Democratic Policing Inside and Out

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Despite the revolution over the past few decades in the ideology of American law enforcement—the much heralded shift from “police professionalism” to “community policing” as the reigning orthodoxy of managers and reformers alike—two basic assumptions have endured. The first is that the central task of police reform, and of the ongoing legal regulation of the police, is reconciling law enforcement with the goals and principles of a democratic society. Police professionalism and community policing are in this sense different paths to the same destination: “democratic policing.” The second enduring assumption is that democratic policing means making the police answerable to democracy, not bringing the benefits of democracy to police officers themselves. The democracy in democratic policing is external, not internal, to law enforcement. The thinking is that external and internal democracy are two different things, and that at least in this context they are mutually incompatible.

My goal here is to challenge this second assumption. Obviously the police cannot be freed from outside oversight. That would be impossible to reconcile not just with a credible account of democracy but with any sane approach to governance. My claim will be narrower: rank-and-file police officers should participate collectively in the shaping of their work. This should be part of what we mean by “democratic policing.” It should be part of the agenda of police reform, and it should be taken into account in the legal regulation of the police. We can and should make room for a degree of workplace democracy in law enforcement.

This claim is both modest and radical. It is modest because in many ways police officers already do participate collectively in the shaping of the work. Partners assigned

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to the same patrol car discuss how they should spend their time. Teams of officers plan undercover stings and neighborhood sweeps. Policing is heavily unionized, and police unions often take strong positions on matters of departmental policy. Today they are often joined at the table by identity-based organizations of police officers—groups, for example, of Black, or Latino or gay and lesbian officers. And, even without pressure from below, wise sergeants, lieutenants, and captains—like wise supervisors in any occupation—find ways to enlist the rank and file in processes of cooperative problem-solving.

But in law enforcement all of this occurs at the margins. It cuts against the grain. The dominant mindset of police departments, police reformers, appellate judges, and criminal justice scholars—the dominant mindset, in short, of nearly everyone who thinks about policing and its problems—is, and always has been, that policing is a place for top-down management. Good police officers are police officers who follow rules. Police unions, and police organizing more generally, are obstacles, not opportunities. Democracy means the rule of law, and the rule of law means that policing is no place for exercises in workforce empowerment. If law enforcement has turned out, ironically, to be one of the last strongholds of trade unionism, it is also (and not accidentally) a lingering bastion of the Taylorist faith in scientific management. Police work is notoriously rule-bound, so much so that “all cops exist in a state of mild infraction.”¹ The particular focus of police rulebooks is often the subject of criticism: too much attention to the proper kind of shoe laces, not enough attention to the grounds for an investigative stop. But outside the ranks of police officers themselves, there is little sentiment for giving line officers more of a say in how policing should be carried out. Even the fiercest foes of regimented workforces tend to make an exception for law enforcement. Indeed, the very same people who usually argue strongly for industrial democracy often tend to favor, again in the name of democracy, subjecting the work of police officers to strict, comprehensive, and minutely detailed rules.

That program—prescribing from above the “one best method” of policing, in the name of democracy and the rule of law—animates our law of constitutional criminal procedure, is taken for granted in most efforts at police reform, and provides a point of continuity in the managerial philosophy of policing, bridging the shift from police professionalism to community policing. “Team policing” and “problem-oriented policing,” two important predecessors of community policing, each incorporated elements of participatory management. But those elements became much more muted as time went on and as team policing and problem-oriented policing were absorbed into mainstream thinking about law enforcement. My claim is that this was a loss, and one worth rectifying.

The argument in this essay proceeds as follows. Part I of the essay sketches the affirmative case for bringing a dose of workplace democracy to policing—or, put differently, the case against Taylorism in law enforcement. The case draws heavily on the familiar arguments for letting employees of all kinds participate in the shaping of their work, but many of those arguments take on special strength when the employees in question are law enforcement officers. Part II explores why workplace democracy nonetheless has played little part in most discussions of democratic policing. A portion of the explanation is a particular set of ideas about democracy and the rule of law. Another portion of the explanation is a particular set of ideas about the police: that they are unintelligent, unimaginative, and insufficiently committed to democratic values. Some of this is just class snobbery, but the bit about democratic values had some historical grounding: the cause of participatory democracy at the jobsite gained popularity in the late 1960s and early 1970s—a time of surging police activism, and activism with a decidedly anti-liberal feel. Nonetheless Part III of this essay argues that the view of the police as unsuited for workplace democracy, temperamentally or otherwise, is now largely outdated. Part III also re-examines the notion that the rule of law requires police officers to be followers, not collective decisionmakers. I conclude that there is not enough to that notion, today, to outweigh the affirmative case for bringing a degree of workplace democracy to law enforcement. Finally, Part IV sketches
some implications of a commitment to workplace democracy in police departments, and some important issues raised by such a commitment.

A few comments on terminology are in order. “Law enforcement” and “policing” sometimes have different meanings. “Law enforcement” refers to efforts to enforce positive legal rules, whereas “policing” encompasses not only that activity but also the order-maintenance and community caretaking functions commonly exercised by police officers. So, too, “workplace democracy” and “participatory management” often are distinguished from each other. “Workplace democracy” refers to unionism and other bottom-up efforts at employee empowerment; “participatory management” means efforts at cooperative problem-solving implemented and controlled by management, often over strong objections from unions. I will not be observing either of these distinctions, except when they seem important. In general, I will use “law enforcement” and “policing” interchangeably to refer to the activities of the police, and I will use both “workplace democracy” and “participatory management” to refer to efforts to allow employees, whether police officers or otherwise, to participate in the shaping of their work.

Similarly, I will be using the term “Taylorism” a little loosely. Strictly speaking, Taylorism called for simplifying manual tasks by breaking them down and dividing them among employees, and then for controlling employees’ every movement in order to eliminate inefficiency. Obviously policing consists of more than manual labor, and no one has ever tried to break down and to routinize police work the way that Frederick Taylor broke down and routinized factory work. More broadly, though, Taylorism stands for a certain approach to managing work, an approach calling for top-down promulgation of a rigid, detailed, and comprehensive set of rules. I will argue that we tend instinctively to take this approach to police work, and that this may be a mistake, for many of the reasons that Taylorism in the narrow sense has been discredited.

I will be contrasting Taylorism with workplace democracy, and this, too, is a simplification. A workplace can be completely undemocratic without having even a touch of Taylorism. (Think of a company run by a mercurial, utterly vacuous despot:
Mr. Wick on *The Drew Carey Show*, or J. Peterman on *Seinfeld.*) And some systems of participatory management are entirely compatible with the kind of detailed work rules Taylor favored—a point to which we return. As long as these caveats are kept in mind, though, the crude dichotomy between workplace democracy, loosely defined, and Taylorism, loosely defined, will prove useful in identifying and challenging certain unstated preconceptions underlying almost all discussions of democratic policing.

I should also stress at the outset that this is a speculative essay. I will not try to show conclusively that this or that form of workplace democracy should be introduced to policing. My claims are only that the common reasons for rejecting all calls for workplace democracy in policing are unsatisfactory, that internal and external democracy in policing are not necessarily at odds, and that the idea of giving police rank and file a voice in the shaping of their work deserves more serious consideration than it usually gets.

I. POLICE DEPARTMENTS AS WORKPLACES

Top-down workplace regimentation of the kind famously advocated by Frederick Taylor still has fans, many of whom may never have heard of “scientific management.” But Taylor’s ideas have long been out of fashion, and for good reason. Fixed systems of rules that seek to control employees’ every action are widely thought today to be bad for management, bad for employees, and bad for society. They are bad for management because they inevitably fail to address the full complexity of the tasks given to employees; because they make employees unmotivated and disloyal; and because they forfeit the knowledge and insights of the workforce—what John Dewey would call its “diffused and seminal intelligence.” They are bad for workers because they are stultifying and immiserating. And they are bad for society because they train workers in

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2 Frederick Winslow Taylor, *The Principles of Scientific Management* (1911); see also, e.g., Frank Barkley Copley, *Frederick W. Taylor: Father of Scientific Management* (1923).

habits of alienation and passivity, rather than the habits of engagement, cooperation, and deliberation that help a democratic society flourish.

This multifaceted critique of Taylorism is conventional wisdom today among labor activists and management theorists alike. It has at least three sources: one in social theory, one in democratic theory, and one in management theory. The first source is the “alienation” indictment of industrial and post-industrial employment: the idea, as old as Taylorism itself, that the loss of “meaningful work” has helped to bring about the crippling sense of disconnection and disempowerment that pervades modern collective life.\(^4\) The second source is the notion that democracy consists not just in elections and representation, but also, and more critically, in a broadly engaged citizenry. This way of thinking about democracy gained especially wide currency in the 1960s, when “participatory democracy” became the catchphrase of the New Left, but its roots are much older. It is the tradition of Rousseau, Tocqueville, and Dewey.\(^5\) There is also a long tradition, revived in the late 1960s and early 1970s, of viewing workplaces as the ideal loci for experiments in participatory democracy: intimate enough for face-to-face conversations, and important enough to make participation manifestly worthwhile.\(^6\) The third source of disenchantment with Taylorism is the widespread enthusiasm among

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management theorists, beginning in the 1980s and 1990s, for workforces marked by teamwork and cooperation.\textsuperscript{7}

The agendas of meaningful work, industrial democracy, and cooperative management do not always coincide. Trade unions, the most familiar form of industrial democracy, can be impediments to management-controlled structures for employee participation in workplace decisionmaking—in part because unions often suspect, sometimes with justification, that these structures are aimed chiefly at pacifying workers and undermining their solidarity.\textsuperscript{8} Some tactics of cooperative management—“quality circles,” for example—have proven compatible with workplaces arguably as regimented as anything dreamed of by Frederick Taylor, even if the rules change more often, and even if employees participate in their revision.\textsuperscript{9} I will return to these points of tension later in this essay. For now, though, the important thing is that Taylor’s agenda of improving workplace performance by minutely regulating job practices from the top down is now widely believed to be bad for management, bad for workers, and bad for society.

Each prong of the modern anti-Taylorist consensus has readily apparent implications for policing. Indeed the standard indictment of Taylorism takes on some special strength in the context of law enforcement. I will discuss that standard indictment, and its application to policing, by first considering the costs to management, then the costs to workers, and then the costs to society. The tripartite division here is


\textsuperscript{8} See Barenberg, supra note 7, at 870-79, 904-18; Simon, The Politics of “Cooperation,” supra note 7, at 18, 20-21, 55-57.

\textsuperscript{9} See Simon, The Politics of “Cooperation,” supra note 7, at 18-19, 59-61. “Quality circles” are “periodic meetings at which small groups of employees are encouraged to discuss workplace issues and to make ‘suggestions’ to management.” Id. at 18; see also, e.g., WILMS, supra note 7, at 34.
artificial: the interests of police managers overlap considerably both with the interests of rank-and-file police officers and with the interests of society. As long as we keep the artificiality in mind, though, separating out the costs to management, to officers, and to the public at large will be analytically useful.

A. Costs to Management.

Start with the view, now quite common, that inflexible, rule-bound workplaces are bad for management. The standard arguments for this view are (a) that predetermined rules cannot possibly address the full complexity of any but the very simplest tasks, (b) that efforts to specify in advance the “one best method” to perform a particular job forfeit the diffused, hands-on knowledge that workers gain by actually doing the job, and (c) that rigid regulation of workers undercuts their loyalty and motivation. All three of these arguments apply at least in part to police officers, and the first and second apply with particular strength.

1. Ignoring Complexity. In the second half of the twentieth century we made a great discovery about policing: it is a very complicated job. This discovery was made in two stages. First, in the 1950s and 1960s, legal scholars and sociologists documented the extraordinary degree of discretion that police officers exercised in their work. To most of these scholars, the discretion exercised by police officers was alarming. It seemed lawless, arbitrary, and hence undemocratic. The solution was to tame police discretion with rules—maybe rules promulgated by courts (the project taken up with enthusiasm by the Warren Court, and continued halfheartedly by the Burger Court), maybe rules promulgated by legislators or by the police themselves (the solutions urged by some academics), or maybe rules promulgated by civilian oversight boards (the program

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embraced by many community activists). The second stage began in the 1970s, when skepticism began to mount that any set of rules could ever address, in anything like a comprehensive fashion, the endlessly changing circumstances encountered daily by the police. Today this skepticism is conventional wisdom.

Nowadays almost everyone who thinks seriously about the police recognizes that the job of a patrol officer is complex and demanding, in large part because it is so varied and unpredictable. It might be different if policing was mostly about applying the law—investigating crimes, arresting suspects based on probable cause, and so on. But we have known for decades that most activities of the police do not involve invoking the law. If the police have a core function, it is not law enforcement, narrowly defined, but rather—in Egon Bittner’s formulation—employing coercive force or the threat of coercive force “in accordance with the dictates of an intuitive grasp of situational exigencies.” This is not the sort of thing that lends itself to systematic regulation.

11 On Warren Court and Burger Court criminal procedure, see, e.g., Sklansky, Police and Democracy, supra note 5, at 1736-41. For the argument for regulating the police by legislation, see, e.g., Craig M. Bradley, The Failure of the Criminal Procedure Revolution (1993). For suggestions that the police should be regulated through rules promulgated by police agencies themselves, see Kenneth Culp Davis, Discretionary Justice 65, 95 (1969); Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 380 (1974). On civilian oversight, see, e.g., Samuel Walker, Police Accountability: The Role of Citizen Oversight (2002).


13 See, e.g., Herman Goldstein, Problem-Oriented Policing xii (1990) [hereinafter Goldstein, Problem-Oriented Policing].


Plenty of thoughtful people still believe we need stricter rules for the police, if not across the board than at least with regard to particular parts of policing. But almost no one imagines that rules alone can give us better policing. The job of police officers is too varied and too complicated for that. It is surely more varied and more complicated than most factory work—jobs for which the managerial case against Taylorism has been made forcefully and cogently in recent years. If it is futile to try to prescribe in advance all the kinds of problems that an assembly line worker may confront and the solutions to each of those problems, it is even more futile to try to the same thing for police officers.

2. **Forfeiting Knowledge.** Some tasks are complicated but are not the kind of things about which one can acquire and pass along knowledge. Mastery just comes with practice. Standup comedy may be like that: telling a joke is not simple, but it may not be the kind of thing that can be taught, either. No one would try to run a comedy club by laying down strict rules of comedy technique for the performers to follow. But that is because rules of that kind seem impossible, not because a good comedy club manager gradually refines his theory of comedy by listening to what the comics report back about their experiences.

Policing used to be thought to be like standup comedy in this regard. Maybe it was complicated, but it did not lend itself to the development of craft knowledge. The parts of policing that did not have to do with following rules had to do with instinct—with the gut rather than the head. Lots of people, including many cops, probably still think this way about policing. Certainly the fictional police officers celebrated on television and in movies place rely heavily on hunches and intuition.

And police departments, by and large, often seem to operate on some variant of this assumption. New officers spend time in an academy, and most sizeable departments also provide opportunities for in-service training—advanced courses, for example, on developments in forensic science or in the law of search and seizure. But little effort is spent collecting and disseminating the lessons learned by officers on the job—neither the local lessons, about who can or cannot be relied upon in a particular neighborhood, the
best routes to follow on patrol, and so forth; nor the global lessons, about how to gain trust on the street, how to calm an agitated suspect, how to protect an informant, etc.

It remains a “central fact of police work,” as Egon Bittner pointed out years ago, that “every individual officer has important information that he does not share with anyone”—“substantive factual information about crime, people, social areas, conditions, etc., which are of use in getting the work of policing done.” Writing in 1970, Bitter described a hierarchy of “systematic information denial,” ameliorated by a “colossally complicated network of secret sharing”: “Teams of partners do not talk about each other in the presence of nonteam members, line personnel do not talk about their peers in the presence of ranking officers and, of course, no members of the department talk about anything remotely connected with police work with any outsiders.” Police departments are less insular places today than they were in 1970, for reasons I will address later in this essay. But the pattern of “systematic information denial” remains, in large part because departments do little in any organized way to capitalize on the “diffused and seminal intelligence” of the rank and file.

It is not that police officers have nothing interesting and reflective to say about these issues. It is a commonplace of scholarship about the police that individual officers are often far more thoughtful, reflective, and insightful than researchers expect them to be. In places where rank-and-file officers have been asked to participate in policymaking, the results have generally been impressive. In the early 1970s, for example, a team of researchers led by the criminologist Hans Toch asked a specially recruited group of Oakland police officers to find ways to reduce violence between officers and citizens. With the outside scholars serving largely as consultants, the

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16 Id. at 148-49.

17 See, e.g., id. at 153 ("Whenever police officers are furnished an opportunity to discuss their work problems around a conference table, they generally display a thoughtful approach that amazes outsiders. Naturally not all policemen contribute to discussions nor do all benefit from them. But in this respect they are not very different from teachers, some of whom might also not attend faculty meetings without much loss.").
officers set their own agenda, carried out their own research, and devised their own proposals. One of those proposals, a “Peer Review Panel” for counseling and assisting officers with a history of violent encounters, in fact proved effective. Toch and his collaborators came away impressed with the ability of rank-and-file officers to serve as “agents of change,” not only in the day-to-day operation of the Peer Review Panel, but also in coming up with the idea for the panel, and in carrying out the research on which it was based.18

But initiatives like this rare. This is a loss, in the same way that it is a loss to the management of a manufacturing facility when insights from the shop floor are systematically ignored. There may be reasons for top down management of policing that do not apply to manufacturing. We will get to that question later. For now, though, the important point is that in policing, just as in manufacturing and probably more so, failing to enlist line police officers in the ongoing reshaping of their job imposes a cost on management, because it forfeits the diffused knowledge and understanding of the workforce.

3. Undercutting Loyalty and Motivation. A major part of the case that management theorists advanced in the 1980s and 1990s for industrial “cooperativism” was that treating employees just as tools or cogs undercuts their loyalty and motivation. Enlisting the minds and imaginations of employees was good for management not just because rules could not possibly cover all the various situations that arose on the shop floor, and not just because employees often acquired valuable knowledge and insights,

18 HANS TOCH, J. DOUGLAS GRANT & RAYMOND T. GALVIN, AGENTS OF CHANGE: A STUDY IN POLICE REFORM (1975). The study was reprinted and expanded in HANS TOCH & J. DOUGLAS GRANT, POLICE AS PROBLEM SOLVERS (1991). The Peer Review Panel and many of Gain’s other innovations were eliminated by Gain’s successor for budgetary reasons. See JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES 151-52 (1986). Toch and Gant note that “[t]he Oakland police began to experience violence problems almost as soon as the interventions were discontinued.” TOCH & GRANT, supra at 85.
but also because treating employees as team members would make them work harder and keep their jobs longer.  

This particular argument against Taylorism applies only in part to policing. Police officers tend to love their jobs and to keep them for a long time. The attrition rate for police departments has always been low—around 4%—even during periods when the police feel particularly embattled. It is easy to lose site of this fact, because police officers are grumblers; the occupation is marked by a kind of culture of complaint. But one of the remarkable things about policing is how officers can hate the daily circumstances of their work and yet still love “the Job.” American police departments have many problems, but keeping officers loyal is not one of them.

Nor, in general, is getting officers to work hard. Many if not most cops are attracted to police work in part because of the excitement it promises and in part because of the opportunities it provides for service. They are attracted, in short, by the work, not just by the paycheck and the power. Among their peers, cops gain respect by “good collars,” by acts of physical courage, by being “completely gung-ho cop[s]”—not by

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19 See, e.g., Wilms, supra note 7.


21 See Conlon, supra note 1, at 74 (“For cops, there was never any shortage of complaints, formal and otherwise: the crime reports we wrote were called complains, and when the DA wrote up a charge, it was called a complaint, and when a civilian accused a cop of wrongdoing, it was also a complaint. We complained among ourselves, about bad food, hurting feet, lousy bosses, long hours, and little money. We complained about the sun and the rain. We did have a lot to complain about, within the Job and without, but some cops seemed to lose the power of speech altogether, except for complaining.”); see also, e.g., id. at 284-85.

22 This is a major subject of Edward Conlon’s recent memoir of his work as a New York City police officer. See, e.g., id. at 307-404.

23 See, e.g., Muir, supra note 14.

24 Conlon, supra note 1, at 312.
cleverly avoiding work.\textsuperscript{25} If anything, police tend to be overly enthusiastic about their work. Excessive zeal among the workforce is not a problem in most industries, but of course it has long been a major problem in policing. That is why so many of the rules imposed on police officers are aimed not at getting them to work hard but at reining in improper law enforcement tactics, and why officers, especially young officers, tend to complain more bitterly about not being “allowed to do our jobs” than about the hours they have to work or the quotas they are expected to meet.\textsuperscript{26}

Still, cynicism and shirking by police officers are hardly unknown. And it is striking how often officers themselves attribute the most notorious manifestations of these problems—the “drive-and-wave” approach to patrolling, for example—to one aspect or another of the top-down management of police departments: either to rules that prevent them from doing their jobs, or to disciplinary codes that do not take sufficient account of the line officer’s perspective.\textsuperscript{27} Again, there may be good reasons—perhaps bound up with the rule of law—for denying rank-and-file officers a more significant voice in the formulation and application of the rules under which they work. We will address that possibility later. The point for now is simply that in policing, as elsewhere, there is reason to think that rigid top-down management imposes a cost on management by undercutting motivation—even if police departments have largely managed to escape the problems of long-term loyalty that plague other employers.

Law enforcement Taylorism may impose another, related cost on management: it may make it harder to recruit high-caliber officers in the first place. The education

\textsuperscript{25} See, e.g., SUSAN EHRLICH MARTIN, BREAKING AND ENTERING: POLICE WOMEN ON PATROL (1980); MUIR, supra note 14.

\textsuperscript{26} See, e.g., CONLON, supra note 1, at 291-94, 322-30; STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE 57 (2003). This, too, is a large theme of Conlon’s book.

credentials of police officers have improved dramatically over the past four decades. The vast majority of police officers in the early 1960s had never attended college; now most officers have at least two years of college education, and a sizeable minority have graduate degrees.\(^{28}\) Findings are inconclusive on the difference that higher education makes in police officers, but the bulk of the research suggests that, all things being equal, college-educated officers are more responsible, more imaginative, more understanding, more adaptable, better at building trust and confidence, and better at resolving conflicts.\(^{29}\) For these reasons most police departments would like to hire more college-educated officers. One impediment to doing so, probably, is the lingering perception that policing is not a job that invites and rewards innovation.

Some departments explicitly defend that view. New London, Connecticut, went to court several years ago to defend, successfully, its policy of refusing to hire applicants who scored too high on a test of “cognitive ability.”\(^{30}\) The publisher of the test recommends its use to screen out employees who will become bored by “unchallenging work”\(^{31}\) with “rigid procedures”\(^{32}\)—jobs “where creativity could be a detriment.”\(^{33}\) New London’s deputy police chief told a reporter that the department had adopted the test because “[p]olice work is kind of mundane.”\(^{34}\)


\(^{29}\) See id. at 62-63.


\(^{31}\) Jordan, supra note 30, at *2.

\(^{32}\) Allen, supra note 30.

\(^{33}\) Id.

\(^{34}\) Id. (quoting New London Deputy Police Chief William C. Gavitt). The president of the test publishing company agreed: "You can't decide not to read someone their Miranda rights because you felt it would be more efficient, or you thought they knew them already.” Id. (quoting Charles F. Wonderlic Jr.). All of this would make perfect sense to Frederick Taylor, who warned that “[t]he man who is mentally alert and
Few departments echo New London’s in making this view of policing a matter of official policy. The vast majority of law enforcement executives today would endorse the position of police unionists that “[t]he better the caliber of the police officer, the fewer problems you have in the community.”35 But by failing to encourage innovation and collective decisionmaking among line officers, even progressive police departments may not only forfeit some of the advantage of their officers’ intelligence, but also send signals to potential recruits that law enforcement is not a field that welcomes thinkers. Those signals may make it hard to recruit the kind of applicants that most departments want.

B. Costs to Officers.

Management theorists are latecomers to anti-Taylorism. The earliest objections to “scientific management” centered not on its costs to employers but on the toll it took on employees. Those objections, still voiced today, are that rigidly rule-bound workplaces are stultifying, demeaning, and alienating. By “deskilling” workers and turning artisans into machines, Taylorism fosters a sense of powerless and disconnection. It fosters, that is to say, what many people see as modernity’s defining social ills.36

Although police officers rarely become so disenchanted as to quit, there are plenty of reports of police officers who grow to feel alienated and discouraged.37 And a collective kind of alienation has been well documented in policing—better documented, probably, than alienation in any other occupation. A central theme of police ethnography since the 1950s has been the distinctive sense of estrangement that police officers feel intelligent is for this very reason entirely unsuited” for monotonous work. An employee hired to handle pig iron, for example, should “be so stupid and so phlegmatic that he more nearly resembles in his mental make-up the ox than any other type.” TAYLOR, supra note 2, at 59.

35 Allen, supra note 30 (quoting Gilbert G. Gallegos, national president of the Fraternal Order of Police).

36 See supra note 4 (citing sources).

37 See, e.g., CONLON, supra note 1, at 313 (discussing officers who “left the Job with the taste of ashes in their mouths”).
from society. That estrangement—often linked accompanied by feelings of frustration, bitterness, and cynicism—has been blamed for a host of police pathologies: the “code of silence,” the paranoia and insularity, the proclivity to violence, the intolerance and “authoritarianism.” This is not precisely the kind of alienation Taylorism is commonly blamed with fostering; it is “us against them” rather than “myself alone.” And the estrangement of the police has itself typically been blamed not on the way their work is structured and managed but on their grinding, daily encounters with crime and disorder.

Still, there may be connections between the collective estrangement experienced by the police and the sense of anxiety and personal isolation that many officers feel. Even if they are separate phenomena, they may well feed on and worsen each other. The widespread impression that police officers are especially prone to domestic violence and suicide has been hard to confirm statistically, but there is no doubt that many officers suffer seriously from job related stress, that their families often suffer along with them, and that a frustrated, alienated police officer is more likely to be a violent and abusive police officer. The stultification and immiseration of any group of employees should be a matter of social concern, but there are special reasons to be worried about unhappy police officers.

Are there reasons to think, though, that unhappy police officers can be blamed in part on the rigid, top-down management of policing? Here the argument must become especially speculative. Police officers regularly complain, and often bitterly, that their


39 See, e.g., SKOLNICK, JUSTICE WITHOUT TRIAL, supra note 10, at 41-68.

views are never consulted, that they are subject to arbitrary and irrational directives from above and without, and that the rules under which they operate are absurdly unrealistic—rules that could never have been promulgated by anyone familiar with the daily realities of law enforcement. Cops often seem to take a kind of subversive glee in the inanity of what they endure, and their shared sense of the thanklessness of their work can contribute in an odd way to esprit de corps. But it stands to reason that the ongoing experience of insult and voicelessness may also take a toll, and that police officers—like any other group of employees—would feel more positively about their work if they participated in its management.

C. Costs to Society.

The costs that law enforcement Taylorism imposes on management and officers it also imposes on the public, because the public has an interest in the effective management of police forces and in the happiness and psychological wellbeing of individual police officers. But there is another potential cost to the public of rigid, top-down management of policing. It forfeits the opportunity to train police officers in the values and habits of democratic citizenship: values of openness, tolerance, and compromise; habits of engagement, cooperation, and deliberation.

There is long tradition of viewing the workplace as the ideal training ground for democratic citizenship. There are hints of the idea in the later work of John Stuart Mill and a sustained development of the notion in the early twentieth-century writings of G. D. H. Cole. The idea went into something of a dormancy during the 1940s and 1950s, when mass participation in democratic governance came to be seen as not only unnecessary but as positively pernicious. (More about this later.) But in the 1960s and 1970s the idea of “participatory democracy” regained favor, and with it the notion that rigid, autocratic workplaces stunted the political development of employees in ways that

41 On Mill and Cole, see PATEMAN, supra note 6, at 33-44.
not only deprived them of full, satisfying lives but also weakened democracy in the broader society.\textsuperscript{42}

That thesis has remained controversial. But even if democracy does not depend on fostering the political growth of all employees, there are special reasons to want police officers to internalize democratic values and habits. There are two points here. First, the police are often placed in positions where they can actively support or actively threaten democratic activities: they can protect political protesters, for example, or they can attack them; they can help create a climate of respect for individual privacy and autonomy, or they can make privacy insecure and nonconformity difficult; they can enforce norms of tolerance, or they can reinforce bias and prejudice; they can teach citizens that authority may safely be challenged, or they can teach the opposite.\textsuperscript{43}

Second, there are reasons to think that effective policing in general—at least the forms of effective policing most congenial to a free and open society—depends on some of the same values and skills often thought important for democratic citizenship more broadly.

This is the great lesson of William Ker Muir’s classic study of Oakland police officers in the early 1970s. Muir’s book remains unusual. Nearly every other police sociologist, before and after Muir, has sought to explain why the police, in general, are the way they are. Muir asked a different question, if anything more pressing: what makes some police officers more effective and more trustworthy than others? His answer was that good police officers had democratic virtues: a comfort with moral ambiguity, an ability to see shades of gray, a broad capacity for tolerance and empathy, and, perhaps most important, “an enjoyment of talk”—an affinity, that is to say, for conversation, argument, deliberation, advocacy, and compromise.\textsuperscript{44}

\textsuperscript{42} See, e.g., id.; MANSBRIDGE, supra note 6.

\textsuperscript{43} See, e.g., HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 1 (1977) [hereinafter GOLDSTEIN, POLICING A FREE SOCIETY].

\textsuperscript{44} See MUIR, supra note 14, at 3-4, 79-80, 99, 119, 144, 268.
Police officers developed these virtues, in part, by working in a department that itself embraced them. Among the heroes of Muir’s book is Chief Charles Gain, a legendary reformer who ran Oakland’s police force from 1967 to 1973. Gain ruled with a heavy hand and was never popular with the rank and file; in 1972 the Oakland Police Officers’ Association voted no confidence in his administration. Muir admired him nonetheless for infusing the department “with a sense of purpose from which his men derived dignity and moral meaning.” Much of that was accomplished, Muir thought, through a training style and a workplace climate that invited “participation, discussion, argument, and questioning.” What Muir liked about the Oakland Police Department, in short, was the way it seemed to operate as a school for democratic citizenry—or, more precisely, democratic leadership. Muir saw police officers as “streetcorner politicians,” and they were most likely to grow in that role if they worked in departments that within themselves fostered “widespread political participation.” His touchstone here was Tocqueville.

Muir was not alone in thinking workplace democracy particularly important for police officers. The pioneering police ethnographer William Westley suggested in 1970 that the remedy for the alienated and repressive mentality of the police was, in large part, “participatory democracy.” “Police organizations,” he argued, “must be democratized by involving as many policemen as possible in decisionmaking on all aspects of the

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46 MUIR, supra note 14, 253. All of the officers Muir studied were men. Oakland’s police force at the time was 97% male; the nationwide figure was 98%. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 160, 249 (1971). More later about the changing demographics of American law enforcement and the implications of those changes for democratic policing.

47 MUIR, supra note 14, at 253.

48 Id. at 281.

49 See id.
Westley was echoing George Berkley, who had argued a year earlier in *The Democratic Policeman* that strong, democratic police unions and widespread participation by officers in departmental decisionmaking were critical for training the police in the “rules and values” of democracy. Berkley reasoned that a police force “cannot hope to function in a manner with a democratic society if its internal operations deviate from that society’s norms and values.” Only by “participating in the give-and-take of . . . deliberations” were police officers “likely to develop the respect for accommodation and conciliation along with the attitudes of patience and tolerance which are indispensable to the democratic process.”

The criminologist John Angell took an even stronger line in 1971, suggesting that the “basic hope for correcting the dysfunctional trends of American police organizations” was to bring law enforcement in line with the participatory, “humanistic-democratic values of the United States,” especially as reflected in “the trend toward employee involvement in decision-making processes.” That required, among other things, abolishing the chain of command. Angell’s program proved too radical even for reform-minded departments. But several police forces experimented in the 1970s with “team policing,” a loosely defined idea that generally involved a designated group of officers working cooperatively and with shared operational independence to address the problems of a particular neighborhood.

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50 Westley, *supra* note 38, at xvii.


52 *Id.* at 29, 30.


Team policing remained a “buzz phrase in police circles” well into the 1980s, but it soon lost its connotation of participatory management.\(^{55}\) By the end of the 1970s, moreover, arguments like Westley’s, Berkley’s, and Angell’s had dropped out of sight. Except among police officers themselves, enthusiasm vanished for bringing even the mildest forms of workplace democracy to American law enforcement.\(^{56}\) It has yet to reappear.\(^{57}\)

II. THE MISSING STRAND IN DEMOCRATIC POLICING

What happened? Why did the arguments for giving police officers a voice in the shaping of their work—arguments that attracted such thoughtful and well-informed supporters in the early 1970s—disappear by the decade’s end? To be sure, a certain amount of disenchantment emerged by the 1980s about workplace democracy in general.\(^{58}\) But shared decisionmaking in the workplace soon found new fans among


\(^{56}\) The theme is entirely absent, for example, from a recent, otherwise balanced encyclopedia article on police and democracy by the sociologist Gary Marx, despite the fact that both Berkley and Muir appear in the bibliography. See Gary T. Marx, *Police Power*, in *ENCYCLOPEDIA OF DEMOCRACY* 954 (Seymour Martin Lipset ed. 1995), *reprinted with revisions as* Gary T. Marx, *Police and Democracy*, in *POLICING, SECURITY, AND DEMOCRACY: THEORY AND PRACTICE* 35 (Menachem Amir & Staley Einstein eds., 2000).


\(^{58}\) Compare, for example, Carole Pateman’s influential argument for workplace democracy, published in 1970, **PATEMAN**, *supra* note 6, with Jane Mansbridge’s equally
management theorists. And the case for participatory democracy had seemed in the early 1970s to apply with special urgency to law enforcement, because of the strong social interest in fostering democratic values and habits in the police. Why, then, did sentiment for workplace democracy in policing vanish so completely, and why has it never rematerialized? And why, for that matter, did the sentiment take until the 1960s to emerge in the first place? Why has internal democracy nearly always been the missing strand in discussions of democratic policing?

The short answer is bad timing. At the very point in the twentieth century when interest in workplace democracy reached its zenith—the late 1960s and early 1970s—American police departments seemed peculiarly inhospitable places for experiments in participatory management. Police forces at that time were almost uniformly white, male, and politically reactionary. Grass roots activism among police officers was in fact on the rise, but it took discouraging forms: contempt for civilian authority, fierce opposition to outside oversight of any kind, organized brutality against student protesters, vigilante attacks on student protesters, and active participation in far-right organizations. As a result, the very scholars and community activists who might otherwise have been most sympathetic to calls for participatory management of law enforcement agencies instead concluded that democracy required tight, top-down control of the police.

That is the short answer. The longer answer is a story that starts well before the 1960s and continues to the present day. It has partly to do with the history of police

famous but much more qualified defense of the same ideal in 1980, MANSBRIDGE, supra note 6.

59 See Sklansky, Police and Democracy, supra note 5, at 1772, 1823-24; David Alan Sklansky, Not Your Father’s Police Department: Making Sense of the Changing Demographics of Law Enforcement (Oct. 17, 2005) (unpublished manuscript on file with author) [hereinafter Sklansky, Not Your Father’s Police Department].

reform, partly to do with democratic theory, and partly to do with public perceptions of the police. And it divides roughly into two chapters: pre-1968 and post-1968.61

A. Pre-1968: Police Professionalism and Democratic Pluralism.

It was in the middle decades of the twentieth century, with the specter of the “police state” looming across the Atlantic, that American intellectuals began to focus their attention on the problem of democratic policing—conceived then, as it largely is today, as the problem of reconciling law enforcement with the institutions and values of a democratic society. The attention paid to this problem remained sporadic until the 1950s, when two things happened: the Warren Court initiated its “criminal procedure revolution,” subjecting state law enforcement activity to federal constitutional limitations, and sustained, academic examinations of the police began to appear.

Conceptions of democratic policing in the 1950s and early 1960s were strongly shaped by then prevalent ideas about the police and about politics. The ideas about the police were the ones championed by a reform movement seeking to “professionalize” American law enforcement. The ideas about politics were the ones associated with democratic pluralism, the extraordinarily influential account of American democracy that was then nearly omnipresent, both within and without academia. When it came to ideas about law enforcement, police professionalism and democratic pluralism reinforced each other, and they both pushed strongly away from the notion that police officers themselves should be given a say in the shaping of their work.

1. Police professionalism. Police professionalism, the dominant reform tradition in American law enforcement from the early twentieth century until the late 1960s, meant politically insulated police departments organized along hierarchical, quasi-military lines, with strong commitments to efficient operations, centralized command, technological

61 Much of the discussion that follows is adapted from Sklansky, Police and Democracy, supra note 5, at 1709-1806.
sophistication, well-trained personnel, and high standards of integrity.\textsuperscript{62} The roots of the movement lay in the "good government" managerialism of the Progressive Era and the interwar period,\textsuperscript{63} but the tradition was reinvigorated and transformed in the middle decades of the twentieth century.

Early police reformers, drawn mainly from the ranks of civic and religious groups,\textsuperscript{64} had aimed above all to get officers out of the hands of ward bosses and into the front lines in the fight against crime and, more particularly, vice. Their principal organizational strategies, shifting control from precincts to headquarters and adopting quasi-military lines of command, were adopted and expanded in the 1930s through the 1960s by a different set of reformers for a different set of ends. Robert Fogelson calls this the "second wave" of American police reform.\textsuperscript{65} It crested in the 1950s and early 1960s.

The second wave reformers differed from their predecessors in several ways. They were police administrators, not civic or religious crusaders, and they tended to see police departments as first and foremost organizations, not all that different from military or industrial units.\textsuperscript{66} They continued to insist on the political independence of the police,


\textsuperscript{63} See, e.g., GOLDSTEIN, POLICING A FREE SOCIETY, supra note 43, at 2-3, 133-34, 144.

\textsuperscript{64} Vollmer was an important exception, in the respect and in others. See infra note 67.

\textsuperscript{65} FOGELSON, supra note 60, at 167-92 (1977).

but their primary concerns were administrators' concerns: streamlining operations, strengthening lines of command, raising the quality of personnel, leveraging personnel with technology, clarifying the organizational mission, and building public support.

Much more than the first wave of reformers, the second wave took "professionalism" as their watchword.67 By “professionalism” they emphatically did not mean that police officers should have substantial latitude to exercise trained judgment in matters of importance, nor did they mean that police officers should exercise collective self-governance in the manner of a guild. Rather they had in mind enhanced prestige for the occupation of policing, high standards of integrity for officers, improved training, insulation from partisan politics, and the application of modern concepts of administration. It was a professionalism of police forces, not of police officers. It claimed autonomy "primarily for the institution of policing, and only secondarily, and then only in a severely limited sense, for its functionaries."68 Police professionalism thus sought to give individual officers less of a say in the shaping of their work, not more.

This particular aspect of police professionalism never encountered significant resistance, in part because police officers were poorly respected by the public; they seemed to need more direction, not more of say in how they did their jobs. Throughout the first half of the twentieth century, police officers were widely viewed as slowwitted at best and venal at worst.69 Improving this image was one of the express goals of police

67 See Fogelson, supra note 60, at 141-66. Fogelson argues the first wave reformers had a military model for the police rather than the professional model adopted by the second wave. See id. at 40-66, 154. The distinction between the two models may be overdrawn, because both called for strict, top-down control of the police. See Egon Bittner, The Rise and Fall of the Thin Blue Line, 6 REV. AM. HIST. 421, 424-27 (1978) [hereinafter Bittner, The Rise and Fall of the Thin Blue Line]. Fogelson makes clear, moreover, that some of the early reformers, including Vollmer, favored a professional analogy, see Fogelson, supra note 60, at 154.

68 Bittner, The Rise and Fall of the Thin Blue Line, supra note 67, at 426; see also Guyot, supra note 62, at 5-10.

69 See, e.g., Max Lerner, America as a Civilization: Life and Thought in the United States Today 433 (1957) (“The American is not overly impressed by
professionalism. (Chief William Parker of the Los Angeles Police Department, a famously fervent advocate for police professionalism, objected to his officers being called “cops,” because he thought the term had too many negative connotations.) But popular perceptions reinforced the ideology of progressive law enforcement administrators in steering police reform away from any experiments with participatory management.

2. Democratic pluralism. There was another reason that no one called for bringing democracy inside police departments during the era of police professionalism: this was also the era of democratic pluralism, a powerful account of American democracy that downplayed the value of broad political participation and gave special reason to worry about police officers. The political scientists and sociologists who shaped democratic pluralism—Robert Dahl, David Truman, Earl Latham, V.O. Key, Seymour Martin Lipset, Edward Shils, and others—drew a series of sharp lessons from the calamitous rise of modern “police states” and the subsequent, sordid excesses of American anti-communism. They learned to distrust mass politics, to fear extremism, and to prize political stability. Those predilections drove them to an account of American democracy that stressed the role of responsible elites in taming and reconciling the conflicting demands of interest groups, and the importance of a mediating consensus about the rule of law and other basic democratic norms.70

The pluralists thought sustained political participation by ordinary citizens was unnecessary. The system and the citizenry each could function perfectly well without

it. More than that, widespread political participation was actually a threat to democratic stability, in part because citizens outside the elite “political stratum” were likely to have personalities ill-suited to democratic politics: personalities that disposed them to extremism, intolerance, and authoritarianism. There was a psychoanalytic component to democratic pluralism, drawing heavily on the concept of the “authoritarian personality” developed by expatriate members of the Frankfurt School.

The generation of social scientists that created the field of police studies in the 1950s and 1960s grew up with pluralism and saw the world through its lenses. They therefore tended to see little need to let police officers participate in the decisions that shaped their work. Workplace democracy, like participatory democracy more generally, was off the pluralist agenda. And police officers, drawn from the working class and hardened by the nature of their work, seemed especially prone to the “authoritarian personality” feared by the pluralists—and especially important to bring under elite control, given their license and assignment to use coercive force. Unsurprisingly, then, James Q. Wilson, an enormously influential police scholar generally sympathetic to the

71 See, e.g., ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960); ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY 225, 279, 305 (1961); TRUMAN, supra note 70, at 356.

72 DAHL, supra note 71, at 90-94.

73 See, e.g., DAHL, supra note 70, at 18, 81-82, 89; SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 97-130 (1960); SHILS, supra note 70, at 225-30; Morris Janowitz & Dwaine Marvick, Authoritarianism and Political Behavior, 17 PUB. OPINION Q. 185 (1953).


75 T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950); see, e.g., SKOLNICK, THE POLITICS OF PROTEST, supra note 60, at 259-62; ARTHUR NIEDERHOFFER, BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY 103-51 (1967); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 33-34, 47 (1968); Robert W. Balch, The Police Personality: Fact or Fiction?, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 106, 107 (1972) (noting that “the typical policeman, as he is portrayed in the literature, is almost a classic example of the authoritarian personality”).
interests of law enforcement, dismissed the resurgent, politically charged police unionism of the late 1960s as “criminal justice syndicalism.” Jerome Skolnick, an equally influential but much more liberal scholar than Wilson, nonetheless agreed with him on this point. Skolnick saw police activism as a threat to the rule of law, and he therefore concluded that police officers, like judges or soldiers, must forswear politics.

Skolnick’s thinking on this subject is particularly interesting, because he fully appreciated the tension between his approach and the ideal of participatory democracy scorned by the pluralists. Skolnick drew explicitly on a distinction the sociologist Reinhard Bendix had drawn in the late 1950s between “totalitarian” and “nontotalitarian” responses to the “strategies of independence” adopted by employees in a bureaucracy—responses, that is to say, to employees’ “tacit evasion of rules and norms through application of individual judgment.” Bendix suggested that totalitarian regimes sought systematically to suppress independent judgment by employees, while nontotalitarian regimes sought to capitalize on it, addressing “managerial appeals . . . to the good faith of subordinates.” The “dilemma of the police in a democratic society,” Skolnick suggested, “arises out of the conflict between the extent of initiative contemplated by nontotalitarian norms of work and restraints upon police demanded by the rule of law.” Skolnick saw “forceful normative claims” on each side of this conflict, particularly because he thought it entirely plausible that working in an authoritarian organization would make the police less sympathetic to democratic values, and more attached to “social uniformity and routine and a somewhat rigid conception of order.” Ultimately, though, Skolnick took “the ideal of legality” to be “highest stated commitment” of “democratic society.” And that ideal required reining in police discretion with rules laid

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76 JAMES Q. WILSON, THINKING ABOUT CRIME xix (1975).
77 See SKOLNICK, THE POLITICS OF PROTEST, supra note 60, at 286-88.
79 SKOLNICK, JUSTICE WITHOUT TRIAL, supra note 10, at 226-30.
80 Id. at 11.
down by society; it did not tolerate “justice without trial.”” That was a conclusion fully consistent both with the agenda of police professionalism and with the tenets of democratic pluralism.

B. Post-1968: Community Policing and Participatory Democracy.

Police professionalism and democratic pluralism both unraveled in the late 1960s. Neither succumbed suddenly, so any date of demarcation will be arbitrary. But 1968 will do as well as any. The behavior of the Chicago police outside the Democratic National Convention that year helped to crystallize the disillusionment many people had come to feel about the evolution of American law enforcement. The assassinations that year of Martin Luther King and Robert Kennedy, followed by the dispiriting contest between Richard Nixon and Hubert Humphrey, helped to crystallize for many people the alienation they had come to feel from the American political system celebrated by the pluralists for its supposed moderation, stability, and inclusiveness. And 1968 was also the year that “participatory democracy”—the rhetorical centerpiece of the Port Huron Statement and the principal slogan of the New Left—went mainstream. Nixon called in his campaign for “an expanded democracy” in which “the people can be involved, their voices can be heard and heeded.”

Nixon’s brand of participatory democracy differed, of course, from the New Left’s. For activists in the 1960s participatory democracy had been an avenue of critique; for Nixon it was partly a strategy of cooptation and partly a rhetoric of apology. There is

81 Id. at 6, 226-30; see also Jonathan Simon, Speaking Truth and Power, 36 L. & SOC. REV. 37, 40 (2002) [hereinafter Simon, Speaking Truth and Power] (noting that “Skolnick saw the identification with the rule of law as the defining aspect of the police and a way to reconcile their fundamentally authoritarian character with the democratic society they were policing”).

82 See, e.g., LASCH, supra note 60, at 189, 206-07.

more than a small note of apology, likewise, in the prominent role that participation and deliberation have come to play, since 1968, in academic and popular discussions of democracy: as often as not the kind of participation thought critical to democracy turns out to be not very different from what we already have. 84 It is nonetheless significant that broad public participation, in one form or another, is now widely viewed as essential to democracy. That fact—together with the related decline, post-Vietnam and post-Watergate, in the trust placed in elites—marks the downfall of democratic pluralism as the orthodox account of the American political system.

The downfall of police professionalism, too, had something to do with diminishing faith in elites and deepening interest in participatory government. By the late 1960s the kind of policing lauded as “professional” and “politically independent” had come to be seen by many people as arrogant, aloof, heavy-handed, and ineffective. Much of the problem was thought to be the way “professional” police departments had removed themselves from the communities they served, ignoring the desires of ordinary citizens and relying instead on the views of self-appointed experts—police chiefs and their top aides. 85 By the 1980s this content had coalesced into the new orthodoxy of “community policing.” The new orthodoxy is notorious for meaning different things to different people, but at its heart is a rejection of police professionalism and an insistence that police should work with communities, not against them. 86

The downfall of police professionalism and democratic pluralism might have cleared space for proposals to bring a degree of workplace democracy to policing. And it

84 See, e.g., Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 70-71 (2005) (seeing “a form of participatory democracy” in the “national conversation” through which Americans find solutions to complex problems); Christopher H. Schroeder, Deliberative Democracy’s Attempt to Turn Politics Into Law, 65 LAW & CONTEMP. PROBS. 95, 116-17 (2002); Sklansky, Police and Democracy, supra note 5, at 1762-67.


did, briefly: witness the writings of George Berkley, William Westley, William Muir, and John Angell in the last 1960s and early 1970s. But the moment quickly passed, for reasons having to do with the extraordinary politics of the time.

To a degree that now appears remarkable, the police figured hardly at all in the early thinking of student radicals in the 1960s. The Port Huron Statement, rarely faulted for brevity or narrow focus, says not a word about the police. By the end of the decade, of course, police—often in riot gear—had become a fixture of New Left iconography. In retrospect this seems a predictable manifestation of themes present in New Left thinking from the outset: the rebelliousness, the suspicion of authority, the "anti-institutionalism." But it also reflected the course of protest politics in the 1960s, a sequence of events only partly determined by the ideology of student activists.

To begin with, the escalating war in Vietnam pushed the student movement beyond tactics of lawful protest and into increasing conflict with the police, confrontations that culminated in the debacle outside the 1968 Democratic Convention in Chicago and, two years later, in the shootings at Kent State. During this same period, Black protest grew more militant, and urban rioting became widespread. The police response to all of these events was often disproportionate, unsophisticated, emotional, and inflammatory.

The urban rioting itself was typically sparked by police activity and fueled in significant part by accumulated resentment of law enforcement in the inner city. Among the causes of that resentment were some of the central achievements of police professionalism: the insulation of police departments from local political control; the militaristic training of officers; the replacement of precinct stations and foot patrols with centrally dispatched patrol cars; the aggressive employment of the "stop and frisk"; and

87 See supra notes 44-54 and accompanying text.
88 Richard Flacks, The Liberated Generation: An Exploration of the Roots of Student Protest, 23 J. SOC. ISSUES 52, 56-57 (1967); see also, e.g., MILLER, supra note 5, at 7.
personnel policies—including standardized entry examinations and the elimination of residency requirements—that severely limited the hiring of minority officers. In combination, these practices alienated the police from inner-city residents, contributed to widespread racism among the police, and sharpened the sense in which the police officer in the ghetto seemed, in James Baldwin's resonant words, "like an occupying soldier in a bitterly hostile country."

But the police were controversial in the late 1960s for reasons that went beyond their operational practices. The police themselves entered the political fray, vocally and visibly. They complained bitterly about their public image, they attacked the restrictions imposed on them by the Supreme Court, they spoke out against left-wing groups ranging from the Communist Party to the Black Muslims and the ACLU, and they organized against efforts to insert civilians into police disciplinary procedures. All of this occurred not just at the level of police executives but also at the level of the rank and file. Law enforcement unionism, long crippled by the public backlash against a failed strike by Boston police officers in 1919, began to surge in the late 1960s and early 1970s, and in a strongly politicized form. The rallying issues included not only working conditions and compensation but also, crucially, opposition to civilian review boards and related efforts at police reform. And these were some of the tamer forms of police politics in the late 1960s. The less tame forms included active participation in reactionary organizations, organized brutality against political protesters, open defiance of civilian authorities, and vigilante attacks on Black militants.

By the end of the 1970s, when policing was among the most heavily organized of all public occupations, police unions had joined "the mainstream of American trade unionism," devoting the bulk of their attention to working conditions, job security, and the "bread-and-butter ... issues that have been near and dear to the hearts of U.S. trade

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89 See, e.g., Fogelson, supra note 60, at 243-68.
90 James Baldwin, Nobody Knows My Name: More Notes of a Native Son 66 (1962).
91 See supra note 60 (citing sources).
unionists for decades." But by then the damage had been done. The frightening forms taken by police activism in the late 1960s and early 1970s had dulled the appetite of virtually all scholars and police reformers for bringing workplace democracy to law enforcement. There were isolated exceptions. Herman Goldstein, in particular, continued to argue for “problem-oriented policing” that, among other things, “engage[d] rank-and-file officers more fully in the operation of the police agency” and gave them “more of a say in policies affecting [their] own role[s].” But by the mid-1980s the police reform agenda became monopolized by community policing, which except at the margins has had little to say about the role of ordinary officers in shaping departmental policy. Even the mildest versions of workplace democracy for police officers, therefore, have stayed largely off the table.

III. REASSESSING POLICE DEPARTMENTS AS SITES FOR WORKPLACE DEMOCRACY

The idea of bringing participatory management and rank-and-file intellectual engagement to policing was bandied about in the late 1960s and early 1970s, and tried out cautiously and successfully in some places, but it never caught on. There were two basic reasons. The first was an accident of history: at the time when workplace democracy was most in vogue, police officers were monolithically white, male, and reactionary, and they were organizing themselves in ways that seemed to threaten democracy rather than support it. The second was a matter of principle: the rule of law seemed to require police officers to be followers, not innovators. Democracy inside police departments, even in small doses, seemed—and may still—incompatible with external democratic control of the police.


93 GOLDSTEIN, PROBLEM-ORIENTED POLICING, supra note 13, at 156.

94 GOLDSTEIN, POLICING A FREE SOCIETY, supra note 43, at 264.
I now want to reexamine these considerations in light of present day realities. Not to keep anyone in suspense, I will conclude that they do not justify the continued neglect of internal democracy in discussions of democratic policing. Police departments have changed dramatically over the past 35 years and now are far safer places for experiments in workplace democracy. And there is no obvious conception of the rule of law that is both plausibly central to democracy and inconsistent with any effort to give police officers a greater say in the shaping of their work.


I have already mentioned one way in which police departments have altered since the early 1970s: police unions are less focused on issues of civilian oversight and more focused on the kind of prosaic, bread-and-butter issues addressed by other unions. This is surely an important change, and a positive one for anyone worried about giving police officers more say in policymaking. But it pales in comparison with a much fundamental change in American law enforcement: the sweeping transformation of the police workforce. That transformation has had two components. The first is demographic. The second, which owes much to the first, is cultural.  

1. Police demographics. American police forces are far more diverse now than they were in 1970, and far more representative of the communities that they serve. Minority officers, female officers, and openly gay and lesbian officers are slowly but dramatically transforming a profession that 35 years ago was virtually all white, virtually all male, and uniformly homophobic.

Blacks, for example, made up somewhere around 6% of sworn officers in the 300 or so largest American police departments in 1970; today the figure is around 18%. In cities with populations over 250,000, 20% of sworn officers are Black, and 14% are

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95 Some of the following material is adapted from Sklansky, Not Your Father’s Police Department, supra note 59.

96 See McCrary, supra note 20, at 44.
Latino—up from figures of 18% and 9%, respectively, in 1990. In 2005, for the first time in the history of the New York City Police Department, a majority of the new officers graduating from its academy were members of racial minorities. In some major cities—including Los Angeles, Detroit, and Washington, D.C.—the entire police force is now majority minority. Minority officers remain concentrated in lower ranks, but not across the board. In Los Angeles, for example, where the Black share of the city population in 2000 was 11%, Black officers that year comprised 14% of the police force, 15% of supervisors, and 22% of command-level personnel.

Women were 2% of sworn officers in large police agencies in 1972; today they are close to 13%. Again, the figure in some departments is significantly higher, although it tops out around 25%. Like minority officers, female officers remain concentrated in lower ranks—although, as with minority officers, the extent and uniformity of the concentration is less than one might expect.


99 See LOS ANGELES POLICE DEPARTMENT ANNUAL REPORT 2000, at 27; REAVES & HICKMAN, supra note 97.

100 See, e.g., Lee, supra note 98.

101 See LOS ANGELES POLICE DEPARTMENT ANNUAL REPORT 2000, supra note 99, at 27. Latino officers in Los Angeles remain strongly concentrated in the lower ranks—at least in part, presumably, because the Latino percentage of the city population has been steadily growing over the past several decades, and with it the Latino percentage of new officers hired by the department. Nationwide, as in Los Angeles, the Latino officer-to-resident ratio lags behind the Black officer-to-resident ratio, but leads the corresponding figure for other minorities. See REAVES & HICKMAN, supra note 97, at 3.

102 See KIM LONSWAY ET AL., NATIONAL CENTER FOR WOMEN & POLICING, EQUALITY DENIED: THE STATUS OF WOMEN IN POLICING: 2001 (2001). Women comprise a much larger share of the civilian workforce in large police departments. In departments with over 100 sworn officers, women hold more than two-thirds of the civilian positions, which generally are lower paid and offer fewer opportunities for advancement. See id. at 8. Chiefly to save money, American police departments have greatly increased their
The mere fact that there are *any* openly gay officers, let alone gay police executives, is a sea change from the situation thirty years ago. San Francisco had no openly gay officers as late as 1979; Chicago had none as recently as 1991. Even today, gay and lesbian officers can feel strong pressures to keep their orientation hidden or at least unadvertised. This is particularly true for gay male officers. The Berkeley Police Department, for example, has had several openly lesbian supervisors, but to this day has never had an openly gay male officer at any rank. It is therefore difficult to estimate the number of gay and lesbian police officers, or even those who are, to a greater or lesser extent, open about their status. The latter category is clearly growing, though, to the point where, in some departments, "the presence of self-disclosed gay and lesbian

reliance on civilian employees in recent years; large departments now employ more civilians than sworn officers. See, e.g., REAVES & HICKMAN, supra note 97, at 2. The stark gender difference between the two groups—the vast majority of officers are men, and the vast majority of civilian employees are women—both exacerbates and makes more troubling the way in which "civilianization" has tended to create two-tier departments, with a civilian employees treated as second-class citizens.

103 See STEPHEN LEINEN, GAY COPS 11 (1993); Katy Butler, The Gay Push for S.F. Police Jobs, S.F. CHRON., Apr. 9, 1979, at A1; Randy Shilts, Gay Police—"We're Not All That Different," POLICE MAGAZINE, July 1980, at 32. The novelist Jonathan Kellerman recalls that he created the character of a gay Los Angeles homicide detective in the early 1980s "because I wanted to avoid cliches, and a gay officer was a revolutionary concept." Jonathan Kellerman, Two Identities, But One Compulsion, N.Y. TIMES, Mar. 31, 2003, at E1. Most police chiefs at the time adamantly opposed hiring gay officers. Shilts, supra, at 32.


104 See, e.g., DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY 275-76 (2000).
officers has become normalized.\textsuperscript{105} Between 1992 and 2001, for example, the number of "self-identified gay men and women" working for the San Diego Police Department increased from 5 to somewhere between 35 and 50. In San Diego as elsewhere, as the number of "out" cops has risen, their presence on the force has become increasingly taken for granted.\textsuperscript{106} The participation of uniformed police officers in gay pride parades is now commonplace, if still at times controversial. And in November 2004, the annual meeting of the International Association of Chiefs of Police included, for the first time, a workshop on gay, lesbian, bisexual, and transgendered officers.\textsuperscript{107}

It is far from certain that police forces will continue to diversify at the rate they have over the past three decades. Much of the past progress was produced by court-ordered programs of affirmative action, which are now growing less common.\textsuperscript{108} The increase in the representation of women in large police departments, for example, appears to have stalled since 1999; in fact, the nationwide percentage of officers who are female may have ticked slightly downward.\textsuperscript{109} Still, the demographics of law enforcement have already altered dramatically. Today's Los Angeles Police Department is not the homogeneous workplace celebrated on \textit{Dragnet}—and neither is the police force of any other large American city.

2. \textit{Police culture}. The new, much more diverse demographics of American law enforcement have powerfully altered the internal culture of police forces. This is something that older officers—particularly white, male, heterosexual officers—talk about

\begin{itemize}
\item[\textsuperscript{105}] Belkin & McNichol, supra note 103, at 78; \textit{see also}, e.g., SUSAN L. MILLER, \textsc{Gender and Community Policing: Walking the Talk} 134 (1999).
\item[\textsuperscript{106}] Belkin & McNichol, supra note 103, at 77-83.
\item[\textsuperscript{107}] \textit{See} Fox, supra note 103, at B11; Laurel J. Sweet, \textit{O'Toole Aims for Gay Cops' Acceptance at Powwow}, Boston Herald, June 21, 2004, at 12.
\item[\textsuperscript{109}] \textit{See} LONSWAY ET AL., supra note 102, at 6.
\end{itemize}
a lot. A white male officer interviewed by sociologist Robin Haarr in the mid-1990s put it this way: "It used to be we were all 'blue,' but that has changed over the past years. Today there is black, white, and female segregation." Haarr agrees. Expressing what seems to be the emerging consensus among police ethnographers, she reports that "unified occupational subculture" of policing is being replaced by workplaces marked by "division" and "segmentation."

One manifestation has been the emergence of identify-based organizations of police officers, organizations which now compete for membership with mainstream police unions and police benevolent associations. In Los Angeles, for example, the Police Protective League is joined by the Oscar Joel Bryant Foundation, which represents Black officers, and the Latino American Law Enforcement Association, known informally as "La Ley." On the national level, there are the National Black Police Association, the National Organization of Black Law Enforcement Officers, the National Organization of Black Law Enforcement Executives, the Hispanic National Law Enforcement Association, and the National Latino Peace Officers Association.

At both the local and national level, these organizations often take positions at dramatic variance with the position of mainline police organizations—not just on hiring and promotion policies, but on issues such as racial profiling and police brutality, and


111 Id. at 53; see also, e.g., BARLOW & BARLOW, supra note 104, at 205; MAYNARD-MOODY & MUSHENO, supra note 26, at 64-76. Samuel Walker has been pressing this point for twenty years. See, e.g., Samuel Walker, Racial Minority and Female Employment in Policing: The Implications of 'Glacial' Change, 31 CRIME & DELINQ. 555, 556, 565 (1985).

112 See, e.g., BARLOW & BARLOW, supra note 104, at 235-41; Erin Aubry Kaplan, Rethinking the LAPD Black and Blue, L.A. WEEKLY, Sept. 6, 2002.

on questions of police leadership. In Los Angeles, for example, when Chief Bernard Parks was being considered for reappointment in 2002, he was strongly opposed by the Police Protective League, supported by the Oscar Joel Bryant Foundation, and opposed by La Ley.114 Another, earlier example: in 1991, after Milwaukee’s police chief suspended three officers in the fallout from the Jeffrey Dahmer case, the Milwaukee Police Association voted “no confidence” in the chief, but the League of Martin—an organization of Black officers—pointedly distanced itself from the vote and defended the suspensions.115

The division and segmentation of police workforces is exactly what many people feared thirty years ago, when courts began imposing race- and gender-conscious hiring plans on police departments. Samuel Williams, a Black lawyer serving as president of the Los Angeles Board of Police Commissioners, warned in 1975 that “[t]he entrance of minorities into a department under a judge-fashioned statistical umbrella can only lead to an organization ... torn by faction and laced with angry mutterings,” an organization "deprived of that crucial cooperation among brother officers so critically essential to effective service."116

The factions and mutterings have come. Police officers today report lines of division, distrust, and resentment not only between white officers and minority officers, but also between male and female officers, between gay and straight officers, and sometimes between Black officers and Latino officers, Latino officers and Asian-American officers, and so on. It is not clear how much of this can be laid at the feet of


the courts; some of it may have happened no matter what route police departments took to greater workforce diversity. But the decline in solidarity is everywhere apparent. The good news is that it has turned out to be a much more beneficial development than Williams and others feared. The decline in solidarity does not seem to have impaired police effectiveness. For operational purposes, it appears still to be true that "blue is blue."\(^{117}\) In between calls to service, police officers are a less cohesive group than they used to be. But that appears to be a very good thing. It makes the internal cultures of police departments less stifling, and it opens up space for dissent and disagreement. Studies of police departments today read far differently than those of thirty or forty years ago: investigators rarely find a single police perspective on any given issue, but rather a range a conflicting perspectives.\(^{118}\)

Moreover, the social fragmentation has gone hand in hand with a decline in police insularity. For identity binds as well as divides.\(^{119}\) Minority officer organizations frequently work closely with minority organizations outside law enforcement; to a lesser extent, female officers sometimes form organizational ties with women working in other historically male professions. The National Center for Women and Policing, for example, is part of Eleanor Smeal’s Feminist Majority Project. Organizational alliances like this operate alongside, and help to foster, less formal ties of affinity between minority cops and minority citizens, female cops and women more broadly, and gays and lesbians inside and outside law enforcement.\(^{120}\) Both the formal, organizational alliances and the less formal ties of affinity create channels for expanding civilian involvement in

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\(^{117}\) See, e.g., Myers, Forest & Miller, supra note 103, at 34..

\(^{118}\) See, e.g., Barlow, Barlow & Stajkovic, supra note 115, at 140.


\(^{120}\) See id. at 910-17; Barlow & Barlow, supra note 104, at 235-41.
the shaping and directing of law enforcement. The social fragmentation I have been discussing might more accurately be described, therefore, as social realignment.

The growing, still far from complete acceptance of openly gay and lesbian officers may contribute in a particularly powerful way to the social realignment of law enforcement—in part by accelerating the fragmentation of the police subculture, in part by creating new channels of communication with groups outside of law enforcement, and in part by challenging the endemic homophobia of law enforcement. There is good reason to think that the suppression of homosexuality has played a central role in cementing police solidarity, in part by rendering professional male-male partnerships sexually unthreatening, and in part by helping to shape a whole, hyper-masculinized professional ethos. The presence of openly gay and lesbian officers, particularly once they begin to rise through the ranks, challenges the easy, taken-for-granted homophobia

121 I owe this point to Michael Musheno.

122 Erin Murphy has pointed out to me that the social realignment may be assisted by new technologies of communication. Cell phones, for example, now let officers communicate directly, regularly, and privately with fellow officers of their choosing, as well as with members of the public. On the effects of cell phones and communication technology more generally on the social dynamics of policing, see, e.g., Peter K. Manning, Policing Contingencies 123-74 (2003).

123 When William Westley did his pioneering ethnography of an American police department in the 1950s, for example, he found that the rampant condoning of illegal violence among police officers owed a good deal to the experiences that officers had policing "sex cases"—a category which for him, and for the officers he studied, lumped homosexuals together with rapists, peeping toms, and exhibitionists. Westley thought the police correctly understood the public to approve "extremely rough treatment" in sex cases, but to want that treatment carried out unofficially and without their involvement. The experience of the police in this cases, Westley concluded, "encourage[d] them to use violence as a general resource," and left them embittered and cynical about what the public expected of them. It helped to convince them that their jobs required them to exercise discretion in a way that could not be publicly acknowledged—that police work was essentially and necessarily outside the law. William A. Westley, supra note 38, at 61-63, 89-90, 107; William Westley, Violence and the Police, 59 Am. J. Soc. 34, 37-38 (1953). Seven of fifteen law enforcement agencies in Los Angeles County interviewed by law students in 1966 admitted engaging in organized, extralegal harassment of homosexuals. See Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 UCLA L. Rev. 643, 719 (1966).
of law enforcement, and all that it has helped to foster—the nominally desexualized police workplace, the hyper-masculinized ethos of the profession, and the tacit acceptance of extra-legal violence. All of that is on top of the ways in which gay and lesbian officers, like minority officers and female officers, will help to fragment the police subculture and to build identity-based bridges to groups outside of law enforcement.

The social realignment of policing—the decline in the solidarity and insularity of the police—has turned out to be the most important effect of the profession’s growing diversity. The notion of police departments as insular, homogeneous bastions of unchallenged patriarchy, racism, and authoritarianism is seriously out of date. Along with the vastly increased numbers of college-educated police officers, the demographic and cultural transformation of American law enforcement suggests that police departments are much safer places today for experiments in workplace democracy.

B. Police Departments and the Rule of Law

Police forces have changed over the past three decades. They are more diverse, more open to debate and disagreement, and less insular. All of that makes them more promising sites for experiments in rank-and-file participation in organizational decisionmaking. But are experiments of that kind inconsistent with the rule of law?

Skolnick’s influential account of democratic policing stressed the rule of law as the key to reconciling the “fundamentally authoritarian character” of the police “with the democratic society they were policing.” And he suggested that the rule of law required police to follow the directions laid down for them by the courts, elected officials, and the public at large; it was therefore inconsistent, in the context of policing, with “the extent

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124 See supra notes 28-29 and accompanying text.

125 Simon, Speaking Truth and Power, supra note 81, at 40.
of initiative” ordinarily “contemplated by nontotalitarian norms of work.” Skolnick never quite said that collective innovation by police officers should be discouraged, but his account left little room for it. Individual “strategies of independence” were inconsistent with “the principle of legality.” So was police activism. Programs of participatory management controlled from above—say, some kind of law enforcement equivalent of “quality circles”—were not ruled out, but neither did Skolnick show any enthusiasm for them. The police reform agenda suggested by his work was controlling the police from above and from outside. And that is largely the police reform agenda we have had since the 1960s. Police professionalism and community policing, despite their differences, have both been versions of this agenda.

Here is the difficulty in assessing whether workplace democracy in law enforcement really is inconsistent with the rule of law: no one knows precisely what the “rule of law” means. Like most scholars who invoke the concept, Skolnick was unapologetically vague about its details but seemed influenced by Lon Fuller’s account. Fuller identified eight elements in the rule of law: (1) rules of general application that are (2) publicized, (3) applied prospectively, (4) understandable, (5) non-contradictory, (6) capable of being followed, (7) stable, and (8) faithfully applied. How many of these elements are truly separate is controversial. More importantly, there is dispute about what the elements themselves mean, and about how they should be

126 SKOLNICK, JUSTICE WITHOUT TRIAL, supra note 10, at 226-30.

127 See supra notes 77-81 and accompanying text.

128 See SKOLNICK, JUSTICE WITHOUT TRIAL, supra note 10, at 11 (“In the abstract, the rule of law embodies rational restraints on authority as it defines criminal conduct. There must be specificity, clarity, prospectivity, and strict construction in favor of the accused. There must be procedural regularity and fairness, and so forth. In practice, however, such standards may not be clear.”) Phrases like “and so forth” are quite typical in discussions of the rule of law.


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weighted and combined. Depending on the answers to those questions, the “rule of law” can wind up meaning—as Richard Fallon demonstrated several years ago—anything from originalism to formalism to fair process to substantive justice.131

As a result, it is not entirely clear what we mean when we talk about reconciling police with the rule of law. Four possibilities suggest themselves. First, the “rule of law” in policing could simply mean that the police do not themselves violate the law. Fuller himself seemed to think that “lawless conduct by the police” was the chief threat they posed to the rule of law.132 Second, reconciling the police with the rule of law could mean ensuring that the police do not frustrate the application of the law to the people they police—by, for example, failing to arrest offenders. This view emphasizes the role of the police in securing the last of the eight elements Fuller identified in the rule of law, namely “congruence between the rules as announced and their actual administration.”133 Third, the “rule of law” in policing could mean ensuring that all exercises of power by the police are governed by law, rather than simply being arbitrary exercises of discretion. This view seems consistent with Hayek’s famous definition of the rule of law: “stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.”134 Fourth and finally, the “rule of law” in policing could mean that the police are subject to majoritarian control or judicial oversight—or some combination of those two checks. It may dilute the value of the term

131 See Fallon, supra note 130, at 10-24.
132 Fuller, supra note 129, at 81; cf., e.g., Jerome H. Skolnick & James J. Fyfe, Above the Law: Police and the Excessive Use of Force xvi (1993) (arguing that “in a free society, especially in the United States, where police derive their authority from law and take an oath to support the Constitution, they are obliged to acknowledge the law’s moral force and to be constrained by it”).
133 Fuller, supra note 129, at 39.
134 F. A. Hayek, The Road to Serfdom 54 (1944) (quoted in, e.g., Raz, supra note 130, at 210); cf., e.g., Raz, supra note 130, at 219 (noting that “the rule of law is often rightly contrasted with arbitrary power”).
“rule of law” to employ it as a synonym for democracy or for the protection of civil rights, but there is no doubt that the term is sometimes used in this way.

Fortunately, we do not need to decide for present purposes which of these formulations—or what admixture of two or more of them—best captures our intuitions regarding what it means to reconcile the police with the rule of law. The fact is that none of these four versions of the rule of law in policing, alone or in combination, are inconsistent or even in strong tension with a resolve to greatly increase the voice of rank-and-file officers in the management of their departments.

This is perhaps most obvious with respect to the first formulation of the rule of law in policing, the formulation stressing the obligation of police officers not to break the law. One way for police officers to help shape the nature of their work is for them simply to ignore legal directives addressed to them. But this certainly is not the only way, nor is it a particularly powerful way. When we talk about workplace democracy in any field, what we typically have in mind is not employees ignoring the rules imposed on them, but (a) employees collectively participating in the shaping of those rules, and (b) the rules being shaped in such a manner that room is left for employees to be creative about how best to further the objectives of the organization. Both these possibilities seem worth exploring in the context of law enforcement. Rank-and-file officers could be involved in the formulation of the rules under which the police operate, and the rules could be designed to leave room for innovation by individual officers and teams of officers. Neither of these would involve any violation of the law by the police; they are alternative ideas about how the law governing the police should be hammered out in the first place, and about what that law should look like.

The situation is slightly more complicated with respect to our second version of the rule of law in policing: the notion that police discretion should not be allowed to frustrate the neutral and consistent application of pre-announced legal rules. This version of the rule of law is violated when the police decide on their own, for example, not to

\[135\] See Raz, supra note 130, at 210-11.
enforce a particular prohibition of which they disapprove (think of police during Prohibition refusing to pursue bootleggers), or to ignore violations of the law in a particular area (think of “the time-honored practice of ghetto confinement of deviance”\textsuperscript{136}), or to refrain from arresting particular suspects, despite the existence of probable cause (think of the tacit condoning of lynching during Jim Crow). This version of the rule of law could also be violated, if less egregiously, by some of the innovations one might expect if police officers were given a larger say in the nature of their work: decisions by groups of officers, for example, to concentrate their efforts on certain areas or certain kinds of offenses, ignoring other areas or other offenses, or decisions by individual officers to look the other way in particular situations.

But this second formulation of the rule of law in policing is hopelessly unrealistic. Enforcement discretion in policing is unavoidable. Police departments \textit{today} make decisions all the time about where to concentrate their resources; police officers \textit{today} make decisions all the time about whether to look the other way. And very few of the legal rules imposed on officers \textit{today} do anything to rein in enforcement discretion. Mandatory arrest rules for domestic violence suspects are an obvious exception. But these rules have been noteworthy and controversial in part because they are so unusual.\textsuperscript{137} If the rule of law means that the police must arrest everyone who there is reason to believe has committed a crime, then the rule of law is pie in the sky, and we might as well stop talking about it. Police discretion, and a massive amount of it, is simply unavoidable.

This is a large part of the attraction of the third formulation of the rule of law in policing: the idea that all exercises of power by the police, including decisions not to invoke their power, should be governed by rules announced in advance. This version of the rule of law seems inconsistent, or at least in tension, with \textit{some} of what I have been


calling workplace democracy in policing. It seems in tension with the view that the rules under which the police operate should be structured to allow ample room for \textit{ad hoc} decisions by individual officers—or, for the matter, by groups of officers—about how the mission of the police can best be advanced in particular situations. But it is fully compatible with other forms of workplace democracy in policing—in particular, with those forms that involve rank-and-file police officers in the formulation of the rules under which they operate. Indeed, those forms of workplace democracy might \textit{bolster} the third version of the rule of law in policing, by helping the police to develop rules that are more workable and less likely to be flouted. They may be the most attractive forms of workplace democracy in policing for other reasons, as well: they are the forms that have the best potential for developing the democratic skills and habits of officers, and giving them a greater appreciation for democratic values.

Something further should be said, before we move on, about the tension between the third version of the rule of law in policing and the notion that the rules under which police operate should leave them room for creativity. The fact that police discretion comes into conflict with a coherent and plausible conception of the rule of law does not mean that police discretion should be minimized. There are other things we care about, in addition to the rule of law—particularly this particular conception of the rule of law.\textsuperscript{138} And compliance with this particular conception of the rule of law in policing will always be a matter of degree. Just as there is no way to eliminate enforcement discretion in policing, there is no way to bring all of that enforcement discretion under the control of rules. Rules simply cannot be drafted that will dictate, without ambiguity, the appropriate exercise of enforcement discretion in every imaginable situation. Nor can rules be drafted to specify, in advance, the proper application of all the other kinds of discretion exercised by the police when applying their coercive powers. Therefore it may make sense to expand even those kinds of workplace democracy that come into conflict with the third version of the rule of law in policing, the notion that all exercises of police authority should be governed by rules.

\textsuperscript{138} This is the point stressed by Raz: the rule of law is a political virtue, but it is not the only political virtue, and sometimes it should yield. \textit{See} Raz, \textit{supra} note 130.
What about the fourth version of the rule of law in policing—the version that takes the “rule of law” to mean majoritarian control, or judicial oversight, or some combination of the two? The first thing to be said is that any kind of workplace democracy in policing could and should be subject to outside checks, both political and judicial. Giving police officers more of a say does not mean giving them a final say. None of the benefits of workplace democracy would be threatened by allowing for an electoral veto, a judicial veto, or both—so long as the veto power is not exercised excessively.

The caveat is significant, of course. At some point there is a tradeoff between giving police officers a greater voice and giving the public, or the courts, more control over policing. But tradeoffs between different elements of “democratic policing” are unavoidable, even without bringing workplace democracy for police officers into the mix. There is a familiar tradeoff, for example, between majoritarian control of policing and judicial control of policing. So the existence of tradeoff between workplace democracy for police officers and outside control of the police is not, by itself, sufficient reason to reject the notion that rank-and-file officers should play a greater role in shaping the nature of their work.

All the more so given how far we are from actually confronting that tradeoff. Few of the rules under which police currently operate were imposed by elected officials or adopted through other majoritarian processes. Judicial control of the police is more extensive. But even this is easy to overestimate. By far the largest source of constraints on the police is departmental management.

This is the great legacy of police professionalism: law enforcement agencies run their own shops, largely free from outside interference. Community policing has made departments less insular and more likely to consult with outsiders, but it has almost never meant a decrease in the operational autonomy of law enforcement. With minor exceptions, community policing programs are adopted unilaterally by the police—and
that means by police management.\textsuperscript{139} Civilian oversight is now an accepted feature of law enforcement in most major American cities, but for the most part the oversight operates at the margins: reviewing selected disciplinary decisions, for example.\textsuperscript{140} We could give police officers substantially more voice in shaping their work without diminishing outside control. What would have to yield is the ability of management to operate unilaterally. In this respect, at least, policing is not very different from other lines of work.

IV. WHAT MIGHT WORKPLACE DEMOCRACY IN POLICING MEAN?

My principal goal in this essay has been to suggest that workplace democracy deserves more attention than it receives in current discussions of democratic policing. I will not try here to chart the best ways to give rank-and-file police officers a greater voice in the nature of their work. But I do want to sketch briefly four implications of a commitment to expanding workplace democracy in policing. First, such a commitment will require us to confront the tensions between different approaches to involving line officers in police management and policymaking—the tensions, in particular, between the model of police unionism, the model of participatory management, and the model of what I will call “multivalent organizing.” Second, any serious effort to bring more participatory democracy to policing should include greater attention to the quality of supervision in law enforcement agencies. Third, judges, policymakers and the public at large may want to pay more heed to the views of organized groups of police officers—particularly when those groups appear democratic and broadly representative. Fourth and finally, the value of workplace democracy in policing provides an additional reason, beyond the more familiar ones, for worrying about the growing privatization of law enforcement.


A. Models of Rank-and-File Participation.

Up until now I have purposefully put to one side the distinction often drawn between “industrial democracy” and “participatory management”: between trade unionism on the one hand and, on the other hand, management-controlled exercises in consulting with workers. (“Participatory management” in this narrower sense is to workplace democracy roughly as community policing is to “neighborhood policing,” the umbrella term for various proposals advanced in the 1970s to place police departments under a strong version of neighborhood control.141) I now want to turn my attention to that distinction, as well as to the possibility that the best model for workplace democracy in policing may differ both from traditional trade unionism and from traditional forms of “participatory management,” narrowly defined.142

There are at least three different models for giving rank-and-file officers more say in how policing is carried out. The first is by strengthening police unions and giving them a greater role in the setting of policy. The second is through management-controlled initiatives at participatory policymaking—initiatives that might look roughly like “quality circles” in manufacturing, or like the violence-prevention effort that Hans Toch and his collaborators studied in Oakland in the 1970s.143 The third is by building on the pattern of multivalent organizing that seems to have developed over the past few decades in policing—the patchwork quilt of police unions and identity-based police organizations.144 Some but not all of the police unions are now affiliated with broad-based labor organizations like the Teamsters or the AFL-CIO. Some but not all of the


142 I thank Monique Marks for helping me to see the importance of these distinctions.

143 See supra note 18 and accompanying text.

144 See supra notes 112-123 and accompanying text.
identify-based police organizations are associated, formally or informally, with identity-based groups outside of policing.

Strictly speaking these three models are not mutually exclusive: one can imagine strong police unions existing alongside a vibrant set of identity-based police organizations, and all of this grass-roots organizing sharing the stage with efforts by management to consult more broadly with the rank and file. As a practical matter, though, the models can tend to crowd each other out. Management-led efforts at participatory decisionmaking can wind up marginalizing and undercutting bottom-up exercises in participatory democracy, sometimes by design. Unions, partly for that reason, often oppose top-down exercises in participatory management. Unions can be threatened, as well, by the proliferation of groups that compete with them for the allegiance of the rank and file. Nor is this simply a matter of institutional competition: groups representing minority officers, or female officers, or gay and lesbian officers, offer a different kind of solidarity than traditional police unions, a solidarity that sweeps less broadly within policing but also builds bridges with groups outside of policing.

I will not attempt in this essay to identify the ideal admixture of the three models of rank-and-file participation I have described. Nonetheless I want to note several distinct advantages of the multivalent organizing model. First, it is already emerging of its own accord. Efforts to capitalize on it will be swimming with the current. Second, multivalent organizing offers the familiar advantages of competition. Precisely because they are often rivals for the allegiance of the rank and file, organizations of police officers today help to keep each other honest. Third and finally, multivalent organizing in police forces does double duty, not only fostering solidarity among police officers, but also breaking down the traditional insularity of policing by building bridges to outside groups. A hint of the good that might do, outside as well as inside police departments, may be found in the critical role that organizations of Black police officers in South Africa have played not only in reforming law enforcement but also in the broader struggle for racial
equality—or, closer to home, the role that organizations of minority police officer, working with groups outside law enforcement, have played in debates over racial profiling. It is true that multivalent organizing does not foster occupation-wide solidarity of officers to the same degree as traditional police unionism. But this may well be a price worth paying, particularly given how prone law enforcement has been to excessive insularity.

In theory, police unions could be bridges to groups outside of policing, too. In the early 1970s, when police unions were emerging from a decades-long period of dormancy, some people hoped that unionism would build solidarity between police officers and other working class employees. For the most part it has not happened: the ideology of collective bargaining and class solidarity has proved too weak to alter the traditional insularity and law-and-order ideology of the police. All the more striking, then, that identity politics, for all its faults, seems to have managed that trick.

Even more striking, competition from identity-based groups may be prompting some mainstream police unions to build their own bridges to civilian groups, both inside and outside the labor movement. Local police unions arose in late 1960s and early 1970s from local “benevolent associations” and “protective leagues.” They tended to keep their old names, avoid the term “union,” and steer clear of affiliation with other labor organizations. In recent years, though, a growing number of police unions have affiliated either with the Teamsters or with the AFL-CIO’s International Union of Police

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145 See, e.g., Marks, *Transforming Police Organizations from Within*, supra note 57.

146 See, e.g., Berkley, *supra* note 51.

Associations, and some have formed more surprising alliances.\textsuperscript{148} A case in point is the Los Angeles Police Protective League, a notoriously inward-looking organization that five years ago found itself struggling against Bernard Parks, an African-American chief of police strongly supported by the Oscar Joel Bryant Foundation, which represents Black officers in Los Angeles. To challenge the lessons Chief Parks drew from the Rampart Division corruption scandal, the PPL commissioned a report by Erwin Chemerinsky, a law professor long active in the ACLU.\textsuperscript{149} Two years later, the PPL’s efforts to oust Parks triggered a decertification drive by dissent officers supported by the Teamsters; in response the PPL joined the IUPA.\textsuperscript{150}

B. \textit{The Role of Supervision.}

Efforts to expand workplace democracy in policing will depend heavily on skillful and enlightened leadership with the police hierarchy, both among command staff and among mid-level supervisors. This is true most obviously of management-driven exercises in participatory decisionmaking. But it is also true, perhaps paradoxically, of efforts to foster “bottom up” forms of workplace democracy, including both stronger and more productive police unions and what I have been calling multivalent organizing of the rank and file. Grass-roots efforts at workplace democracy in policing are most likely to flourish, and to be channeled in productive directions, when they are welcomed. It is naïve to think that repression, either in a workplace or in society at large, helps nurture


movements for change.\textsuperscript{151} Departments that make clear their desire and ability to work with organizations of rank-and-file officers in reexamining policies and improving operations are more likely to elicit that kind of productive engagement. But sending signals of this sort, and making good on them, requires skillful managers and supervisors.\textsuperscript{152}

Facilitating workplace democracy is not the only reason to want better managers and supervisors in policing. Even aside from this benefit, more skillful supervision—particularly at the sergeant level—has long been thought, by many informed observers, to be one of the best ways to improve the quality of policing. Good supervision can do much of what the criminal procedure revolution tried, with only limited success, to accomplish with rules: make the day-to-day work of policing less arbitrary, more accountable, and more enlightened.\textsuperscript{153} One alternative to Taylorism other than workplace democracy is, in fact, greater reliance on responsible and flexible supervision. There is a case to be made for this kind of thing throughout government, including in policing.\textsuperscript{154} For reasons I have tried to make clear in this essay, I think it should be combined in policing with an expanded role for workplace democracy.

Fortunately, these two alternatives to law enforcement are not in strong competition; instead, they can complement each other. Not only can skillful supervision facilitate workplace democracy, but workplace democracy can help responsible supervisors: by tapping them into the street-level expertise of the rank and file, by strengthening the attachment of the rank and file to the department’s objectives, and by developing in officers the kind of habits and temperaments that should ease relations with the communities served by the department.

\textsuperscript{151} See, e.g., LASCH, supra note 60, at 203.

\textsuperscript{152} See, e.g., GOLDSTEIN, PROBLEM-ORIENTED POLICING, supra note 13, at 155-57.

\textsuperscript{153} See, e.g., id. at 157-59.

\textsuperscript{154} Gillian Metzger, in fact, has suggested that due process might be re-imagined to include a duty on the part of government to assure adequate supervision of its agents, both public and private. See Gillian E. Metzger, Private Delegations and Due Process 32 (Mar. 12, 2005) (unpublished manuscript on file with author).
C. Paying Heed.

It is not clear there is much courts can or should do to expand workplace democracy in policing, even assuming that goal is worth pursuing. This is mainly a task for police officers themselves and for enlightened law enforcement management. Courts could take one small step, though. They could start to pay heed to the views of organized groups of police officers in the same way they pay heed to the views of law enforcement management. It is common for courts, including the United States Supreme Court, to give heavy weight to the official views of state and federal law enforcement agencies when ruling on questions of police procedure. It is far less common for courts to give weight to the views of organizations of rank and file police officers. Doing so is one straightforward way for courts to give line officers a greater voice in the nature of their work.

In determining how much weight to give the views of a particular organization of police officers, courts may want to take into account not only the number of and kinds of officers involved in the organization, but also how democratically it is run, and to what degree positions adopted by the organization are the products of deliberation and debate. Drawing distinctions along these lines will not only help courts identify those organizations whose views are likely to be better informed and more representative of the views of police officers more broadly; it may also help to push organizations of police officers—unions as well as identity-based organizations—toward greater openness and more careful deliberation. If there are reasons to democratize the insides of police

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156 Cf. Bd of Educ. v. Earls, 536 U.S. 822, 841 (Breyer, J., concurring) (arguing for deferring to views of local school board regarding drug testing of students, in part because the school board had used a “democratic, participatory process to uncover and to resolve differences”).
departments, there are also reasons to try to democratize the insides of the organizations claiming to represent the views of rank and file police officers.

D. Workplace Democracy and Police Privatization.

Over the last thirty-five years, as police departments have transformed the demographics of their workforces and changed their operational philosophy from police professionalism to community policing, they have also lost their monopoly. Growth in public law enforcement has slackened, and the private security industry has exploded. Today private guards greatly outnumber sworn law enforcement officers throughout the United States, and the gap continues to widen. Increasingly, private security firms patrol not only industrial facilities and commercial establishments but also office buildings, transportation facilities, recreational complexes, and entire shopping districts and residential neighborhoods. Many Americans—particularly wealthier Americans—are more likely to encounter a private security guard than a police officer on any given day. In the words of one industry executive, "[t]he plain truth is that today much of the protection of our people, their property and their businesses, has been turned over to private security."\(^{157}\)

Police privatization has raised concerns about training and supervision, about circumvention of constitutional and legislative constraints on the police, and about linking physical security to wealth.\(^{158}\) All of these issues deserve the attention they have received, and the last deserves considerably more.


But police privatization also threatens, in ways that have been almost entirely ignored, the halting, unfinished project of democratizing the internal operations of police departments.\textsuperscript{159} In a recent, illuminating study of a large Canadian security firm, George Rigakos found a workplace marked by extraordinary efforts at monitoring, controlling, and disciplining employees, and by levels of alienation and cynicism remarkable even in comparison with what we have come to expect from public law enforcement officers.\textsuperscript{160} There is no reason to think other security firms would look strikingly different in these regards.\textsuperscript{161}

Things could change, of course. The private security industry is currently the target of a major organizing campaign,\textsuperscript{162} and workplace democracy could be imposed by statute on private security firms—just as on any other private firm. At bottom, though, what a private security firm offers its customers is, as Rigakos puts it, "a management system for hire."\textsuperscript{163} This will likely make public norms regarding the internal operation of police forces the hardest to export to the private sector. Their internal operations—overwhelmingly nonunion, unburdened by civil service rules and "police officer bills of rights," relentlessly focused on efficiency and narrowly drawn performance goals—are

\textsuperscript{159} I discuss this point at greater length in Sklansky, Private Police and Democracy, supra note 158, at 24-29.


\textsuperscript{161} Some of the same technological developments that allow patrol officers to communicate more easily and more privately, see supra note 122, also allow their employers to monitor them more closely. See, e.g., id.; Manning, supra note 122. In policing as in other occupations, advances in communications technology can make the choice between the democratic and authoritarian norms of work that Bendix described more pressing than ever. See supra notes 78-79 and accompanying text.


\textsuperscript{163} RIGAKOS, supra note 160, at 148.
precisely what the private firms have to offer. 164 It is what distinguishes one firm from another, and what still, despite the spread of public sector managerialism, 165 most strongly distinguishes private policing as a whole from public law enforcement. If the current trend toward police privatization has any single point, after all—other than retreating from a collective commitment to equalitarian protection against illegal force—the point is to escape, to circumvent, or to limit the domain of the organizational styles associated with public law enforcement, and to move the internal operations of policing toward a more thoroughgoing form of managerialism.

CONCLUSION

Democracy within police organizations has long been thought at best peripheral and at worst antithetical to the more pressing task of reconciling law enforcement with democracy outside police organizations. Despite the large changes in the makeup of police forces over the past several decades, and in their operational philosophy, workplace democracy has remained largely absent from discussions of police reform. It formed no part of the ideology of police professionalism, and it plays almost no role in the ideology of community policing. It is off the agenda.

164 Police officer bills of rights—statutory guarantees of procedural rights to sworn law enforcement personnel—warrant a brief discussion. If there is anything to the notion that police officers who experience democracy at work will be more comfortable with and respectful of democracy in the broader society, see supra notes 50-52 and accompanying text, one might expect that officers who enjoy procedural protections—e.g., the right to representation when questioned by internal affairs investigators—will be more understanding and supportive of similar rights enjoyed by criminal suspects. Whether this in fact happens is largely unknown. There is some evidence that police officers, like other government workers, think more legalistically about their own treatment than about their treatment of others. See Maynard-Moody & Musheno, supra note 26, at 57. But it may not be coincidence that it was a police chief famous for his heavy hand in disciplinary matters who helped drive the Los Angeles Police Protective League into its novel partnership with a civil libertarian law professor. See supra note 149 and accompanying text.

My chief claim here has been that this should change. Participatory democracy in policing has many of the same attractions that it has elsewhere. Some of those attractions, in fact, are heightened in the context of policing. Nor do there appear to be good reasons to reject workplace democracy in policing across the board. Police forces are different places than they were thirty years ago. They are more educated, more diverse, less insular, and less reactionary. All of this makes them much more hospitable environments now than they were three decades ago for experiments in giving voice to the rank and file. Experiments of that kind need not seriously threaten any plausible version of the rule of law.

I have not tried to describe here what those experiments should look like; that is a task for later work. What I have tried to make clear is why they are desirable.