203] Indeed, "there is no evidence [to] date to indicate that civilian oversight leads to some tangible benefit such as a higher sustained complaint rate."[204]

Actions by civilian oversight bodies have traditionally been limited by the mandates given to them by municipal governments or by statutory limits imposed by state legislatures. For instance, most civilian oversight bodies can only recommend disciplinary action or changes in departmental procedures and depend on the cooperation of police departments.[205] Civilian oversight bodies are often contained within police Investigative Affairs departments or limited to a supervisory function.[206] When cities create standing bodies with investigative powers, they often under-resource them, limiting their ability to carry out their mandate.[207] LEOBRs can further limit the authority of civilian review boards to oversee police

199. Abdul Nasser Rad, Police Institutions and Police Abuse: Evidence from the US (Jan. 11, 2018) (masters of philosophy in politics thesis, Oxford University) (SSRN).

200. Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J. L. & SOC. PROBS. 1, 2 (2009) (citations omitted) ("Local executive branch officials, local legislatures, criminal courts, and civil courts generally do little to punish and deter routine acts of police misconduct or to reform problematic police-department policies. When scandals erupt, crises occur, and police misconduct obtains momentary political salience, cities create civilian-oversight bodies to fill this oversight gap.").

201. *Id.* ("Civilian oversight bodies exist in roughly eighty percent of the large cities in America, and approximately one-hundred different civilian-oversight bodies currently operate in the United States.").

202. JOEL MILLER, CIVILIAN OVERSIGHT OF POLICING: LESSONS FROM THE LITERATURE, VERA INSTITUTE OF JUSTICE 3 (2002).

203. O'Rourke et al., *supra* note 91, at 1351.

204. Terrill & Ingram, *supra* note 95, at 154.

205. Miller, *supra* note 202, at 11–12.

206. *Id.* at 12–16.

207. *Id.* at 17.

use of force by reducing them to an "advisory role" and denying them authority to issue subpoenas or punitive measures.[208]

Additionally, civilian oversight bodies are vulnerable to "regulatory capture," wherein the group being regulated—police—"subverts the impartiality and zealousness of the regulator"—the civilian oversight body.[209] This problem can emerge when these bodies are "co-opted" by police norms from causes as benign as the exchange of staff and values through routine contact.[210] For these reasons, activists who demand civilian accountability often become disheartened by its failure to live up to expectations and criticize it as "inefficient and ineffective."[211]

III. Pattern-or-Practice Litigation Fails to Bridge the "Grey Hole" in Accountability for Police Violence.

Pattern-or-practice litigation is the best existing method for bridging the gap in police accountability.[212] But it does not go far enough.

34 U.S.C. § 12601 was intended to "close [the] gap in the law" of accountability for police violence.[213] Existing civil rights statutes, including 18 U.S.C. §§ 241 and 242, provide the Department of Justice a limited power to seek injunctive relief because the specific intent requirement is so difficult to meet.[214] Supreme Court cases *City of Los Angeles v. Lyons* and *United States v. City of Philadelphia* restricted the ability of private individuals and the federal government to enjoin unconstitutional police practices.[215] 34 U.S.C. § 12601 was initially introduced by Representative Don Edwards of California as part of the Police Accountability Act,

208. NAACP, *Resolution: Thorough Reformation of Law Enforcement Officers' Bill of Rights* (2021) ("WHEREAS, LEOBORs also limit the authority of civilian review boards to review determinations regarding complaints filed against police officers by only granting the boards an advisory role without the ability to issue subpoenas or actually impose punitive action.").

209. Tim Prenzler, *Civilian Oversight of Police: A Test of Capture Theory*, 40 BRIT. J. CRIMINOLOGY 659, 662 (2000).

210. *See id.* at 662–63.

211. Miller, *supra* note 202, at 3.

212. In the absence of action by federal authorities, state attorneys general can initiate civil suit against police departments and develop consent decrees through parens patriae standing in civil rights lawsuits, though scholars have identified problems in this legal base for standing that may be better suited by a federal statute granting standing. *See* Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999 (2020). This Note does not explore this avenue of reform.

213. Kim, *supra* note 23, at 769; Miller, *supra* note 158, at 163.

214. Kim, *supra* note 23, at 769–70.

215. Silveira, *supra* note 123, at 611.

impelled by the violence of the Los Angeles Police Department against Rodney King.[216] In its initial drafting, the bill gave a private right of action to both the Attorney General and victims of police violence to obtain injunctive relief to eliminate the pattern or practice.[217] The private right of action for victims was dropped in the Conference Committee's compromise version of the bill.[218] The bill had previously failed to overcome a filibuster by Senate Republicans and a threatened veto by President George H.W. Bush, but was passed as part of the Violent Crime Control and Law Enforcement Act of 1994.[219]

Only the Department of Justice may bring suit for patterns or practices of unconstitutional and unlawful conduct within a police department under 34 U.S.C. § 12601.[220] This statute is directed toward systematic practices, not singular instances of police misconduct.[221] Unlike reviews of police department practices from the DOJ's Office of Community Oriented Policing Services, the initiation of review brought under this statutory mechanism is not voluntary on the part of departments, and its findings compel police departments to act through court orders or court-enforced agreements.[222] It is invoked in rare situations: out of the nation's 12,300 police departments, only 78 have come under investigation under this statute.[223] DOJ action under this statute typically proceeds in five stages: case selection, initial inquiry, formal investigation, settlement negotiation, and monitored reform.[224]

"Pattern or practice" is undefined in the statute, and other sources provide "no definitive answer" regarding the definition of the term.[225] The DOJ defines "pattern or practice" as "[w]hen officers engage in unlawful conduct repeatedly or over a period of

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216. Adam J. Smith, *Police Reform through Section 1983*, 43 N. ILL. U. L. REV. 51, 64–65 (2022).

217. Miller, *supra* note 158, at 163.

218. *Id.*

219. Kim, *supra* note 23, at 772–73.

220. Silveira, *supra* note 123, at 612.

221. John Guzman, *What Is a Pattern-or-Practice Investigation? Why It's Important to Understand This Police Accountability Process — and Its Limitations*, LEGAL DEF. FUND (Mar. 8, 2023), https://www.naacpldf.org/police-pattern-practice-investigation/ [https://perma.cc/ZQP8-24EX].

222. *Id.*

223. Jason W. Ostrowe, *A Framework to Forestall Systemic Police Misconduct: Applying DOJ'S Pattern or Practice Findings to Municipal Police*, 18 POLICING 1, 1 (2024).

224. Ellen A. Donnelly & Nicole J. Salvatore, *Emerging Patterns in Federal Responses to Police Misconduct: A Review of "Pattern or Practice" Agreements over Time*, 20 CRIMINOLOGY, CRIM. JUST. L & SOC'Y 23, 25 (2019).

225. Miller, *supra* note 158, at 165.

time, the police department, as a whole, may be engaging in a pattern or practice of conduct that violates the law."[226] With respect to the number of incidents, the DOJ says only that "[a] single incident of excessive force or one unlawful stop does not establish a pattern or practice," but can be an indicator of one.[227]

In pursuing pattern-or-practice litigation, the Civil Rights Division of the Department of Justice first conducts a preliminary investigation.[228] This inquiry is typically not public.[229] If the DOJ finds systemic problems that police departments cannot fix on their own, the DOJ then conducts a formal investigation.[230] The DOJ has not publicly provided a list of indicators of systemic problems, but has historically focused on police use of force, ineffective early intervention systems, racial or ethnic bias in policing, gender bias during investigation of sexual assaults, and harm against persons with mental illness.[231] The initiation of the investigative process is highly variable by administration: the Obama Administration initiated twenty-five pattern-or-practice investigations, under the Trump Administration there were zero.[232]

If the general findings of the preliminary investigation demonstrate "signs of serious misconduct," the DOJ proceeds with a formal investigation.[233] The city and the public are noticed of this investigation.[234] The DOJ collects information from a variety of sources, including the police department and community.[235] This investigation lasts years.[236] If the DOJ finds evidence of a pattern or practice of unconstitutional police conduct, the DOJ then

226. U.S. DEP'T OF JUST., FAQ ABOUT PATTERN OR PRACTICE INVESTIGATIONS, https://www.justice.gov/d9/2023-10/pattern_or_practice_investigation_faqs_english.pdf [https://perma.cc/MBF6-DCQB].

227. *Id.*

228. Norman, *supra* note 22, at 277.

229. Donnelly & Salvatore, *supra* note 224, at 25.

230. *Id.* at 277–78.

231. POLICE EXEC. RSCH. FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED (2013), https://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf [https://perma.cc/W9M4-PECH].

232. Smith, *supra* note 216, at 68.

233. Donnelly & Salvatore, *supra* note 224, at 25.

234. Silveira, *supra* note 123, at 613.

235. *Id.*

236. Smith, *supra* note 216, at 66.

publishes a public report summarizing its findings.[237] Otherwise, the DOJ will "walk away" and the process ends there.[238]

If the DOJ's formal investigation produces evidence of "repeated, systematic unlawful behavior," the DOJ then files suit.[239] Historically, the DOJ's strategy has been to pursue negotiations first, resorting to litigation only when those efforts fail.[240] Thus, the DOJ has pursued consent decrees, settlements, or memoranda of understanding instead of court judgments.[241] Through these agreements, the DOJ implements a comprehensive set of provisions to bring police departments into compliance with the Constitution. To access injunctive relief, the DOJ must demonstrate "reasonable cause," but on this issue, courts are highly deferential to the judgment of the DOJ.[242] Once formally implemented, the court appoints a "special monitor" to oversee the execution of the terms and determine compliance.[243] Once the police department satisfactorily completes the requirements of the agreement, the case is closed.

A. Potential of Pattern-or-Practice Litigation

The potential of pattern-or-practice litigation is the power of federal action to enforce civil rights despite state and local obstacles. As political scientist Robert Mickey observed, outside intervention by the federal government and national Democratic party were necessary to democratize the southern states by breaking the post-secession consolidation of power under white supremacist minority rule in "authoritarian enclaves."[244] For Mickey, key events in the decades-long timeline of democratization included the Supreme Court decisions *Smith v. Allwright*, *Brown v. Board of Education*, and *Cooper v. Aaron*; the passing of the 1964

237. *Id.*

238. Silveira, *supra* note 123, at 613.

239. Norman, *supra* note 22, at 278 ("[A] cause of action is only substantiated when investigations reveal repeated, systematic unlawful behavior including, but not limited to, patterns of excessive use of force, promotion systems rewarding those who engage in excessive force, and systems suppressing citizen complaints against officers.").

240. Kim, *supra* note 23, at 773.

241. Donnelly & Salvatore, *supra* note 224, at 25. While consent decrees are typically overseen and enforceable by federal courts, memoranda of understanding usually are not. *Id.*

242. Miller, *supra* note 158, at 180.

243. Smith, *supra* note 216, at 66.

244. ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN THE DEEP SOUTH, 1944-1972, at 33–34, 55, 61–63 (Princeton Univ. Press 2015).

Civil Rights Act and the 1965 Voting Rights Act; the embrace of racial equality in the national Democratic party; and the deployment of U.S. Marshals to protect Black students and vindicate their right to an education.[245] These watershed victories were accomplished by effective pressure and "good trouble" by movement lawyers such as Thurgood Marshall in radical legal organizations, political activists such as Fannie Lou Hamer in Democratic splinter parties, and all participants young and old in the mass mobilization of the Civil Rights Movement.[246] Federal action was forced by the overwhelming courage and sacrifice of these individuals, all of whom faced overwhelming state repression. Mickey's description of the twenty-year battle largely between the NAACP and the Texas legislature in the lead-up to *Smith v. Allwright* is a case study for how strategic and aggressive civil rights litigation can challenge and change democratic failures.[247]

In 1927, the Supreme Court in *Nixon v. Herndon* overturned a Texas statute that banned Black people from voting in the state's Democratic party primaries.[248] The Texas legislature responded by passing a statute that allowed political parties' executive committees to determine membership qualifications, and inevitably, the Texas Democratic party passed a rule forbidding Black Texans from voting in primary elections.[249] The Supreme Court struck down the statute in *Nixon v. Condon*, but, by limiting the extension of constitutional voting rights to "state action," the ruling lacked foresight that white-only primaries in single-party states violated voting rights whether the restriction came from the party or the state.[250] The Texas Democratic Party did just that, passing an internal rule prohibiting Black people from participating.[251]

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245. *Id.* at 62–63.

246. Kenneth T. Andrews & Kay Jowers, *Lawyers and Embedded Legal Activity in the Southern Civil Rights Movement*, 40 L. & POL'Y 10 (2018); Susan Johnson, *Fannie Lou Hamer: Mississippi Grassroots Organizer*, 2 UCLA NAT'L BLACK L.J. 155 (1972); Juliet R. Aiken, Elizabeth D. Salmon & Paul J. Hanges, *The Origins and Legacy of the Civil Rights Act of 1964*, 28 J. BUS. PSYCH. 383, 388 (2013) ("Following mass protests in the African American community and subsequent violent responses, Kennedy laid the groundwork for a civil rights bill in a series of speeches over the summer of 1963.") (citing SUSAN WRIGHT, THE CIVIL RIGHTS ACT OF 1964: LANDMARK ANTIDISCRIMINATION LEGISLATION (2005)).

247. MICKEY, *supra* note 244, at 96. Note that the institution of the white-only primary was present not just in Texas but throughout the South. *Id.* at 412–13 n.5.

248. Nixon v. Herndon, 273 U.S. 536 (1927); MICKEY, *supra* note 244, at 97.

249. MICKEY, *supra* note 244, at 97.

250. *Id.* at 98–99; Nixon v. Condon, 286 U.S. 73 (1932).

251. MICKEY, *supra* note 244, at 98.

In the 1935 case *Grovey v. Townsend*, the Court upheld the Texas Democratic Party's ability to exclude Black people from party primaries on the basis it was not "state action."[252] Six years later, the Department of Justice's Civil Rights Section created the ground to walk back *Grovey* in *U.S. v. Classic*, where the Court found that a primary was within the definition of an "election" for purposes of Article 1, Section 4 of the Constitution.[253] The state NAACP chapter successfully persuaded the national NAACP chapter to litigate *Smith v. Allwright*—before, the Texas NAACP were fighting the battle for voter rights in defiance of the national NAACP.[254] This was the decisive moment: a coalition of activist legal organizations submitted briefs in amicus curiae, including the National Lawyers Guild, the American Civil Liberties Union, and the Workers' Defense League (but, notably, not the Department of Justice).[255] The Court's holding finally outlawed the white-only primary. The Court held that the party primary was an integral feature of Texas' elections because Texas excluded losing primary candidates from general elections.[256] Though the short-term impact of this ruling was limited by white supremacist mob violence and repression of Black voters, *Smith v. Allwright* was the bedrock for subsequent challenges to the power of Southern authoritarian rulers.[257]

This historical anecdote demonstrates the power of federal action. Where communities mobilize into movements but fail to overcome barriers at the state and local level, the federal government can weigh in to break the tie. Here, the work of the Department of Justice's Civil Rights Section—the same division that works on pattern-or-practice litigation—laid the groundwork for successful strategic litigation brought by movement lawyers in the NAACP and supported by a coalition of progressive and radical legal organizations. The legal victory in this case produced political power for Black people in the southeastern states. For pattern-or-practice litigation, this historical narrative is aspirational. Federal actors can support movements calling for accountability for police violence to overcome local and state obstacles. As will be shown in the case study of Portland, activists sometimes call for the DOJ to act when confronted by the limitations of local systems. This

252. *Id.*; Grovey v. Townsend, 295 U.S. 45 (1935).

253. United States v. Classic, 61 U.S. 1031 (1941); MICKEY, *supra* note 244, at 98, 414 n.13.

254. MICKEY, *supra* note 244, at 98.

255. *Id.* at 100, 414 n.15.

256. Smith v. Allwright, 321 U.S. 649 (1944); MICKEY, *supra* note 244, at 99.

257. MICKEY, *supra* note 244, at 62–63.

organizing base provides good conditions for implementing lasting reform, but only if community actors are treated as equal partners.

B. Pitfalls of Pattern-or-Practice Litigation

Existing research has discussed many limitations of pattern-or-practice litigation: capacity,[258] cost,[259] lack of resilience to change in administration,[260] among others. This Note focuses on one: the lack of buy-in from community stakeholders.

Community groups may join the DOJ in pattern-or-practice litigation in their cities as intervenors. Under Rule 24 of the Federal Rules of Civil Procedure, there are two kinds of intervenors: intervenors of right and permissive intervenors.[261] Intervenors of right must be allowed to intervene if one of two conditions are true. First, that the prospective intervenor has an unconditional right to intervene provided by a federal statute.[262] Second, that they have a protectable interest related to the litigation, that interest may be harmed by the litigation, and the parties to that litigation do not "adequately represent" the prospective intervenor's interest.[263] The court has discretion to allow an outside nongovernmental party to join litigation as a permissive intervenor if one of two conditions are true. First, that the prospective intervenor has a conditional right to intervene by federal statute.[264] Second, that the prospective intervenor has a claim that has a common question of law or fact to the original claim.[265] Intervenors of right and permissive intervenors may only join if that party's intervention will not "unduly delay or prejudice" the original party's case.[266]

Much ink has been spilled about the phenomenon of "depolicing," a form of "dissent shirking" where police reduce

258. Smith, *supra* note 216, at 68 ("[E]ven a reform-minded administration cannot account for every instance of unconstitutional policing.").

259. Mark Puente & Cid Standifer, *Federal Oversight of Police Has Cost Cleveland Millions. What's Changed?*, MARSHALL PROJECT (Sept. 12, 2022).

260. Smith, *supra* note 216, at 68 ("Still, the statute suffers a number of significant flaws. First, and most damningly, its enforcement depends entirely on whether a presiding administration is sympathetic to police reform."); *see also* Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017).

261. FED. R. CIV. P. 24.

262. *Id.* 24(a)(1).

263. *Id.* 24(a)(2).

264. *Id.* 24(b)(1)(A).

265. *Id.* 24(b)(1)(B).

266. *Id.* 24(c).

performance of their duties in protest of increased oversight.[267] This phenomenon is where police react to oversight or criticism by the public by withholding necessary protection from that public.[268] Depolicing—and the associated increase in violent crime—is thought to be a common phenomenon in the early years of pattern-or-practice litigation.[269] Because of these concerns, the Department of Justice has often avoided challenging provisions in police collective bargaining agreements despite their contribution to police violence.[270] This is a concern for the capacity of the DOJ: the DOJ has limited resources and depends on buy-in by police departments

267. Joshua Chanin & Brittany Sheats, *Depolicing as Dissent Shirking: Examining the Effects of Pattern or Practice Misconduct Reform on Police Behavior*, 20 CRIM. JUST. REV. 1, 3 (2017) ("The logic of depolicing is well recognized in the organizational behavior literature. As a form of dissent shirking, this behavior 'stems directly from an organization member's opposition to some policy. Not working thus serves as silent protest.'").

268. O'Rourke, *supra* note 91, at 1350 ("The phenomenon of 'de-policing' further illustrates how rank-and-file culture can stymie reforms . . . when police are criticized by the public they police, they close ranks and leave that public unprotected. In short, it is democratic supervision that police culture finds particularly intolerable.") (emphasis omitted).

269. Statistical evidence suggests depolicing reactions are present in police departments subject to pattern-or-practice litigation in the immediate years, then decline over time, but this claim is contested. *Compare* Stephen Rushin & Griffin Sims Edwards, *De-Policing*, 102 CORNELL L. REV. 722 (2017), *with* Chanin & Sheats, *supra* note 267. Whether depolicing causes increases in violent crime is a controversial question, and statistical evidence suggests that depolicing is associated with no statistical effect on instances of violent crime. *See* Richard Rosenfeld, *Is De-Policing the Cause of the Spike in Urban Violence? Comment on Cassell*, 33 FED. SENT'G REP. 142, 143 (2020) ("In summary, Professor Cassell has not made a convincing case for de-policing as the primary source of the recent increase in urban violence in the United States."); John A. Shjarback, David C. Pyrooz, Scott E. Wolfe, & Scott H. Decker, *De-Policing and Crime in the Wake of Ferguson: Racialized Changes in the Quantity and Quality of Policing Among Missouri Police Departments*, 50 J. CRIM. JUST. 42, 42 (2017) ("Changes in police behavior had no appreciable effect on total, violent, or property crime rates."); Richard Rosenfeld & Joel Wallman, *Did De-Policing Cause the Increase in Homicide Rates?*, 18 CRIMINOLOGY & PUB. POL. 51 (2019). Whether the phenomenon of depolicing actually occurs or produces these harms is immaterial for purposes of this argument.

270. Stephen Rushin & Allison Garnett, *State Labor Law and Federal Police Reform*, 51 GA. L. REV. 1209, 1224–25 (2017) ("Given the obstacles that certain police union contracts may pose for § 14141 reform efforts, some may wonder—why doesn't the DOJ simply challenge the terms of collective bargaining agreements as contributing to a pattern of unconstitutional misconduct? Why is it that, generally, the DOJ has been reluctant to try and immediately reform the police union contract? . . . . In order to be successful, federal officials need frontline officers to buy in to the reform process."); *see id.* at 1220 ("[B]ringing about constitutional reform in police departments may require not just changes in leadership and enhanced training, but also a renegotiation of internal disciplinary procedures via the collective bargaining process.") (footnotes omitted); Fisk & Richardson, *supra* note 179, at 758 ("[C]ollective bargaining agreements, including seniority systems, union power over conditions of work, and the structure and incentives of police unions can all be barriers to reform.").

to institute reform.[271] But the DOJ does not depend only on police buy-in. The DOJ and the police depend on community buy-in. But there has been astoundingly little discussion of the lack of involvement of community stakeholders, including groups from the protected classes in whose name the DOJ acts.

As Derrick Bell observed of post-*Brown v. Board of Education* school desegregation litigation, political-economy problems limit the democratic representativeness of civil rights representation.[272] The group affected by civil rights litigation is not the group that decides the course of that litigation.[273] Bell adopts a distinction between "clients" and "constituents."[274] Clients are the people on whose behalf civil rights attorneys act, including named plaintiffs in and communities affected by civil rights litigation.[275] Constituents are the people the attorney must answer to for their actions, identifiable by who directly decides the goals of litigation with the attorney.[276] In school desegregation litigation, white people and middle-class Black people were the constituents, while lower-class Black parents and children were "merely clients."[277] Though civil rights attorneys owed ethical obligations to the clients and classes they represented, these obligations necessarily gave way to financial obligations to attorneys' employer organizations (who were themselves beholden to upper-class donors).[278] Therefore, middle- and upper-class donors had the power to steer the goals of

271. Rushin, *supra* note 195, at 1224–25.

272. Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 514 (1976) ("'[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.").

273. *Id.* at 491 ("Edmonds suggests that, more than other professionals, the civil rights attorney labors in a closed setting isolated from most of his clients. No matter how numerous, the attorney's clients cannot become constituents unless they have access to him before or during the legal process.").

274. *Id.* at 490–91.

275. *Id.*

276. *Id.*

277. *Id.*

278. Bell, *supra* note 272, at 504 (citations omitted) ("The *Code* approach . . . is simply the wrong answer to the right question in civil rights offices where basic organizational policies where basic organizational policies such as the goals of school desegregation are often designed by lawyers and then adopted by the board or other leadership group . . . . Admonitions that the lawyer make no important decisions without consulting the client and that the client be fully informed of all relevant considerations are, of course, appropriate. But they are difficult to enforce in the context of complex, long term school desegregation litigation where the original plaintiffs may have left the system and the members of the class whose interests are at stake are numerous, generally uninformed, and, if aware of the issues, divided in their views.").

school desegregation litigation that clients and communities did not.[279] The outcome was, Bell charges, that organizations' donor-driven interests eclipsed the interest of clients.[280]

Bell's solution to inadequacies in civil rights representation is twofold. First, courts ought to vigilantly monitor class action civil rights litigation and step in to make inquiries "on behalf of large classes unable to speak effectively for themselves."[281] Second, courts ought to recognize that inadequate democratic representativeness translates to inadequate legal representation and allow themselves to hear dissident views from community groups with legal representation by granting them intervenor status.[282]

For many of the cities under consent decrees, Washington D.C. is as physically and metaphorically inaccessible as the civil rights organizations described in Bell's work.[283] The Department of Justice has increased space for community groups over time, most promisingly requiring a Community Police Commission in the City of Seattle.[284] While these reforms are laudable, the DOJ has continued to resist community groups' intervention in litigation undertaken in their name.[285] In several cities where DOJ pursued

279. *Id.* at 491 (quoting Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 178 (1974)) ("[A] class action suit serving only those who pay the attorney fee has the effect of permitting the fee paying minority to impose its will on the majority of the class on whose behalf suit is presumably brought."); *id.* at 489–90 ("The lawyers' freedom to pursue their own ideas of right may pose no problems as long as both clients and contributors share a common social outlook. But when the views of some or all of the clients change, a delayed recognition and response by the lawyers is predictable."); *id.* at 500 ("Although a plaintiff could withdraw from the suit at any time, he could not influence the primary goals of the litigation. Except in rare instances, policy decisions were made by the attorneys, often in conjunction with the organizational leadership and without consultation with the client.").

280. *Id.* at 492 ("The position of the established civil rights groups obviates any need to determine whether a continued policy of maximum racial balance conforms with the wishes of even a minority of the class.").

281. *Id.* at 511.

282. *Id.* at 508–09 ("These problems can be avoided if, instead of routinely assuming that school desegregation plaintiffs adequately represent the class, courts will apply carefully the standard tests for determining the validity of class action allegations and the standard procedures for protecting the interests of unnamed class members. Where objecting members of the class seek to intervene, their conflicting interests can be recognized under the provisions of Rule 23(d)(2).").

283. *See* Bell, *supra* note 272, at 513 ("In the closest of lawyer-client relationships this continual reexamination can be difficult; it becomes much harder where much of the representation takes place hundreds of miles from the site of the litigation.").

284. Ayesha Bell Hardaway, *Creating Space for Community Representation in Police Reform Litigation*, 109 GEO. L. J. 523, 539 (2021).

285. *Id.* at 548 ("The presumption that a governmental authority can speak for marginalized communities impacted by police violence promotes paternalistic, hierarchal principles that are antithetical to contemporary notions of democracy.").

pattern-or-practice litigation against a police department, a community organization attempted to intervene under Federal Rules of Civil Procedure 24 to be party to the litigation.[286] Every attempt has been opposed by the DOJ and rejected by the court.[287] The DOJ shoots itself in the foot by doing so—without partners to continue litigation when it lacks the political capital or will, progress is stalled or reversed.

Ayesha Bell Hardaway powerfully and persuasively argues that the problem is that courts are failing to "appropriately consider whether impacted communities are adequately represented in DOJ-initiated police reform litigation" under existing case law.[288] Applying *Trbovich v. United Mine Workers of America*, the standard under Rule 24(a) is that the original parties "may be" inadequate representatives of the prospective intervenor's interests.[289] In police civil rights litigation, the presumption that the government inherently adequately represents prospective intervenors' interests ought to be rebutted because adequate representation requires more than merely shared general interest, the federal government is unlikely to make the arguments of impacted communities, and the federal government has historically neglected the perspectives and experiences of community groups harmed by police.[290] To the extent that the law does not, scholars have argued that the law should change to give community stakeholders a seat at the table in the consent decree process.[291] Sigourney Norman has proposed a "legal mechanism compelling police departments to set a concurrent agreement with stakeholder groups."[292]

C. Promise of Pattern-or-Practice Litigation

Despite the failure of pattern-or-practice litigation to bridge the "grey hole" in police accountability, this is not to say legal

286. *Id.* at 526; Patel, *supra* note 38, at 879.

287. Patel, *supra* note 38, at 879.

288. Hardaway, *supra* note 284, at 531.

289. *Id.* at 568.

290. *Id.* at 569–74.

291. *Id.*

292. Norman, *supra* note 22, at 290 ("The amendment to § 14141 would read: Any department entering a memorandum of agreement or consent decree with the United States government will enter a concurrent agreement with stakeholder groups from its jurisdiction. The stakeholder agreement shall include as plaintiffs both groups representing police and groups representing community civil rights advocates. The stakeholder agreement will remain in effect until the settlement agreement or consent decree closes.").

strategy is not a powerful tool to achieve system change.[293] At critical moments, sleepless movement lawyers have achieved hard-won victories for clients and communities despite the law being stacked against them. While it may seem difficult to imagine with the composition of our courts today, history shows that they once provided leverage to build the political power of the Civil Rights Movement. But movements must be realistic in what they can expect from law and be deliberate in how they use law in broader strategy.

Pattern-or-practice litigation has such promise. Paul Butler observed that pattern-or-practice litigation can create *stronger* protections than would otherwise be afforded under existing law.[294] As Butler observed, while law can create false consciousness by creating impossibly high expectations, it can also defeat false consciousness by demonstrating that people in movement can change the status quo.[295] In the context of pattern-or-practice litigation, Portland demonstrates how movements can use legal coalitions as a vector to build power by moving to intervene in pattern-or-practice litigation and turn them into spaces of meaningful contestation. While pattern-or-practice litigation on its own is not sufficient to end police violence or provide accountability, it is powerful and influential. Although law is not a panacea to police violence, movements can use law as a platform to challenge police violence and should learn from the Albina Ministerial Alliance Coalition's troubles and triumphs in intervening in pattern-or-practice litigation.[296]

Community groups can use their position in the litigation to their advantage. Pattern-or-practice litigation does not have some of the same limitations that block change in other areas. The DOJ process is conciliatory—prioritizing negotiation—and it is integral that community voices demand to be included in highly consequential decision-making regarding their public safety.[297]

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293. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 5 (2008, 2nd ed.).

294. Butler, *supra* note 113, at 119–20 (detailing that the Ferguson consent decree provides stronger protections than United States v. Whren, Atwater v. City of Lago Vista, Pennsylvania v. Mimms, Schneckloth v. Bustamonte, and United States v. Drayton).

295. *Id.* at 123, 127.

296. *See* discussion *infra* Part IV.

297. DEPARTMENT OF JUSTICE, HOW DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION CONDUCTS PATTERN-OR-PRACTICE INVESTIGATIONS, https://www.justice.gov/archives/file/how-pp-investigations-work/dl

Community groups can counter police unions' involvement and work towards ensuring subsequent agreements have real teeth.[298] Perhaps most importantly, community groups in the room can resist the terms and implementation of the litigation becoming another obstacle to abolitionist futures.[299]

Through their legal work, community groups can raise consciousness about police violence. Where litigation succeeds, community groups can show that movement has the power to challenge and change the power of police. Where litigation fails, community groups can show the shortcomings of reform through the highly publicized litigation process. The legal work may also be an end in itself: community groups can unite the broad coalitions precedent to actualizing a truly democratic vision of public safety.

One objection may be that participation in pattern-or-practice litigation may be seen as legitimating police violence. The argument follows that if police violence is illegitimate because of a lack of democratic accountability, then participating in systems that have the power to create accountability will create the democratic smokescreen to contend those policies have consent of the communities they are used against. Sunita Patel responds that "[r]ather than viewing the various methods of police reform as consensus building, legitimizing, or transparency mechanisms . . . community engagement elevates the role of stakeholders and affected individuals through a *contested* process."[300] As shown by the Albina Ministerial Alliance Coalition's work in Portland, community groups can elevate the salience of constituencies and issues that may have been passed over during the DOJ's investigation and negotiation.[301] However, there is a theoretical limit to community groups' participation. By getting involved in pattern-or-practice litigation, community groups can

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[https://perma.cc/TTP7-YA38] ("If an investigation reveals patterns or practices of unlawful policing, the division will seek to work with the department, with input from community stakeholders, to effectively and sustainably remedy any unlawful practices. This usually takes the form of a negotiated agreement that incorporates specific remedies and that becomes a federal court order overseen by an independent monitor.").

298. Hardaway, *supra* note 284, at 577.

299. *See* Mike Carter, *Federal judge to Seattle City Council: Tread Carefully with Efforts to Defund Police or Risk Violating Consent Decree*, SEATTLE TIMES (Feb. 4, 2021), https://www.seattletimes.com/seattle-news/federal-judge-to-seattle-city-council-tread-carefully-with-efforts-to-defund-police-or-risk-violating-consent-decree/ [https://perma.cc/L8Z5-E2WD] (detailing how a federal court obstructed efforts to defund the police in Seattle).

300. Patel, *supra* note 38, at 798 (emphasis in original).

301. *See* discussion *infra* Part IV.

advantage their position to try to reduce police violence, contain police violence, and limit police violence, but they cannot eliminate police violence.

IV. Case Study: Portland

In response to the killing of Aaron Campbell, a Black man experiencing a mental health crisis when grieving the loss of his brother, community groups called for change. System actors responded to community demands by taking the laudable step of requesting the assistance of the DOJ, and the DOJ responded. However, the DOJ made a shocking decision to exclude race from its lawsuit, despite the intersectionality of race and mental health in the killing of Aaron Campbell. In this context, *U.S. v. City of Portland*, where the district court decided whether community groups could intervene in the process, became a critical inflection point. If the community groups were entitled to a seat at the table, they would be able to make the DOJ respond to their demands or provide a good reason why they hadn't and secure their gains against the police union. Instead, the Court granted the community groups only "enhanced *amicus*" status.[302]

The outcome of the DOJ litigation in Portland was a settlement that provided for some concessions to community groups, such as community involvement in police oversight. This was a step in the right direction. But these reforms failed to live up to their potential. Violence by the Portland Police Bureau continued and escalated in the police violence against nonviolent demonstrations in 2020. Portland is still under court oversight and enforcement of the settlement.[303] This case study aspires to be a "history from the bottom up" of the Portland police reform litigation process.[304] It does so by centering the activism in community groups in spurring the DOJ to take action against Portland Police and how those same groups formed a coalition to participate in the litigation process. Despite the DOJ resisting if not blocking community demands, this coalition used the DOJ litigation as a powerful platform for increasing the salience of community demands.

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302. *See* discussion *infra* Part IV.D.

303. *See* Courtney Vaughn, *Portland Settles Lawsuit With Journalists, Legal Observers Targeted By Police During Protests*, PORTLAND MERCURY (Mar. 5, 2025), https://www.portlandmercury.com/news/2025/03/05/47675016/portland-settles-lawsuit-with-journalists-legal-observers-targeted-by-police-during-protests [https://perma.cc/E3G8-VRHP] ("The DOJ found PPB ran afoul of a longstanding consent decree it has with the federal government.").

304. *See* STAUGHTON LYND, DOING HISTORY FROM THE BOTTOM UP xi–xvii (2014).

A. Existing Systems Failed to Provide Accountability for the Killing of Aaron Campbell by Portland Police.

On January 29, 2010, Portland Police responded to a call that a man named Aaron Campbell was experiencing a mental health crisis.[305] He was despondent over the death of his brother that same morning and was threatening suicide.[306] During constructive dialogue with Officer James Quackenbush, Campbell "specifically and emphatically said he was not going to hurt himself or anyone else."[307] Campbell left his apartment and approached police outside with his hands on the back of his head.[308] Officer Ryan Lewton told him to "do exactly as we say, or you will be shot."[309] Lewton commanded Campbell to put his hands straight up in the air, but Campbell kept his hands behind his head.[310] Lewton fired a beanbag round at Campbell's lower back.[311] Campbell began to run back to his apartment. Lewton fired six more beanbag rounds.[312] Officer Ron Frashour fired a round from an AR-15, striking Campbell in the back.[313] Frashour had a history of excessive force

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305. *Aaron Campbell: Officer-Involved Shooting Summary,* PORTLAND.GOV, https://www.portland.gov/police/open-data/aaron-campbell [https://perma.cc/7D5P-QQSY].

306. Maxine Bernstein, *Portland Police Told Aaron Campbell's Mother That Her Son Committed Suicide Though Police Shot Him, Court Records Say*, THE OREGONIAN (Mar. 18, 2011), https://www.oregonlive.com/portland/2011/03/portland_police_told_mother_of.html [https://perma.cc/YLG8-HDZX].

307. Letter from Grand Jury 1 Session 1 2010 to Michael D. Schrunk, Dist. Att., Portland, Or. (Feb. 10, 2010) (on file with The Oregonian).

308. *Aaron Campbell: Officer-Involved Shooting Summary*, *supra* note 305.

309. Portland Police Bureau, Taped Statement Transcription: Officer Ryan Lewton, Case No. 10-8352, at 20 (Jan. 29, 2010) [hereinafter Lewton Transcript] (on file with the City of Portland). The transcript details the exchange further:

> Kammerer: Okay.
>
> Lewton: I tell him, "stop", and he stops, right about here. And I said, "walk backwards, slowly". So, he starts walking backwards slowly, to about right here. And I tell him to "stop". I said, I told him, "do exactly as we say, or you will be shot".

Id.

310. *Id.* at 21 ("Lewton: But, I told him again, 'put your hands straight up in the air'. Um, and he didn't do that. He did not put his hands straight up in the air. He just stood there with his hands behind his head. Okay. So, I shot him with the bean bag gun. I-I-I fired a round at him, I-I-um, I uh, my first round, um, um, hit in the, hit in the rearend.").

311. *Id.*

312. *Id.* at 23. ("Kammerer: Okay. So, uh, how many rounds in total did you fire at him? Lewton: Six.").

313. Portland Police Bureau, Taped Statement Transcription: Officer Craig Andersen, Case No. 10-8352, at 10 (Jan. 29, 2010) [hereinafter Andersen transcript]

against civilians.[314] Campbell fell forward and did not receive medical care for a half hour.[315] He was left on wet pavement, and when officers approached to administer aid, they handcuffed his hands behind his back.[316] By that point, Aaron Campbell had died. He was twenty-five years old.

Administrative paths for accountability failed.[317] Frashour claimed he thought Campbell was reaching for a gun and running for cover to fire at police.[318] In fact, Campbell was unarmed and posed no threat to police.[319] In November 2010, Portland Police Chief Reese terminated Frashour's employment and disciplined other officers.[320] The Portland Police Association—the police union—filed a grievance challenging the firing, and an arbitrator ordered the city to rehire Frashour.[321] The city refused to comply with the order.[322] The Portland Police Association then went to the Oregon state Employment Relations Board, which ordered the city

(on file with the City of Portland) ("Foulke: Okay. How, how quickly after the, the, the shot was fired did SERT arrive? Any, any idea? Andersen: I have no idea. I, I would guess a half an hour maybe.").

314. Brief for the Albina Ministerial Coalition Alliance for Justice and Police Reform as Amicus Curiae in the public interest, Portland Police Association v. City of Portland (June 8, 2012) (No. UP-023-12) [hereinafter AMA Amicus Brief 2012].

315. James Pitikin, *"We're Better Than All This" And Nine Other Things We've Learned in the Past Week About the Fatal Police Shooting of Aaron Campbell* (Feb. 23, 2010), https://www.wweek.com/portland/article-11686-were-better-than-all-this.html [https://perma.cc/RF8J-UBBG].

316. Lisa Loving, *Slim Chance for Civil Rights Remedy in Campbell Case*, THE SKANNER (Feb. 25, 2010), https://www.theskanner.com/news/17-news/northwest/6697-slim-chance-for-civil-rights-remedy-in-campbell-case-2010-02-25 [https://perma.cc/28MZ-6BC3].

317. KGW Staff, *$1.2M Settlement in Campbell Police Shooting*, KGW 8 (Feb. 2, 2012), https://www.kgw.com/article/news/12m-settlement-in-campbell-police-shooting/283-414042077 [https://perma.cc/RR7H-E4AS].

318. Portland Police Chief Mike Reese later testified that Campbell posed no immediate threat to police. Maxine Bernstein, *Aaron Campbell Wasn't an Immediate Threat, Portland Police Chief Testified, so Officer Ron Frashour Didn't Have a Right to Shoot Him*, THE OREGONIAN (June 13, 2012), https://www.oregonlive.com/portland/2012/06/aaron_campbell_wasnt_an_immedi.html [https://perma.cc/XBG6-E9JQ].

319. *Id.*

320. Press Release, Portland Police Bureau, Statement from Chief Michael Reese on the Death of Aaron Campbell (Nov. 16, 2010) (on file with OregonArchive).

321. Maxine Bernstein, *Arbitrator Orders Portland Reinstate Ronald Frashour as an Officer, With Lost Wages*, THE OREGONIAN (Mar. 30, 2012), https://www.oregonlive.com/portland/2012/03/arbitrator_orders_portland_rei.html [https://perma.cc/844R-2EWT].

322. Maxine Bernstein, *Portland Mayor Won't Honor Arbitrator's Ruling to Reinstate Ronald Frashour as a PPB Officer*, THE OREGONIAN (Apr. 12, 2012), https://www.oregonlive.com/portland/2012/04/portland_mayor_wont_honor_arbi.html [https://perma.cc/Q4C8-JKXJ].

to comply.[323] The union won again at the Oregon Court of Appeals.[324] Fashour returned to work in 2016.[325]

In February 2010, a grand jury declined to indict Frashour, though the jury members released a spirited letter declaring "[n]o one person is responsible for this tragedy, and the errors of many people in the PPB need to be identified and addressed" and that "Portland deserves better. Aaron Campbell deserved better."[326] Aaron Campbell's death was a "[t]urning point for Portland Police accountability."[327]

B. Community Groups Demand Accountability for the Killing of Aaron Campbell.

Community groups' reaction to the grand jury's refusal to hold Officer Frashour accountable was the impetus for the subsequent DOJ litigation.[328] These community groups provided a strong political base for DOJ action, and DOJ had the mandate and the authority to correct for the failures of existing systems. These groups became critical actors in the community response and prospective intervenors in the legal proceedings against the violence of the Portland Police Bureau:

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323. Maxine Bernstein, *State Employment Board Orders City of Portland to Reinstate Ron Frashour*, THE OREGONIAN (Sept. 24, 2012), https://www.oregonlive.com/portland/2012/09/state_employment_board_orders.html [https://perma.cc/T5C3-XZFA].

324. Everton Bailey Jr., *Portland Must Rehire Cop Fired After Killing Unarmed Man in 2010, Court Rules*, THE OREGONIAN (Dec. 30, 2015), https://www.oregonlive.com/portland/2015/12/portland_must_rehire_cop_fired.html [https://perma.cc/84VX-8YTZ].

325. *Aaron Campbell: Officer-Involved Shooting Summary*, *supra* note 305.

326. Letter from Grand Jury, *supra* note 312, at 3.

327. PORTLAND OCCUPIER, *Aaron Campbell's Death: Six Years on from the Turning Point for Portland Police Accountability* (Feb. 3, 2016), https://www.portlandoccupier.org/2016/02/03/aaron-campbells-death-six-years-on-from-the-turning-point-for-portland-police-accountability/ [https://perma.cc/NU8Q-QM7Z]; *see also* Steve Duin, *Portland Police Training Leaves Many of Us Fuming After Shooting Death*, THE OREGONIAN (Feb. 3, 2010), https://www.oregonlive.com/news/oregonian/steve_duin/2010/02/portland_police_training_leave.html [https://perma.cc/D9XK-HFEG]; *"Basically, we shot an unarmed black guy running away from us": Aaron Campbell Killed in Third Avoidable Sniper Shooting in Five Years*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (2010) [hereinafter Portland Copwatch, Aaron Campbell Killed], https://www.portlandcopwatch.org/ppr50web.pdf [https://perma.cc/SQP6-J6MS].

328. Portland Copwatch, Aaron Campbell Killed, *supra* note 327 ("The community response was quick and clear: Aaron Campbell's death was unacceptable, and those responsible need to be held accountable. A series of news conferences, marches and rallies, including a gathering of over 1200 people headlined by Rev. Jesse Jackson on February 16, continued to put pressure on the City's elected leadership and the Police Bureau.").

- **Albina Ministerial Alliance Coalition on Justice and Police Reform (AMA Coalition):** This organization has its roots in the Albina Ministerial Alliance, a coalition of 125 churches with predominantly Black congregations founded in 1964 to provide a voice and social services to people of color in Northeast Portland.[329] Historically, the Albina neighborhood was the center of the Black community where police operated as colonial agents harassing residents rather than providing protection.[330] In 2003, in response to the killing of Kendra James by Portland police, the AMA Coalition rallied a number of community groups to coalesce into the Coalition on Justice and Police Reform.[331] The AMA Coalition led protests in response to police violence and the police killings of Kendra James, James Jahar Perez, and James Chasse.[332] The AMA Coalition developed a set of five demands for police accountability and follows three principles, including non-violent direct action.[333] During the

329. Rich Mealey, *Albina Ministerial Alliance (CA. 1964–*), BLACKPAST (Apr. 8, 2012), https://www.blackpast.org/african-american-history/albina-ministerial-alliance-ca-1964/ [https://perma.cc/WP7W-E9GU].

330. Leanne Claire Serbulo & Karen J. Gibson, *Black and Blue: Police-Community Relations in Portland's Albina District, 1964–1985*, 114 OR. HIST. Q. 6, 7–8 (2013) (footnotes omitted) ("In the Albina neighborhood, citizen harassment and social control were higher Police Bureau priorities than public safety. At that time, African Americans comprised more than 60 percent of some Albina District neighborhoods, yet they made up just 1 percent of Portland's 720 police officers . . . . Patterns of residential segregation and racial isolation led many residents in Albina and similar inner-city neighborhoods across the country to view their communities as internal colonies, dependent on outsiders for political and economic resources and subject to the authority of white-dominated institutions such as the school district, police, and welfare bureaucracy. After an uprising in the summer of 1967, youth worker Frank Fair spoke of a 'new awareness' among Albina youth: 'They come to realize that if Albina is going to be categorized as a colony, something separate and foreign from the city, they'll have to deal with their problems on those terms.').

331. *See* Mealey, *supra* note 329.

332. *Community Calls for Justice in Aaron Campbell Shooting*, OREGON MENTAL HEALTH ARCHIVE (Feb. 9, 2010), https://www.oregonarchive.org/community-calls-for-justice-in-aaron-campbell-shooting/ [https://perma.cc/5MZF-7CKX].

333. *AMA Community Demands 2010*, ALBINA MINISTERIAL ALL. (AMA) COALITION FOR JUST. & POLICE REFORM (Sept. 2012), https://albinaministerialcoalition.org/amademands2010.html [https://perma.cc/SR6Y-HAKY]. The AMA Coalition for Justice and Police Reform is working toward these five goals:

> 1. A federal investigation by the Justice Department to include criminal and civil rights violations, as well as a federal audit of patterns and practices of the Portland Police Bureau.
>
> 2. Strengthening the Independent Police Review Division and the Citizen Review Committee with the goal of adding power to compel testimony.

DOJ litigation, the AMA Coalition developed a set of 37 community demands.[334]

- **Portland Chapter of the National Lawyers' Guild:** This organization is the local chapter of the National Lawyers Guild, founded in 1937 in opposition to the anti-New Deal stances by American Bar Association and the ascendance of fascism.[335] The National Lawyers Guild was the first integrated bar association and is currently the nation's largest progressive legal organization.[336] In conjunction with the Albina Ministerial Alliance Coalition on Justice and Police Reform, this organization advocated for an elected, independent civilian oversight board for the police.[337]
- **Disability Rights Oregon (DRO):** This organization is the federally mandated system for protection and advocacy of people with disabilities. Disability Rights Oregon is authorized to "investigate incidents of abuse, neglect, and rights violations and pursue administrative, legal and other

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3. A full review of the Bureau's excessive force and deadly force policies and training with diverse citizen participation for the purpose of making recommendations to change policies and training.

4. The Oregon State Legislature narrowing the language of the State statute for deadly force used by police officers.

5. Establishing a special prosecutor for police excessive force and deadly force cases.

Id. The AMA Coalition follows three principles: "Embrace the five goals[,] [a]ccept the principles of non-violent direct action as enunciated by Dr. Martin Luther King, Jr., [and] [w]ork as a team in concert to achieve the goals." *Id*.

334. *Portland Police Shoot, Kill Third Person in Mental Health Crisis in 2010: Keaton Otis' Death Follows Racial Profiling; Office Injury; Campbell and Collins Justice Efforts Continue*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (Sept. 2010), https://www.portlandcopwatch.org/PPR51/shootingsportland51.html [https://perma.cc/5ZHF-XJJU]; AMA Amicus Brief 2012, *supra* note 314.

335. NATIONAL LAWYERS GUILD FOUNDATION, A HISTORY OF THE NATIONAL LAWYERS GUILD 1937–1987, at 10 https://www.nlg.org/wp-content/uploads/2017/06/A-History-of-the-NLG-1937-1987.pdf [https://perma.cc/VC2F-879Q] ("The National Lawyers Guild aims to unite the lawyers of America in a professional organization which shall function as an effective social force in the service of the people to the end that human rights shall be regarded as more sacred then property interests.").

336. *About*, NAT'L LAWS. GUILD, https://www.nlg.org/about/ [https://perma.cc/E82P-2P94].

337. JoAnn Bowman, *Loss of Trust in Police Threatens the Safety of Officers and Citizens*, THE OREGONIAN, (Feb. 20, 2010), https://www.oregonlive.com/opinion/2010/02/loss_of_trust_in_police_threat.html [https://perma.cc/E76X-YHVA].

appropriate remedies to ensure the protection of people with disabilities."[338]

- **The Mental Health Alliance:** Formed in 2018, this organization consolidated multiple other organizations, including Disability Rights Oregon, Mental Health Association of Portland, the Portland Interfaith Clergy Resistance, and the Oregon Justice Resource Center.[339] The purpose of this organization was to join *United States v. City of Portland* as *amicus*.[340]
- **Oregon Action:** In 2006, this organization called for annual data on the racial characteristics of police encounters.[341] In 2011, they were training hundreds of community members on how to protect themselves in police interactions.[342]
- **Portland Copwatch (PCW):** The practice of "copwatching" emerged in the 1960s.[343] The Black Panthers and other civil rights organizations organized patrols of city streets, monitoring police activity with cameras and notepads.[344] Copwatching groups exploded over the past two decades and include activity such as uniformed patrols watching and recording police, court-watching, leading "Know Your Rights" trainings, and sometimes participating in political advocacy.[345] Portland Copwatch formed in 1992 in response to the killing of a 12-year-old boy by Portland Police and the Rodney King verdict that same year.[346] Since 1992, Portland Copwatch has maintained a report line for reports and complaints of "police misconduct, harassment, and/or brutality."[347] Portland Copwatch conducted foot patrols, or "beats" from 1995 to 1996, and continues to hold "Your Rights and the Police" seminars with volunteer

338. Complaint at 6, Wolfe v. Portland, 566 F. Supp. 3d 1069, (D. Or. Nov. 1, 2020) (No. 3:20-cv-01882-BR).

339. *Mental Health Alliance*, THE MENTAL HEALTH ALL., https://www.mentalhealthalliance.org/ [https://perma.cc/Z8CQ-PDSP].

340. *Id.*

341. Bowman, *supra* note 337.

342. *Id.*

343. Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 408–09 (2016).

344. *Id.*

345. *Id.* at 409–12, 423–24.

346. *About Portland Copwatch: Who is Portland Copwatch?*, PORTLAND COPWATCH, https://www.portlandcopwatch.org/whois.html [https://perma.cc/MA4V-T4GZ].

347. *Id.*

lawyers.[348] Since December 1993, Portland Copwatch has published a triannual circular called "The People's Police Report," which chronicled police violence, community actions, changes in the law, "Your Rights and the Police" cards, and critical reprints of the Police Union newsletter, "The Rap Sheet."[349] Portland Copwatch has been critical of the collective bargaining agreement with the Portland Police Bureau.[350]

The AMA Coalition called for a federal "pattern or practice" investigation into the Portland Police Bureau.[351] On February 11, 2010, the AMA Coalition on Justice and Police Reform organized a protest on the steps of the Justice Center in Portland.[352] On February 15, the editorial board of *The Skanner News* published an editorial warning readers from calling police and denouncing the militarized tools used against Aaron Campbell.[353] On February 16, Reverend Jesse Jackson, Jr. spoke to a standing-room only crowd of 1,200 people, decrying the killing of Aaron Campbell as "beneath the dignity of man . . . beneath the dignity of Oregonians . . . beneath the dignity of the citizens of Portland" and

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348. *Id.*

349. *The People's Police Report*, PORTLAND COPWATCH, https://www.portlandcopwatch.org/PPR.html [https://perma.cc/C63H-73FQ].

350. *Police Review Board to Get Some Teeth--Nine Years Later*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (May 2010), https://www.portlandcopwatch.org/PPR50/iprreforms50.html [https://perma.cc/Q6CY-WKZY] ("Regarding the 'union' contract, PCW believes all workers have the right to collectively bargain for their wages, benefits, and safe working conditions. However, it is not appropriate for the PPA contract to direct public policy--dictating who will investigate alleged misconduct, and in particular, deadly force cases.").

351. *Department of Justice Investigates Portland Police Use of Force*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (Sept. 2011), https://www.portlandcopwatch.org/PPR54/DOJ54.html [https://perma.cc/2ZLQ-MJ6L].

352. *Community Calls for Justice in Aaron Campbell Shooting*, *supra* note 332.

353. Bernie Foster, *Having an Emergency? Don't Call the Police*, THE SKANNER (Feb. 15, 2010), https://www.theskanner.com/opinion/commentary/6652-having-an-emergency-dont-call-the-police-2010-02-15 [https://perma.cc/D6LA-PMKE] ("The fact is, we at *The Skanner News* simply have to warn our readers away from calling the police when they are in a crisis situation. We cannot have faith that innocents won't get caught in the firing line when trigger-finger officers arrive in force. We need to start solving our own problems.") ("Each and every city leader should be aware of the special brand of fear – and repulsion – inspired by the use of police dogs against unarmed African Americans in this country. The tools Bull Connor used to beat down Civil Rights marchers, the weapons used by enslavers against those who would have escaped from bondage, police dogs have no place on the scene of a 'welfare check' on a suicidally-despondent Black man.").

calling for "a redemptive moment."[354] On February 17, protestors marched into City Hall.[355] The people, including the mother of Aaron Campbell, Marva Davis, confronted Mayor Sam Adams face-to-face.[356] On February 17, a special meeting of the Citizen Review Committee, a city police oversight board, heard the excessive force case of Frank Waterhouse, who had been tased by Ron Frashour.[357] On February 19, a group marched to Portland State University and confronted Attorney General John Kroger.[358] Though Kroger denounced the police and acknowledged the power of the community response, the crowd was angered that Kroger's Civil Rights Division did not have statutory jurisdiction to take legal action against the Campbell killing.[359] On February 20, JoAnn Bowman, executive director of Oregon Action, called for many systemic changes including revising the Police Bureau's union contract.[360]

C. The Department of Justice Responds to Community Demands and Investigates the Portland Police

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354. Helen Jung, *Jesse Jackson Says Shooting of Aaron Campbell Was an 'Execution'*, THE OREGONIAN (Feb. 17, 2010), https://www.oregonlive.com/news/2010/02/portland_commissioner_dan_salt.html [https://perma.cc/5G69-ZYNM]; *Rev. Jesse Jackson Coming to PDX in Light of Latest Police Shooting*, STREET ROOTS (Feb. 14, 2010), https://www.streetroots.org/news/2010/02/14/rev-jesse-jackson-coming-pdx-light-latest-police-shooting [https://perma.cc/7JZ3-N678]; *see also*; Bowman, *supra* note 337.

355. Bowman, *supra* note 337.

356. Portland Copwatch, Aaron Campbell Killed, *supra* note 327; Jim Lockhart, *Outraged Citizens Storm Portland City Hall*, YOUTUBE (Feb. 18, 2010), https://www.youtube.com/watch?v=r2IfRQNlQZA [https://perma.cc/TVF8-3KWH].

357. *Citizen Review Committee Holds 3 Hearings, Finds Excessive Force Against Shooter Cop Conducts Community Forum Despite "Pushback," Advocates for Stronger Independent Review*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (May 2010), https://www.portlandcopwatch.org/PPR50/ipr50.html [https://perma.cc/43WX-S8SZ].

358. Portland Copwatch, Aaron Campbell Killed, *supra* note 327; Maxine Bernstein, *Aaron Campbell Protesters Want New Laws on Police Use of Deadly F xorce*, THE OREGONIAN (Feb. 24, 2010), https://www.oregonlive.com/portland/2010/02/campbell_protesters_press_legi.html [https://perma.cc/RN2A-EFLB].

359. Loving, *supra* note 316 (citing "longtime community organizer" Kathleen Sadat, who said, "The police are protected by the union and by the bureaucracy — and that leaves us at the whim of the man with the gun").

360. Bowman, *supra* note 337, ("Revise the Police Bureau's union contract, which expires June 30, to require mandatory and immediate drug testing for all officers involved in use-of-force incidents; annual evaluations of police officers; tracking and documentation of all disciplinary activities, including verbal and written reprimands and suspensions, and reporting them in reviews for promotions and/or reassignments; and reporting annually to the public.").

Bureau but Does Not Go Far Enough

In response to community demands, Portland City Commissioner Dan Saltzman submitted a letter to Senator Ron Wyden asking him to request Attorney General Eric Holder to conduct a review of the killing of Aaron Campbell and the Portland Police.[361] Senator Wyden and Congressmember Earl Blumenauer submitted a letter calling on the Department of Justice to investigate the killing of Aaron Campbell—though he is not mentioned by name—"and, if any errors were made, recommend necessary changes."[362] At the press conference where this letter was announced, community groups used it as a platform to speak truth to power.[363]

In its investigation, the DOJ seemed to make a good effort to include community groups. The DOJ attended a forum run by the Albina Ministerial Alliance Coalition for Justice and Police Reform, where the parents of Keaton Otis, Fred Bryant, Kendra James, and Deontae Keller and members of Occupy Portland testified about the brutality of the Portland Police.[364] The DOJ organized a second

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361. Dan Saltzman, Letter to Senator Ron Wyden, MENTAL HEALTH PORTLAND (Feb. 19, 2010), https://www.mentalhealthportland.org/wp-content/uploads/2014/07/Saltzman-Wyden-letter.pdf [https://perma.cc/M8FH-PRJR].

362. Ron Wyden & Earl Blumenauer, *Letter to Attorney General Eric Holder*, MENTAL HEALTH PORTLAND (Feb. 19, 2010), https://www.mentalhealthportland.org/wp-content/uploads/2014/07/Campbell-Holder-021910.pdf [https://perma.cc/MF8D-C78X].

363. Matt Davis, *Campbell Shooting: Adams, Saltzman Call for Civil Rights Probe*, PORTLAND MERCURY (Feb. 19, 2010), https://www.portlandmercury.com/news/2010/02/19/2212341/campbell-shooting-adams-saltzman-call-for-civil-rights-probe [https://perma.cc/GXL5-4DK2] ("Jim Redden at the Portland Tribune: 'Do you agree with these people that Portland Police have repeatedly violated the civil rights of Portlanders?' he asked. 'I can't say I agree,' responded Saltzman. 'I guess I'd say I don't know.'").

364. Portland Copwatch, *Forums Bring Portland Misconduct Tales to the Department of Justice*, PEOPLE'S POLICE REPORT (May 2012), https://www.portlandcopwatch.org/PPR56/doj56.html [https://perma.cc/7WVN-QLMJ]. On October 6, 2011, Occupy Portland took over a park in downtown Portland. The occupation continued until November 13. Ken Boddie, *Where We Live: Occupy Portland 'Still Ripples'*, KOIN6 (Oct. 16, 2017), https://www.koin.com/news/where-we-live-occupy-portland-still-ripples/ [https://perma.cc/V4T4-RW5U]. The 5,000 people present in the camp were violently evicted by "hundreds of militarized riot police armed with tasers, stun batons, tear gas, pepper spray, and live ammunition." THE OREGONIAN, *Occupy Portland: Eviction*, YOUTUBE (Nov. 12, 2015), 0:40–0:55, https://www.youtube.com/watch?v=TS8uJ8QJEOY (last visited Apr. 23, 2025). The scandal over the eviction forced Police Chief Mike Reese to drop out of the race for mayor. Maxine Bernstein, *Portland Police Chief Mike Reese Misled With Claim that Occupy Kept Officers Too Busy to Answer a Call*, THE OREGONIAN (Nov. 19, 2011),

forum, where a Public Defender named Chris O'Connor testified that many of his clients have been injured by police.[365]

i. The DOJ's Findings and Proposed Settlement Excluded Race Despite Having Data to Suggest Unconstitutional Practices Affecting Minority Communities

On June 7, 2011, the DOJ announced it would not criminally prosecute the officers who killed Aaron Campbell.[366] On June 8, the DOJ announced they were opening a "pattern or practice" investigation into the Portland Police Bureau.[367] On September 12, 2012, the DOJ released its findings that "PBB engages in a pattern or practice of unnecessary or unreasonable force during interactions with people who have or are perceived to have mental illness."[368] The Department of Justice found that Portland Police inappropriately used excessive force or deadly force against people having mental health crises.[369] There was systematically inadequate investigation by supervisors and an ineffective internal review process for use of force and complaints.[370] The civilian review organizations, the Police Review Board and the Citizen Review

https://www.oregonlive.com/portland/2011/11/the_portland_police_delayed_re.html [https://perma.cc/2RZQ-5W69]; Maxine Bernstein, *Portland Police Chief Mike Reese Says He Won't Run for Mayor*, THE OREGONIAN (Nov. 21, 2011), https://www.oregonlive.com/portland/2011/11/portland_chief_mike_reese_says_1.html [https://perma.cc/PRV6-E4PT].

365. Portland Copwatch, Aaron Campbell Killed, *supra* note 327.

366. Maxine Bernstein, *Feds Won't Prosecute Portland Police in Fatal Shooting of Aaron Campbell; Further Inquiry Possible*, THE OREGONIAN (June 7, 2011), https://www.oregonlive.com/portland/2011/06/federal_justice_department_won.html [https://perma.cc/2NDM-TUQG].

367. Press Release, U.S. DEP'T JUST., *Justice Department Opens Investigation into the Portland, Oregon, Police Bureau* (June 8, 2011) (on file with U.S. Department of Justice).

368. Letter from Thomas E. Perez, Assistant Att'y Gen. & Amanda Marshall, U.S. Attorney, District of Oregon, to Mayor Sam Adams, at 1 (Sept. 12, 2012) (on file with U.S. Department of Justice), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf [https://perma.cc/9YNY-2KJ3].

369. *Id.* at 12 ("We found that PPB officers often do not adequately consider a person's mental state before using force and that there is instead a pattern of responding inappropriately to persons in mental health crisis, resulting in a practice of excessive use of force, including deadly force, against them.").

370. *Id.* at 23–24; *id.* at 27 ("Like the complaint process, the force review interactions with the complaint system are so byzantine as to undercut the efficacy of the system. In this case, PPB's own force review chart speaks volumes about this problem."); *id.* at 28–30.

Committee, were flawed.[371] The DOJ provided extensive remedial measures directed at bringing use of force practices and review mechanisms into compliance with the Constitution.[372] The same day, the DOJ and the City announced a preliminary agreement.[373]

The DOJ acknowledged that "Mayor Adams made clear that one of his reasons to call for our investigation of PPB was PPB's relationships with communities of color."[374] Based on an analysis of data provided to it by the AMA Coalition, "12-24% of PPB's traffic and pedestrian stops are of African Americans" while "only 6.4% of the City's overall [population] is African American" which the DOJ concluded "indicated that PPB disproportionately stops African Americans."[375] The DOJ also found that Portland Police "tend to

371. *Id.* at 32–33 (finding that the Police Review Board was not comprehensive and resulted in delays); *id.* at 33–34 (finding that the Citizen Review Committee applied the wrong standard in its appellate review of complaint dispositions).

372. *Id.* at 40–41.

373. *Press Release: Justice Department and the City of Portland, Ore., Reach Preliminary Agreement on Reforms Regarding Portland Police Bureau's Use of Force Against Persons with Mental Illness*, U.S. DEP'T OF JUST. (Sept. 13, 2012), https://www.justice.gov/archives/opa/pr/justice-department-and-city-portland-ore-reach-preliminary-agreement-reforms-regarding [https://perma.cc/F2RV-DGRX]. The prelimary agreement states:

> DOJ and the City of Portland have preliminarily reached an agreement that will address the following:
>
> - Use of force policies to ensure that officers have necessary guidance when encountering someone with mental illness or perceived to have mental illness. In particular, the City will enhance its policy guidance on the use of ECW and techniques to de-escalate encounters arising from non-criminally related well-being checks and arrests for low level offenses;
> - Increase capacity for crisis intervention with specially-trained officers and civilians;
> - Enhance the early warning system to identify gaps in policy, training and supervision;
> - Expedite the investigations of complaints of misconduct while preserving the thoroughness and quality of investigations and community participation; and
> - Create a body to ensure increased community oversight of reforms.

374. Letter from Thomas E. Perez, *supra* note 368, at 38. The DOJ's decision to exclude race from the scope of their investigation is baffling. This is demonstrated by the sickening comments of Scott Westerman, the head of the Portland Police Association—the police union—who callously described the killing of Aaron Campbell: "Basically, we shot an unarmed [B]lack guy running away from us." Steve Duin, *Portland Police Training Leaves Many of Us Fuming After Shooting Death*, THE OREGONIAN (Feb. 3, 2010), https://www.oregonlive.com/news/oregonian/steve_duin/2010/02/portland_police_training_leave.html [https://perma.cc/YX7M-EVYJ]; Portland Copwatch, Aaron Campbell Killed, *supra* note 327. The racialization of the killing of Mr. Campbell was recognized by the head of the police union but not by the DOJ. Future research is necessary to determine what caused this puzzling strategic decision.

375. *Id.*

blend the distinction between initiating a 'mere conversation' and a *Terry* stop," making no further conclusions but providing a stern reprimand about the requirements of the Fourth Amendment and requiring data collection on escalation of police interactions with civilians.[376] Despite all these shocking findings, the DOJ decided that "whether PBB engages in pattern or practice of bias-based policing" was outside the scope of their investigation.[377] The DOJ recommended "that PPB provide a broader and more frequent opportunity to listen and respond to the community's concerns."[378]

Based on these findings, the DOJ filed a complaint on December 17, 2012, alleging violations of the Fourth and Fourteenth Amendments by the Portland Police Bureau.[379] The complaint focuses on violations against people with mental illness, making no mention of violation of the rights of people of color or people with other kinds of disabilities.[380] The DOJ had the cooperation of the city, and the parties jointly filed a motion to conditionally dismiss based on a proposed settlement agreement.[381]

ii. Because the DOJ Excluded Race from their Findings and Proposed Settlement, Community Groups Moved to Intervene

Community groups were frustrated that the complaint failed to address racially discriminatory police practices.[382] On January 8, 2013, the Albina Ministerial Alliance Coalition for Justice and Police Reform filed for intervenor status as of right or permissive intervenor status in the alternative.[383] The motion criticized the DOJ because it "specifically declined to make a finding of a pattern or practice regarding PPB's interaction with people of color."[384] The motion further criticized the DOJ for leaving the AMA Coalition out of the negotiation of the settlement agreement when the AMA

376. Letter from Thomas E. Perez, *supra* note 368, at 40; *id.* at 41.

377. *Id.* at 38.

378. *Id.* at 39.

379. Complaint at 6, United States v. City of Portland, (Dec. 17, 2012) (No. 3:12-cv-02265-SI).

380. *Id.*

381. Memorandum in Support of Joint Motion to Enter Settlement Agreement and Conditional Dismissal of Action, U.S. v. City of Portland, (Dec. 17, 2012) (No. 3:12-cv-02265-SI).

382. Patel, *supra* note 38, at 840.

383. Opinion and Order at 3, U.S. v. City of Portland and Portland Police Bureau, (Feb. 19, 2013) (No. 3:12-cv-02265-SI) (granting in part and deferring in part motions to intervene by the Portland Police Association and by the Albina Ministerial Alliance Coalition for Justice and Police Reform).

384. *Id.* at 4.

Coalition provided the DOJ with crucial data.[385] The AMA Coalition argued they should be granted status as intervenor of right because of its long history of advocacy related to police reform and it lacks other effective means to "protect its interest in protecting its members from unlawful police practices" because of democratic failures in other attempts at reform.[386] The AMA Coalition alleged that the government would fail to adequately represent their interest based on what it had already done: refused to address use of force disparities based on race and rejected the AMA Coalition's recommendations without explanation.[387] The AMA Coalition provided concrete concerns with inadequacies in the remedies proposed by the DOJ.[388]

On December 18, 2012, the Portland Police Association also moved to intervene as an intervenor of right or as a permissive intervenor in the alternative.[389] The Portland Police Association argued the settlement agreement affected their rights to collectively bargain with the City.[390] The Portland Police Association alleged that they should be granted intervenor of right status "even if the conflict between the collective bargaining agreement and the Settlement Agreement is merely hypothetical."[391] The Portland Police Association further alleged that the DOJ would not adequately represent their interests because the government acts as an employer.[392]

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385. *Id.* at 4–7.

386. *Id.* at 10–12.

387. *Id.* at 13–15.

388. *See* Press Release, Albina Ministerial Alliance Coalition on Justice and Police Reform, Announcement of Collaborative Agreement (Jul. 18, 2013) [hereinafter Press Release, Albina Ministerial Alliance], https://www.mentalhealthportland.org/wp-content/uploads/2014/07/186170-City-Albina-Ministerial-Allianceelated-to-police-interactions-with-people-experiencing-mental-illness-testimony.pdf [https://perma.cc/6FE4-CG8B] ("The AMA Coalition, however, maintains the concerns raised in its initial comments on the proposed Settlement Agreement, as outlined in its motion to intervene. These concerns include deficiencies in: the PPB's use of force and less lethal policies; community input into police training; the Citizen Review Committee 's [sic] deferential standard of review and oversight into officer-involved shootings and deaths. The Coalition maintains it concerns that the Settlement Agreement did not eliminate the practice of providing 48 hours notice before use of force interviews with involved officers.").

389. Intervener-Defendant Portland Police Association's FRCP 24 Motion to Intervene, United States v. City of Portland, (Dec. 18, 2012) (No. 3:12-cv-02265-SI).

390. *See* Memorandum in Support of Intervener-Defendant Portland Police Association's FRCP 24 Motion to Intervene, U.S. v. City of Portland, (Dec. 18, 2012), (No. 3:12-cv-02265-SI).

391. *Id.* at 25.

392. *Id.* at 29–30.

The United States opposed both motions.[393] However, the United States conceded that the Portland Police Association had a protectable interest at the remedy stage.[394] In response to the AMA Coalition's argument, the United States argued that changes to PPB's practices "will undoubtedly have collateral benefits for minority communities" and "changes . . . will flow to the greater Portland Community, including minorities."[395]

D. U.S. v. City of Portland Blocks Community Groups from Intervening

The district court simultaneously decided on the AMA Coalition and the Portland Police Association's motions to intervene in *U.S. v. City of Portland*.[396] In this case, the district court had the opportunity to correct for the exclusion of community groups from the negotiation of the settlement agreement. The district court granted the police union intervenor of right status at the remedy stage because "representation by the City 'may not' adequately represent the PPA's interests."[397]

The district court found that "the AMA Coalition can provide a valuable voice at the table during these proceedings."[398] Nonetheless, the district court rejected their motion to intervene.[399] The court limited the AMA Coalition's protectable interest to "one that is related to the claim brought by the United States in the complaint[,]" preventing them from including race in the litigation despite the DOJ's findings.[400] However, the district court did not decide the question of whether they have a protectable interest because "that interest is not impaired and is adequately represented by the United States."[401] The court rejected the AMA

393. Memorandum in Opposition to Proposed Intervenor-Defendant Portland Police Association and Proposed Intervenor Plaintiff AMA Coalition's FRCP 24 Motions to Intervene, U.S. v. City of Portland, (Jan. 22, 2013) (No. 3:12-cv-02265-SI).

394. *Id.* at 15.

395. *Id.* at 25.

396. United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 LEXIS 188465 (D. Or. Feb. 19, 2013).

397. *Id.* at *15.

398. *Id.* at *7.

399. *Cf.* Hardaway, *supra* note 284, at 560 ("[T]his finding fails on at least two fronts. First, the court failed to acknowledge that a proponent for a general resolution is quite different than an advocate for specified interests. Second, the finding negated the value and insight that those closely connected to the relevant police misconduct could add to inform the reform process.").

400. United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 LEXIS 188465, at *19 (D. Or. Feb. 19, 2013).

401. *Id.* at *18.

Coalition's motion on the basis that the DOJ would adequately represent their interest because "the AMA Coalition and its members *are* the constituency the United States is seeking to protect."[402] The district court argued that the AMA Coalition could bring a § 1983 lawsuit against the Police Bureau.[403] The district court granted the AMA Coalition only enhanced *amicus curiae* status.[404] The court encouraged the United States and the City to enter into mediation with the Albina Ministerial Alliance.[405]

E. Community Involvement was Increased by the AMA Coalition's Work but was Insufficient

The result of the mediation with the Albina Ministerial Alliance was a Collaborative Agreement between the parties.[406] In the collaborative agreement, the City committed to include the AMA Coalition in the selection of a Compliance Officer and Community Liaison and broadened the selection pool for at-large members for the Community Oversight Board.[407] The City also committed to providing "an opportunity for public participation" in alternative processes.[408] The Albina Ministerial Alliance committed to not object to the acceptance of the settlement agreement, but could nonetheless "oppose any attempts to weaken or dilute the Settlement Agreement reforms that the AMA Coalition supports."[409] Though the AMA Coalition did not have an equal seat at the table to the police union, they had some power to prevent the union from using its intervenor status to dilute the impact of the

402. *Id.* at *23–24.

403. *Id.* at *26.

404. *Id.* at *26–28 ("(1) the AMA Coalition shall have the opportunity to present any briefing requested by the Court in the same manner as the parties; (2) the AMA Coalition shall have the opportunity to participate in any oral arguments to the same extent as the parties; (3) the AMA Coalition may present its arguments from counsel table along with the parties; (4) the AMA Coalition may participate in the Fairness Hearing to the same extent as the parties; and (5) to the extent that the United States, the City, and the PPA may participate in mediated settlement discussions under the authority of the Court and a court-appointed special master for settlement purposes, see discussion below, the AMA Coalition shall be invited and allowed to participate in those negotiations.").

405. *Id.* at *31–32.

406. Collaborative Agreement at 1, U.S. v. City of Portland and Portland Police Bureau, (2013) (No. 3:12-cv-02265-SI).

407. *Id.* at 4.

408. *Id.* at 3.

409. *Id.* at 4.

settlement. The court further conducted a "fairness hearing" that platformed 58 community members.[410]

The issues the AMA Coalition argued were important through their role in the litigation compelled political action in other spaces. This is demonstrated by the removal of the "48-hour rule" from the police collective bargaining agreement.[411] The AMA Coalition advocated for the removal of this rule in its initial motion to intervene.[412] The Mental Health Association also called for the renegotiation of the police contract, including the removal of the "48-hour rule."[413] This rule became a symbol of the most egregious impunity of the collective bargaining agreement. Mayor Charlie Hales sought to pass a contract removing the "48-hour provision," but it included anti-accountability provisions on body cameras that threatened defendants' rights and provided for sizeable raises.[414] Activists criticized the contract as a "trojan horse."[415] The AMA Coalition criticized the contract because it was negotiated in secret and allowed the rule to persist through a loophole for less-than-lethal force.[416] The contract was approved.[417] In 2017, however, Mayor Ted Wheeler announced that the District Attorney refused to prosecute cases where the City compelled an officer to participate in an interview too soon after a shooting.[418] In response, the Portland City Council voted unanimously to pass an ordinance that

410. Patel, *supra* note 38, at 841–43 (praising the fairness hearing as democratizing litigation).

411. Status Report of the Albina Ministerial Alliance for Justice and Police Reform at 123, U.S. v. City of Portland and Portland Police Bureau, No. 3:12-cv-02265-SI (Oct. 19, 2016).

412. Press Release, Albina Ministerial Alliance, *supra* note 386.

413. Jenny Westberg & Jasen Reneaud, *Police Accountability Starts with a New Police Union Contract*, ST. ROOTS (Jan. 7, 2016), https://www.streetroots.org/news/2016/01/07/police-accountability-starts-new-police-union-contract [https://perma.cc/4AH5-E8E3].

414. Rachel Monahan, *What's Wrong With the New Police Union Contract?*, WILLAMETTE WEEK (Oct. 11, 2016),), https://www.wweek.com/news/2016/10/12/whats-wrong-with-the-new-police-union-contract/ [https://perma.cc/R6RS-H8MT].

415. *Id.*

416. Status Report of the Albina Ministerial Alliance for Justice and Police Reform at 6–7, U.S. v. City of Portland and Portland Police Bureau, No. 3:12-cv-02265-SI (Oct. 19, 2016).

417. Rachel Monahan, *City Hall Approves Controversial New Portland Police Contract*, WILLAMETTE WEEK (Oct. 12, 2016), https://www.wweek.com/news/2016/10/12/city-hall-approves-new-portland-police-contract/./ [https://perma.cc/T54W-H69Q].

418. Katie Shepherd, *Despite City Hall Efforts, the 48-Hour Rule is Back—And Stronger Than Ever*, WILLAMETTE WEEK (July 14, 2017), https://www.wweek.com/news/city/2017/07/14/despite-city-hall-efforts-the-48-hour-rule-is-back-and-stronger-than-ever/ [https://perma.cc/25R7-G9XG].

requires officers to give statements within 48 hours of a shooting unless they are physically incapacitated.[419] On this issue, community groups got what they demanded not through their status in the litigation, but despite it. Being put in a place of powerlessness could not constrain the power they held.

Metrics of police use of lethal and nonlethal force against people of color, people with mental disabilities, and protestors consistently reflect the inadequacy of the enforcement of the settlement. In the 2020 protests, there were 6,000 documented uses of force.[420] The violence was so extreme the DOJ found the City out of compliance with the settlement agreement.[421] In 2021, Jonathan Betz Brown of the Mental Health Alliance demonstrated using statistical evidence that "the number of applications and the severity of force used in force events involving mentally impaired citizens has been rising quickly and steadily over the last four years."[422] In 2020, the AMA Coalition observed a "lack of overall change" in "incidents of violence against people of color and people with mental illness since the inception of the Settlement Agreement."[423] In 2022, the AMA Coalition found that "the PPB's own data continues to reflect disparate policing of Black people and people of color in its stops, searches, and arrests, with an increase in percentage of traffic stops and searches of Black people in 2021."[424]

F. Interpretation

Despite the struggle of community groups, despite the assistance of movement lawyers, and despite the volume of ink spilled on court documents, Portland is left with the same problems with police accountability and a settlement that has been in effect

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419. Amelia Templeton, *Portland Council, At Odds With DA, Solidifies Police Shooting Overhaul*, OREGON PUB. BROAD. (Aug. 24, 2017), https://www.opb.org/news/article/portland-police-shooting-reform-48-hours-testimony/ [https://perma.cc/UR59-S7SG].

420. Piper McDaniel, *Injury Claims from PPB's 2020 Protest Response Cost City of Portland over $2.8 million*, ST.. ROOTS (Apr. 5, 2023), https://www.streetroots.org/news/2023/04/04/injury-claims-cost-portland-over-28m [https://perma.cc/CVZ7-2Q5W].

421. Letter from Jonas Geissler, Senior Trial Att'y, and Jared Hager, Assistant U.S. Att'y, to Robert Taylor, City Att'y, and Charles Lovell, Chief of Police (Apr. 2, 2021) (on file with the Mental Health Alliance).

422. Declaration of Juan C. Chavez, United States v. City of Portland, (Apr. 15, 2021), (No. 3:12-cv-02265-SI).

423. *Id.*

424. July 2022 Status Report of The Albina Ministerial Alliance For Justice And Police Reform at 8, United States v. City of Portland, (Feb. 24, 2020) (No. 3:12-cv-02265-SI).

for more than ten years with little progress. As of August 2024, the AMA Coalition "believes we are still a long way from producing a 21st Century Community Police force that offers public safety and trust to the most vulnerable citizens in the City of Portland."[425]

In looking at Portland, we are left to wonder *what went wrong*? DOJ intervention in Portland seemed to have so much potential to correct for structural failures. The broad coalition of community groups represented a political base to support change. The DOJ did not have the same constraints that prevented sympathetic system actors from implementing reform at the city and state level. Why did reform fail? An easy answer is the change in administration. Under the Trump Administration, pattern-or-practice litigation was deprioritized.[426] However, this is a symptom of a deeper problem. Once the DOJ initiates litigation against a city police department, community groups should not have to *ask* the DOJ to represent them, they should *be* represented as part of the judicial process in litigating settlement agreements, consent decrees, or decrees by the court.

U.S. v. City of Portland represents missed potential. The events in the years following the decision demonstrate the necessity that community groups be included in police civil rights litigation as full partners—enhanced *amicus* status is not enough. The court's reasoning that the AMA Coalition was the constituency the DOJ would represent and that the interest people of color was not related to the DOJ's claim struggles to be read in a way that is not contradictory. Furthermore, § 1983 plaintiffs are foreclosed from pursuing the injunctive measures that the DOJ is empowered to implement in pattern-or-practice lawsuits. The court is simply wrong to claim that as a viable alternative. However, the court's encouragement of mediation with the AMA Coalition did lead to greater, though insufficient, community involvement. In that portion of the holding, there is hope for future progress.

Conclusion

On December 17, 1951, Paul Robeson and William Patterson submitted a petition on behalf of the Civil Rights Congress and signed by 100 activists to the United Nations entitled "We Charge

425. August 2024 Status Report Of The Albina Ministerial Alliance Coalition For Justice And Police Reform at 2, U.S. v. City of Portland and Portland Police Bureau, No. 3:12-cv-02265-SI (2013).

426. Mazzone & Rushin, *supra* note 212, at 1005–06 & nn.30–31 (2020); VITALE, *supra* note 9, at 22–23.

Genocide: The Crime of Government Against the Negro People."[427] The petition contended that the segregation, discrimination, and police violence faced by Black Americans constituted genocide under the United Nations definition.[428] The charge remains outstanding.[429]

Police violence must be challenged and changed by procedural and substantive democratic accountability. This gap in police accountability is a problem for law, it is a problem for the legitimacy of police as an institution, and it is a problem for public safety. It must be closed. Accountability for police violence requires substantive and procedural remedies. And as the case study of Portland demonstrates, true change is not made from the top down, it is built from the bottom up by the tireless work of activists and movements.

The present political moment is undoubtedly grim.[430] The George Floyd Justice in Policing Act was introduced three times under the Trump and Biden Administration and as of now has failed to pass.[431] We are once again under an administration where pattern-or-practice litigation, however flawed, will be absent.[432] The narrow window for police accountability under existing law just got a whole lot narrower. For Minneapolis, that uncertainty is compounded. Much work is necessary to provide robust guarantees of non-repetition regarding the actions of the Minneapolis Police Department detailed in the DOJ's own findings.[433] Community participation will be necessary to ensure that this change lives up to its power.

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427. *This Day in History: Dec. 17, 1951: "We Charge Genocide" Petition Submitted to United Nations*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/we_charge_genocide_petition [https://perma.cc/C59W-DUXH].

428. *Id.*

429. Haile et al., *supra* note 7.

430. SEIGEL, *supra* note 32, at 3 ("Yet there is something unique about our moment that augurs even worse. In both of the historical periods that ours evokes, reaction followed the abolition of a great evil: slavery first, and, a century later, Jim Crow segregation. This time we are perched on the edge of reaction without having abolished anything.").

431. Ray Sanchez, *Renewed Calls for Passage of George Floyd Justice in Policing Act After Fatal Shooting of Black Woman in her Home*, CNN (July 25, 2024), https://www.cnn.com/2024/07/25/us/george-floyd-justice-in-policing-act/index.html [https://perma.cc/EVE7-YG34].

432. *Id.*

433. U.S. DEP'T OF JUST. CIV. R. DIV. AND U.S. ATTY'S OFF. DIST. OF MINN. CIV. DIV., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT (2023).

In May, the United Nations Expert Mechanism to Advance Racial Justice visited Minneapolis for a single day.[434] At the Urban League over north, they met with Antonio Willaims, Breanna Buckhalton, Elizer Darris, Lucina Kayee, Myon Burrell, and Marvina Haynes.[435] They also met with family honoring Kobe Heisler, Dolal Idd, George Floyd, Emmitt Till, Amir Locke, Jaffort Smith, Howard Johnson, Courtney William, Justin Teigen, and Philando Castile.[436] Based on their testimony and testimonies of people in the District of Columbia, Atlanta, Los Angeles, Chicago, and New York City, the Human Rights Council released a major report calling for dramatic change addressing all levels of the criminal legal system in America, including policing, the school-to-prison pipeline, immigration enforcement, incarceration of children and adults, criminalization of unhoused people, and pre-trial detention.[437]

The transformative change the United Nations called on us to carry out is change activists have been demanding for a long time. Echoing Alex S. Vitale's criticism of the DOJ's proposed reforms for the police in Ferguson, Missouri, "[w]ell-trained police following proper procedure are still going to be arresting people for mostly low-level offenses, and the burden will continue to fall primarily on communities of color because *that is how the system is designed to operate*—not because of the biases or misunderstandings of officers."[438] To truly have an accountable and democratic system of public safety, transformative changes are required that address the patterns or practices not just of policing but of mass incarceration and bordering. That system would be unrecognizable to what we know now as "policing."[439]

Movements have the power to make that transformative change. In Stearns County, St. Cloud, and Cold Spring, Minnesota, community groups have engaged in dialogue with their police departments and signed community policing agreements.[440] Among

434. *Id.*

435. UN Report, *supra* note 88, at 32.

436. *Id.*

437. *Id.*

438. VITALE, *supra* note 9, at 15 (emphasis added).

439. *See id.*

440. Stearns County Sheriff, Stearns County Sheriff's Office Community Policing Agreement (May 19, 2021), https://content.civicplus.com/api/assets/7dd2d16a-c6cb-420b-8e2d-681f28b6d465?cache=1800 [https://perma.cc/RDH4-886S]; St. Cloud Police Department, St. Cloud Community Policing Agreement (Feb. 22, 2018), https://www.ci.stcloud.mn.us/DocumentCenter/View/14904/St-Cloud-Community-

other significant commitments, these agreements challenged pretextual traffic stops and arrests and detentions based solely on immigration status, and called for a consent search advisory. The community groups that made these agreements happen did it on their own, without the help of the federal government or the Department of Justice. It is doubtful that change in policing could ever be done by the federal government alone. But in the present political moment, it is all but certain that the federal government will not be a partner in transforming policing. This moment is not a limitation; it is an invitation for community groups to rise beyond the failures of law and institutions and mobilize to hold police accountable.

Policing-Agreement-English-PDF?bidId= [https://perma.cc/TL67-755N]; Cold Spring Police Department, Cold Spring Community Policing Agreement (May 4, 2022), https://coldspring.govoffice.com/vertical/sites/%7B01184721-7780-4C87-A564-E6EF5442EC4F%7D/uploads/SKMBT_C224e22050509230.pdf [https://perma.cc/Q5KN-YM9E].