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Police and Democracy

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POLICE AND DEMOCRACY

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INTRODUCTION

What constraints does a commitment to democracy place on law enforcement? What implications, conversely, do modern police forces have for how we think about democracy? What is the relationship, in short, between democracy and policing?

Everyone seems to agree that the relationship is important. References to democracy or to "democratic values" appear regularly in judicial decisions setting limits on law enforcement. They are even more common in legal scholarship analyzing and appraising those limits. And they are a fixture of sociological studies of the police. No one could suggest now, as George Berkley did in 1969, that the police pose one of the "least recognized problems of modern democracy."[1] Even in 1969 the suggestion was doubtful: Jerome Skolnick's widely influential study of the dilemmas of "law enforcement in democratic society" was already three years old,[2] James Q. Wilson had just published his equally influential study tying police practices to local political traditions,[3] and three presidential commissions had been appointed in rapid succession to address problems associated with the police.[4] In the late 1960s, the police were on many people's minds, and, to a remarkable extent, they have stayed there ever since.

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1. GEORGE E. BERKLEY, THE DEMOCRATIC POLICEMAN 1 (1969).

2. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966) [hereinafter SKOLNICK, JUSTICE WITHOUT TRIAL].

3. JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1968) [hereinafter WILSON, POLICE BEHAVIOR].

4. The President's Commission on Law Enforcement and Administration of Justice was appointed in 1965, while the National Advisory Commission on Civil Disorders was appointed in 1967, and the National Commission on the Causes and Prevention of Violence was appointed in 1968. HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 5 (1977).

Discussions of democracy and policing are widespread today, particularly with respect to policing outside the United States. Increasingly, for example, efforts to create or to strengthen democracies overseas take for granted the need to establish police forces that are, in some important sense, democratic.[5] In a sign of the times, part of the retraining that the American military has conducted for Iraqi police officers has involved asking them to come up with "words consistent with 'democratic policing.'"[6]

But what exactly *is* "democratic policing"? The Iraqi police could be excused for scratching their heads. For the truth is that relatively little effort has been made to spell out, systematically and carefully, the connections between policing and democracy. We sometimes talk as though there were a simple trade-off between "democratic values" on the one hand and, on the other hand, security, order, and law enforcement — the objectives of the police. This way of thinking assumes both that we know what "democratic values" policing affects and that the relationship is straightforward. But the values at stake and the nature of the relationship are anything but clear.

Sometimes, for example, democratic policing seems identified with procedural regularity and the "rule of law"; this was an important part of Skolnick's account,[7] which in turn echoed aspects of earlier arguments by Jerome Hall[8] and Herbert Packer.[9] At other times democracy appears tied to respect for certain substantive rights — rights, for example, against unreasonable search and seizure and

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Skolnick's report to the National Commission on the Causes and Prevention of Violence was itself published in 1969, continuing his exploration of the predicaments that the police posed for American democracy. *See* JEROME H. SKOLNICK, THE POLITICS OF PROTEST 183-222 (1969) [hereinafter SKOLNICK, POLITICS OF PROTEST].

5. *See, e.g.*, Carlotta Gall, *In Warlord Land, Democracy Tries Baby Steps*, N.Y. TIMES, June 11, 2003, at A4; Peter S. Green, *Kosovo Pins Its Hopes on Rule of Law*, N.Y. TIMES, May 19, 2003, at A8; Todd S. Purdum, *It's Democracy, Like It or Not*, N.Y. TIMES, Mar. 9, 2003, § 4, at 1; Amy Waldman, *U.S. Struggles to Transform a Tainted Iraqi Police Force*, N.Y. TIMES, June 30, 2003, at A1.

6. Waldman, *supra* note 5.

7. *See* SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 1-22; *see also* Jonathan Simon, *Speaking Truth and Power*, 36 LAW & SOC'Y REV. 37, 39 (2002) ("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.").

8. *See* Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 143-45, 170 (1953).

9. *See* Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). In a widely influential formulation, Packer contrasted the "Due Process Model" of criminal procedure with the "Crime Control Model" and, without explicitly invoking democracy, found the former model rooted in a "complex of values" that included equality and anti-authoritarianism. *Id.* at 16-18.

compelled self-incrimination.[10] An Iraqi village leader invoked this idea when complaining about home searches conducted by occupying American forces: "How do these soldiers have the right to come into my home like this? . . . Where is the democracy that the Americans promised?"[11] Sometimes democracy seems tied to popular participation in policing, either through some form of civilian oversight or through police practices that involve "partnering" with or "delegation" to the "community."[12] At other times democracy is said to require placing police departments under a much more thoroughgoing form of community control.[13] Democratic values are sometimes invoked in support of giving police officers *themselves* a degree of control over the nature of their work.[14] (Not surprisingly, some Iraqi police officers have taken this view.[15]) And sometimes democracy in policing seems simply a matter of dealing with the public in a particular way: what Wilson called the "service style"[16] and what is now often lumped together with "partnering," "delegation," and sundry other fixes under the slogan "community policing."[17] The

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10. *See, e.g.*, Harris v. United States, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting) (calling constitutional limits on search and seizure by the police "an indispensable need for a democratic society").

11. Patrick J. McDonnell, *Searches of Homes Just Plain Rude, Iraqis Say*, L.A. TIMES, July 1, 2003, at A5.

12. *See, e.g.*, Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1535-37 (2002) [hereinafter Kahan, *Collective Action*]; Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1598 (2002) [hereinafter Meares, *Praying*].

13. *See, e.g.*, GOLDSTEIN, *supra* note 4, at 141-42; Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23, 81 (1998); Jerome Skolnick, *Neighborhood Police*, THE NATION, Mar. 22, 1971, at 372; Arthur L. Waskow, *Community Control of the Police*, TRANS-ACTION, Dec. 1969, at 4.

14. *See, e.g.*, BERKLEY, *supra* note 1, at 30-35; WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY, at xvii (1970).

15. *See* Waldman, *supra* note 5.

16. WILSON, POLICE BEHAVIOR, *supra* note 3, at 200-26. Wilson himself was skeptical that the "service style" of policing could be employed effectively in large, heterogeneous communities. *See id.* at 249-57, 290. Other scholars, writing around the same time, expressed similar doubts. *See, e.g.*, Maureen Cain, *Trends in the Sociology of Police Work*, 7 INT'L. J. SOC. L. 143, 151 (1979).

17. Like democratic policing, "community policing" remains ill-defined. Often it seems "less a program than a set of aspirations wrapped in a slogan," David H. Baley, *Community Policing: A Report from the Devil's Advocate*, *in* COMMUNITY POLICING: RHETORIC OR REALITY 225, 225 (Jack R. Green & Stephen D. Mastrofski eds., 1988) — albeit a set of aspirations that has become "the new orthodoxy for cops," John E. Eck & Dennis P. Rosenbaum, *The New Police Order: Effectiveness, Equity, and Efficiency in Community Policing*, *in* THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES 3, 3 (Dennis P. Rosenbaum ed., 1994). Still, "[f]or all the diverse definitions of community policing, it may boil down to this: police treating a neighborhood the way a security guard treats a client property." Lawrence W. Sherman, *The Police*, *in* CRIME 327, 338-39 (James Q. Wilson & Joan Petersilia eds., 1995). On the roots of community policing in Wilson's

American officials retraining the Iraqi police may have had something like the "service style" in mind when they talked about "democratic policing"; press reports suggest the Iraqi officers have been urged to become more "polite," "kind-hearted," and "service-oriented."[18]

As for the trade-offs, we sometimes talk as though effective policing is like trains running on time: something we need to sacrifice a little if we wish to live in a democracy. The goal is to strike the right balance between letting the police do their job and preserving our democratic liberties. The more of one, the less of the other. This is the assumption that underlay much of the discussion of the "homeland security" measures the Bush Administration proposed in the aftermath of the terrorist attacks of September 11, 2001. At other times, though, we talk as though democratic policing is the same thing as effective policing — as though "democracies can, so to speak, have their cake and eat it too,"[19] because, with respect to the police, "democracy and efficiency in public administration are one and the same."[20] A good deal of the discussion about "community policing" in recent years, for example, has proceeded from this optimistic assumption. Between the poles of strict trade-off and perfect convergence, of course, lie other, more complicated possibilities. But they remain largely unexplored.

The vagueness of most discussions of democratic policing is particularly striking given the efforts that philosophers, political scientists, sociologists, and legal scholars have made over the past half-century to think rigorously about the nature of democracy. Since the 1950s, "democratic theory" has been a rich, lively, and sprawling field of interdisciplinary inquiry. The field has attracted more than its share of gifted thinkers and has generated more than its share of arresting, influential work. But little of this work directly addresses the police; this is one sense in which Berkley was right to complain that the problems of democratic policing were under-recognized. And few discussions of policing draw explicitly on democratic theory.

Certainly this is true of criminal procedure, the field of jurisprudence and legal scholarship concerned with how the police carry out their business. In often minute detail, criminal procedure law regulates how and when the police can conduct searches, seizures, and interrogations. Almost everybody appears to believe that these

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"service style," see, for example, DOROTHY GUYOT, POLICING AS THOUGH PEOPLE MATTER 5-7 (1991).

18. Waldman, *supra* note 5.

19. BERKLEY, *supra* note 1, at 196.

20. *Id.* (quoting Woodrow Wilson). For similar sentiments, see, for example, Hall, *supra* note 8, at 156, 161, and Lawrence W. Sherman, *Consent of the Governed: Police, Democracy, and Diversity*, *in* POLICING, SECURITY AND DEMOCRACY: THEORY AND PRACTICE 17, 18 (Menachem Amir & Stanley Einstein eds., 2001).

restrictions have important implications for democracy, but the nature of those implications is rarely examined with care, either by judges deciding cases or by scholars reviewing what the judges have done. As a result, invocations of democracy in criminal procedure cases often seem to be little more than lip service. In criminal procedure scholarship, sometimes even the lip service is missing.

Moreover, criminal procedure has almost nothing to say, in any direct fashion, about other questions of apparent pertinence to the relation between policing and democracy, such as the structure of decisionmaking within police agencies and the arrangements by which the police are made subject to or insulated from external, political control. In part, but only in part, this selective silence reflects our collective decision to entrust the development of criminal procedure rules to courts, and our sense, which may or may not be well-founded, that courts are ill-suited to address questions of systemic design.[21] Because thinking about criminal procedure has tended to focus on the questions taken up by courts, the unfortunate result has been not just that *judges* have largely failed to consider the systemic requirements for democratic policing, but that most of the rest of us have, too.

None of this is to suggest that democratic theory and criminal procedure have had nothing to say to each other. It is just that the conversation has been largely below the surface.

This Article seeks to unearth half of that conversation: the changing ideas about American democracy that have informed the development of criminal procedure jurisprudence and scholarship over the past several decades. Those ideas, I hope to show, largely track, in a delayed fashion, developments in democratic theory over roughly the same period. The most important of these developments were, first, the emergence during the 1950s of the so-called "pluralist" theory of democracy, an unusually rich and resonant account that emphasized the roles of elites, interest groups, and competition in sustaining American democracy; and second, beginning in the 1960s, the gradual shift away from this theory and toward accounts of democracy emphasizing popular participation, community, and deliberation.

Arranging democratic theories on a timeline can be deceptive, because intellectual history is seldom tidy. The recent focus on the participative and deliberative dimensions of democracy harks back to eighteenth-century ideas that the democratic pluralists expressly repudiated, and pluralism itself is far from vanquished today. Like the just and unjust versions of Calvino's city of Berenice, ideas about democracy are all "present in this instant, wrapped one within the

21. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1286-92 (2002).

other, confined, crammed, inextricable."[22] In some critical respects, moreover, pluralism and its rivals converge; they share, in particular, a strong sense that democracy is more a matter of culture than of institutions.

Still, the simple story of pluralism's rise and fall holds enough truth to make it a helpful way to approach the complexities of democratic theory. The story is particularly useful because it finds its reflection in certain developments over the past several decades in criminal procedure jurisprudence and in scholarship about the police. The first aim of this Article is to trace these connections between democratic theory and criminal procedure. A second, broader goal is to use this excavated history, and the perspective it provides on modern-day assumptions, to build a framework for thinking systematically about the relationship between policing and American democracy.

The great advantage that democratic theory and criminal procedure offer for this larger purpose is the traditions of rigor they lend to the enterprise, rigor respectively about the nature of democracy and about the proper limits on policing. In order to explore the relationship between democracy and policing critically and systematically, we need to get some distance from ways of thinking that have grown to seem natural. We need to see the points of contingency; we need to gain some analytic leverage. The best way to gain that leverage is to recover ways of thinking that not so long ago seemed natural but that now seem strange. The traditions of rigor in democratic theory and criminal procedure, together with the changes the fields have undergone, mean that each field has left a trail of discarded ideas that can be contrasted usefully with current orthodoxies. These are precisely the materials we need.

For these purposes, though, we will need to construe the field of criminal procedure broadly, to include not only the jurisprudence of policing and academic commentary on that jurisprudence, but also studies of the police carried out by social scientists like Berkley, Skolnick, and Wilson. Work of this latter sort is not normally thought part of criminal procedure, but the divide between the two fields is artificial. Judges and law professors often cite work on the police by sociologists and political scientists, and social scientists writing about the police draw heavily, in turn, on judicial opinions and legal scholarship. Criminal procedure, with its evaluative emphasis, and "police studies," with its more descriptive leaning, in combination form a field roughly comparable to democratic theory, which is noteworthy for its integration of normative and empirical inquiries (as well as notorious for at times conflating them). In any event, tracing

22. ITALO CALVINO, INVISIBLE CITIES 163 (William Weaver trans., 2d ed., Harvest/HBJ 1978) (1972).

the connections between ideas about democracy and legal thinking about the police will often require us to take account of trends in social science about the police, if for no other reason than that the paths of influence have often run through that work.

The argument here will proceed as follows. Part I of the Article describes the emergence in postwar America of a particular understanding of a democracy, an understanding generally referred to as "democratic pluralism," "analytic pluralism," "pluralist theory," or simply "pluralism." Pluralism in this sense was not at bottom an embrace of diversity. It was not the "noetic pluralism" of William James, the "cultural pluralism" of Horace Kallen and Alain Locke, or the "reasonable pluralism" of John Rawls[23] — although it shared with them, among other things, the taste for multifaceted explanation that so exercised people like C. Wright Mills.[24] Democratic pluralism was a nuanced, interrelated set of ideas about American democracy that during the 1950s became extraordinarily influential, even omnipresent, both within and without academia. Those ideas included a distrust of mass politics, a preoccupation with social stability and the avoidance of authoritarianism, and a focus on group competition rather than reasoned discourse as the engine of democracy. We will spend a fair bit of time unpacking pluralism, because its fine points will prove important when we turn to the task of tracing its reflections in criminal procedure.[25]

That task is taken up in Part II, which examines the ways in which the central tenets of democratic pluralism found echoes in criminal procedure — construed broadly to include not only jurisprudence and legal scholarship but also social science about the police. I argue that pluralism helps to make sense of several interrelated hallmarks of criminal procedure and police studies in the Warren and Burger Court eras: the focus on the group psychology of the police, the concern with police discretion and the reliance on judicial oversight, the emphasis on personal dignity, the attraction to "second wave" police professionalism, the embrace of modernity, the centrality of consensus, and the disregard of institutional structure.

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23. WILLIAM JAMES, PRAGMATISM 61-74, 77 (Bruce Kuklick ed., Hackett 1981) (1907); HORACE M. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES: STUDIES IN THE GROUP PSYCHOLOGY OF THE AMERICAN PEOPLES 11, 41-43, 115-25 (1924); Alain Locke, *Pluralism and Intellectual Democracy*, *in* 1942 CONF. ON SCI., PHIL. & RELIGION 196, *reprinted in* THE PHILOSOPHY OF ALAIN LOCKE: HARLEM RENAISSANCE AND BEYOND 53 (Leonard Harris ed., 1989); JOHN RAWLS, POLITICAL LIBERALISM 36-37 (1993).

24. *See* C. WRIGHT MILLS, THE POWER ELITE 244-45 (1956). On this theme, see also the justly acclaimed treatment of democratic pluralism in MICHAEL PAUL ROGIN, THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER 268-82 (1967).

25. Despite the dangers of ambiguity, I will often, as here, use "pluralism" as a synonym for democratic pluralism.

Part III traces the rise, beginning in the 1960s, of "participatory democracy" and later "deliberative democracy" — theories of democracy that were framed in explicit opposition to pluralism and that rejected most of its premises. The new theories were never as unified or as consistent as pluralism in its heyday, but they tended to include each of the following elements: an embrace of grassroots politics, a distrust of elites, an emphasis on cooperation and collective reasoning, and an appreciation for the intrinsic value of democracy wholly apart from its utility as a rule of decision.

Part IV notes the ways in which theories of participatory and deliberative democracy made themselves felt in jurisprudential and academic discussions of the police. I suggest the shift away from pluralism is reflected in several themes in contemporary criminal procedure: the enthusiasm for community participation, the premium placed on transparency, the distrust of elites and expertise, the preoccupation with legitimacy, and the retreat from modernity. Other features of criminal procedure jurisprudence and scholarship today — the continued treatment of the police as a breed apart, the persistent de-emphasis of institutional structure, and the relative inattention to issues of equality — reflect, I argue, important points of continuity between pluralism and the theories that supplanted it.

Finally, Part V draws from the earlier discussions some provisional lessons for thinking more carefully about democracy and policing. I suggest that our ideas about policing could benefit from a more rounded understanding of democracy — an understanding sensitive to the tradition of democratic oppositionalism and mindful of the core insights of democratic pluralism, 1960s-style participatory democracy, and eighteenth-century political economy. And I explore in a tentative fashion how such an understanding of democracy might affect our thinking about five important issues in contemporary law enforcement: community policing, racial profiling, police privatization, police personnel practices, and public disclosure of law enforcement practices.

A final word is in order at the outset. Not everyone agrees that careful thinking about democracy today is worth the effort. Plenty of thoughtful people, for example, suspect democracy is no longer, if it ever was, "a sensible tool of analysis or even a coherent ideal,"[26] but has become simply a term of "vague endorsement"[27] — a "'hurrah'

26. JACK LIVELY, DEMOCRACY 1 (1975).

27. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 2 (1989). Dan Kahan, for example, seems to take this position when he suggests that sensible arguments about institutional structures must "be grounded in normative considerations outside the concept of democracy." Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 800 (1999). But he may be claiming only that we should be clear about our particular conception of democracy. *See id.* at 796-97. This would be consistent with Kahan's own work in criminal procedure, which, as we will see, draws heavily on a specific set of ideas about democracy.

word."[28] That position receives some support from the frequently remarked fact that almost every government in the world today claims to be democratic in some sense or another. Even if the concept of democracy has discernable content, moreover, it may lack modern relevance; it may be too bound up, for example, with the direct democracy of the ancient Greeks.[29] And even if democracy is a meaningful concept, and a concept with present-day relevance, the pursuit of greater democracy may be a mistake.[30] That might be particularly true when it comes to policing. Perhaps the last thing we should want is genuinely democratic policing; perhaps the whole point of constitutional criminal procedure is, and should be, precisely to remove politics from fundamental decisions about law enforcement.[31]

I think these misgivings are unwarranted. I think the careless use of the term democracy is no reason to abandon the effort to use it more precisely; I think the concept of democracy has long transcended its classical origins; and I think the concept of democracy is rich enough to incorporate protections against the pathologies of simple majoritarianism. I also think that the concept of democracy has become so central to our thinking about institutions and society — W.B. Gallie called it "*the* appraisive political concept *par excellence*" — that we probably are stuck with it, like it or not.[32] But I will not pursue these matters here. My chief task in this Article is to trace the links between democratic theory and criminal procedure. If, as I conclude, our thoughts about the police have reflected our thoughts

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28. LIVELY, *supra* note 26, at 1.

29. For an extended argument along precisely these lines, see Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

30. This is the gist, for example, of Fareed Zakaria's recent argument about "illiberal democracy." FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD (2003). He contends that both the United States and the world in general suffer from an excess of democracy — which he takes to require only free and fair elections — and a deficit of what he calls "constitutional liberalism": a "bundle of freedoms" including "the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property." *Id.* at 17. His primary prescription is to delegate more governmental decisions to institutions insulated from politics, such as the Supreme Court and the Federal Reserve Board. *See id.* at 248-54. "What we need in politics today," he argues, "is not more democracy but less." *Id.* at 248.

31. *See, e.g.*, Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427 (2002). Zakaria's ideas are closely paralleled by Pettit's proposal for establishing "penal policies board[s]" that would "operate[] at arm's length from parliament and government," much "[l]ike a central bank." *Id.* at 442.

32. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1955-56), *reprinted in* THE IMPORTANCE OF LANGUAGE 121, 135 (Max Black ed., 1962); *cf.* LIVELY, *supra* note 26, at 1-2 (concluding that "the very fact that the term is so persistently and so ardently canvassed in the ordinary language of politics creates a need for it to be given as great a coherence and clarity as is possible," and that there is "no compulsion on us to allow bad usages to drive out the good").

about democracy, or about things that we lump together with democracy, that seems worth knowing — even if the reflection has been largely baneful, or if the linkage to democracy has been surplusage. Much of the motivation for this Article, it is true, is to lay the groundwork for thinking more carefully about policing and democracy, and the various qualms I have described about the analytic usefulness of democracy do indeed throw doubt on that larger project. But each of these qualms amounts to the suspicion that there is no coherent conception of democracy worth pursuing today, at least not in the context of policing. That suspicion can be rebutted most convincingly, if at all, by finding a theory of democracy useful in addressing modern-day problems of law enforcement. And ultimately we will not know whether there is such a theory until we look.

I. PLURALISM'S RISE

The difficulty is in choosing where to start. I begin in the 1950s — long after Aristotle, long after Rousseau, long after Madison, long after Tocqueville. This decision needs some justifying. I make no claim, of course, that the democratic pluralists were more gifted than their predecessors or more permanently influential. Nor, as we will see, did pluralist thinking represent a clean and lasting break with the past. There were strong similarities, for example, between 1950s pluralism and 1790s Federalism. Moreover, the theories that later emerged to challenge pluralism, chiefly participatory and deliberative democracy, often drew inspiration from writers the pluralists had thought unhelpful, including Aristotle, Rousseau, and the anti-Federalists. And both sides found things to like in Tocqueville.

The rise of democratic pluralism in the 1950s was nonetheless a watershed development in several respects. First, the emergence of pluralism marked the beginning of "democratic theory" as a self-conscious, broadly recognized field of interdisciplinary inquiry; it therefore began a tradition of sustained *academic* thinking about the nature of democracy. (Robert Dahl, perhaps the most influential of the pluralists and certainly the most prolific, recalls that "the term 'democratic theory' hardly existed" when he began his work.[33]) Second, the theory developed by the pluralists was unusually coherent, unified, and powerful; its power derived in part from the manner in which it responded to the felt realities of postwar America. Third, pluralism was the first fully developed account of democracy that reflected the epochal rise, in late nineteenth- and early twentieth-century America, of psychological and sociological understandings of

33. ROBERT A. DAHL, TOWARD DEMOCRACY: A JOURNEY: REFLECTIONS: 1940-1997, at 6 (1997); *see also* Gallie, *supra* note 32, at 33.

collective life — what my brother Jeffrey Sklansky has characterized as "the fall of political economy and the rise of social psychology" as the prevailing "science of American society."[34] Fourth, and partly for the foregoing reasons, democratic pluralism has proven extraordinarily influential over the past half-century. For most of the 1950s, the cluster of ideas at the heart of pluralism went almost unquestioned in mainstream discussions of American democracy; in Theodore Lowi's words, the theory "was considered so fruitful as to be virtually true."[35] Into the 1970s, pluralism still seemed to its critics (who were by then proliferating) to provide "the dominant description and ideal of American politics."[36] The theories of participatory and deliberative democracy that have emerged since the 1950s have been framed largely as responses to pluralism, and the pluralist view itself still has many sympathizers. Fifth and finally, police studies and the modern field of criminal procedure emerged close on the heels of democratic pluralism, and they grew to maturity in its shadow. So there are special reasons to start with democratic pluralism when pursuing the inquiry at the heart of this Article: What connections have there been between our ideas about democracy and our thinking about the police?

It will be useful in the discussion that follows to keep in mind four separate questions that can be asked regarding democracy, questions respectively about *purposes*, *processes*, *proximity*, and *particularity*. The question of *purposes* concerns the ultimate aim of democracy — the reasons the system is valued. The question of *processes* involves the mechanisms of democracy — the ways in which the purposes of democracy are advanced. The question of *proximity* is evaluative; it asks how close our present system is to the democratic ideal. Finally, the question of *particularity* addresses the degree to which the answers

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34. JEFFREY SKLANSKY, THE SOUL'S ECONOMY: MARKET SOCIETY AND SELFHOOD IN AMERICAN THOUGHT, 1820-1920, at 5, 11 (2002). On this theme, see also JAMES LIVINGSTON, PRAGMATISM AND THE POLITICAL ECONOMY OF CULTURAL REVOLUTION, 1850-1940 (1994).

35. Theodore J. Lowi, *Foreword* to KENNETH PREWITT & ALAN STONE, THE RULING ELITES: ELITE THEORY, POWER, AND AMERICAN DEMOCRACY, at vii, vii (1973). Mancur Olson noted in 1965 that parts of the pluralist account were sufficiently uncontroversial that they were "passed on to the young in the textbooks almost without qualification." MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 124 n.54 (1965) (citing JAMES MACGREGOR BURNS & JAMES WALTER PELTASON, GOVERNMENT BY THE PEOPLE 310-11 (4th ed. 1960)).

36. William E. Connolly, *The Challenge to Pluralist Theory*, *in* THE BIAS OF PLURALISM 3 (William E. Connolly ed., 1969). For similar, contemporary assessments, see, for example, CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 14 (1970); PREWITT & STONE, *supra* note 35, at 114; and Darryl Baskin, *American Pluralism: Theory, Practice, and Ideology*, 32 J. POL. 71, 80 (1970).

to the other three questions relate to one specific society — say, the United States — or, on the contrary, are universally applicable.

The democratic pluralists of the 1950s sometimes spoke as though they were addressing only the second of these questions: as if they were pursuing a strictly empirical inquiry into the actual workings of modern American democracy. But the questions are difficult to disentangle, and in fact the pluralists answered all four. Their answers were heavily informed by their era. They had witnessed the calamitous rise of European fascism and Soviet-style communism. Those experiences left them with a deep distrust of mass politics, a distrust that then shaped and was in turn strengthened by their understanding of McCarthyism as a lineal descendant of populism. They grew to see ideological extremism as the paramount political vice, and compromise and moderation as prerequisites for a stable democracy. They came to view authoritarianism as the antithesis of democracy, and democratic stability as the chief protection against a descent into authoritarianism. And, as the Cold War progressed, they sought an understanding of democracy that explained and made manifest the political superiority of America to the Soviet Union.[37]

All of this drove the pluralists toward an understanding of democracy that de-emphasized mass participation while still assuring the dispersion of political power. The chief obstacle to such an understanding lay in the long-standing celebration of grassroots politics in America, the universal "tumult" and "confused clamor" in which Tocqueville had found, admiringly, Americans of all "ranks" and "classes" engaged in the ongoing project of government.[38] Asking an American to consider only "his own affairs," Tocqueville wrote, would be like robbing him "of half of his existence; he would feel an immense void in his days, and he would become incredibly unhappy."[39] Tocqueville saw widespread political participation as America's chief bulwark against despotism, and that view had at least as much surface appeal when the pluralists began writing as it does today. The imagery of the New England town meeting ran deep.

It was that imagery, above all else, that the pluralists rejected. They were not the first, of course. Max Weber had thought democracy, in its full and traditional sense, an inevitable casualty of the increasing

37. On these themes, see PATEMAN, *supra* note 36, at 1-21; EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 235-72 (1972); and ROGIN, *supra* note 24, at 1-31, 216-82. Not all pluralists saw McCarthyism as a mass phenomenon. *See, e.g.*, Nelson W. Polsby, *Toward an Explanation of McCarthyism*, *in* NELSON W. POLSBY ET AL., POLITICS AND SOCIAL LIFE, 809 (1963); Nelson W. Polsby, *Down Memory Lane with Joe McCarthy*, COMMENT., Feb. 1983, at 55.

38. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 232 (Harvey C. Mansfield & Delba Winthrop trans. & eds., 2000) (1835).

39. *Id.* at 233.

complexity of modern government and the associated rise of bureaucracy.[40] He shared this view with his friend Robert Michels, author of the famous "iron law of oligarchy": "Who says organization, says oligarchy."[41] But Weber and Michels saw this dynamic as tragic. The pluralists, in contrast, thought low participation not only was required by modern circumstances, but was a source and a reflection of democratic strength.

The pluralists had nothing but derision for what David Truman, the only of their number to rival Robert Dahl for influence, called "the myth of omnivigilant citizenship, the picture of the nation as a sort of continuous town meeting with perfect attendance."[42] Truman himself saw "considerable validity" in Joseph Wood Hutch's light essay, *Whom Do We Picket Tonight?*, which asked half seriously, "Wouldn't a really healthy citizen in a really healthy country be as unaware of the government as a healthy man is unaware of his physiology?"[43] Dahl was of the same view. It "would clear the air of a good deal of cant," he thought:

> if instead of assuming that politics is a normal and natural concern of human beings, one were to make the contrary assumption that whatever lip service citizens may pay to conventional attitudes, politics is a remote, alien, and unrewarding activity. Instead of seeking to explain why citizens are not interested, concerned, and active, the task is to explain why a few citizens *are*.[44]

"In liberal societies," Dahl concluded, "politics is a sideshow in the great circus of life."[45]

The most elaborate statement of this position came from Angus Campbell and his colleagues at the Survey Research Center at the University of Michigan, who in 1960 completed an analysis of election surveys conducted in 1952 and 1956. The results, published under the

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40. Max Weber, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196 (H.H. Gerth & C. Wright Mills trans. & eds., 1946).

41. ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 342, 365 (Eden & Cedar Paul trans., 2d ed., Free Press 1968) (1911).

42. DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: PUBLIC INTERESTS AND PUBLIC OPINION 356 (2d ed. 1971) (1951) [hereinafter TRUMAN, GOVERNMENTAL PROCESS].

43. *Id.* (quoting Joseph Wood Krutch, *Whom Do We Picket Tonight?*, HARPER'S, Mar. 1950, at 66, 67). Krutch said he found himself "looking backward with a certain sense of nostalgia into all those ages of Western civilization when no one supposed that being a good citizen was more than a part-time job." Krutch, *supra*, at 68.

44. ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY 279 (1961) [hereinafter DAHL, WHO GOVERNS?].

45. *Id.* at 305; *see also, e.g.*, *id.* at 225 ("*Homo civicus* is not, by nature, a political animal.").

title *The American Voter*, revealed "an electorate almost wholly without detailed information about decision making in government" and "almost completely unable to judge the rationality of government actions."[46] The authors were neither surprised nor terribly troubled. "For a large part of the public," they supposed, "political affairs are probably too difficult to comprehend in detail."[47] More importantly, even those voters who *could* be well-informed had no reason to spend the time it would take: "It is a rather unusual individual whose deeper personality needs are engaged by politics, and in terms of rational self-interest, the stakes do not seem to be great enough for the ordinary citizen to justify expending the effort necessary to make himself well informed politically."[48]

The hope for democracy, the pluralists thought, lay not in the masses but in responsible leaders. The role of the masses was simply to help keep the leaders responsible.[49] This perspective was hardly new; the pluralists shared it most conspicuously with the Federalists.[50] But the Federalists lived in a different world. They had an Enlightenment faith in abstract moral truths and in the essential unity of human knowledge. They understood human conduct in the terms of political economy, as a fundamentally rational pursuit of individual self-interest. And they saw society as a voluntary assemblage of sovereign, atomistic individuals.[51] This world was as foreign to the pluralists as it is to us today. By the 1950s, abstract moral reasoning had a bad reputation among American intellectuals; it ran counter to the legacy of Pragmatism and to the growing association of "ideology" with frightening forms of utopianism.[52] The pluralists thus had no use for

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46. ANGUS CAMPBELL ET AL., THE AMERICAN VOTER 543 (1960). Dahl and Truman both served on the Social Science Research Council's Committee on Political Behavior, which helped plan the 1952 study and thereafter remained associated with the work at the University of Michigan. *See id.* at vi. The Committee on Political Behavior also included V.O. Key, Jr., whose book, POLITICS, PARTIES, AND PRESSURE GROUPS, first published in 1942, did much to popularize democratic pluralism. *See* CAMPBELL ET AL., *supra*, at vi; V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS (5th ed. 1964) (1942).

47. CAMPBELL ET AL., *supra* note 46, at 543.

48. *Id.* at 544. Similar results were reached in an earlier, influential study of how voters in Elmira, New York made up their minds in the 1948 presidential election. BERNARD R. BERELSON ET AL., VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN 306-11 (1954). Like THE AMERICAN VOTER, the Elmira study found average citizens uninformed, uninvolved, and uninterested in politics. But the system still worked impressively well. "Where the rational citizen seems to abdicate, nevertheless angels seem to tread." *Id.* at 311.

49. *See* PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE 7-9 (1967); ROGIN, *supra* note 24, at 25; Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 286-89 (1966).

50. *See* ROGIN, *supra* note 24, at 45.

51. *See id.* at 46; SKLANSKY, *supra* note 34, at 16-27.

52. *See, e.g.*, CHRISTOPHER LASCH, THE AGONY OF THE AMERICAN LEFT 171 (1969); PURCELL, *supra* note 37, at 197-217.

Walter Lippman's brand of neo-Aristotelian elitism, which they thought amounted to "a kind of benevolent despotism in the guise of a set of Platonic guardians unhappily subject to the vagaries of popular election."[53] The pluralists' view of human nature was heavily colored by Freudianism, then still in its heyday.[54] And their understanding of society reflected the early twentieth-century triumph of the social-science paradigm, which exalted "an ever-widening identification of self and world, individual and society, conceived not as a federation of autonomous agents, but as an indivisible union of interdependent parts."[55]

For all these reasons, the pluralists could not place their trust where the Federalists had placed theirs: in constitutional machinery balancing "ambition" against "ambition."[56] Dahl's *Preface to Democratic Theory*, probably his most influential book, was framed in large part as a critique of "the 'Madisonian' theory of democracy," which Dahl found at odds with "modern concepts of behavior" and the findings of "contemporary social scientist[s]."[57] Similarly, David Truman began *The Governmental Process* by invoking and then rejecting Madison's famous call for institutional guards against "factions."[58] Dahl and Truman, like the pluralists more generally, thought the real prerequisites for a successful democracy were "social" rather than "constitutional."[59] As Dahl put it, the Constitution did not keep the United States democratic; rather "the Constitution has remained because our *society* is essentially democratic."[60]

To find the essence of democracy, the pluralists turned not to institutions but to the twentieth-century understanding of society.

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53. David B. Truman, *The American System in Crisis*, 74 POL. SCI. Q. 481, 486 (1959) [hereinafter Truman, *American System*]; *see also, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 50 (1956) [hereinafter DAHL, PREFACE] ("Philosopher kings are hard to come by."). For a good discussion of Lippman's writings on democracy, see PURCELL, *supra* note 37, at 104-07. The key works are WALTER LIPPMAN, PUBLIC OPINION (1922), and WALTER LIPPMAN, THE PHANTOM PUBLIC (1925).

54. *See* ROGIN, *supra* note 24, at 18.

55. SKLANSKY, *supra* note 34, at 228. The authors of the Elmira study, for example, sought ultimately to understand "the social psychology of the voting decision." BERELSON ET AL., *supra* note 48, at 277.

56. THE FEDERALIST NO. 51, at 252 (James Madison) (Cambridge 2003).

57. DAHL, PREFACE, *supra* note 53, at 4, 18.

58. *See* TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 3-13 (quoting THE FEDERALIST NO. 10 (James Madison)).

59. DAHL, PREFACE, *supra* note 53, at 82; *see also, e.g.*, SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 9 (1960); TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at xli, 529-31; Truman, *American System*, *supra* note 53, at 493.

60. DAHL, PREFACE, *supra* note 53, at 143 (emphasis added).

More specifically, they turned to four fixtures of the new social-science paradigm: consumerism, groups, consensus, and personality.

First, consumerism. The rise of mass markets in late nineteenth-century America seemed to call for a new understanding of the relation between individuals and the economy, replacing the old model of the free market as a kind of tumultuous bazaar in which buyers and sellers, comparably situated, negotiated face-to-face bargains informed by the shouting all around them. A new model emerged that acknowledged the passive nature of modern consumption.[61] Demand could be cultivated and channeled; this was what made the mass market useful to society. Rather than independent agents, merchants and customers were part of an interconnected whole. The role of merchants was to promote demand and then to satisfy it; the role of customers was to enjoy the better life made possible by new and cheaper products. The model retained a remnant of the invisible hand: acting *en masse*, consumers presumably set some limits to the pliability of demand.[62] As long as sellers competed for customers, good detergent at the same price should still drive out bad detergent.[63] But the heart of consumerism was the idea that average people found their freedom not in the market itself, but in what the market produced.

The pluralists of the 1950s did not need to extend the theory of consumerism into the realm of politics; Joseph Schumpeter had already done it for them. Writing in 1942, Schumpeter stressed the parallel between mass markets and modern elections. Democracy consisted simply of pitting would-be leaders against each other in "a competitive struggle for the people's vote";[64] "the reins of government" were "handed to those who command more support than do any of the competing individuals or teams."[65] Political campaigns functioned exactly like commercial advertising.[66] And just as economic

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61. *See, e.g.*, WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 231-44, 288-91, 372-78 (1993); SKLANSKY, *supra* note 34, at 178-91.

62. *See, e.g.*, GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA 17-65 (2000).

63. Assuming, of course, that consumers could be counted on to prefer good detergent, which Veblen famously doubted. *See* THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (1899). But even Veblen gave consumers a degree of collective agency, albeit an agency they were apt to use foolishly. *See* SKLANSKY, *supra* note 34, at 185.

64. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (Harper Perennial 1976) (1942).

65. *Id.* at 273.

66. *Id.* at 263. Schumpeter was not, of course, the first to draw this comparison. The pioneering publicist Edward Bernays, for example, had called politics "the first big business in America," and had suggested that politicians could learn a great deal from businessmen about "methods of mass distribution of ideas and products." EDWARD L. BERNAYS, PROPAGANDA 95 (1928). On Bernays, see, for example, LEACH, *supra* note 61, at 319-22,

competition was generally imperfect but "never completely lacking," so "in political life there is always some competition, though perhaps only a potential one, for the allegiance of the people."[67] The "social function" of democratic politics was "fulfilled, as it were, incidentally — in the same sense as production is incidental to the making of profits."[68]

Like the pluralists after him, Schumpeter argued that the system actually worked better when average citizens stayed relatively uninvolved in politics. The political world was remote from the day-to-day lives of average citizens, so they were unlikely to care much about it or to approach it with a sense of responsibility:

> Normally, the great political questions take their place in the psychic economy of the typical citizen with those leisure-hour interests that have not attained the rank of hobbies, and with the subjects of irresponsible conversation. These things seem so far off; they are not at all like a business proposition; dangers may not materialize at all and if they should they may not prove so very serious; one feels oneself to be moving in a fictitious world.[69]

With respect to political matters, the average citizen was "a member of an unworkable committee, the committee of the whole nation," and therefore he spent "less disciplined effort on mastering a political problem than . . . on a game of bridge."[70]

Schumpeter's understanding of electoral politics as akin to mass marketing, together with his rejection of "town meeting" picture of American democracy, heavily influenced the pluralists.[71] Unlike Schumpeter, the pluralists thought elections actually gave voters a

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and LARRY TYE, THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS (1998).

67. SCHUMPETER, *supra* note 64, at 271.

68. *Id.* at 282.

69. *Id.* at 261.

70. *Id.*

71. *See, e.g.*, BACHRACH, *supra* note 49, at 17-25; LIVELY, *supra* note 26, at 35-41, 76; PATEMAN, *supra* note 36, at 3, 5. The authors of the Elmira study dissented from "the usual analogy" between voting and "the more or less carefully calculated decisions of consumers or businessmen or courts"; they thought political "preferences" were more like "cultural tastes" in "music, literature, recreational activities, dress, ethics, speech, social behavior." BERELSON ET AL., *supra* note 48, at 311. But classifying voting with clothing choices rather than with calculated economic decisions was very much in keeping with a mass-market view of elections. (Elsewhere the authors compared political views with food selections in a cafeteria. *See id.* at 318.) Moreover, investigations of "voting behavior" such as the Elmira study and THE AMERICAN VOTER, *see supra* notes 46-48 and accompanying text, themselves reflected, in their very methodology and choice of subject matter, a consumerist view of politics. They brought to political science "the theory and techniques of market research." Robert B. Westbrook, *Politics as Consumption: Managing the Modern American Election*, *in* THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980, at 143, 163 (Richard Wightman Fox & T.J. Jackson Lears eds., 1983).

significant amount of control over leaders, but they agreed with him that the control was limited and indirect, because "[t]he public's explicit task is to decide not what government shall do but rather *who shall decide* what government shall do."[72] The pluralists also shared Schumpeter's understanding of democracy as simply "a political *method*," not "an end in itself."[73] Democracy was desirable, Schumpeter believed, only to the extent that it could be expected to advance other interests or ideals, such as individual freedom.[74] Schumpeter did in fact think that democracy could be expected to protect individual freedom, although only as a very general matter; the relationship was contingent and far from secure.[75] His legacy to the pluralists, though, included the notion that "the value of the democratic system for ordinary individuals should be measured by the degree to which the 'outputs' of the system, in the form of security, services, and material support, benefit them," and that therefore "the less the individual has to participate in politics on the 'input' and demand side of the system in order to gain his interests on the output side, the better off he is."[76]

The pluralists' debt to Schumpeter has so frequently been emphasized that their differences from him are sometimes overlooked. Keeping those differences in mind will help to bring pluralism into sharper focus. The pluralists shared Schumpeter's consumerist view of the purpose of democracy; they agreed it was simply a method for arriving at good policies. They shared his view that an election was more like a supermarket than like a town hall, and they placed the same emphasis he did on "the vital fact of leadership."[77] But Schumpeter took an especially bleak view of the ability of ordinary citizens to think rationally about politics. The remoteness of political questions from everyday life meant not only that most people found it hard to care much about politics, but that, when they did care, they were apt to act foolishly and irresponsibly. The average person, Schumpeter thought, "drops down to a lower level of mental performance as soon as he enters the political field," reasoning "in a way which he would readily recognize as infantile within the sphere of his real interests."[78] And "if for once he does emerge from his usual

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72. CAMPBELL ET AL., *supra* note 46, at 541; *see also, e.g.*, DAHL, PREFACE, *supra* note 53, at 131-32 & n.12; ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE 283 n.15 (1953).

73. SCHUMPETER, *supra* note 64, at 242.

74. *Id.* at 242-43.

75. *See id.* at 243, 271-72, 290.

76. BACHRACH, *supra* note 49, at 95.

77. SCHUMPETER, *supra* note 64, at 270.

78. *Id.* at 262.

vagueness" about political matters, the typical citizen "is as likely as not to become still more unintelligent and irresponsible."[79] Public opinions were largely "manufactured" by the political process; this was why Schumpeter thought elections were unlikely to give voters even indirect control of government in any meaningful sense.[80]

Consequently, Schumpeter argued that the success of democracy depended at bottom on a fairly rigid class structure, a healthy dose of "traditionalism," and a great deal of political quietude.[81] It required, first of all, a stable, elite "social stratum" that saw political leadership as its special calling.[82] Next, a separate, intermediate stratum — "not too rich, not too poor, not too exclusive, not too accessible" — was needed to staff a powerful, professional bureaucracy.[83] Certain issues then had to be placed off-limits to democratic politics — by, for example, delegating them to independent agencies.[84]

Most important of all was what Schumpeter called "Democratic Self-Control,"[85] by which he meant much more than broad acceptance of "the rules of the democratic game."[86] Voters and elected officials had to be sufficiently smart and upright to resist "the offerings of the crook and the crank."[87] Backers of particular programs had to be "content to stand in an orderly breadline; they must not attempt to rush the shop."[88] And ordinary citizens had to confine their political

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79. *Id.*

80. *Id.* at 263. The pluralists' divergence from Schumpeter on this point was consistent with the emerging position of social scientists in the 1950s that public attitudes resisted easy manipulation — a position that itself was based in part on the Elmira study of voting behavior. On this so-called "law of minimal effects," see, for example, BERELSON ET AL., *supra* note 48, at 248; KEY, *supra* note 46, at 483-85; JOSEPH T. KLAPPER, THE EFFECTS OF MASS COMMUNICATION 4-9, 43-47 (1960); and Westbrook, *supra* note 71, at 164.

81. SCHUMPETER, *supra* note 64, at 290-96.

82. *Id.* at 290-91.

83. *Id.* at 293-94.

84. *Id.* at 291-92. This is, of course, precisely the suggestion made today by people like Fareed Zakaria and Philip Pettit. *See supra* notes 30-31. Interestingly, Schumpeter's example of an issue that should be placed beyond politics was similar to Pettit's: the detailed content of a criminal code. Crime, he pointed out, "is a complex phenomenon," the "[p]opular slogans about it are almost invariably wrong," and it is prone to be approached in "fits of vindictiveness" or "fits of sentimentality." SCHUMPETER, *supra* note 64, at 292. Schumpeter used the Bank of England, the Interstate Commerce Commission, and "certain of our . . . state universities" to illustrate the point that "[d]emocracy does not require that every function of the state be subject to its political method." *Id.* at 292-93.

85. SCHUMPETER, *supra* note 64, at 294.

86. *Id.* at 301.

87. *Id.* at 294.

88. *Id.*

activity to voting: "[T]hey must understand that, once they have elected an individual, political action is his business and not theirs."[89]

Schumpeter's prerequisites for a successful democracy pretty clearly excluded the United States, even in the relative calm of the postwar period. His model seems to have been Victorian England,[90] augmented by a European-style civil service.[91] He thought civil services of this kind were bound to expand of their own accord, "whatever the political method a nation may adopt"; their growth was "the one certain thing about our future."[92] But if a successful democracy required a stable class system and a politics of "self-control," it was hard to be optimistic about America. Schumpeter himself was comfortable with pessimism. His book amounted to an extended requiem for bourgeois capitalism, which he thought was done in by its own successes — including modern democracy.[93] But to the pluralists, American democracy seemed thriving. They therefore searched for the secret of democratic success someplace other than in social stratification and a culture of restraint. They found it in groups.

Schumpeter's view of "pressure groups" was close to Madison's: he saw them as a kind of democratic disease, aberrational and injurious.[94] The pluralists, in contrast, celebrated interest groups as the lifeblood of modern democracy.[95] They took their lead here from Arthur Bentley, who described society in 1908 as "nothing other than the complex of groups that compose it."[96] Bentley had hardly originated the notion that groups rather than individuals were the key unit of social analysis. "Group theory," based in part on studies in the newly emerging field of anthropology, was a broad intellectual current in America at the beginning of the twentieth century.[97] Bentley's contribution was to apply group theory, in a particularly

89. *Id.* at 295.

90. *See, e.g.*, *id.* at 275-81, nn.16-19, 21-22.

91. *See id.* at 293.

92. *Id.* at 294.

93. *See, e.g.*, *id.* at 300-02.

94. *Id.* at 263, 298. Schumpeter accepted political parties, which he saw as opportunistic alliances for the purpose of achieving political power. The political process needed them, in the same way that the mass market needed department stores. *See id.* at 283. But he had no use for groups actually united by a common interest: "[G]roups with an ax to grind." *Id.* at 263.

95. *See* Baskin, *supra* note 36, at 73-79.

96. ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES 222 (Transaction Publishers 1995) (1908). On Bentley's influence, see, for example, OLSON, *supra* note 35, at 117-31, and PURCELL, *supra* note 37, at 254.

97. *See* R. JEFFREY LUSTIG, CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920, at 109-49 (1982); SKLANSKY, *supra* note 34, at 131.

uncompromising form, to the study of politics. "When groups are adequately stated," Bentley wrote, "everything is stated. When I say everything I mean everything."[98] Politics was competition among groups, no more and no less. Groups meant interests: every group had its interest, and interests manifested themselves only through groups. There was no such thing as the "social whole"; there were only groups working against each other.[99] Government was the balancing or adjustment of group interests,[100] and the eventual resolution inevitably reflected the relative strengths of the underlying groups.[101]

Bentley took his pragmatism as seriously as he took his group theory; the one-sentence forward to his book declared it "an Attempt to Fashion a Tool." He therefore had nothing but scorn for the notion that government should be detached and impartial. Abstract standards such as "justice, truth, or what not" were simply products and manifestations of group pressures. Reason itself was just one "technique" for balancing those pressures,[102] and an overrated technique at that. Parties would do better to "drop their set, formal, logically coherent policies," and simply to give "more efficient expression to the underlying interests they represent."[103]

Unlike the pluralists, Bentley had relatively little interest in the nature of democracy or in the special conditions for its success. In his view all forms of government amounted to the same thing: "interest groups wrestling with one another."[104] But he ventured that perhaps "pure despotism" and "pure democracy" could be understood as hypothetical extremes at opposite ends of a continuum, with despotism "consisting of an individual who passes personally on every group antagonism at its inception and allays it by appropriate action," and democracy involving "a government in which every interest would be able to find a technique for organizing and expressing itself in a system in which every other interest was equally represented on 'fair' terms, so that in the final course of action all interests would get their 'due' weight."[105] And he suggested in passing that the dispersed form of interest adjustment found in "governments like that of the United

98. BENTLEY, *supra* note 96, at 208-09.

99. *See id.* at 220-21.

100. *See id.* at 211, 258-59.

101. *See id.* at 226-27.

102. *Id.* at 448.

103. *Id.* at 452.

104. *Id.* at 307; *see also id.* at 447-59.

105. *Id.* at 305-06.

States" was remarkable "for the trifling proportion of physical violence involved considering the ardent nature of the struggles."[106]

Bentley's account of government through interest groups received little attention until after World War II, when the pluralists picked it up and ran with it.[107] They embraced his view of society as a complex of groups, they liked his notion that logrolling and lobbying were the very stuff of governance rather than a degradation of some pristine ideal, and they were intrigued by his suggestion that democracy might be stabilizing and pacifying. Like Bentley, the pluralists viewed group conflict as the essence of politics. And like Bentley, the pluralists were struck by the scattered, multiplicitous adjustments of those conflicts in the United States. They came to see the diversity of interest groups in the United States, and the diversity of mechanisms for the balancing of group interests, as signal strengths of American democracy.

This was the "pluralism" in democratic pluralism. It should not be minimized. For all their discomfort with mass politics, the pluralists had no touch of pastoral traditionalism. They placed their faith in precisely those aspects of modernity — industrialization and urbanization — that people like Ortega y Gasset found so threatening.[108] Old affiliations might be swept aside, but new ones arose in their place.[109] The image of the town meeting left the pluralists cold not just because it seemed inapplicable to national politics; the image smacked of nostalgia for small-town life, and the pluralists were moderns. They shared the broad tendency of intellectuals in postwar America to associate democracy with a kind of freewheeling cosmopolitanism, expressed through "a culture that denied absolute truths, remained intellectually flexible and critical, valued diversity, and drew strength from innumerable competing subgroups."[110]

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106. *Id.* at 453.

107. *See* DAHL & LINDBLOM, *supra* note 72, at 330 n.7; Thelma Z. Lavine, *Introduction* to BENTLEY, *supra* note 96, at xiv.

108. *See* JOSÉ ORTEGA Y GASSET, THE REVOLT OF THE MASSES (anon. trans., 1932).

109. The insight is Michael Rogin's. Rogin persuasively characterized pluralism as in part "a theory of history in which industrialization is the major actor." ROGIN, *supra* note 24, at 10. "For the modern pluralists, industrial society destroys old groups and loyalties, but it also creates new ones" — "more utilitarian than traditional," but stabilizing nonetheless. *Id.* at 12. Indeed, it was precisely "the success of industrialization" that allowed "group politics to dominate a society." *Id.* at 10.

110. PURCELL, *supra* note 37, at 211; David A. Hollinger, *Ethnic Diversity, Cosmopolitanism and the Emergence of the American Liberal Intelligentsia*, 27 AM. Q. 133 (1975). Hollinger describes the "cosmopolitan ideal" of midcentury intellectuals as "a desire to transcend the limitations of any and all particularisms in order to achieve a more complete human experience and a more complete understanding of that experience." Hollinger, *supra*, at 135, 150. He makes the intriguing suggestion that the rise of this ideal may have been linked to the rise of elitism. Cosmpolitanism, he argues:

> is difficult to maintain as a prescription for society at large unless one is willing — as most American intellectuals have not been — to attribute to the general populations a prodigious capacity for growth. The cosmopolitan ideal commanded the widest allegiance from

Adding together interest-group lobbying and electoral control, the pluralists arrived at a much rosier view than Schumpeter regarding the ability of average citizens to exert meaningful control over government. Individuals might not have many ways to influence government policy, but groups did. David Truman suggested that "the outstanding characteristic of American politics" was its "multiplicity of points of access," its "decentralized and more or less independent" loci of influence over government decisionmaking.[111] Robert Dahl also praised the "decentralized" nature of American politics, which made it likely "that any active and legitimate group will make itself heard effectively at some stage in the process of decision."[112] In his influential study of how pressure groups shaped federal legislation governing freight delivery charges, Earl Latham commended lobbying and backroom bargaining — the hobgoblins of "good government" reformers — as triumphs of American democracy. It was "impossible to witness the process," he thought, "without admiration" for the manner in which it allowed "a free people" to "refine[] and sift[]" a "fantastically complicated question of public policy."[113]

The pluralists were not in complete accord about the nature of groups. Latham, for example, thought groups served solely to promote the preexisting interests of their members; they were "devices" through which "the individual fulfills personal values and felt needs."[114] In contrast, Truman saw groups as not simply reflecting individual interests but helping to shape them. Groups molded attitudes and behavior; they were "the primary, though not the exclusive, means by which the individual knows, interprets, and reacts to the society in which he exists."[115] (Dahl seemed to side with Truman.[116]) But the pluralists all agreed that groups were "the basic political form"[117] and a key to the success of American democracy. And they agreed that group politics functioned not just outside government but also within it: between branches, between agencies,

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American intellectuals when it was implicitly understood to be their peculiar possession, when members of the intelligentsia did not feel obliged — as many of them did after the mid-1960s — to adopt values that could be justified in the wider context of general social theory.

Id. at 150-51.

111. TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 507-19.

112. DAHL, PREFACE, *supra* note 53, at 150. Similar claims may also be found in, for example, KEY, *supra* note 46, at 6-8.

113. EARL LATHAM, THE GROUP BASIS OF POLITICS: A STUDY IN BASING-POINT LEGISLATION 226-27 (1952).

114. *Id.* at 13, 28.

115. TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 21.

116. *See* DAHL, PREFACE, *supra* note 53, at 18.

117. LATHAM, *supra* note 113, at 10; *see also, e.g.*, KEY, *supra* note 46, at 17.

between bureaus and branch offices, and so forth.[118] Official and unofficial groups were "inhabitants of one pluralistic world,"[119] and government bureaucracies were part of "the 'normal' American political process."[120]

The pluralists were optimistic about group politics in the United States for several related reasons. First, they thought America was particularly rich with groups. They liked Tocqueville's notion that in no other nation had "the principle of association been more successfully used or applied to a greater multitude of objects,"[121] and they thought the observation as sound in the mid-twentieth century as in the early-nineteenth. Second, they believed groups were constantly forming and evolving in response to changing circumstances and changing interests. In Latham's words, the process was "dynamic, not static; fluid, not fixed"; society was "a moving multitude of human clusters," combining to "form coalitions and constellations of power in a flux of restless alterations."[122] Third, the pluralists thought that the nature of group politics in the United States worked to stabilize the system and to prevent any one group from gaining too much power. It was not just that there were so many groups, but also that the groups overlapped in complicated ways, that they focused on different but intersecting sets of issues, and that each group tended to enjoy its own distinctive array of political resources — some had time, some had money, some had expertise, some had social connections, and so on.[123]

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118. *See, e.g.*, LATHAM, *supra* note 114 at 38-49; DAHL, PREFACE, *supra* note 53, at 136-37, 145; KEY, *supra* note 46, at 690-712.

119. LATHAM, *supra* note 113, at 49.

120. DAHL, PREFACE, *supra* note 53, at 145.

121. TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 7 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 191 (Phillips Bradley ed., Knopf 1945) (1835)); *see also, e.g.*, DAHL, DEMOCRACY AND ITS CRITICS, *supra* note 27, at 295.

122. LATHAM, *supra* note 113, at 37-49; *see also, e.g.*, TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 31-35, 51-52; Truman, *American System*, *supra* note 53, at 488. Latham thought this ceaseless activity was "fully in accord with the American culture pattern which rates high in the characteristics of optimism, risk, experimentalism, change, aggressiveness, acquisitiveness, and a colossal faith in man's ability to subdue and bend nature to his desire." LATHAM, *supra* note 113, at 37. Presumably it was rhetoric like Latham's that C. Wright Mills had in mind when he dismissed the pluralists as "romantic," caught up in "a kind of bewildering, Whitmanesque enthusiasm for variety." MILLS, *supra* note 24, at 244.

123. Thus, for example, Robert Dahl concluded in his study of New Haven politics:

> Probably the most striking characteristic of influence in New Haven is the extent to which it is *specialized*; that is, individuals who are influential in one sector of public activity tend not to be influential in another sector; and, what is probably more significant, the social strata from which individuals in one sector tend to come are different from the social strata from which individuals in other sectors are drawn.

DAHL, WHO GOVERNS?, *supra* note 44, at 169. Like "a number of old American cities," New Haven had evolved "from a system in which resources of influence were highly concentrated to a system in which they are highly dispersed," from "a system of *cumulative*

The strength of the system lay in "complexity, or more to the point, multiplicity: multiplicity of issues, multiplicity of groups, multiplicity of memberships, multiplicity of influence resources, and multiplicity of access or check points."[124] All this multiplicity meant that American politics "worked essentially by bargaining."[125] In Dahl's memorable formulation, the United States had a system not of "government by a majority" nor of "government by a minority," but rather of "rule by *minorities*."[126] American democracy was "not a majestic march of great majorities united upon certain matters of basic policy"; instead it was "the steady appeasement of relatively small groups."[127]

All this bargaining, all this "flux of restless alterations," held together only because of a powerful underlying consensus. After consumerism and group theory, the notion of consensus was the third social-science fixture incorporated by the pluralists, and William Connolly may have been right to call it "the most important force sustaining political pluralism."[128]

The pluralists thought that a successful democracy on the American model required two kinds of consensus. The first was rough agreement about the range of reasonable policy alternatives. Dahl, in particular, stressed that unless the options on the table were somehow "winnowed down to those within [a] broad area of basic agreement," democracy "would not long survive the endless irritations and frustrations of elections and party competition." Consequently, democracy depended on an "underlying consensus on policy" among "a predominant portion of the politically active members" of society.[129] Second, and even more fundamental, was broad agreement on underlying democratic norms — what Truman, echoing Schumpeter,[130]

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inequalities in political resources to a system of noncumulative or *dispersed inequalities* in political resources." *Id.* at 227-28.

124. Baskin, *supra* note 36, at 73-79. On the importance of overlapping memberships, see especially BERELSON ET AL., *supra* note 48, at 318-20, and TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 168, 514, 520.

125. DAHL, PREFACE, *supra* note 53, at 145; *see also id.* at 150 (suggesting that "perhaps in no other national political system in the world is bargaining so basic a component of the political process"); LATHAM, *supra* note 113, at 224 (stressing centrality of "the principle of toleration and compromise, without which the democratic process would not function at all").

126. DAHL, PREFACE, *supra* note 53, at 133.

127. *Id.* at 146.

128. Connolly, *supra* note 36, at 13; *see also, e.g.*, BACHRACH, *supra* note 49, at 62-63. Thus George Berkley, drawing on pluralist scholarship in 1969 for insight into democratic policing, took it as uncontroversial that democracy "first of all requires consensus." BERKLEY, *supra* note 1, at 2.

129. DAHL, PREFACE, *supra* note 53, at 132; *see also id.* at 77-80; BERELSON ET AL., *supra* note 48, at 313, 319; KEY, *supra* note 46, at 227; LATHAM, *supra* note 113, at 225.

130. *See supra* note 86 and accompanying text.

called the "rules of the game."[131] The precise nature of these procedural principles was never completely clear, but they seemed to rest "at bottom on a respect for the dignity of man,"[132] and the pluralists agreed that "social training" in them was critical to the success of a democracy.[133]

They agreed, too, that the critical figures in forging consensus both on policies and on procedural norms were members of an elite "political stratum":[134] "the politically active and articulate portion of the population."[135] Unlike Schumpeter's stable, class-based leadership stratum, the pluralist elite was in theory porous and heterogeneous.[136] It was for all that an elite, comprising not just government officials, but also, crucially, leaders of interest groups and shapers of public opinion. Members of the political stratum were apt to be better educated and more effectively trained in democratic values. They also tended to belong to more groups, and their leadership roles made them more worldly. The consensus at the heart of pluralism was thus an "elite consensus,"[137] a consensus formed through "the affiliations of the guardians."[138] As Michael Rogin put it, pluralism ultimately was "not the politics of group conflict but the politics of leadership conflict."[139]

The fourth and final social-science concept relied upon by the pluralists was personality, in the Freudian sense of a complex, largely unconscious mental structure governing attitudes and behavior. The pluralists were particularly attracted to the notion that democratic and

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131. TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at xli, 159, 512, 524. Truman, for example, thought these included:

> acceptance of the rule of law over a resort either to violence or to arbitrary official action, the guarantees of the Bill of Rights, effective modes of mass participation both in the institutions of government itself and in the organized groups in the society broadly, and a measure of equality of access to the fruits of the social enterprise.

Id. at xxxvii; *see also id.* at 512-13.

132. Truman, *American System*, *supra* note 53, at 490.

133. DAHL, PREFACE, *supra* note 53, at 47, 76-77; *see also* KEY, *supra* note 46, at 12-13; TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 512-13, 524.

134. DAHL, WHO GOVERNS?, *supra* note 44, at 90-94.

135. TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at xxxviii.

136. *See* DAHL, WHO GOVERNS?, *supra* note 44, at 91.

137. BACHRACH, *supra* note 49, at 47-64.

138. TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 535; *see also* Truman, *American System*, *supra* note 53, at 495-97. The authors of the Elmira study similarly stressed the importance of "opinion-leading relationships," through which "the total information and knowledge possessed in the group's present and past generations can be made available for the group's choice." BERELSON ET AL., *supra* note 48, at 321; *see also id.* at 322-23. Opinion leaders were thus the "angels" that seemed to intercede when "the rational citizen seems to abdicate." *Id.* at 311.

139. ROGIN, *supra* note 24, at 25. The same point is made in PREWITT & STONE, *supra* note 35, at 201, and Walker, *supra* note 49, at 287.

antidemocratic values were psychologically embedded, and that, in particular, there was something that could be called "the authoritarian personality."[140] The widely influential book first articulating this view described the authoritarian "character structure"[141] as including all of the following dispositions: "[r]igid adherence to conventional, middle-class values"; a "[s]ubmissive, uncritical attitude toward idealized moral authorities of the ingroup"; a "[t]endency to be on the lookout for, and to condemn, reject, and punish people who violate conventional values"; "[o]pposition to the subjective, the imaginative, and the tender-minded"; a "belief in mystical determinants of the individual's faith"; a "disposition to think in rigid categories"; a "[p]reoccupation" with "[p]ower and 'toughness'"; a "[g]eneralized hostility" and "vilification of the human"; a "disposition to believe that wild and dangerous things go on in the world"; a "projection outwards of unconscious emotional impulses"; and an "[e]xaggerated concern with sexual 'goings-on.'"[142]

This cluster of dispositions, the authoritarian personality, was thought to be especially prevalent among those with low to moderate levels of education, income, and political activity — that is to say, among people outside the political stratum.[143] The role of personality in politics thus provided another reason to leave the day-to-day functions of democracy to the elite. For reasons of individual psychology, broadening political participation was likely to mean bringing "the authoritarian-minded into the political arena."[144] Mass politics was authoritarian politics; democratic politics was, paradoxically, elite politics.

The notion of the authoritarian personality reinforced and in turn was strengthened by the pluralist emphasis on bargaining. For part of what distinguished "the authoritarian-minded" was precisely their extremism, their discomfort with compromise, their affinity for "total

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140. T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950); *see also, e.g.*, DAHL, PREFACE, *supra* note 53, at 18; LIPSET, *supra* note 59, at 105; Morris Janowitz & Dwaine Marvick, *Authoritarianism and Political Behavior*, 17 PUB. OPINION Q. 185 (1953); Robert E. Lane, *Political Personality and Electoral Choice*, 49 AM. POL. SCI. REV. 173 (1955). For assessments of the role of personality in pluralism, see PURCELL, *supra* note 37, at 253-54, and ROGIN, *supra* note 24, at 18.

141. ADORNO ET AL., *supra* note 140, at ix.

142. *Id.* at 228; *see also, e.g.*, Lane, *supra* note 140, at 176. On reactions to THE AUTHORITARIAN PERSONALITY, and on the study's roots in earlier work by Adorno and other members of the Frankfurt School, see MARTIN JAY, THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950, at 219-52 (2d ed., Univ. of Cal. Press 1996) (1973).

143. *See, e.g.*, DAHL, PREFACE, *supra* note 53, at 18, 81-82; LIPSET, *supra* note 59, at 97-130; Janowitz & Marvick, *supra* note 140, at 191, 195, 199.

144. DAHL, PREFACE, *supra* note 53, at 89.

politics."[145] They cared too much; they were too reluctant to yield. They were overly attracted to the revolutionary aspirations that by the 1950s had come to seem a "deep betrayal, treason not only to the narrow interests of the United States but to the basic values of Western civilization."[146] Democratic politics was thus elite politics in part because average citizens, if they became politically engaged, were likely to become engaged in the wrong way. They were apt to become "highly partisan" if not "rigidly fanatic."[147] Democracy depended on "an implicit division of political labor," in which the bulk of the work was left to those who could occupy the psychological middle ground between indifference and extremism.[148]

The psychoanalytic orientation of the pluralists contributed to their mixed position on the subject of expertise. On the one hand, the pluralists shared Dewey's disdain for Platonic "philosopher kings," a disdain that by the 1950s had become intellectual orthodoxy.[149] And their attraction to Bentley's group theory of politics made them unsympathetic to "good government" managerialism of the kind associated with Herbert Hoover. They did not believe government was or should be a science. On the other hand, they did believe that government, and our views about government, should be *informed* by science, and by social science in particular. They saw themselves, after all, as bringing social science to bear on the practical problems of democracy.[150] They were empiricists — often in methodology, and always in disposition. An important part of their empiricism was rooted in Freud. They shared his faith in the analyst's ability to subjugate the irrational through detached inquiry, and they tended to see themselves as engaged in essentially the same project.[151] And, of

145. BERELSON ET AL., *supra* note 48, at 319.

146. LASCH, *supra* note 52, at 172. For the classic declaration of "the end of deep political conflict in the West, the end of utopian attempts to reconstruct society," *id.* at 171, see Daniel Bell's collection of essays, DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (1961).

147. BERELSON ET AL., *supra* note 48, at 314, 323.

148. *Id.* at 321, 323; *see also, e.g.*, Walker, *supra* note 49, at 287.

149. *See* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 205 (Gateway Books 1946) (1927); *see also* TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42 and accompanying text. On Dewey's influence, see PURCELL, *supra* note 37, at 197-217.

150. *See, e.g.*, BERELSON ET AL., *supra* note 48, at 306; DAHL, PREFACE, *supra* note 53, at 18; TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 14-44.

151. David Truman, for example, opened his essay on McCarthyism — the same essay in which he dismissed Lippman as a Platonist — by warning that America's failure in China, together with the Sputnik crisis, had "produced a variety of responses, a good many of which were inappropriate in the sense that they were not adequately based on reality," although they may have been "comforting" and "psychologically useful." Truman, *American System*, *supra* note 53, at 481. Later, he suggested that "psychoanalytic examination" of Lippman himself "might be revealing," although Truman did not propose to carry it out. *Id.* at 487.

course, they had little confidence in the ability of the average citizen to think rationally about public affairs, and a strong belief in the importance of delegating the main work of politics. All of this meant that respect for certain kinds of expertise — particularly scientific and professional expertise — suffused democratic pluralism.[152]

We finally are in a position to summarize the pluralist account of democracy. Consider in turn the four dimensions of democracy we identified earlier: purposes, processes, proximity, and particularity.[153]

Purposes. The pluralists saw democracy not as end in itself but as purely instrumental, a means of protection against violent upheavals and authoritarianism. Individuals were prior to politics. The purposes of democracy were to promote stability and to preserve a certain baseline of civil liberty.

Processes. The pluralists believed that democracy depended at bottom not on specific institutional arrangements but rather on personality and culture. They spoke of democratic *societies*, not democratic governments. The one institutional arrangement they did think critical was election of the officials with final say over government policy. But the true engines of politics were groups, both inside and outside government, and democratic politics required resolving group conflicts through competition, bargaining, and compromise. Those processes in turn required that politically active members of the community have democratic personalities, be trained in democratic norms, and share a rough consensus about the range of acceptable policies. These conditions, finally, were easier to secure when politics was largely the province of an elite, and the elite in turn made appropriate use of scientific and technical expertise.

Proximity. The pluralists thought that American democracy, while obviously imperfect, was on the whole fair, open, and remarkably successful. They therefore believed it far less important to improve the system than to recognize and to preserve its strengths. This orientation, in turn, reinforced and accentuated their concern with political stability.[154]

Particularity. Pluralism was very much a theory of *American* democracy. Partly because democracy was a property of a society

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152. This tendency of pluralism, present from the outset, grew more pronounced after October 1957. Pluralism was always a response to the felt realities of the times, and few realities were felt as sharply as Sputnik. *See* PAUL DICKSON, SPUTNIK: THE SHOCK OF THE CENTURY 108-33, 223-34 (2001); ROBERT A. DIVINE, THE SPUTNIK CHALLENGE 3-96 (1993); WALTER A. MCDOUGALL, THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE 137-65, 227-30 (1985); Walter A. McDougall, *Technocracy and Statecraft in the Space Age — Toward the History of a Saltation*, 87 AM. HIST. REV. 1010, 1023-24 (1982).

153. *See supra* text accompanying notes 36-38.

154. *See, e.g.*, LIVELY, *supra* note 26, at 82; PATEMAN, *supra* note 36, at 1-2.

rather than of a system of government, the pluralists did not assume that what worked here would work elsewhere.[155] American democracy was part and parcel of America's distinctive culture: daring, restive, and optimistic.[156] The pluralists, in short, were American exceptionalists, joining fully in the postwar "celebration of American deviation from Old World tradition."[157] In this respect, as in so many others, they were of their time. They lived and worked in a period when, as Edward Purcell has written, America seemed to many people "more and more a norm in itself, standing for practical democratic achievement and the fulfillment of that last, best hope."[158]

II. PLURALISM AND POLICING

I want now to trace the connections between democratic pluralism and criminal procedure, understood broadly to include not just judge-made rules for police practices, but also scholarship about those rules and about the police more generally. I do not seek to show that democratic pluralism or its constituent concepts "caused" criminal procedure and scholarship about the police to take the forms that they did in the 1950s and 1960s — in the sense that without the ideas about democracy, the ideas about the police would not have emerged as they did. Ideas rarely stack upon each other in such straightforward ways; the arrows of causation run in too many directions. Ideas about the police influence ideas about democracy, as well as vice versa. What I hope to demonstrate is not that democratic pluralism is responsible for, say, the *Miranda* decision, but rather that pluralism can help to explain the ruling, by making more understandable certain broad features of Warren and Burger Court criminal procedure and of contemporaneous studies of the police. Ideas about democracy and ideas about the police were related: they "resonate[d] and fit together."[159]

Needless to say, it did not take the democratic pluralism of the 1950s to get the Supreme Court interested in the police. In important respects modern criminal procedure law can be traced back to the 1920s and 1930s. It was in these earlier decades that the Court, largely

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155. Here is Dahl, for example: "Probably this strange hybrid, the normal American political system, is not for export to others." DAHL, PREFACE, *supra* note 53, at 151.

156. *See id.*; LATHAM, *supra* note 113, at 35.

157. Alan Taylor, *The Exceptionalist*, NEW REPUBLIC, June 9, 2003, at 33; *cf.* MILLS, *supra* note 24, at 25 (criticizing "[t]hose who have abandoned criticism for the new American celebration"); *id.* at 358 n.* (calling American history the "common denominator of the conservative mood in America today").

158. PURCELL, *supra* note 37, at 271; *see also* Hollinger, *supra* note 110, at 147.

159. David Nelkin, *Using the Concept of Legal Culture*, 29 AUSTL. J. LEGAL PHIL. 1, 9 (2004).

as a result of Prohibition, began to confront the kinds of search-and-seizure issues that have come to constitute such a large part of criminal procedure law — electronic surveillance,[160] automobile searches,[161] the uses of informants.[162] More importantly, it was during the interwar period that the Supreme Court first applied the federal Constitution to overturn state criminal convictions — a pivotal move, because law enforcement in the United States was and remains chiefly a responsibility of state and local governments.[163] The seeds of Warren Court criminal procedure thus were planted long before the pluralists began to write.[164]

Unsurprisingly, though, the criminal procedure decisions of the 1920s and 1930s were rooted in concerns different from those that chiefly occupied the pluralists. In particular, the Court's initial forays into state criminal procedure are best understood as responses to the worst excesses of Jim Crow: cases in which Black defendants were sentenced to death with barely the facade of trial.[165] The Court confronted trials held in the midst of lynch mobs,[166] trials in which Black defendants were denied anything resembling adequate counsel,[167] trials held before juries from which Blacks were flatly excluded,[168] and trials based on confessions obtained from Black defendants by torture.[169] These were race cases, not democracy cases. More precisely, if they were democracy cases it was largely *because* they were race cases — and race was never central to the pluralist account of democracy.[170] Pluralism was compatible with a certain measured egalitarianism, but on the whole the pluralists tended to

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160. *See* Olmstead v. United States, 277 U.S. 438 (1928).

161. *See* Carroll v. United States, 267 U.S. 132 (1925).

162. *See* Sorrells v. United States, 287 U.S. 435 (1932).

163. *See, e.g.*, Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 81 (2000).

164. *See, e.g.*, CRAIG BRADLEY, THE FAILURE OF THE CRIMINAL JUSTICE REVOLUTION 18 (1993).

165. *See, e.g.*, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 26-30 (1942); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841-44 (1994).

166. Moore v. Dempsey, 261 U.S. 86 (1923).

167. Powell v. Alabama, 287 U.S. 45 (1932).

168. Norris v. Alabama, 294 U.S. 587 (1935).

169. Brown v. Mississippi, 297 U.S. 278 (1936).

170. Here, again, is Dahl: "[P]erhaps in no society have the conditions of polyarchy been so fully present as they were in the United States in the ante-bellum period (save, of course, for the position of Negroes)." DAHL, PREFACE, *supra* note 53, at 142-43.

think that groups could fend for themselves, even groups as historically disadvantaged as African Americans.[171]

Of the state criminal procedure cases the Court decided in the 1920s and 1930s, only *Brown v. Mississippi*, the confession-by-torture decision, involved the police. *Brown* became the basis for a series of coerced confession decisions in the 1940s, a line of cases that, as it progressed, had less and less to do with race and more and more to do with police brutality.[172] These decisions reflected, in part, a drive toward police "professionalism" that began in the last decade of the nineteenth century and reached its peak in the 1950s and 1960s. Police professionalism meant politically insulated police departments organized along hierarchical, quasi-military lines, with strong commitments to efficient operations, centralized command, technological sophistication, well-trained personnel, and high standards of integrity.[173] Police professionalism proved compatible with democratic pluralism, for reasons we will explore later, but its roots lay in the "good government" managerialism of the Progressive Era and the interwar period.[174] Managerialism of this kind, so antithetical to the thinking of someone like Arthur Bentley, permeated the work of the National Commission of Law Observance and Enforcement, appointed by President Herbert Hoover and chaired by George Wickersham.[175] The Wickersham Commission was sharply and famously critical of "the third degree," which it viewed as simply one particularly egregious instance of the general problem of "lawlessness in law enforcement."[176] That criticism, so fully in accord with the "good government" approach to police reform, helped lay the groundwork for the coerced confession cases of the 1940s. To the extent the coerced confession cases reflected ideas about democracy, therefore, those ideas were not identifiably and specifically those of the pluralists.

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171. *See id.* at 121, 138; DAHL, WHO GOVERNS?, *supra* note 44, at 293-96; TRUMAN, GOVERNMENTAL PROCESS, *supra* note 42, at 103-04, 511, 518.

172. *See* Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

173. *See, e.g.*, GOLDSTEIN, *supra* note 4, at 2-3; GUYOT, *supra* note 17, at 5-7. The canonical works are AUGUST VOLLMER, THE POLICE AND MODERN SOCIETY (1936), and O.W. WILSON, POLICE ADMINISTRATION (1950). Vollmer was the chief of police in Berkeley, California, until 1932 and then taught police administration at U.C. Berkeley. Wilson, Vollmer's protégé, was the Dean of the School of Criminology at U.C. Berkeley and later directed the police departments in Fullerton, Wichita, and Chicago. On Wilson's influence, see, for example, Lawrence W. Sherman, *The Sociology and the Social Reform of the American Police: 1950-1973*, 2 J. POL. SCI. & ADMIN. 255, 256 (1974).

174. *See, e.g.*, GOLDSTEIN, *supra* note 4, at 2-3, 133-34, 144.

175. *See id.*

176. *See, e.g.*, BRADLEY, *supra* note 164, at 9-10.

By contrast, the distinctive outlook of democratic pluralism *was* reflected in Warren and Burger Court criminal procedure, and in the scholarship about policing that accompanied and informed those decisions. Democratic pluralism was not the only intellectual influence on criminal procedure in this period; it may not even have been the most important. I will argue, though, that pluralism helps us make sense of several interrelated hallmarks of criminal procedure and police studies in the Warren and Burger Court eras: the focus on the group psychology of the police, the concern with police discretion and the reliance on judicial oversight, the emphasis on personal dignity, the attraction to "second wave" police professionalism, the embrace of modernity, the centrality of consensus, and the disregard of institutional structure.

A. *The Focus on the Group Psychology of the Police*

The year that Earl Warren became Chief Justice of the Supreme Court, 1953, also marked a turning point in scholarship about the police. The few prior studies of policing tended to be the work of journalists, public figures like George Wickersham and his fellow commissioners, or reform-minded police executives.[177] There was no tradition of independent, academic examination of American police. That changed with the publication in 1953 of two pioneering and highly influential articles, one by the sociologist William Westley and the other by the legal scholar Jerome Hall.[178] Westley's study, adapted from a doctoral dissertation later published in its entirety,[179] reported the results of firsthand observation of and interviews with working police officers. Hall's article was an "emergence study" of the modern law and practice of policing. Both authors focused on the ways in which the actual operations of police departments conflicted with "democratic ideals"[180] and "legal mandate";[181] both sought to

177. The second category included, for example, RAYMOND B. FOSDICK, AMERICAN POLICE SYSTEMS (1920). The third category included, most notably, the work of August Vollmer, *see supra* note 173, as well as, for example, ARTHUR WOODS, POLICEMAN AND PUBLIC (1919). For an important but limited exception to the generalization in the text, see the discussion of police graft in WILLIAM FOOTE WHYTE, STREET CORNER SOCIETY: THE SOCIAL STRUCTURE OF AN ITALIAN SLUM 123-46 (1943).

178. *See* Hall, *supra* note 8; William Westley, *Violence and the Police*, 59 AM. J. SOC. 34 (1953) [hereinafter Westley, *Violence and the Police*].

179. *See* WESTLEY, *supra* note 14. In addition to the part of the dissertation published in 1953, a second portion appeared as William A. Westley, *Secrecy and the Police*, 34 SOC. FORCES 254 (1956) [hereinafter Westley, *Secrecy and the Police*].

180. Hall, *supra* note 8, at 145-46.

181. Westley, *Violence and the Police*, *supra* note 178, at 41; *see also* WESTLEY, *supra* note 14, at 10.

understand the "basic causes" of those conflicts;[182] and both believed that the causes were to be found in social relations — relations among police officers, and relations between police officers and the wider society. In each of these respects, the work of Westley and Hall set the pattern for the many academic studies of the police published during the Warren and Burger Court eras.[183]

Westley, in particular, set the pattern in another respect as well. Drawing heavily on the group theory incorporated within democratic pluralism, Westley argued that the key to understanding the police was to analyze them "as a social and occupational group."[184] More precisely, the police were a "conflict group,"[185] united by the manner in which the job they shared isolated them from the community and threatened their collective sense of status. The police officer "regard[ed] himself to be a pariah"[186] and came to "regard the public as an enemy."[187] The collective alienation of police officers drove them to create a distinctive set of group norms, at war in important respects with "formal social controls."[188] The norms of the police approved the selective use of illegal violence against suspects, for example, and they forbade officers from testifying against each other. New recruits were systematically indoctrinated into both norms.

Westley thus thought that the key to understanding the police was to understand their shared mentality, and that the key to their shared mentality was the nature of their job, including the ways in which their job estranged them from the community and threatened their collective self-esteem. This set of premises — "the Policeman as Other" — became a central motif of police sociology in the 1960s and 1970s.[189] It links together, for example, the work of James Q. Wilson

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182. Hall, *supra* note 8, at 146.

183. *See, e.g.*, Cain, *supra* note 16, at 144-48.

184. WESTLEY, *supra* note 14, at 8; *see also* Westley, *Secrecy and the Police*, *supra* note 179, at 256-57; Westley, *Violence and the Police*, *supra* note 178, at 34.

185. Westley, *Secrecy and the Police*, *supra* note 179, at 256.

186. Westley, *Violence and the Police*, *supra* note 178, at 35.

187. Westley, *Secrecy and the Police*, *supra* note 179, at 256.

188. WESTLEY, *supra* note 14, at 10.

189. Maureen Cain, *Some Go Forward, Some Go Back: Police Work in Comparative Perspective*, 22 COMP. SOC. 319, 320 (1993); *see also, e.g.*, Stuart A. Scheingold, *Cultural Cleavage and Criminal Justice*, 40 J. POL. 865, 881-82 (1978); John Van Maanen, *Working the Street: A Developmental View of Police Behavior*, *in* THE POTENTIAL FOR CRIMINAL JUSTICE REFORM 83, 84-85 (Herbert Jacob ed., 1974). For a skeptical review, see Robert W. Balch, *The Police Personality: Fact or Fiction?*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 106 (1972). For an early, dissenting perspective, see MICHAEL BANTON, THE POLICEMAN IN THE COMMUNITY 215-68 (1964).

and Jerome Skolnick, two scholars whose perspectives are in other respects so different.[190]

Wilson and Skolnick shared another premise. Like other police scholars of the era, they believed that the psychology of the police was shaped not just by occupational role and outcast status, but also by a cluster of dispositions that officers brought with them to the job. Wilson speculated that the "working-class backgrounds" of police officers inclined them to view violence as legitimate and gave them "a preoccupation with maintaining self-respect, proving one's masculinity, 'not taking any crap,' and not being 'taken in.'"[191] Skolnick found it plain that "a Goldwater-type of conservatism was the dominant political and emotional persuasion of police."[192] The worldview of the police included a simplistic, acontextual understanding of criminality, an apprehensive traditionalism, an intolerance for nonconformity, and a hostility to permissive childrearing.[193] It sounded very much like the "authoritarian personality." Skolnick himself hesitated to call the police mentality "authoritarian," but other sociologists did not.[194] And even Skolnick's hesitation stemmed not from doubts about the accuracy or descriptive value of the term,[195] but rather from a belief that the dispositions in question were shared with the "great mass of people."[196] That was what the pluralists thought, too.

The notion that the police have a distinctive mentality — rigid, insecure, inclined toward violence, hostile to anyone "different" — became widespread by the late 1960s, particularly on the Left and particularly after the 1968 Democratic Convention in Chicago.[197] It does not appear explicitly in the Warren and Burger Courts' criminal procedure decisions, but it is hard not to sense in some of those cases a degree of lurking wariness about the group psychology of the police.

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190. *See* SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 45 n.4, 49-59, 231; James Q. Wilson, *The Police and Their Problems: A Theory*, 12 PUB. POL'Y 189, 191-94 (1963).

191. WILSON, POLICE BEHAVIOR, *supra* note 3, at 33-34, 47.

192. SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 61.

193. *See* SKOLNICK, POLITICS OF PROTEST, *supra* note 4, at 259-62.

194. *See, e.g.*, ARTHUR NIEDERHOFFER, BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY 103-51 (1967); *cf.* Balch, *supra* note 189, at 107 (noting that "the typical policeman, as he is portrayed in the literature, is almost a classic example of the authoritarian personality").

195. *See* NIEDERHOFFER, *supra* note 194, at 192.

196. SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 61. "Therefore it is preferable to call the policeman's a conventional personality." *Id.*

197. *See, e.g.*, LASCH, *supra* note 52, at 207; Thomas R. Brooks, *New York's Finest*, COMMENTARY, Aug. 1965, at 29, 31; James Ridgeway, *The Cops & the Kids*, NEW REPUBLIC, Sept. 7, 1968, at 11; Waskow, *supra* note 13.

When insisting that searches and seizures be conducted pursuant to warrants, for example, the Court liked to quote Justice Jackson's famous warning in *United States v. Johnson* that the decision should not be entrusted to "the officer engaged in the often competitive enterprise of ferreting out crime."[198] So fond was the Court of this formulation that one begins to suspect it was, at least at times, a diplomatic way to address worries beyond an excess of zeal. Justice Jackson himself seemed concerned that the "point" of the Fourth Amendment was "often not grasped" by the police[199] — even, presumably, in their reflective moments — and that concern was echoed in the Court's later opinions.[200] Herbert Packer, hardly unsympathetic to the direction the Warren Court took in criminal procedure, suggested in 1966 that, "[t]o anywhere from five to nine members of the Court, depending on how hair-raising the facts of the particular case appear to be, the police are suspect."[201] The judiciary in general, Packer explained, was "unconvinced that the police regard the rights of the accused as anything but a nuisance and an impediment."[202] Packer shared that skepticism, as did many if not most legal scholars writing in the 1960s and 1970s. Their concerns about the police mentality were only heightened by developments to which we will return later: the nature of police responses to rioting and political demonstrations in the late 1960s, and the campaigns that law enforcement administrators and police unions mounted against key Warren Court rulings and against emerging proposals for civilian review boards.

Ideas about social psychology are not necessarily ideas about democracy. But the two sets of ideas were closely related for the pluralists: their beliefs about the mentality of the masses heavily informed their notions about the importance of elites. So, too, we will see, underlying ideas about the group psychology of the police likely informed the views of many people in the 1960s and 1970s, perhaps including Supreme Court justices, about the proper ways to reconcile law enforcement and democracy. Tracing the connections requires us to consider other pervasive themes of criminal procedure in the Warren and Burger Court eras. But two points merit passing mention here.

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198. 333 U.S. 10, 14 (1948).

199. *Id.*

200. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); Chapman v. United States, 365 U.S. 610, 614 (1961).

201. Herbert L. Packer, *The Courts, The Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 241 (1966).

202. *Id.*

First, the conception of the police as a discrete and unified group, alienated from mainstream society, encouraged the notion that effective regulation of the police required strong oversight from a different group — if not politicians, then judges or some kind of civilian oversight board. It contributed to the great pessimism shown by scholars in the 1960s and later decades about the potential for police departments to regulate themselves, or even to cooperate with systems of outside review.[203]

Second, a concern for the group mentality of the police may help to explain the lax standards the Warren and Burger Courts applied to searches by government agencies other than the police. Initially the Warren Court entirely exempted "administrative searches" from the warrant and probable-cause requirements imposed on searches conducted in the course of criminal investigations.[204] Later the Court held that an administrative search did require a warrant, but that the warrant could issue without the kind of probable cause that a criminal search would require — in fact without any individualized suspicion at all.[205] In the early 1970s, the Court loosened the requirements again, holding that warrants often were not required for administrative searches of closely regulated businesses.[206] Subsequently the administrative search doctrine was broadened into the "special needs" doctrine, applying relaxed standards to searches by public school teachers, government office managers, and so on.[207]

There has always seemed something counterintuitive about giving the government more leeway to search when no crime is suspected.[208] The explanation cannot be simply, as the Court has said, that lower standards are necessary in order for the searches to go forward: a similar argument could just as easily justify reduced standards for

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203. See, for example, Herbert Jacob's fairly typical characterization of the police as engaged "in a gigantic conspiracy against the outside world," a conspiracy so "deeply embedded in the norms and work routines of policemen" that "civilian review of police activities is bound to arouse frantic opposition by the police" and "even in-house investigatory agencies will usually fail to penetrate the protective wall that policemen have built around themselves." Herbert Jacob, *Introduction* to THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE 9, 10 (Herbert Jacob ed., 1974).

204. Frank v. Maryland, 359 U.S. 360 (1959).

205. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

206. United States v. Biswell, 406 U.S. 311 (1972); *see* Colonade Catering Corp. v. United States, 397 U.S. 72 (1970).

207. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 720 (1987); New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

208. *See, e.g.*, 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.1(b), at 373-80 (3d ed. 1996).

searches in criminal investigations.[209] Nor, despite the Court's suggestions, does the fact that no criminal case is contemplated seem to make a search any less invasive. If criminal searches felt more "hostile" to the Court,[210] perhaps that had less to do with the prospect of criminal charges than with the involvement of a specific group of government officials: the police. It is true that on occasion the Court has applied the administrative search and "special needs" doctrines to searches carried out by police officers.[211] But those decisions were outliers, and they have always seemed the least convincing applications of the doctrines.

B. *The Concern with Police Discretion and the Reliance on Judicial Oversight*

Jerome Hall's influential article of 1953 drew attention to the many circumstances in which the police operated without clear standards. He warned that the wide scope of police discretion opened the door to discrimination against minorities, and he argued that it violated a core component of democracy, the "rule of law."[212] The rule of law was also a key concept for many of the democratic pluralists. It was part of what David Truman meant by the "rules of the game": the whole system of interest-group competition made sense only if government involved something more than officials acting on their arbitrary whims.[213] Many of the social scientists who turned their attention to the police beginning in the 1950s shared the pluralists' view in this regard, and they agreed with Hall that police discretion represented a worrisome deviation from the rule of law — all the more worrisome given the characteristic mindset of the police. Westley thought this way: he warned that the internal norms of the police threatened the "formalized controls" on which society increasingly depended.[214] Skolnick thought this way: that was why he titled his major work *Justice Without Trial*.[215] And when legal scholarship on the police

209. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 650 (1989) (Marshall, J., dissenting).

210. *Camara*, 387 U.S. at 530.

211. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990); New York v. Burger, 482 U.S. 691, 717 (1987).

212. Hall, *supra* note 8, at 153, 156, 171.

213. *See supra* note 131 and accompanying text.

214. WESTLEY, *supra* note 14, at 10.

215. SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2.

began to proliferate in the 1960s, much of it focused on the problem of police discretion.[216]

There was general agreement, too, that the principal solution lay in greater judicial oversight of the police. This was definitely what Hall had in mind. Stronger *executive* control of the police was too dangerous for democracy: "Certainly we do not want our police to be a Praetorian Guard available to some would-be Caesar."[217] Skolnick, reflecting the prevailing tone of criminal procedure scholarship in the 1960s, placed even more weight on the rule of law than Hall. As Jonathan Simon has noted, Skolnick saw identification with the rule of law to be both "the defining aspect of the police" and "a way to reconcile their fundamentally authoritarian character with the democratic society they were policing."[218] And the rule of law was applied to the police officer chiefly by the judge, both directly and through the intermediary of the prosecutor.[219]

This combination of diagnosis and prescription — the problem of police discretion and the solution of judicial oversight — was not restricted to scholars. It was perhaps the most characteristic feature of the Warren Court's approach to the police. Consider just the decisions that: extended the Fourth Amendment exclusionary rule to state law enforcement;[220] conditioned investigatory stops and pat-downs on grounds sufficiently "articulable" to allow judicial review;[221] inserted defense attorneys as witnesses at interrogations and lineups;[222] constrained interrogations with bright-line requirements of prescribed

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216. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 906-15 (1962); Wayne R. LaFave, *The Police and Nonenforcement of the Law* (pts. 1 & 2), 1962 WISC. L. REV. 105, 180; Packer, *supra* note 9, at 24-38; Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1164-70 (1966).

217. Hall, *supra* note 8, at 155.

218. Simon, *supra* note 7, at 39.

219. *See* SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 199-202, 227-29. On the tendency of scholars in the 1960s to favor judicial control of the police, see, for example, Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 5 AM. SOC. REV. 699, 699-700 (1967). In his widely admired lectures at the University of Minnesota in 1974, Anthony Amsterdam urged the use of police administrators as intermediaries, expanding on an earlier suggestion by the administrative law scholar Kenneth Culp Davis. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); *see also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65, 95 (1969). Amsterdam argued that police discretion should be reined in by police rulemaking, but he stressed that police rulemaking could be "created and maintained in working order only by the stimulation and the oversight of courts enforcing constitutional law." Amsterdam, *supra*, at 380.

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

221. Terry v. Ohio, 392 U.S. 1 (1968).

222. United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966).

warnings and automatic shutoffs;[223] required warrants for electronic surveillance;[224] required warrants for home searches following arrests;[225] and required warrants — after a fashion — for administrative inspections.[226]

Warrants, in fact, were the principal motif of the Warren Court's approach to the Fourth Amendment. The constitutional text does not explicitly require warrants; it requires only that searches and seizures be reasonable, and that warrants, when they do issue, be appropriately narrow and based on probable cause. The Court's efforts to harmonize these two commands were always erratic, but by the time Warren took the bench the Court seemed inclined to the general view that searches and seizures were constitutional if they were reasonable, regardless whether they were pursuant to warrant.[227] The Warren Court emphatically rejected that position. Again and again, the Court insisted that, with certain narrow exceptions, searches and seizures were reasonable only if the police obtained "advance judicial approval" in the form of a warrant.[228] The point was that judges should decide, not police officers. Adopting a position Justice Frankfurter had often expressed in dissent,[229] the Warren Court saw the Fourth Amendment as aimed above all at the evil of the arbitrary exercise of discretion, and it saw judicial prescreening of searches and seizures as the Constitution's favored remedy. This view of the Fourth Amendment persisted into the Burger Court era, though its application grew more sporadic.[230]

As a prescription for the problem of police discretion, judicial oversight could draw strength from democratic pluralism in several ways. To begin with, of course, courts specialized in procedural regularity, so they seemed ideal bodies for applying the rule of law. More fundamentally, judges were *independent* of the police. They were a separate group, within the government, that could serve as a counterbalance against other governmental groups, including the

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223. *Miranda*, 384 U.S. at 444-45.

224. Katz v. United States, 389 U.S. 347 (1967).

225. Chimel v. California, 395 U.S. 752 (1969).

226. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

227. *See* United States v. Rabinowitz, 339 U.S. 56 (1950).

228. *See, e.g.*, *Katz*, 392 U.S. at 20. The most explicit rejection of *Rabinowitz* came in *Chimel*, 395 U.S. at 759-68.

229. *See Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 161-62 (1947) (Frankfurter, J., dissenting); Davis v. United States, 328 U.S. 582, 595 (1946) (Frankfurter, J., dissenting); Amsterdam, *supra* note 219, at 396-97.

230. *See, e.g.*, Payton v. New York, 455 U.S. 573 (1980); United States v. Chadwick, 433 U.S. 1 (1977); United States v. United States Dist. Court, 407 U.S. 297 (1972).

police, in the classic manner described by the pluralists.[231] Skolnick invoked this idea quite explicitly. Like "any agency," he explained, "the police would of course engage in activities promoting self-serving ends," unless other "regulators" intervened. It was precisely the inability of the police to "capture" their regulators — the judiciary — that kept our system from resembling a "police state."[232] (Disregard for a moment the weighty term "police state": we will return to that piece of vocabulary shortly.) In addition to their independence and their association with procedural regularity, judges tended to belong to the political elite — those educated, civically engaged people to whom pluralist theory gave the task of defending democratic values.[233] Police officers clearly did not. Finally, pluralism took the sting out of the most obvious objection to placing police under the control of unelected judges: what Alexander Bickel famously called the "countermajoritarian difficulty."[234] That objection counted for little if, as the pluralists believed, there was no such thing as majority rule to begin with.[235] Hall invoked this very concept to reject the argument that police illegality might simply reflect what the public wanted. "[T]here is no 'the public' in a democracy," he insisted, only various "groups and organizations" — many of which surely wanted the police to obey the law.[236]

Now back to "police state." This was a familiar trope in criminal procedure by the time Skolnick wrote in 1966. Beginning in the 1930s

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231. *See supra* note 118 and accompanying text. For a nice illustration of how pluralists tended to view the courts, see WALTER E. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY OF THE JUDICIAL PROCESS (1965). Murphy took the history of wiretapping to show that the "basic process" of American governance remained "essentially the same," regardless whether the "major contestants" were "private citizens or government officials." In either case, the system provided so many "avenues of access" that "[r]epresentatives of the losing interest . . . in one governmental forum" generally could "take their threatened cause to another governmental agency"; this process continued until the opposing interests were "physically or financially exhausted, a viable compromise reached, or the problem outlived." *Id.* at 160.

232. SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 229.

233. Dahl made precisely this point in an influential essay on the Supreme Court: "[I]t would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite." Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957) [hereinafter Dahl, *Decision-Making in a Democracy*].

234. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

235. Dahl put it this way: "Few of the Court's policy decisions can be interpreted sensibly in terms of a 'majority' versus a 'minority.' In this respect, the Court is no different from the rest of the political leadership." Dahl, *Decision-Making in a Democracy*, *supra* note 233, at 294.

236. Hall, *supra* note 8, at 160.

and 1940s, totalitarianism had established itself as — to use William Connolly's term — the chief "contrast-model" for American institutions, including the machinery of criminal justice.[237] The first point of comparison to surface in Supreme Court opinions pertained to the brutal interrogation practices of "dictatorial" regimes; oblique references to the atrocities of the Gestapo and the NKVD helped the Court to underscore its condemnation of police torture in the United States.[238] Jerome Hall drew the same contrast, for the same purposes, more explicitly.[239]

Beginning in the late 1940s, references to totalitarianism in Supreme Court opinions grew more pointed and more common. The term "police state" began to be used. And the valence of the concept began to shift. Some justices began to emphasize judicial control of the police, rather than civilized police practices, as the critical distinction between a democracy and a "police state."[240] The closing lines of Justice Jackson's opinion for the Court in *Johnson v. United States* were particularly influential in this regard: the Fourth Amendment, he suggested, was "one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."[241]

The specter of the police state became a fixture of criminal procedure rhetoric in the 1960s.[242] Invocation of the term functioned not just to invoke totalitarianism as the contrast-model for democracy, and not just to make the role of the police a defining difference between the two ideals, but also, and more specifically, to suggest that

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237. Connolly, *supra* note 36, at 22-23.

238. *See* Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227, 236 (1940); *cf.* Goldman v. United States, 316 U.S. 114, 142 (1941) (Murphy, J., dissenting) (stressing the importance of protecting civil liberties, including Fourth Amendment rights, "[a]t a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom").

239. Hall, *supra* note 8, at 140.

240. *See* Irvine v. California, 347 U.S. 128, 149 (1954) (Douglas, J., dissenting); United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting). On the general subject of antitotalitarian rhetoric in postwar criminal procedure, see Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193 (1998).

241. 333 U.S. 10, 17 (1948); *cf.* Wolf v. Colorado, 338 U.S. 25 (1949). Writing for the Court in *Wolf*, Justice Frankfurter called protection from "arbitrary" police intrusions "basic to a free society." *Id.* at 27. It did not take "the commentary of recent history," he noted, for the "knock at the door . . . as a prelude to a search, without authority of law but solely on the authority of the police . . . to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." *Id.* at 28.

242. *See, e.g.*, Osborn v. United States, 385 U.S. 323, 343, 349, 352 (1966) (Douglas, J., dissenting); Lopez v. United States, 373 U.S. 427, 466, 470 (1962) (Brennan, J., dissenting).

democracy depended in part on the systematic substitution of judicial judgment for police judgment.

C. *The Emphasis on Personal Dignity*

If judicial control of police discretion was the primary procedural theme of Warren Court criminal procedure, the main substantive theme was the protection of personal dignity against the threat of an overpowering state. Thus the coerced confession cases progressed from a focus on torture in the 1930s and 1940s to a focus on more subtle, psychological means of manipulation.[243] By the time the Court decided *Miranda v. Arizona*, it saw the confession problem as essentially about defending "human dignity" against increasingly sophisticated efforts to "subjugate the individual to the will of his examiner."[244] The Fourth Amendment, similarly, came to be understood less as a protection of individual sovereignty and more as a prophylactic against the prying eye of the government. No longer did the Fourth Amendment provide an "indefeasible right of personal security, personal liberty, and private property."[245] Now it safeguarded "reasonable expectations of privacy," which could be "defeated by electronic as well as physical invasion."[246]

Like the concern with police discretion, the Warren Court's emphasis on personal dignity drew support from the anti-authoritarianism strand of democratic pluralism. The overpowering, omnipresent state was not just a hypothetical hazard; it was modern democracy's very real rival. The "police state" trope thus advanced the substantive as well as the procedural theme of Warren Court criminal procedure.[247]

Just as it encouraged a judicial remedy for the problem of police discretion, democratic pluralism lent support to the notion that dignity should find its protection in the courts. Here as well, if there was no majority rule to begin with, there was no countermajoritarian difficulty. The value of dignity was part of the consensus the pluralists thought was a prerequisite for democracy. It was often taken to be the

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243. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Spano v. New York, 360 U.S. 315 (1959).

244. 384 U.S. 436, 457 (1966).

245. Boyd v. United States, 116 U.S. 616, 630 (1886). On the fading of *Boyd*, a decision praised as late as the 1940s and 1950s as the leading interpretation of the Fourth Amendment, see, for example, Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184 (1977).

246. Katz v. United States, 389 U.S. 347, 362 (1967) (Harlan, J., concurring); *accord, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968).

247. *See, e.g.*, Raymond, *supra* note 240, at 1210-20.

core of that consensus. David Truman, for example, thought it obvious that "the system rests at bottom on a respect for the dignity of man. This much is imperative; this much is indispensable."[248]

In giving content to that commitment, it made no sense under the pluralist view to rely on popular votes. Elections were useful for resolving conflicts between groups and for concentrating the minds of government officials. But democratic norms were not up for grabs; they were the "rules of the game." They needed to be a matter of social consensus — not among everyone but among the elite. Judges, again, were members of that elite. So were legislators and party leaders, but their jobs naturally focused them less on preserving norms and more on balancing group interests. So it made sense to entrust judges with responsibility for articulating and enforcing the core democratic value of dignity. Robert Dahl argued, in fact, that the Supreme Court's highest function was precisely "to confer legitimacy, not simply on the particular and parochial policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy."[249]

D. *The Attraction to "Second Wave" Police Professionalism*

Although its roots lay in reform movements of the late nineteenth and early twentieth century, police professionalism entered a new phase in the 1950s. Early police reformers, drawn mainly from the ranks of civic and religious groups,[250] 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.[251] 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

248. Truman, *American System*, *supra* note 53, at 490-91; *see also* BERKLEY, *supra* note 1, at 4 (noting that "[a]lthough in former days the contract theory was often viewed as expressing the essence of democracy, more contemporary thinkers focus on . . . the affirmation of individual worth. Adlai Stevenson, for example, felt that the essence of democracy is the dignity of man").

249. Dahl, *Decision-Making in a Democracy*, *supra* note 233, at 295.

250. Vollmer was an important exception, in this respect and in others. *See* VOLLMER, *supra* note 173.

251. ROBERT M. FOGELSON, BIG-CITY POLICE 167-92 (1977).

foremost organizations not all that different from military or industrial units.[252] They continued to insist on the political independence of the police, 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. Because they thought the mission of the police was crime control, they fought to rid the police of other, distracting responsibilities, like operating lockups or running youth programs.[253] And they viewed the public through the lens of consumerism, as a market that needed to be cultivated and directed.[254]

Chief William Parker of the Los Angeles Police Department, which in the 1950s emerged as the leading model of police professionalism,[255] was particularly clear about this last point. Like a private business, he argued, the police could not be successful without a market, and markets had to be created: "They seldom spring full-blown from the unshaped desires of the people. The vital elements of our civilized life, including our most sacred institutions, at one time or another have been laboriously *sold* to the people."[256] The way to do this was first to sell the police mission to "practical community leaders"; they would then help to sell it to the public.[257] The key point was that public demands should be shaped to conform to the mission of the police department, and not the other way around.[258]

Much more than the first wave of reformers, the second wave took "professionalism" as their watchword.[259] By professionalism they emphatically did not mean that police officers should have substantial

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252. *See, e.g.*, WILSON, *supra* note 173, at 8; William H. Parker, *The Police Challenge in Our Great Cities*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 5, 6 (1954).

253. FOGELSON, *supra* note 251, at 161; Parker, *supra* note 252, at 7-8.

254. *See, e.g.*, BANTON, *supra* note 189, at 1 (quoting police administrators); WILSON, *supra* note 173, at 421 (advising that "[t]he solution of most police problems involves influencing mass attitudes, which can only be molded, directed, and controlled by the force of public opinion"). Vollmer, too, had stressed the importance of public opinion. *See* VOLLMER, *supra* note 173, at 6-7.

255. *See, e.g.*, GOLDSTEIN, *supra* note 4, at 2.

256. Parker, *supra* note 252, at 6.

257. *Id.*

258. *Id.* at 6-7. Parker did not like the term "public relations," precisely because he thought it suggested too much responsiveness on the part of the police. *See id.* at 7.

259. *See* FOGELSON, *supra* note 251, 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, *see* Egon Bittner, *The Rise and Fall of the Thin Blue Line*, 6 REV. AM. HIST. 421, 424-27 (1978), and Fogelson makes clear, in any event, that some of the early reformers, including Vollmer, favored a professional model, *see* FOGELSON, *supra* note 251, at 154.

latitude to exercise trained judgment in matters of importance, nor did they mean that police officers should regulate themselves collectively 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."[260]

In part because it resonated with the idea of the police as a distinct group, and in part because it sought to give individual officers less leeway rather than more, police professionalism as it gained ascendance in the 1950s was fully compatible with democratic pluralism and with Warren and Burger Court criminal procedure. The strong position of leading law enforcement administrators in favor of stricter standards for officers did much to create a climate hospitable to heightened judicial oversight of the police. In return the justices — like the pluralists — proved more comfortable with claims of quasi-scientific expertise than with neo-Aristotelian assertions of practical wisdom. The hunches and vague suspicions of patrol officers counted for little,[261] but the judgments of forward-thinking police administrators could be a different matter. In *Miranda*, for example, the Court couched its ruling as extending to state and local police certain longtime practices of the Federal Bureau of Investigation, practices which the Court suggested had not interfered with the FBI's "exemplary record of effective law enforcement."[262] The Burger Court later pursued a similar strategy when it gave constitutional status to the emerging practice of metropolitan police departments to restrict the use of lethal force against fleeing felons.[263] And the Burger Court carved out exceptions to the warrant and probable cause requirements for certain inventory searches conducted pursuant to internal regulations.[264] Writing in one of these cases for a unanimous Court, Chief Justice Burger stressed that the justices were "hardly in a position to second-guess police departments as to what practical administrative method" was most appropriate for inventory searches.[265] Second-guessing police *officers*, of course, was something

260. Bittner, *supra* note 259, at 426; *see also* GUYOT, *supra* note 17, at 5-10.

261. *See* Terry v. Ohio, 392 U.S. 1, 22, 27 (1968).

262. Miranda v. Arizona, 384 U.S. 436, 483-86 (1966).

263. Tennessee v. Garner, 471 U.S. 1, 18-19 (1985).

264. *See* Illinois v. Lafayette, 462 U.S. 640 (1983); South Dakota v. Opperman, 428 U.S. 364 (1976).

265. *Lafayette*, 462 U.S. at 648.

else entirely; the Court did that all the time. The whole effort to rein in police discretion through judicial oversight amounted to institutionalized second-guessing of the police, and it was defended on precisely those grounds.

There was still another reason that "second wave" police professionalism proved congenial to democratic pluralism and to criminal procedure during the years of the Warren and Burger Courts. Professionalism, like constitutional constraints on the police, offered a way to protect policing from mass politics while preserving, at least in form, the tradition of local control. That tradition was widely thought to guard against authoritarianism: it kept the police close to the communities they served, and it prevented the emergence of an American Fouché.[266] Public opinion, as Justice Frankfurter wrote for the Supreme Court, could "far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself" than against "remote authority pervasively exerted throughout the country."[267] But local politics seemed to offer fewer mechanisms for mediating group conflicts through elite consensus, and more opportunities for factions to seize control of the police for their own purposes.[268] That was the lesson of the police torture cases of the 1920s and 1930s. Police professionalism offered a solution: decentralization without true community control. By the 1970s this arrangement had began to look to many people like a sham,[269] but in the 1950s and through most of the 1960s it seemed a logical response to the "political meddling . . . facilitated by local control of police forces."[270]

E. *The Embrace of Modernity*

Perhaps the simplest appeal of police professionalism in the 1950s and 1960s has yet to be mentioned. Police professionalism seemed

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266. *See* BERKLEY, *supra* note 1, at 21-22. Even J. Edgar Hoover — probably the closest this country ever came to a homegrown version of Napoleon's security chief — disavowed any interest in transforming the FBI into a national police force. Law enforcement, he agreed, should remain primarily a local responsibility, controlled by authorities attuned to "the pulse of the community"; centralized policing would pose "a distinct danger to democratic self-government." John Edgar Hoover, *The Basis of Sound Law Enforcement*, 291 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40-42 (1954).

267. Wolf v. Colorado, 338 U.S. 25, 32-33 (1949). It was partly on this basis that *Wolf* refused to apply the exclusionary rule to state criminal proceedings. The Supreme Court reversed that decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), but not because it had come to doubt the wisdom of decentralized policing.

268. *See, e.g.*, WILSON, POLICE BEHAVIOR, *supra* note 3, at 289.

269. *See, e.g.*, GOLDSTEIN, *supra* note 4, at 131-32.

270. Wilson, *supra* note 190, at 191.

modern — new, scientific, and bold. The attraction of the Warren and Burger Courts to police professionalism reflected, in part, the pluralists' broader embrace of modernity. That broader embrace had at least two other manifestations in criminal procedure law and scholarship.

The first of these was the virtual disappearance of original intent as a guide to interpreting constitutional restrictions on the police. This development was particularly striking in search-and-seizure law, where the Supreme Court had long relied on eighteenth-century history to clarify the vague commands of the Fourth Amendment. The Warren Court abandoned that tradition and refocused Fourth Amendment law on the realities of modern life — particularly modern *urban* life.[271] Electronic surveillance of a telephone booth, for example, was a "search" within the meaning of the Constitution, and therefore required a warrant, not because of the language or history of the Fourth Amendment, but simply because of "the vital role that the public telephone has come to play in private communication."[272] The coverage of the Fourth Amendment depended not on text or original intent but on "reasonable expectations of privacy" *in today's world.*[273] Similarly, the constitutional restrictions on street confrontations between police officers and suspects were set not by eighteenth-century understandings but rather by the reasonableness of particular intrusions in light of modern urban circumstances.[274] In interpreting the Fourth Amendment, the justices and most scholars were in agreement: "Its language is no help and neither is its history."[275]

Warren Court and early Burger Court criminal procedure reflected the pluralist embrace of modernity in another respect as well. The idea that democracy resided in an open, flexible, diverse, and freewheeling culture — the notion, in short, of twentieth-century democracy as distinctively urban[276] — contributed to the relatively low priority the

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271. I have described this shift in greater detail elsewhere. *See* David A. Sklansky, *Back to the Future:* Kyllo, Katz, *and Common Law*, 72 MISS. L.J. 143, 149-60 (2002).

272. Katz v. United States, 389 U.S. 347, 352 (1967).

273. *See id.* at 362 (Harlan, J., concurring); Terry v. Ohio, 392 U.S. 1, 9 (1968).

274. *See Terry*, 392 U.S. at 19, 23-24.

275. Amsterdam, *supra* note 219, at 395; *see also, e.g.*, Peter Arenella, *Fourth Amendment, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1092 (Leonard W. Levy et al. eds., 2000).

276. *Cf.* Reynolds v. Sims, 377 U.S. 533, 567 (1964) (noting that the United States, "once primarily rural in character," had become "predominantly urban"). In requiring that state legislative districts be of roughly equal population, the Court understood itself to be preventing the unfair advantaging of rural areas at the expense of cities and suburbs. The Court purported, of course, to care only about evenhandedness: Chief Justice Warren's majority opinion warned that "[m]alapportionment can, and has historically, run in various directions." *Id.* at 567 n.43. Still, the opinion had a faint but unmistakable air of urban condescension: "Legislators represent people, not trees or acres. . . . [P]eople, not land or trees or pastures, vote." *Id.* at 562, 580.

Court gave to the values of order, decorum, and safety. In striking down vagrancy statutes as unconstitutionally vague, for example, the Court was only partly concerned with the risk of arbitrary or discriminatory enforcement. It saw vagrancy laws as archaic constraints on "independence," "creativity," "self-confidence," and "high spirits" — the "unwritten amenities" at the heart of modern, democratic ways of life.[277] These were the very "amenities" against which the "authoritarian personality" found itself in conflict, so placing a premium on them meant, among other things, having even more reason to worry about the mindset of the police.

It also inclined the Court and its academic commentators toward a certain resignation about the risk of victimization. Crime was among the hazards of modern life, like industrial accidents and traffic fatalities. To some extent this attitude reflected the historically low crime rates of the 1950s and early 1960s.[278] But crime rates were only part of the story. Homicide rates, for example, are now at the same levels they were in the mid-1960s. At their peaks in the late 1970s through the early 1990s, moreover, they were roughly twice the levels of the 1950s and early 1960s — hardly a change in order of magnitude.[279] And people in the 1950s and 1960s did not think that crime rates were low. When they thought about crime rates at all, the rates seemed high to them. But there was relatively little alarm about crime — a fact about which police executives regularly complained, and which their "marketing" efforts attempted to change.[280] Even among law enforcement professionals, the goal was "crime control"; no one spoke yet of "zero tolerance."[281] And outside law enforcement,

277. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); *see also* Reich, *supra* note 216, at 1172 (warning that although "safety requires measures" so do "independence, boldness, creativity, high spirits"). The Court's opinion in *Papachristou*, written by Justice Douglas, cited Reich's article and plainly shared its spirit.

278. *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 24-25 (1997).

279. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf (last modified Sept. 28, 2004).

280. *See, e.g.*, Parker, *supra* note 252; O.W. Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 175 (1963). On the relative lack of alarm about crime in this period, despite rising crime rates, see DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 66, 147, 152-54 (2001). Garland suggests that, starting in the 1970s, the threat of crime began to be experienced as a "normal social fact," an "everyday risk" comparable with traffic accidents. *Id.* at 106, 109. This seems to me to get things backwards. What happened in the 1970s was that crime *ceased* to be accepted as a normal, everyday risk. But Garland's larger point about this social transformation seems plainly right: crime became, beginning in the 1970s, "much more salient as a social and cultural fact." *Id.* at 148.

281. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 12 (1967) (setting forth "the

particularly among scholars, there was widespread sympathy for the view that the chief task of criminal procedure was to protect individuals against the state because "[i]t inflicts no tangible harm on anyone when a criminal evades punishment."[282] That view was rendered more plausible by the rise during the 1960s of "labeling theory" as an approach to the sociology of crime: the rise, that is to say, of the views that designating someone a criminal or a delinquent was likely to be self-fulfilling, and that the initial designation often said as much about society as about the individual in question.[283]

All these intellectual currents echoed the pluralist enthusiasm for the spontaneity and freedom of modern urban life. That enthusiasm grew less evident in the opinions of the Supreme Court during the Burger Court era — a development that was very much an intended consequence of Richard Nixon's election in 1968.[284] Nixon's "law and order" campaign was in large part a backlash against protests and disturbances that themselves reflected, in ways we will explore, attacks on the pluralist understanding of democracy. It was a testament, in a way, to pluralism's continuing purchase that both sides in the late 1960s found things to hate about it.

F. *The Centrality of Consensus*

We have already seen two ways in which criminal procedure law and police scholarship, as they developed in the 1960s, reflected the pluralists' emphasis on consensus. The reliance on judicial oversight and the embrace of "second wave" police professionalism both can be understood in part as efforts to regulate the police through consensus, specifically through consensus developed and defended by elites. The emphasis on consensus cut still deeper, though, in Warren and Burger

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foundations of a crime control program"). On the transformation of crime from a "challenge" to a "crisis," to be eliminated rather than managed, see also Markus Dirk Dubber, *Criminal Justice Process and War on Crime*, *in* THE BLACKWELL COMPANION TO CRIMINOLOGY 49 (Colin Sumner ed., 2004).

282. David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 91 (David Luban ed., 1983); *see also, e.g.*, Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 553 (suggesting that "the basic purpose" of criminal procedure is "to avoid one type of error"). By 1983, when both these pieces were published, homicide rates were significantly higher than in the 1950s or today — suggesting, again, that crime rates go only so far in explaining levels of concern about crime and disorder.

283. *See* Cain, *supra* note 16, at 148-49. The seminal work was HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963).

284. The change also reflected, in part, changes in urban life itself, and particularly changes in patterns of urban crime. Unlike national homicide rates, big-city homicide rates really did begin to skyrocket in the late 1960s. *See* Eric Monkkonen, *Homicide Over the Centuries*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 163, 166-67 (Lawrence M. Friedman & George Fisher eds., 1997). On other contributions to the decline of the "cosmopolitan ideal," see Hollinger, *supra* note 110, at 149-51.

Court criminal procedure. Consensus was not just a strategy for controlling the police; it was a way in which the criminal justice system served the larger goal of social stability. Broad agreement on the legitimacy of the criminal justice system thus became not just a *sign* that the system was operating effectively; it became part of what it *meant* for the system to operate effectively.

This made imagery greatly important, and it further underscored the critical significance of personal dignity. The core elements of Warren Court criminal procedure — the exclusionary rule, the *Miranda* doctrine, the *Terry* rules for stops and frisks — have all been criticized, particularly in retrospect, as more about symbolism than about substance. The exclusionary rule keeps the courtroom clean but does little to stop police illegality.[285] *Miranda* dresses up interrogations without altering their fundamental dynamics.[286] *Terry* purports to regulate the police but actually gives them wide berth.[287] These criticisms were raised when the cases were decided, too, but the criticisms then seemed in some ways beside the point. The point was, at least in part, to sustain the consensus without which, it was thought, American society would fly apart. Social stability preserved democracy, and consensus preserved social stability. As the 1960s wore on, social stability grew to seem more precarious, and consensus became, correspondingly, all the more imperative.

In seeking stability through consensus, criminal justice jurisprudence in the 1960s and early 1970s paralleled and built upon the work performed by the series of blue-ribbon commissions appointed in this period to investigate the causes of urban riots and campus unrest. The most important of these were the Governor's Commission on the Los Angeles Riots (commonly known as the McCone Commission), the National Advisory Commission on Civil Disorders (commonly known as the Kerner Commission), the National Commission on the Causes and Prevention of Violence, and the President's Commission on Campus Unrest.[288] Each of these task forces visibly embodied the pluralist ideal of elite consensus: a cross-section of group leaders, informed by experts, hammering out and

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285. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment First Principles*].

286. *See, e.g.*, Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 718-47 (1992).

287. *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

288. *See* GOVERNOR'S COMM'N ON THE L.A. RIOTS, VIOLENCE IN THE CITY — AN END OR A BEGINNING? (1965); NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT (1968); NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY (1969); PRESIDENT'S COMM'N ON CAMPUS UNREST, REPORT (1970).

lending credence to a middle-of-the-road response to threats to social stability.[289] It does not take away from the real contributions made by some of these bodies, particularly the Kerner Commission, to recognize that they were, to a large extent, exercises in pluralist political theater. There was an element of that, too, in criminal procedure law: the elite endorsement of a moderate path of reform that redeemed and legitimized the underlying system, in part by safeguarding and valorizing its cherished symbols and its core commitment to dignity.

G. *The Disregard of Institutional Structure*

The pluralist emphasis on psychology and sociology encouraged people interested in the police to train their sights on the behavior of individual officers and the police mentality. It discouraged attention to the structure of decisionmaking within police departments. Even without pluralism, the reliance on judges to regulate the police probably would have directed criminal procedure away from questions of systemic design; those are not the kinds of questions judges are thought well-positioned to address. But the psychosocial framework of pluralism made this selective competence of courts seem like a happy fortuity, and all the more reason to lean heavily on the judiciary in approaching the problems of the police. The problems that courts were ill-equipped to tackle were not the important ones, anyway.

It was not just judges who paid less attention to the institutional structure of law enforcement than to police psychology and sociology; scholars did the same. In part this reflected the ability of the Supreme Court to set the intellectual agenda of law professors and the unremarkable tendency of sociologists to focus on sociology. But political scientists studying the police also tended to neglect questions of organizational design, and here the guiding role of pluralism is particularly easy to discern. James Q. Wilson, the only student of the police to rival Skolnick for influence in the 1960s, was in many ways a thoroughgoing pluralist. He took group theory and consumerism as givens: "'[T]he people' do not govern — organizations, parties, factions, politicians, and groups govern. The people choose among competing leaders and thereby constrain them."[290] He shared, too, the pluralists' overriding concern with social stability; their strong aversion to mass politics; their focus on group psychology; and — most fundamentally — their conviction that institutional structures were epiphenomenal, that the real action took place at the level of cultural

289. *See* THE POLITICS OF RIOT COMMISSIONS, 1917-1970, at 3-54, 259-527 (Anthony Platt ed., 1971).

290. WILSON, POLICE BEHAVIOR, *supra* note 3, at 289; *see also, e.g.*, *id.* at 250 (characterizing voters as "political consumer[s]").

norms. Wilson therefore sought to explain police policies as expressions of the local "political culture."[291]

The political culture created a police culture within each department. Initially Wilson suggested that police cultures came in two versions: a rule-bound, "good government" professionalism and a patronage-based network of relationships and reciprocity. He called the first "the code of professionalism" and linked it to what Richard Hofstadter had characterized as the "'Yankee-Protestant' style" of politics; he called the second "the code of the system" and linked it to Hofstadter's "immigrant" style.[292] Because Wilson saw police cultures as outgrowths of the broader political cultures of particular municipalities, he was pessimistic about efforts to graft police professionalism onto the political systems of inner-city areas traditionally run in the "immigrant" style: "the law of the Yankee" was not made for "the conditions of the jungle."[293]

Later, in a comparative study of eight American police departments, Wilson identified three "styles" of law enforcement: the "watchman style," which corresponded roughly to the "code of the system"; the "legalistic style," which was more or less the "code of professionalism"; and the "service style," which was the form of policing Wilson found in the affluent New York suburbs of Brighton and Nassau County.[294] Once again, he attributed the styles of particular police departments to the local political cultures in which they operated. He was therefore dismissive of most efforts at police reform, particularly those involving structural innovations.[295] It was all pie in the sky: "The 'problems of the police,'" Wilson thought, were "longstanding and inherent in the nature of their function."[296] The reform proposals of the late 1960s revealed simply that "our definition

291. *See id.* at 233.

292. Wilson, *supra* note 190, at 200-12 (quoting RICHARD HOFSTADTER, THE AGE OF REFORM (1960)).

293. *Id.* at 216. A fair amount might be said about Wilson's use of the term "jungle" to refer to the inner city. Among its tamer connotations, the term signaled Wilson's concern for orderliness, and his rejection of the pluralist enthusiasm for the hurly-burly of modern urban life. These themes grew more pronounced in his later writings, most famously in James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. On that essay's "aesthetic of orderliness, cleanliness and sobriety," see BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 23-27 (2001). On the broad influence of the essay, see *infra* notes 482-485 and accompanying text.

294. WILSON, POLICE BEHAVIOR, *supra* note 3, at 140-226.

295. *See id.* at 227-99.

296. *Id.* at 299.

of those problems has changed and, by changing, has misled or unsettled us."[297]

By 1969, when Wilson offered that counsel of quietism, pluralism and the police were both under attack. The attacks were related in ways we will explore. For now, though, the important point is the way in which pluralism shaped Wilson's response to attacks on the police. Not only did it give him an almost Burkean suspicion of institutional engineering, it made him particularly unsympathetic to calls for greater community control of urban policing — calls that he correctly understood to reflect widening interest in "participatory democracy."[298] Wilson warned that the "service style" could work in homogeneous communities of the well-off and well-educated, but not in the inner city. Group conflicts there were too acute, and norms of cooperation too weak. "Community control" would therefore mean "putting the police at the mercy of the rawest emotions, the most demagogic spokesmen, and the most provincial concerns."[299] The end result could well be authoritarianism rather than democracy; Wilson compared proposals for neighborhood control of policing to the Soviet Union's system of "People's Patrols."[300]

Wilson had little more sympathy for the growing calls among police officers themselves for greater participation in departmental decisionmaking; he dismissed police unions as a form of "criminal justice syndicalism."[301] In this respect he found himself once again in accord with Skolnick. Skolnick's wariness about police unions had much to do with the circumstances of the late 1960s. Police unionism surged in that period, and it was a highly politicized form of unionism: the rallying cry was as likely to be opposition to civilian review boards or reform-oriented chiefs as support for better benefits or enhanced job security.[302] Skolnick therefore saw police activism as a threat to the rule of law: like judges or soldiers, police officers should be apolitical.[303]

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297. *Id.*

298. *Id.* at 288.

299. *Id.* at 289; *see also* JAMES Q. WILSON, THINKING ABOUT CRIME 132-34 (1975) [hereinafter WILSON, THINKING ABOUT CRIME].

300. WILSON, POLICE BEHAVIOR, *supra* note 3, at 285 n.5.

301. WILSON, THINKING ABOUT CRIME, *supra* note 299, at xix.

302. On the critical role that proposals for citizen review boards played as focal points for police organizing in the late 1960s, see, for example, STEPHEN C. HALPERN, POLICE-ASSOCIATION AND DEPARTMENT LEADERS: THE POLITICS OF CO-OPTATION 11-88 (1974); SKOLNICK, POLITICS OF PROTEST, *supra* note 4, at 278-81; and SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 27-29 (2001).

303. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 249-50, 258-62 (2d ed. 1975); SKOLNICK, POLITICS OF PROTEST, *supra* note 4, at 286-88. An important development in this regard was the 1971 vote of no confidence in Chief Charles Gain of the Oakland Police Department by the local Police

Even without pluralism, the direction taken by police unions in the late 1960s would have soured many people on the prospects for bringing true participatory democracy to policing: there was always the nettlesome difficulty of participation by the police themselves. The point I wish to emphasize here, though, is that pluralism made this reaction more likely in two different ways. First, it made many people, such as Wilson, suspicious of any calls for broadening political participation, including by the police. Second, it led many people, including Skolnick, to see police unionism first and foremost as a social movement, and not as a set of institutional possibilities. It would have been difficult in any event in the late 1960s to think past the immediate political context and to imagine what collective bargaining or arbitration might mean once police unions had become "normalized." Normalization of anything was not on the horizon in 1968. But the strong emphasis that pluralism placed on social psychology made it even harder to think in terms of institutional structure. Structure seemed superficial.

This is not to say that the institutional structure of policing was wholly ignored in the 1960s and 1970s. Police administrators spent time thinking about the structure of their institutions, but with few exceptions they focused on efficiency, not democracy. Outside reformers *did* think about restructuring police departments to make them more democratic, but their energies were overwhelmingly devoted to a particular, relatively modest form of restructuring: adding a layer of civilian review to particular categories of police decisionmaking.[304] Building on the model of judicial review, this innovation found support in the pluralist emphasis on group politics, while also appealing, if only symbolically, to emerging notions of participatory democracy. What was missing in this period was sustained, systematic attention to the ways in which organizational design in law enforcement might advance democracy. For reasons to be explored below, it is still missing today.

Officers' Association. Gain was a committed reformer who won the respect not only of Skolnick but also other scholars who used the Oakland department for sociological research on the police. *See* WILLIAM KER MUIR, JR., POLICE: STREETCORNER POLITICIANS (1977); HANS TOCH, J. DOUGLAS GRANT & RAYMOND T. GALVIN, AGENTS OF CHANGE: A STUDY IN POLICE REFORM (1975); Byron Michael Jackson, Leadership and Change in Public Organization: The Dilemmas of an Urban Police Chief (1979) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author). Berkley, too, was favorably impressed with Gain's reforms. *See* BERKLEY, *supra* note 1, at 97, 104, 168, 198. Further discussion on Gain will appear later. *See infra* text accompanying notes 398-400.

304. *See* WALKER, *supra* note 302.

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We have not exhausted the ways in which pluralism influenced criminal procedure and police scholarship in the 1960s and beyond. The American exceptionalism incorporated within pluralism, for example, may well have contributed to the relative disinterest that judges and scholars showed in police procedures abroad. But I hope the discussion so far has established three important points.

First, ideas about democracy are linked to ideas about the police. Democratic pluralism helps to explain the focus on the group psychology of the police in the 1960s and 1970s, the concern with police discretion and the reliance on judicial oversight during the same period, the emphasis of the Warren and Burger Courts on personal dignity in criminal procedure, the Court's attraction to 1950s-style police professionalism, the broader embrace of modern urban life by the Warren Court and its commentators, the centrality of consensus in criminal procedure during the 1960s and 1970s, and the tendency both of the Court and of many scholars in this period to disregard institutional structure. These were not minor features of Warren and Burger Court criminal procedure; they were some of its most conspicuous features. They are also features that from today's vantage point can seem particularly mysterious and hard to justify.

It bears repeating that pluralism was not the only influence on criminal procedure law in the 1960s and 1970s. The widely recognized theme of racial equality in Warren Court criminal procedure, in particular, is hard to trace to the pluralists.[305] Pluralism may well have played a role, though, in keeping that theme "domesticated" and almost entirely subtextual.[306] I will have more to say later about the relationship between democracy and equality — or, more precisely, between democracy and opposition to entrenched systems of *in*equality.[307] For now, the important point is that pluralism downplayed this relationship: first, through its emphasis on leadership elites, and second, through its assumption that the complexity of the American political system prevented any particular group from achieving undue dominance. Pluralism thus does little to explain the egalitarianism of criminal procedure in the Warren Court era, but it

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305. On that theme, see, for example, Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156-59 (1998) [hereinafter Kahan & Meares, *The Coming Crisis*], and Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2315-17 (1998) (book review).

306. *See* Seidman, *supra* note 286, at 673; *see also* Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 230 (2003). Consider, for example, the Court's deliberate de-emphasis of race in *Miranda*. *See* Seidman, *supra*, at 751 n.254.

307. *See infra* notes 513-524 and accompanying text.

may help to explain why that egalitarianism never became more thoroughgoing, more explicit, or more lasting.

Second, in order to trace the connections between ideas about democracy and ideas about the police, we need to pay attention to the complexity of ideas about democracy. Pluralism, for example, is sometimes counterposed with faith in expertise.[308] There is truth in that formulation: the pluralists were eager to distance themselves from people like Walter Lippman, and they stressed the role of group competition in sustaining American democracy. But the real pluralists were not ideal types; their theory of democracy was richer and more complicated than a simple analogy of politics to markets. They tempered their distaste for philosopher kings with an appreciation of scientific and technical know-how, and they matched their emphasis on competition with a heavy reliance on consensus. It was this actual set of beliefs, held by flesh-and-blood people, that influenced ideas about policing in the 1960s, the 1970s, and into the 1980s. Oversimplifying pluralism obscures its significance.

Third, and more particularly, pluralism must be understood within the context of the social-science paradigm from which it emerged. Ignoring that paradigm makes the central tenets of pluralism harder to identify, and it makes pluralism's largest impacts on criminal procedure and police studies all but invisible. It also, as we will see, obscures an important point of continuity between pluralism and the theories that emerged as its chief rivals, participatory democracy and deliberative democracy.

The continuity is important, because it explains two of the most persistent themes in our thinking about the police: the conception of the police as a breed apart, and the sense that culture matters more than structure in regulating the police. There are good grounds for both of these views. The social-science paradigm triumphed for a reason. But democratic pluralism triumphed for a reason, too. Its explanatory power was no illusion. The problem with pluralism, as its critics pointed out, was not so much what it said but what it left out.[309] Over the past decade or so, some of what pluralism left out — participation, deliberation — has worked its way back into our thinking about policing. What the social-science paradigm leaves out, on the other hand, still remains muted in criminal procedure.

In a larger sense, for reasons we will explore, democracy itself has become muted in criminal procedure. Theories of participatory democracy and deliberative democracy have never achieved the

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308. *See, e.g.*, Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

309. *See, e.g.*, ROGIN, *supra* note 24, at 269; Connolly, *supra* note 36, at 13.

combination of comprehensive explanatory power and broad, almost unquestioned acceptance that pluralism enjoyed in its heyday. Pluralism itself retains adherents, although it survives largely in forms that sacrifice clarity and rigor for ecumenicalism. Even pluralists now endorse participation. Our ideas about democracy are broader today than they were in the 1950s and early 1960s, but they are also less coherent. That may be one reason that democracy tends to enter into discussions of policing today in ways that are hesitant, weak, and confused.

III. PLURALISM'S FALL

A. *A "Democracy of Participation"*

The disastrous course of the Vietnam War, followed by the revelations of Watergate, would have placed great strain on any theory of democracy that relied as heavily as pluralism on leadership elites. But pluralism's decline began long before Watergate, and before Americans took up arms against the Vietcong. A signal event came in 1960, when the philosopher Arnold Kaufman coined the term "participatory democracy" in the course of an argument that insisted on what the pluralists above all else denied: the importance of widespread political involvement.[310] The phrase "participatory democracy" had an extraordinary career over the next decade and a half. It became the slogan of the New Left, and then, remarkably, it went mainstream. The story of that progression is, to a great extent, the story of pluralism's downfall.

Kaufman's essay did not contest the utility of representative government for promoting social stability and safeguarding individual liberty. But he thought those arrangements could and should be supplemented with "institutional forms" that facilitated a "democracy of participation." The chief purpose of these other arrangements was not to promote good policy, but to assist "the development of human powers of thought, feeling, and action." Participation was "an essential condition of the good society and the good life."[311] These were old ideas, of course, and Kaufman's essay was self-consciously an effort at recovery. In this respect it continued a small counter-tradition in political theory that had been slowly gathering steam for half a decade.[312] But Kaufman's essay was also a direct and pointed attack on the consumerism the pluralists had inherited from Schumpeter — the

310. Arnold S. Kaufman, *Human Nature and Participatory Democracy*, *in* NOMOS III: RESPONSIBILITY 266 (Carl J. Friedrich ed., 1960).

311. *Id.* at 272, 289.

312. *See, e.g.*, HANNAH ARENDT, THE HUMAN CONDITION (1958).

notion that political "outputs" were all that mattered, and that the complexity of modern life made widespread participation impractical.

Kaufman's argument, and even more so his phrasing, proved enormously influential, largely by virtue of their incorporation into the manifesto adopted by Students for a Democratic Society at the organization's June 1962 conference in Port Huron, Michigan. The principal drafter of the manifesto, Tom Hayden, was a student of Kaufman's, and Kaufman himself attended the conference as an informal adviser. "Participatory democracy" was the rhetorical centerpiece of the Port Huron Statement.[313] The document called for "a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for their common participation."[314] The Port Huron Statement became possibly "the most widely distributed document of the American left in the sixties,"[315] and — somewhat to Kaufman's dismay — it helped make participatory democracy the catchphrase of the New Left, the slogan that "defined what was *new* about this left."[316]

Participatory democracy in the 1960s was not first and foremost a theory of scholars; it was a theory of activists. (For all their influence, Arnold Kaufman and C. Wright Mills may have mattered less to the student radicals at Port Huron than the model set by the Student Nonviolent Coordinating Committee.)[317] Partly as a result, participatory democracy was never as coherent and consistent as democratic pluralism. It also changed over time: there was quite a distance, for example, from the committed pacifism of the Port Huron Statement — "we find violence to be abhorrent"[318] — to the glorification of street crime at the decade's end.[319] The ambiguities and

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313. JAMES MILLER, DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO 44, 111, 119 (paperback ed. 1994).

314. Students for a Democratic Soc'y, The Port Huron Statement (1962) [hereinafter The Port Huron Statement], *reprinted in id.* at 329, 333.

315. KIRKPATRICK SALE, SDS 69 (1973).

316. MILLER, *supra* note 313, at 142, 153. Kaufman remained convinced that it was "both possible and desirable vastly to extend the frontiers of participatory institutions in many areas of social and political life," but by the late 1960s he warned that "uncritical exuberance" about participatory democracy had obscured "the nature and limits of a democracy of participation. For if participation provides an answer to many problems, it does not answer every problem; nor does it serve in any old form." Arnold S. Kaufman, *Participatory Democracy: Ten Years Later*, *in* THE BIAS OF PLURALISM, *supra* note 36, at 201, 203-04, 206.

317. *See, e.g.*, MILLER, *supra* note 313, at 55-61.

318. The Port Huron Statement, *supra* note 314, at 333.

319. MILLER, *supra* note 313, at 310.

contradictions in the rhetoric of the New Left are by now well known, and we will return to them shortly. But they should not be overstated. For all their differences, people who invoked the concept of participatory democracy in the 1960s tended to agree on several key points.

First, they shared Kaufman's discomfort with the consumerism that led the pluralists to see democracy as solely a mechanism for delivering good policies. They thus disagreed with the pluralists about the *purposes* of democracy. Advocates of participatory democracy thought much of the value of democracy lay in the way it facilitated individual development and enriched social interaction. In the words of the Port Huron Statement, politics in a participatory democracy served "the function of bringing people out of isolation and into community, thus being a necessary, though not sufficient, means of finding meaning in personal life."[320] Nor was it simply a matter of personal satisfaction. Political consumerism, like economic consumerism, stunted society as well as its members. By making people alienated, helpless, and stupefied, it blocked critical thinking and prevented the emergence of alternative forms of collective life.[321]

In this respect the rhetoric of participatory democracy drew heavily from the broader attack on consumerism in the 1960s. That attack, characteristically couched as a call to replace "conformity" with "authenticity," was embraced with special fervor by the counterculture, but its presence was felt more widely. It reflected a growing discomfort, particularly among intellectuals, with the power of modern advertising, and a mounting sense that middle-class life in America had become too passive, too comfortable, too manipulated, and too shallow.[322]

Second, believers in participatory democracy disagreed with the pluralists about the *processes* of democracy. The pluralists had distrusted mass politics and had placed their faith in leaders, guided by scientific and technical experts. That strategy obviously made no sense if political participation was essential for individual development. But the pluralists' emphasis on leadership and expertise ran into trouble in the 1960s on its own terms as well. The Vietnam War shook

320. The Port Huron Statement, *supra* note 314, at 333.

321. *See id.* at 330-31. This theme in the Port Huron Statement drew heavily on the work of C. Wright Mills. *See* MILLER, *supra* note 313, at 78-91; MILLS, *supra* note 24, at 298-324. It was influentially expanded from a neo-Marxist perspective in HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (1964).

322. *See, e.g.*, CROSS, *supra* note 62, at 146-55. The best-selling works of Vance Packard were particularly influential in this regard. *See* VANCE PACKARD, THE HIDDEN PERSUADERS (1957); VANCE PACKARD, THE STATUS SEEKERS (1959); VANCE PACKARD, THE WASTE MAKERS (1960); *see also* DANIEL HOROWITZ, VANCE PACKARD AND AMERICAN SOCIAL CRITICISM 148-52 (1994).

confidence in the technical competence of experts and elites and, more importantly, in precisely those features of the political system on which pluralists relied to make leadership democratic: the commitment of elites to core democratic norms, the disciplining function of electoral competition, and the accommodation of interests facilitated by group competition. The secrecy and deception practiced by "the best and the brightest" made the whole notion of "rules of the game" seem almost farcical. As two social scientists asked in the early 1970s, "[i]f the Kennedys and McNamaras and Rowstows and Johnsons can conceive, plan, and initiate a 'secret war,' how are we to remain confident that the principles of representative democracy rest secure in the inward convictions of the elite?"[323] That same pattern of opacity, combined with the turbulence and violence of the 1960s, made elections seem, in many quarters, increasingly beside the point,[324] and eroded confidence in the ability of interest-group politics to accommodate peacefully the concerns of ordinary people.

With regard to this last point — the disenchantment with interest-group politics — the New Left could draw on escalating skepticism about pluralism within mainstream social science. The belief that organized groups could be relied upon to represent all interests, no matter how diffuse, came under particularly heavy attack. The influential political scientist E.E. Schattschneider spoke in 1960 for a growing group of critics: "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system. . . . The system is skewed, loaded and unbalanced in favor of a fraction of a minority."[325] The notion that interest-group politics had a built-in bias received a particularly strong boost in 1965, when Mancur Olson published *The Logic of Collective Action*. Olson pointed out that the pluralist optimism about group politics rested on an unsubstantiated assumption that, whenever existing groups failed to take sufficient account of an important interest, a new group would organize to represent that interest. Not only was this idea unsubstantiated, Olson argued, it was almost certainly false. Microeconomic analysis confirmed what politicians and journalists had always known: small "special interest" groups found it easier than larger groups to organize

323. PREWITT & STONE, *supra* note 35, at 195; *see also* DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1972).

324. *See, e.g.*, LASCH, *supra* note 52, at 189. "The system," Lasch wrote, "no longer responds to the expressed wishes of the voters. If they elect Lyndon Johnson as a dove, he turns into a hawk; if they try to end the war by voting for Robert Kennedy, the arbitrary, unpredictable, and meaningless act of an assassin thwarts this choice as well." *Id.*

325. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 35 (1960).

and therefore to wield political power. Narrow, "vested interests" therefore could defeat the broader public interests, "which are normally supposed to prevail in a democracy."[326]

Third, and as a consequence of the foregoing, advocates of participatory democracy in the 1960s tended to differ strongly with the pluralists on the question of *proximity* — that is, the issue of how close America actually was to achieving the democratic ideal. (Partly for this reason, they were also less impressed with the *particularity* of American democracy.) For most of the 1960s, participatory democracy was both a rhetoric of critique and a strategy of attack. As rhetoric, it took aim at "complacency" and "contentment"[327] by identifying what was missing in American democracy. As strategy, it endorsed political involvement as a means of developing, among other things, the individual's powers of critical thought.

Fourth, and notwithstanding the preceding points of contrast, supporters of participatory democracy tended to agree with the pluralists that democracy had more to do with culture than with institutions. They shared what I have been calling the social-science paradigm. True, they rejected the reliance the pluralists had placed on two fixtures of that paradigm, consumerism and group theory. But believers in participatory democracy tended to talk about consensus as much as the pluralists. It was a different kind of consensus — a consensus reached through face-to-face discussions rather than through overlapping elites and "social training." And advocates of participatory democracy, unlike the pluralists, tended to see the formation of a framing consensus as a key *part* of democratic politics, rather than a *precondition* for it. Again, Schattschneider put it well: "Political conflict is not like an intercollegiate debate in which the opponents agree in advance on a definition of the issues. . . . [T]he definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power."[328] Still, the consensus reached in participatory democracy appealed, like the pluralist consensus, to the post-Lockean ideal of "an ever-widening identification of self and world, individual and society."[329] Not for nothing did the conferees at Port Huron call themselves Students for a Democratic *Society*. Writing in 1967, the sociologist Richard Flacks — who had himself been one of those conferees — identified "community" and "anti-institutionalism"

326. OLSON, *supra* note 35, at 127-28.

327. The Port Huron Statement, *supra* note 314, at 329, 330. Here, too, the influence of C. Wright Mills was apparent.

328. SCHATTSCHNEIDER, *supra* note 325, at 68.

329. SKLANSKY, *supra* note 34, at 228.

as two of "the main value themes which characterize the student movement."[330]

Nor did participatory democracy as developed in the 1960s reject the emphasis the pluralists had placed on personality. If anything, participatory democracy gave psychology a new, heightened importance by stressing the role of politics in personal growth.[331] Political participation did not just deepen the individual's critical faculties; it also assisted the growth of a democratic personality: self-confident, public-minded, civically engaged, and "authentic." Authenticity, in particular, figured prominently in New Left thinking. The concept of authenticity was notoriously hard to pin down, but it drew heavily on the "humanistic psychology" of Abraham Maslow and his followers, a psychology that departed from Freudianism by stressing the universal human drives for meaning and "self-actualization."[332]

There was obvious tension between the notion of an "authentic" personality and the idea that personality was shaped by politics. This tension was merely one aspect of larger divide in the rhetoric of participatory democracy. One strand of this rhetoric emphasized community, consensus, and rational deliberation. Another strand stressed a kind of romantic existentialism, the "re-assertion of the personal" in politics.[333] In his perceptive history of the New Left, James Miller describes participatory democracy as combining "two distinct political visions": the "face-to-face community of friends sharing interests in common," and the "experimental collective, embarked on a high-risk effort to test the limits of democracy in modern life."[334] Miller calls the two visions "contradictory."[335] That may exaggerate the conflict: there can be plenty of daring in efforts toward community. But he is surely right that reconciling the two images proved difficult: "The will to act can easily be sapped by endless debate. And thoughtful discussion is rarely advanced through heroics."[336] All of this is to say that although participatory democracy

330. Richard Flacks, *The Liberated Generation: An Exploration of the Roots of Student Protest*, 23 J. SOC. ISSUES 52, 56-57 (1967). On Flacks and SDS, see MILLER, *supra* note 313, at 157-83.

331. *See, e.g.*, PATEMAN, *supra* note 36, at 24-25; Connolly, *supra* note 36, at 10-11.

332. *See, e.g.*, A.H. MASLOW, MOTIVATION AND PERSONALITY (1954); CARL R. ROGERS, ON BECOMING A PERSON (1961). On the influence of humanistic psychology on New Left ideology, see, for example, LASCH, *supra* note 52, at 181-82, and Harry R. Targ, *Social Science and a New Social Order*, 8 J. PEACE RES. 207, 218 n.6 (1971).

333. MILLER, *supra* note 313, at 101 (quoting Tom Hayden).

334. *Id.* at 146.

335. *Id.* at 147.

336. *Id.* at 146.

shared the emphasis pluralism had placed on both consensus and personality, it never combined those two emphases as seamlessly as pluralism had.

B. *The Apologetic Turn*

In the 1970s and 1980s, when participatory democracy moved back from the world of manifestos to the world of scholarship, the "consensus" strand and the "experimental" strands began to separate. The first strand figured in the revival of civic republicanism, in some versions of communitarianism, and more recently in the escalating academic enthusiasm for deliberative democracy. The second strand has been less prominent and harder to categorize, beyond saying that it has tended to focus on strategies of popular "empowerment."[337]

Both strands have continued to view democracy as more a matter of culture than of institutions. Communitarianism and civic republicanism followed Tocqueville in stressing public spirit and the norms of community involvement.[338] Deliberative democracy has been less a comprehensive account of American politics than a philosophical argument for a particular democratic ideal, an ideal characterized chiefly by the nature of political discussion rather than by structural arrangements. The core idea is that we should arrive at political decisions through sincere public debate, based on arguments that "appeal to reasons that are shared or could come to be shared by our fellow citizens."[339] As for the "experimental" strand of participatory democracy, scholars writing in this tradition have focused their attention on building movements rather than institutions. Participatory democracy has meant for them not any specific set of structural arrangements but instead a process of progressive liberation,

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337. For the former, see, for example, JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); PATEMAN, *supra* note 36; and MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996). For the latter, see, for example, Frug, *supra* note 308, at 1295-96; Phillip Green, *'Democracy' as a Contested Idea*, *in* DEMOCRACY 2, 14-18 (Phillip Green ed., 1993); and Hannah Fenischel Pitkin & Sarah M. Shumer, *On Participation*, 2 DEMOCRACY 43 (1982). Some work continued to straddle the divide, most notably BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984).

338. *See, e.g.*, SANDEL, *supra* note 337; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

339. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 14 (1996); *see also, e.g.*, Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 407 (James Bohman & William Rehg eds., 1997); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-85 (1991). For a helpful overview, see Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. & PUB. AFF. 371 (2000). For a skeptical treatment, see Christopher H. Schroeder, *Deliberative Democracy's Attempt to Turn Politics into Law*, 65 LAW & CONTEMP. PROBS. 95 (2002).

an "ideal under which the possibilities of joint transformation of social life are collected."[340]

Alongside these descendents of New Left ideology emerged a third form of participatory democracy, what might be called the status-quo version. Robert Dahl predicted in 1970 that participatory democracy would soon prove "only a youthful fashion of the sixties, which the youth of the seventies will disdain as the foolish ideas of their elders."[341] It never quite worked out that way. Instead something stranger happened: participatory democracy became a lasting fixture of mainstream political rhetoric, but as a strategy of stability rather than an avenue of critique. Richard Nixon, for example, promised in his 1968 campaign "an expanded democracy" in which "the people can participate, they can be involved, their voices can be heard and heeded."[342] He called as President for giving "all Americans . . . full and effective participation in the decisions that affect their lives."[343] Arnold Kaufman pointed out the obvious: the appeal of participation for a politician like Nixon lay less in its transformative potential than in its power to "allay discontent."[344] Participation was "a double-edged political instrument"; instead of promoting "radical change" it could easily result in "the disappearance of outside critics — those who possess the cool detachment and ability to calculate consequences that come with having little identification with the organization, no axe to grind, no piece of the action."[345] What Kaufman did not foresee was that participation would become not just "an instrument of co-optation"[346] but a rhetoric of apology — that the very *possibility* of

340. Frug, *supra* note 308, at 1296.

341. ROBERT A. DAHL, AFTER THE REVOLUTION? 81 (1970).

342. Richard M. Nixon, Toward an Expanded Democracy (June 27, 1968), *in* NIXON SPEAKS OUT: MAJOR SPEECHES AND STATEMENTS BY RICHARD M. NIXON IN THE PRESIDENTIAL CAMPAIGN OF 1968, at 9, 15 (1968) [hereinafter Nixon, Expanded Democracy].

343. Richard M. Nixon, The State of the Union, Address Before a Joint Session of Congress (Jan. 22, 1971), *in* 7 WEEKLY COMPILATION PRES. DOCS. 89, 96 (Jan. 25, 1971) [hereinafter, Nixon, State of the Union]. The development was transatlantic. General DeGaulle called in the late 1960s for a "policy of participation" for French laborers. *See* Kaufman, *supra* note 316, at 210-11. A decade later the British government committed itself "to strengthen our democracy by providing new opportunities for citizens to take part in the decisions that affect their lives." Queen Elizabeth II, The Queen's Speech, *in* 396 PARL. DEB., H.L. (5th ser.) 1, 4 (1978).

344. Kaufman, *supra* note 316, at 211. Nixon also used the rhetoric of participatory democracy to support the conservative strategy of shifting power from the federal government to states, localities, and the private sector. *See* Nixon, Expanded Democracy, *supra* note 342, at 16; Nixon, State of the Union, *supra* note 343, at 94.

345. Kaufman, *supra* note 316, at 211.

346. *Id.*

involvement would be used to defend existing arrangements as democratic.

Before explaining how that has happened, I should say a bit more about deliberative democracy. The growing body of political philosophy that invokes that label varies in its claims (and in its clarity), but some generalizations seem safe. Like participatory democracy, deliberative democracy is a reaction against aspects of democratic pluralism, including the notion that politics is and should be largely a matter of aggregating and balancing preexisting interests. Unlike participatory democracy, though, deliberative democracy does not stress the effects of political involvement on human development, either at the level of the individual or at the level the community.[347] Instead, deliberative democracy is primarily a theory of "democratic legitimacy"[348] — that is to say, of the "normative essence of democracy," what makes democracy morally appealing.[349] Advocates of deliberative democracy find that essence in the idea of collective self-determination. They further argue that collective self-determination requires that political decisions be made through sincere public debate, in which "we offer considerations that others (whose conduct will be governed by the decisions) can accept," instead of simply "count[ing] their interests in deciding what to do, while keeping our fingers crossed that those interests are outweighed."[350]

Although justified first and foremost on grounds of political morality, public debate of this kind is said to have two practical benefits as well. The first is that decisions made in this matter are likely to be smarter and better informed.[351] This part of the argument for deliberative democracy harks back to John Dewey's championing of face-to-face dialogue as a means of "securing diffused and seminal intelligence," a notion that appealed greatly to C. Wright Mills and, through his influence, found its way into the Port Huron Statement.[352] The second practical benefit of sincere public debate is that it can make losers more willing to accept the outcome. Dewey noted this benefit as well,[353] but he downplayed it for reasons that are easy to understand. Mollification always serves the interest of stability, but stability — depending on the circumstances — may or may not serve the cause of justice, or even the cause of overall material welfare. This

347. *See* Freeman, *supra* note 339, at 378.

348. Cohen, *supra* note 339, at 407.

349. Post, *supra* note 339, at 282.

350. Cohen, *supra* note 339, at 415.

351. *See, e.g.*, Freeman, *supra* note 339, at 383.

352. DEWEY, *supra* note 149, at 217; *see also* MILLER, *supra* note 313, at 84-85; MILLS, *supra* note 24, at 298-301; The Port Huron Statement, *supra* note 314, at 336.

353. DEWEY, *supra* note 149, at 208.

is why Kaufman worried about the potential of participatory democracy to allay discontent. And it is presumably for this reason that modern advocates of deliberative democracy echo Dewey in downplaying the pacifying advantages of sincere public debate. Pluralism had lost favor, after all, in part because of its "preoccupation with the stability of the political system"[354] and its relative inattention to "whether or not the situation stabilized is itself desirable."[355]

Nonetheless, concerns about actual, objective "legitimacy" prove hard to separate from concerns about *perceived* legitimacy. Certainly this happens often in arguments for deliberative democracy. The "value of self-determination" slides over into the imperative "to instill a *sense* of self-determination."[356] Considerations of moral "acceptability" slide into questions of *practical* acceptability.[357] Most advocates of deliberative democracy stress that they are describing an ideal: deliberation among "free and equal citizens . . . motivated by justice or the common good."[358] And the practical acceptability of decisions *in that kind of society* might be thought an especially good indication of their moral acceptability. But most advocates of deliberative democracy also insist that they are not simply constructing a thought experiment along the lines of John Rawls's "original position." It is "actual deliberation" that matters,[359] and they tend to recommend doing as much as possible to facilitate deliberation, even in our imperfect society.[360] Their reform proposals tend to focus on mechanisms for changing attitudes toward public debate rather than on changing economic and political structures. Amy Guttmann and Dennis Thompson, for example, stress in their influential account the need for schools "to develop their students' capacities to understand different perspectives, communicate their understandings to other people, and engage in the give-and-take of moral argument with a view to making mutually acceptable decisions."[361]

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354. PATEMAN, *supra* note 36, at 1.

355. LIVELY, *supra* note 26, at 82.

356. Post, *supra* note 339, at 281-82 (emphasis added).

357. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 339, at 41-42.

358. Freeman, *supra* note 339, at 380.

359. *E.g.*, GUTMANN & THOMPSON, *supra* note 339, at 16.

360. *See, e.g.*, *id.* at 358-61; Schroeder, *supra* note 339, at 111-13. On the tendency of arguments for deliberative democracy to finesse the problem of the second best, see Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY, *supra* note 339, at 3, 18, and Frederick Schauer, *Talking as a Decision Procedure*, *in* DELIBERATIVE POLITICS: ESSAYS ON *DEMOCRACY AND DISAGREEMENT* 17, 20-26 (Stephen Macedo ed., 1999).

361. GUTMANN & THOMPSON, *supra* note 339, at 359. Joshua Cohen may be an exception in this regard. *See* Cohen, *supra* note 339, at 412-13.

There are two points to be made here. The first is that deliberative democracy, perhaps even more than 1960s-style participatory democracy, tends to focus attention on the cultural underpinnings of democracy at the expense of the institutional structures of decisionmaking. The second is that the rhetoric of deliberative democracy has something of a conservative tilt. It emphasizes the importance of people understanding each other, respecting each other's positions, and accepting political decisions with which they disagree. It directs attention away from the possibilities that some arguments are incoherent, that some political positions are unworthy of respect, and that some systems should be overthrown.

There is nothing intrinsically conservative about the *theory* of deliberative democracy: even if true democracy depends on public-spirited deliberation among free and equal citizens, deliberation in the real world of today might do nothing to promote legitimacy. The first task might be to strengthen freedom and equality, not to promote deliberation. But advocates of deliberative democracy tend to urge more deliberation in the here and now, alongside incremental efforts to improve the conditions of deliberation.[362] The point is not just that deliberation in the real world can be the enemy of action.[363] The point is that even describing real-world political debate as a form of "deliberation" tends to suggest that the outcomes of that process are worthy of respect.

The same is true of "participation." Like deliberation, participation in government can be pacifying; this is the point Kaufman stressed at the end of the 1960s. Equally important, though, the mere *possibility* of participation can be invoked to legitimize decisions as democratic. Used in this way, participatory democracy becomes a rhetoric of apology.

Justice Breyer, for example, sees "participatory democratic self-government" as a core constitutional value, and he urges judges to pay it more attention.[364] But the kind of participation he has in mind is what we already have. "[T]oday's citizen," he explains, "does participate in democratic self-governing processes."[365] Here is how Justice Breyer describes that process:

> Serious complex changes in law are often made in the context of a national conversation involving, among others, scientists, engineers, businessmen and -women, and the media, along with legislators, judges, and many ordinary citizens. . . . That conversation takes place through many meetings, symposia, and discussions, through journal articles and

362. *See, e.g.*, Schroeder, *supra* note 339, at 116-17.

363. This is a trade-off Schroeder stresses. *See id.* at 121-23.

364. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 248 (2002).

365. *Id.* at 249.

> media reports, through legislative hearings and court cases. Lawyers participate fully in this discussion, translating specialized knowledge into ordinary English, defining issues, creating consensus. Typically, administrators and legislators then make decisions, with courts later resolving any constitutional issues that those decisions raise. This "conversation" is the participatory democratic process itself.[366]

There is good reason for the quotation marks around "conversation." Breyer's version of participatory democracy is far from the face-to-face deliberation that Dewey had in mind, and even further from the romantic existentialism of "the experimental collective." It is far from anything we ordinarily think of as a "conversation." It is not really a "conversation" at all; the term functions here as an apologetic metaphor. It suggests that our system is democratic, and its decisions therefore entitled to respect, because it is "*open* to participation," and participation of a relatively attenuated sort.[367] As we will see, it is this apologetic, status-quo version of participatory democracy that has wound up having the greatest impact on criminal procedure law and scholarship.

C. *The Allure of the Past*

There is an additional way in which the rhetoric of participatory democracy has become more conservative. This has to do with the waning attraction of modernity. The student radicals who popularized "participatory democracy" in the 1960s had conflicting attitudes about industrialization and urbanization. The ideal of the "experimental collective," associated with the "authenticity" strand of their thinking, drew heavily on the values of modern urban life: "spontaneity, imagination, passion, playfulness, *movement* — the sensation of being on edge, at the limits of freedom."[368] The Port Huron Statement took notice of "the growing complex of 'city' problems," but it attributed

366. *Id.* at 263.

367. *Id.* at 253 (emphasis added). The watered-down, status-quo version of participatory democracy forms a key part — probably the rhetorical core — of "contented republicanism," one of the four democratic "discourses" that political scientists John Dryzek and Jeffrey Berejikian identified in the cross-section of Americans they studied in the early 1990s. John S. Dryzek & Jeffrey Berejikian, *Reconstructive Democratic Theory*, 87 AM. POL. SCI. REV. 48, 52 (1993). Contented republicans treat "political equality as an established fact," perceive "no structural impediments" to more extensive participation, and believe that politics is "already pervaded by public spirit," so that "all that needs to be done is to make the most of it." *Id.* at 55, 58. Tellingly, none of the four discourses found by Dryzek and Berejikian include the key tenets of pluralism: "the aggregation and articulation of preferences through organized interest groups, leavened by a democracy that can be only representative, never direct." John S. Dryzek, *The Informal Logic of Institutional Design*, *in* THE THEORY OF INSTITUTIONAL DESIGN 103, 117 (Robert E. Goodwin ed., 1996).

368. MILLER, *supra* note 313, at 147. On this theme, see also KENNETH KENISTON, YOUNG RADICALS: NOTES ON COMMITTED YOUTH 275-77 (1968).

those problems not to urbanization but to "the present system of economic priorities and lack of public planning."[369] The solution was not a retreat from modernity but the forward-looking creation of a new "*model* city."[370] On the other hand, though, the "consensus" strand of participatory democracy, the strand inherited from Arnold Kaufman and C. Wright Mills, was conceived from the outset as an exercise in intellectual recovery, an effort to restore pride of place to ideas and forms of social interaction that modernity had pushed aside. There was a mild touch of nostalgia to the enterprise, stronger and more calculated in the case of Mills than in the case of Kaufman.[371] The element of nostalgia in New Left rhetoric grew more pronounced as the decade progressed. It resonated with a key theme of the counterculture: the desire to return to simpler, more honest ways of living. And it fed and in turn drew strength from the romantic portrayal of the Vietnamese Communists as pure-hearted practitioners of "'rice-roots' democracy."[372]

There was rarely anything that sentimental in the academic defenses of participatory democracy that began to emerge in the 1970s. But the theme of intellectual recovery remained pronounced, particularly in work associated with the "consensus" strand of participatory democracy.[373] In this way the academic literature on participatory democracy differed strikingly from the work of the pluralists, who saw themselves as developing a new, more sophisticated account of democracy. The backward-looking posture of the "consensus" strand of participatory democracy grew more noticeable in the "republican revival" of the 1980s, and it can be found as well in some of the recent calls for deliberative democracy.

The chief function of intellectual recovery in the literature on participatory democracy and deliberative democracy has been as a tool of critique. But the backward-looking posture of much of that literature has also helped to give it an anti-modern spin. Coupled with the rhetoric of consensus, deliberation, and reason, the turn to the past has helped to make theories of participatory democracy and deliberative democracy compatible, in ways pluralism never was, with the values of order, decorum, and public safety. Those values are in strong tension with the experimental, "authenticity" strand of 1960s-style participatory democracy, and they are downplayed in academic discussions of participatory democracy that draw on that strand. But

369. The Port Huron Statement, *supra* note 314, at 366.

370. *Id.*

371. *See, e.g.*, MILLS, *supra* note 24, at 350-61. On Mills's use of "classical democracy" as a Weberian ideal-type, see MILLER, *supra* note 313, at 83-91.

372. STAUGHTON LYND & THOMAS HAYDEN, THE OTHER SIDE 200 (1966).

373. *See, e.g.*, MANSBRIDGE, *supra* note 337; PATEMAN, *supra* note 36.

the theme of authenticity finds no place in the dominant tradition of scholarship on participatory democracy, the tradition that includes civic republicanism and deliberative democracy. Nor is it part of the mainstream, apologetic version of participatory democracy. In most of its current forms, therefore, participatory democracy tends to highlight the importance of order and public safety. It lacks the enthusiasm the pluralists had for the spontaneity and freedom of modern urban life. (Some of that enthusiasm, of course, was in fact a casualty of the radical experimentalism of the late 1960s, or more precisely of the backlash it elicited — the backlash that fueled Nixon's 1968 "law and order" campaign, and that made "The Andy Griffith Show" the highest rated television series of 1967-68.)[374]

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We are now in a position to summarize what the various theories of participatory democracy and deliberative democracy have to say about the *purposes*, *processes*, *proximity*, and *particularity* of democracy.[375] We will start with *processes*, because this is the area in which these theories are most in accord. Even here, the answers provided by postpluralist democratic theory are far less unified and consistent than the answers provided by pluralism. Once we get to the other elements of democratic theory, the range of disagreement becomes even broader.

Processes. Theories of participatory democracy and deliberative democracy reject the pluralists' reliance on leadership elites, group competition, and periodic elections. They insist on the centrality of what pluralism scorned: widespread political participation. They tend to share the pluralists' assumption that democracy is more a matter of culture than of institutions. But the cultural patterns they emphasize are different: instead of bargaining and adherence to "rules of the game," we have public spiritedness, political engagement, authenticity (in the case of 1960s-style participatory democracy), empowerment (in the case of scholarship drawing on the "authenticity" strand), and/or a commitment to reason and civility (in the cases of civic republicanism, deliberative democracy, and the "consensus" strand of 1960s-style participatory democracy).

Purposes. Theories of participatory democracy and deliberative democracy largely reject the assumption of democratic pluralism that democracy is simply a procedural tool for avoiding instability and

374. *See* MILLER, *supra* note 313, at 6. On the resurgence in the 1970s of the "anti-modern" themes of "tradition, order, hierarchy, and authority," see GARLAND, *supra* note 280, at 98-102.

375. *See supra* text accompanying note 36.

authoritarianism. But the newer theories disagree regarding the purposes to be substituted for those of the pluralists. The radical version of participatory democracy championed in the 1960s followed Arnold Kaufman in emphasizing the importance of politics in human development. The more recent, mainstream version of participatory democracy stresses the role played by participation in making people feel connected to and satisfied with their government. And deliberative democracy sees democracy first and foremost as a prerequisite for political legitimacy.

Proximity. Participatory democracy in the 1960s was a form of critique; it stressed the distance between true democracy and the current state of American politics. The more mainstream version of participatory democracy that began emerging in the 1970s turned participatory democracy into a rhetoric of apology. The key difference between this new version of participatory democracy and the older, 1960s version was that the new version was much less demanding; the "participation" it envisioned was much closer to what already existed. Deliberative democracy, for its part, is first and foremost a theory of the democratic ideal, with no necessary implications for the question of proximity. Advocates of deliberative democracy often seem to assume, however, that we are sufficiently close to the ideal that the problem of the second-best can be overlooked.

Particularity. Participatory democracy and deliberative democracy have sometimes been developed in ways that suggest the American experience is in fact sufficiently unique so that foreign comparisons are unlikely to be helpful. (This has been particularly true of some of the scholarship on civic republicanism.) But the new theories do not share the strong, consistent theme of American exceptionalism found in democratic pluralism.

IV. PARTICIPATION, DELIBERATION, AND POLICING

I turn now to the ways in which criminal procedure, and our ideas about the police more broadly, have reflected the slow shift away from democratic pluralism and toward theories of participatory democracy and deliberative democracy. The course of influence here was not as smooth as in the case of pluralism; it was punctuated and redirected in important ways by the extraordinary politics of the late 1960s. Before examining the ways in which today's criminal procedure law and scholarship reflects the turn away from pluralism, I need to discuss some false starts and lost opportunities: the neighborhood policing movement of the late 1960s and early 1970s and the efforts around the same time to bring a measure of workplace democracy to policing. The fate of those initiatives is bound up with the history of the New Left, with the nature of police activism in the late 1960s and early 1970s, and

with the emergence, in the 1980s, of "community policing" as the new orthodoxy of law enforcement.

A. *The Police and the Sixties*

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.[376] 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."[377] 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 personnel policies — including standardized entry examinations and the elimination of residency requirements — that severely limited the hiring of minority

376. *See, e.g.*, BENJAMIN BARBER, THE DEATH OF COMMUNAL LIBERTY: A HISTORY OF FREEDOM IN A SWISS MOUNTAIN CANTON 273-75 (1974). An outdoor assembly of thoughtful alpine villagers, photographed heroically from below, appears over the caption "Direct Democracy." To illustrate "Representative Democracy," Barber selected a photograph of police dragging away a protester. *Id.*

377. Flacks, *supra* note 330, at 56-58; *see also, e.g.*, MILLER, *supra* note 313, at 7 (setting student politics of the 1960s in the context of a broader, "unfettered cultural spirit," in which "musicians, movie directors, and student radicals all tried to lay waste to some part of the old order: no more melody, no more narrative, no more governing structure; no taste, no reason, no law and order").

officers.[378] 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."[379]

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 to 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.[380] 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.[381]

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 unionists for decades."[382] But the politically charged nature of police organizing in the late 1960s and early 1970s left two lasting impacts on efforts to bring participatory democracy to policing. The first had to do with community supervision of police departments, and the second had to do with efforts to give police officers themselves a degree of democratic control over the nature of their work.

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378. *See, e.g.*, FOGELSON, *supra* note 251, at 243-68.

379. JAMES BALDWIN, NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON 66 (1962).

380. *See supra* notes 302-303.

381. *See, e.g.*, FOGELSON, *supra* note 251, at 239-42; LASCH, *supra* note 52, at 206-07; SKOLNICK, POLITICS OF PROTEST, *supra* note 4, at 183-88.

382. John Thomas Delaney & Peter Feuille, *Police*, *in* COLLECTIVE BARGAINING IN AMERICAN INDUSTRY: CONTEMPORARY PERSPECTIVES AND FUTURE DIRECTIONS 265, 301 (David B. Lipsky & Clifford B. Donn eds., 1987); *see also, e.g.*, HALPERN, *supra* note 302, at 93-99.

The first set of effects was more obvious. Rank-and-file police organizations actually succeeded in killing off civilian review boards by the end of the 1960s, suing to invalidate Philadelphia's Police Advisory Board, launching a successful ballot referendum to abolish New York City's Civilian Complaint Review Board, and fighting off efforts to create similar panels in other cities.[383] The victory proved transitory. Civilian oversight boards began to reappear in the 1970s, particularly in the wake of Watergate, and have continued to spread. Today Samuel Walker counts roughly 100 police agencies across the country subject to some form of citizen oversight, including eighty percent of the departments in the fifty largest cities. Citizen oversight, he concludes, is now "firmly established as an important feature of American policing."[384] Still, the strong resistance that police unions initially displayed to civilian review boards (and, in many cases, have continued to display),[385] succeeded in making panels of this kind the central battleground of police reform throughout the 1970s and well into the 1980s. It drew attention away from other, more far-reaching proposals for reasserting public control over policing. If the relatively mild notion of civilian review of disciplinary decisions was controversial, anything more radical seemed off the table.

There was another reason, also associated with the politics of the late 1960s, that proposals for strong community control of police departments never gained traction. The proposals became tainted by their association with militant forms of left-wing radicalism. An important case in point was the 1971 ballot measure in Berkeley that would have reorganized the city's police into three neighborhood-based departments, each governed by a separate, elected council of civilians. The proposal lost by a two-to-one vote.[386] Even some liberals sympathetic to police reform had doubts about the plan,[387] but the real cause of the lopsided defeat may have been the ballot measure's association with the Black Panthers (who provided the impetus for the proposal) and certain other radical groups (who conspicuously supported it). Jerome Skolnick, who thought the proposal flawed but deserving of serious consideration, complained at the time that a favorable vote had been "made to appear a vote for the kind of people who go around screaming 'Off the Pigs.'"[388]

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383. *See, e.g.*, FOGELSON, *supra* note 251, at 284-86.

384. WALKER, *supra* note 302, at 40.

385. *See, e.g.*, Michael Fehr, *The 1992 Police Civilian Review Board Controversy in San Jose*, *in* POLICE ASSOCIATION POWER, POLITICS, AND CONFRONTATION: A GUIDE FOR THE SUCCESSFUL POLICE LABOR LEADER 259 (John Burpo et al. eds., 1997).

386. *See, e.g.*, FOGELSON, *supra* note 251, at 296-300.

387. *See, e.g.*, GOLDSTEIN, *supra* note 4, at 145.

388. Skolnick, *supra* note 13, at 372.

The defeat of the ballot measure drew nationwide notice. If efforts to bring the police under neighborhood control failed even in Berkeley, the prospects for success elsewhere seemed dim. And, in fact, similar proposals, also tainted by association with left-wing militants, were easily defeated in Chicago and Washington, D.C. By the middle of the 1970s the movement for neighborhood control of policing seemed dead.[389] "Community policing," which came into vogue in the 1980s and has stayed in vogue ever since, shares some of the rhetoric of the earlier movement but, as we will see, abandons its commitment to giving neighborhoods true control over the police.[390]

B. *Police Departments as Workplaces*

If police activism helped to take proposals for strong community control of policing permanently off the table, it ironically had a similar effect on proposals to bring participatory democracy *inside* police departments, efforts to give police officers themselves significant control over the nature of their work. Much of the thinking about participatory democracy in the late 1960s and early 1970s, particularly the "consensus" strand of that thinking, focused on the workplace as the ideal locus of collective self-determination. Workplaces were small enough for true face-to-face discussions and important enough to make participation manifestly worthwhile.[391] For a brief moment at the end of the 1960s, it looked as though workplace democracy might become a theme of efforts at police reform. William Westley, when his doctoral dissertation was finally published in 1970, suggested that the alienated and repressive mentality of the police could be remedied in part by encouraging police unionization and "involving as many policemen as possible in decision making on all aspects of the department's job."[392] He was echoing George Berkley, who had argued a year earlier that strong, democratic police unions and widespread participation by officers in departmental decisionmaking would help train the police in the "rules and values" of democracy.[393] But the

389. *See* FOGELSON, *supra* note 251, at 300.

390. *See* Michael E. Buerger, *The Limits of Community*, *in* THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PREMISES, *supra* note 17, at 270; Frug, *supra* note 13, at 81.

391. *See, e.g.*, DAVID JENKINS, JOB POWER: BLUE AND WHITE COLLAR DEMOCRACY (1973); MANSBRIDGE, *supra* note 337, at 278-302; PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969); PATEMAN, *supra* note 36, at 109-10.

392. WESTLEY, *supra* note 14, at xvii.

393. BERKLEY, *supra* note 1, at 29-39. John Angell carried the argument even further in 1971. The "basic hope for correcting the dysfunctional trends of American police organizations," he suggested, was to bring policing 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." John E. Angell, *Toward an*

frightening form taken by police activism in the late 1960s soon dulled the appetite of virtually all scholars and police reformers for bringing workplace democracy to law enforcement.

Still, support lingered throughout the 1970s for giving police officers a certain kind of voice in the management of their work. Calls for thoroughgoing democracy within police departments, along the lines suggested by Berkley and Westley, quickly went out of fashion. But several departments experimented in the 1970s with "team policing," a loosely defined idea that generally involved a designated group of officers working cooperatively and with a degree of collective operational autonomy to address the problem of a particular neighborhood.[394] Those experiments drew support, in part, from an emerging interest, among social scientists in the 1970s, in the notion that rank-and-file police officers could and should contribute intellectually to the improvement of police tactics and procedures. The general theme of this scholarship was that police work, and particularly the commonplace tasks of peacekeeping, required far greater skill and understanding than had previously been acknowledged, and that getting officers to think explicitly and systematically about their jobs would make them more effective and less alienated.

The first of these advantages — greater effectiveness — was stressed most famously by Egon Bittner, who argued that policing needed to become a true profession, with its own traditions of scholarship and research-based academic programs.[395] Bittner thought it was for "scholarly policemen," not law professors or social scientists, to "develop an intellectually credible version of what police work should be like."[396] He had no illusions that academic training, even in the hands of "scholarly policemen," could teach aspiring officers everything they needed to know. But he thought it could give them

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Alternative to the Classic Police Organizational Arrangements: A Democratic Model, 9 CRIMINOLOGY 185, 187, 193-94 (1971). That required, among other things, abolishing the chain of command. *Id.* at 194-95. Angell's ideas attracted a good deal of attention from police executives in the early 1970s, although the notion of eliminating middle management proved too radical even for reform-minded departments. *See, e.g.*, Lawrence W. Sherman, *Middle Management and Police Democratization: A Reply to John E. Angell*, 12 CRIMINOLOGY 363 (1975); John E. Angell, *The Democratic Model Needs a Fair Trial: Angell's Response*, 12 CRIMINOLOGY 379 (1975).

394. *See, e.g.*, PETER B. BLOCH & DAVID SPECHT, NEIGHBORHOOD TEAM POLICING (1973); WILLIAM G. GAY ET AL., NEIGHBORHOOD TEAM POLICING (1977); LAWRENCE W. SHERMAN ET AL., TEAM POLICING: SEVEN CASE STUDIES (1973).

395. EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY (1970), *reprinted in* EGON BITTNER, ASPECTS OF POLICE WORK 89, 162-68 (1990). On Bittner's impact, see, for example, William D. Darrough, Book Review, 70 SOC. FORCES 846 (1992), and P.K. Manning, Book Review, 20 CONTEMP. SOC. 435 (1991).

396. BITTNER, *supra* note 395, at 166.

what it gave, say, lawyers: a set of "generalized methods and approaches to facts and problem solving," an inquisitive and studious frame of mind, and habits of methodical, dispassionate reasoning.[397]

William Muir echoed and expanded some of these themes in a widely praised study published in 1977.[398] Muir did not call for academic schools of policing staffed by officers-turned-scholars. But he did think it crucial for police officers to engage in ongoing and collective reflection about the nature of their work. He thought this was how officers became mature, fair-minded, and wise — how they became, in short, people who could be trusted with power. Muir was highly impressed with the efforts that Chief Charles Gain made to infuse the work of the Oakland Police Department with "dignity and moral meaning" by satisfying officers' "appetite for understanding."[399] Gain ran the department from 1967 to 1973. He ruled with a heavy hand and was never popular with the rank and file; in 1971 the Oakland Police Officers' Association voted no confidence in his administration. But he was a dedicated reformer, and his vision of reform included encouraging many of the same qualities of mind that Bittner thought police officers needed: inquisitiveness, methodical reasoning, and self-reflection. To that end he overhauled the department's training program, "inviting participation, discussion, argument, and questioning in every class,"[400] and he welcomed outside researchers interested in police reform.

Three of those researchers themselves mimicked Gain's approach, asking a specially recruited group of rank-and-file officers to come up with ways to reduce violence between officers and citizens. With the outside scholars serving largely as consultants, the 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, appeared to prove effective. The scholars 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.[401]

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397. *Id.* at 165.

398. MUIR, *supra* note 303.

399. *Id.* at 253.

400. *Id.*

401. TOCH ET AL., *supra* note 303. 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 Grant note that

The thrust of all this work — Bittner's, Muir's, the Oakland violence study, and to a lesser extent the "team policing" movement — was to embrace police discretion and to find ways to make its exercise more informed, methodical, and collectively self-reflective, rather than to control discretion from above (the strategy of "second wave" police professionalism) or from outside (the idea behind judicial oversight and civilian review boards).[402] The idea harked back, in a way, to 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 the application of individual judgment.[403] Bendix suggested that totalitarian regimes sought systematically to suppress independent judgment by employees, while nontotalitarian regimes sought to capitalize on it, through "managerial appeals . . . addressed to the good faith of subordinates."[404] Skolnick drew explicitly on Bendix's distinction and saw clearly the tension it created with efforts to rein in police discretion. The "dilemma of the police in 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."[405] Skolnick found "forceful normative claims" on each side of this conflict, but ultimately his primary allegiance was to "the ideal of legality," which he took to be the "highest stated commitment" of "democratic society."[406] Scholars like Bittner and Muir struck the balance the other way. Skolnick's position, as we have seen, was consistent in important ways with democratic pluralism; Bittner's and

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"[t]he Oakland police began to experience violence problems almost soon as the interventions were discontinued." TOCH & GRANT, *supra* at 85.

402. *See also, e.g.*, DAVID H. BAYLEY & HAROLD MENDELSOHN, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA 198-200 (1969) (calling police officers "exceedingly knowledgeable . . . about the requirements for successful police work," noting that their knowledge remained "unorganized and unexploited," and arguing that officers "must begin openly and creatively to study and discuss the discretionary aspects of their work").

403. *See* Reinhard Bendix, *Industrialization, Ideologies, and Social Structure*, 24 AM. SOC. REV. 613, 619-22 (1959), *reprinted in* REINHARD BENDIX, WORK AND AUTHORITY IN INDUSTRY 434, 444-48 (Harper Torchbook 1963) (1956). On Bendix, see Paul Hollander, *In Pursuit of the Great Questions of History: Reinhard Bendix and American Sociology*, 20 CONTEMP. SOC. 762 (1991).

404. Bendix, *supra* note 403, at 619-22.

405. SKOLNICK, JUSTICE WITHOUT TRIAL, *supra* note 2, at 231-32.

406. *Id.* at 230.

Muir's were consistent with increased sympathy in the 1970s for notions of participatory democracy.[407]

During the 1980s, though, views like Bittner's and Muir's grew marginalized, and, except among line police officers themselves, the taste for bringing even a mild form of workplace democracy to policing all but disappeared.[408] Team policing remained a "buzz phrase in police circles," but it lost its earlier connotation of participatory management.[409] The diminished enthusiasm for giving police officers greater control over the nature of their work likely had several causes: lingering concerns with the disturbing character of police organizing in the late 1960s; escalating budgetary constraints and a correspondingly heightened emphasis on public sector managerialism; diminishing aversion to military-style hierarchy as the Vietnam War receded; and — a matter to which we return momentarily — monopolization of the police reform agenda by community policing. Possibly, too, the growing power of police unions made it more difficult for departments to explore new strategies of collaborative decisionmaking that circumvented seniority systems or bypassed the union hierarchy.[410] By the 1990s, in any event, the idea of employee participation had largely dropped off the screen of police reform. 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.[411]

C. *The New Orthodoxy*

And so we come to community policing. Writing in 1977, Robert Fogelson noted that critics of 1950s-style police professionalism, while proliferating, as yet lacked "anything like a military analogy or a professional model that might draw them together."[412] A decade later

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407. In this regard, see also John M. Jermier & Leslie J. Berkes, *Leader Behavior in a Police Command Bureaucracy: A Closer Look at the Quasi-Military Model*, 24 ADMIN. SCI. Q. 1, 16-19 (1979) (finding that "participative leadership" raised the morale of police officers, and suggesting that "much of police authoritarianism and perhaps police brutality" might be traceable to "the authoritarian command model").

408. Among the holdouts were GUYOT, *supra* note 17, and TOCH & GRANT, *supra* note 401.

409. SKOLNICK & BAYLEY, *supra* note 401, at 214-15. Writing in 1986, Skolnick and Bayley identified "three dimensions of strategic change" lumped together by the phrase "team policing": "decentralization of command, integration of service delivery, and mobilization of communities in their own defense." *Id.* at 215.

410. *See, e.g.*, *id.* at 160.

411. Gary T. Marx, *Police Power*, *in* ENCYCLOPEDIA OF DEMOCRACY 954 (Seymour Martin Lipset ed., 1995). A revised version of the essay appears as Gary T. Marx, *Police and Democracy*, *in* POLICING, SECURITY AND DEMOCRACY, *supra* note 20, at 35.

412. FOGELSON, *supra* note 251, at 301.

that assessment seemed quaintly anachronistic. Community policing was by the late 1980s what it remains today: the orthodoxy of police reformers and law enforcement executives alike. It is an orthodoxy notorious for meaning different things to different people, but at its core lies a rejection of the form of police professionalism that came to be epitomized by the Los Angeles Police Department under William Parker: arrogant, heavy-handed, technologically driven, and aloof.[413]

Much of the spirit of the community policing movement was anticipated in the criticism that began to be leveled at the LAPD in the 1960s. Paul Jacobs's 1966 critique in the *Atlantic*, for example, condemned Parker's repressive tactics, particularly in minority areas of Los Angeles, but made clear that "[t]he overwhelming majority of the people living in the ghettos of Los Angeles are not seeking to rid their communities of the police."[414] Rather they wanted a different kind of police. They wanted the police to take time to learn about the people they patrolled, to shift their emphasis away from arrests, and "to act as the lady from Watts remembered they once did, to 'come to the house and talk to the kids if they did something bad.'"[415]

The notion that the police should work *with* communities, rather than against them, became the heart of the community policing movement. The theme is community *partnership*, not community *control*: with minor exceptions, community policing programs are implemented unilaterally by the police.[416] Still, from the outset the movement has appealed in part to the sense that community policing is "*more democratic* than conventional policing," because it improves "the public's capacity to influence policing."[417] Underlying this appeal have been ideas about democracy far more congruent with participatory democracy than with democratic pluralism.

We will return repeatedly to the linkages between participatory democracy and community policing in the pages that follow, but a few of the connections are worth noting now. First, and most obviously, the rhetoric of community policing drew heavily on the emphasis that participatory democracy placed on the involvement of ordinary citizens, precisely the political mechanism the pluralists had spurned

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413. For a sympathetic overview of the new orthodoxy, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

414. Paul Jacobs, *The Los Angeles Police: A Critique*, ATLANTIC, Dec. 1966, at 95, 101.

415. *Id.*

416. *See, e.g.*, Buerger, *supra* note 390, at 270-71; Frug, *supra* note 13, at 81.

417. Peter K. Manning, *Community Policing as a Drama of Control*, *in* COMMUNITY POLICING: RHETORIC OR REALITY, *supra* note 17, at 27, 43; *see also, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 327-32 (1998).

above others. Of equal importance, the new rhetoric typically assumed the existence of a unitary, easily defined "community" or "public" — also an assumption the pluralists had rejected, and an assumption for which the community policing movement has frequently been faulted.[418] Finally, the community policing movement has included from the get-go an element of nostalgia for a friendlier and more orderly past, the past recalled by "the lady from Watts." The very phrase "community policing" summons forth images of clean, safe sidewalks walked by "beat cops (usually with brogues) giving homespun and salubrious advice."[419] The nostalgia wrapped up in the term — out of keeping with pluralism's embrace of modernity but fully in step with certain versions of participatory democracy — contributed significantly to its ambiguity: the 1950s represented both the apogee of the policing practices that the new movement purported to reject, and the golden age of orderliness it sought to recover. Aggressive "stop and frisk" campaigns, for example, might be a hallmark of heavy-handed police professionalism, but they also could be (and were) justified as efforts to "work with communities" in restoring a sense of safety and order.[420]

D. *Antipluralism in Contemporary Criminal Procedure*

The emergence of community policing as the new common language of police reform coincided with the end of the Burger Court and the beginning of the Rehnquist Court. William Rehnquist was elevated to Chief Justice in 1986, the same year that Antonin Scalia was appointed to the Supreme Court. By the early 1990s, the Rehnquist Court was beginning to chart a distinctive course in criminal procedure, often with Scalia's prodding. During this same period the academic field of criminal procedure changed, too. There is widespread agreement about that, if not on the precise nature of the change or even its general direction. What seems clear is that the

418. *See, e.g.*, Buerger, *supra* note 390, at 272-73; Carl B. Klockars, *The Rhetoric of Community Policing*, *in* COMMUNITY POLICING: RHETORIC OR REALITY, *supra* note 17, at 239, 247-50; *cf.* Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343. Not all arguments for community policing are vulnerable to this objection. David Thacher, for example, praises community policing for "exposing police more systematically to a diversity of values" and "putting a premium on their ability to secure cooperation from the groups that are committed to those values." David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC'Y REV. 765, 795 (2001). But much of what makes Thacher's views interesting is precisely that they are unconventional. More about this later. *See infra* text accompanying notes 530-534.

419. TOCH & GRANT, *supra* note 401, at 248. On the nostalgia of the community policing movement for a cleaner, more orderly past, see also Buerger, *supra* note 390, at 272, and Manning, *supra* note 417, at 30, 35.

420. *See, e.g.*, HARCOURT, *supra* note 293, at 10, 19, 173-75, 177-78; Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1163.

generation of legal scholars who began writing about criminal procedure in the late 1980s and early 1990s approached the subject in different ways than their predecessors, whose careers and outlooks had been shaped so strongly by the controversies surrounding the Warren Court and its legacy.

Criminal procedure scholars now are a diverse lot, and many, perhaps most, of them are sharply critical of the Rehnquist Court. Nor has the Rehnquist Court's approach to criminal procedure been entirely consistent. Nonetheless, I want to suggest there are some themes held in common both by some of the most important criminal procedure scholarship of the past decade and by some of the most interesting things the Supreme Court has had to say on the subject. The themes include an enthusiasm for community participation, a premium placed on transparency, a distrust of elites and expertise, a preoccupation with legitimacy, and a retreat from modernity. Each of these themes, I will suggest, is consistent with the shift away from pluralism as the dominant understanding of American democracy and toward theories of participatory democracy and deliberative democracy. Three other features of criminal procedure jurisprudence and scholarship today — the continued treatment of the police as a breed apart, the persistent de-emphasis of institutional structure, and the comparative neglect of inequality — reflect important points of continuity between pluralism and the theories which have supplanted it.

In defending these claims I will make no effort to survey contemporary criminal procedure scholarship comprehensively. Nor will I try to identify global motifs of the Rehnquist Court's approach to criminal procedure. In each case the field is too diverse. Both at the level of jurisprudence and at the level of scholarship, criminal procedure is less unified and coherent than it was in Warren and Burger Court eras — just as democratic theory today is less unified and coherent than it was when pluralism was the reigning orthodoxy. So the discussion here necessarily will be selective. I will highlight certain, particularly noteworthy developments in criminal procedure jurisprudence and scholarship, developments that seem to reflect assumptions about American democracy that are different from the assumptions that animated criminal procedure in the years of the Warren and Burger Courts.

On the scholarship side, I will focus chiefly on the work of Akhil Amar, Dan Kahan, and Tracey Meares. I should say a word or two about why — particularly since, although Kahan and Meares are frequent collaborators, grouping them with Amar may seem odd. Amar is famously textualist; his chief goal is to wring sense from the words of the Constitution. Kahan and Meares, in contrast, are concerned above all with contemporary problems of social control,

and Meares, in particular, is a committed empiricist.[421] But the work of all three scholars merits special attention here, and for similar reasons. First, in each case it is exceptionally thoughtful work, cutting across traditional debates in criminal procedure. Whatever their faults, neither Amar nor Kahan nor Meares follows the pattern that people like Robert Weisberg already found tiresome more than a decade ago: attacking or defending the criminal procedure legacy of the Warren Court largely in the terms set by the Warren Court itself.[422] All three scholars are creative, sophisticated, and quite self-conscious in urging a break with criminal procedure scholarship of the Warren and Burger Court eras. Second, the work of all three scholars has clearly touched nerves. Often (but not always) the ensuing debate has taken the form of an intergenerational dispute — adding to the impression that we are dealing here with something new. And, in each case, there is a widespread sense that the something new is somehow representative: these are scholars that seem to have "captured the moment."[423] Third, more than many other criminal procedure scholars, Amar, Kahan, and Meares explicitly incorporate the theme of collective self-government into their work. All three scholars take democracy seriously. Fourth and finally, the very differences between Amar on the one hand and Kahan and Meares on the other will prove useful for a certain kind of analytic triangulation: their shared points of departure from traditional approaches to criminal procedure are less likely to be idiosyncratic and more likely to reflect broader intellectual trends.

1. *The Enthusiasm for Community Participation*

The rhetoric of community policing, as we have seen, appeals strongly to notions of popular participation in government, and more specifically to notions of *community* participation — notions, that is to say, that communities exist; that they have coherent views and

421. *See* Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure — And Three Answers*, 2002 U. ILL. L. REV. 851; Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

422. *See* Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 530-31 (1992).

423. Ronald F. Wright, Book Review, 14 CONST. COMMENT. 557 (1997) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)); *see also, e.g.*, Seidman, *supra* note 305, at 2282 (arguing that Amar's work "simultaneously symbolizes and helps propel the flood tide away from criminal procedure liberalism," and therefore forms "part of a significant movement that has produced a secular change in the politics of criminal procedure"). For comparable reactions to the work of Kahan and Meares, see, for example, HARCOURT, *supra* note 293, at 37-45; David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); and Richard H. Pildes, *The New Progressives*, BOSTON REV., April/May 1999, at 21.

interests; and that law enforcement, and the criminal justice system more generally, can and should reflect those interests. These same notions are reflected in some of the most influential criminal procedure scholarship of the last decade or so; they are an important part of what makes that scholarship novel and important.

Take, for example, Amar's widely discussed call for renewed reliance on civil juries to set appropriate bounds on law enforcement.[424] Amar shares Tocqueville's famous enthusiasm for the jury as the preeminent instrument of participatory democracy. Like Tocqueville, Amar praises the jury both as a school of democratic virtue and as a site of popular sovereignty. Tocqueville thought the first function was the most important: he was unsure whether the jury was "useful to those who have lawsuits," but he was certain it instilled "practical intelligence and good political sense" in the jurors themselves.[425] Amar, on the other hand, is much more taken with the jury as a vehicle for community control of the criminal justice system. He praises the educative role of the jury, but his argument here feels slight. First and foremost, the jury represents for Amar "the common sense of the common people."[426]

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424. *See, e.g.*, Amar, *Fourth Amendment First Principles*, *supra* note 285, at 817-19; *see also* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995) [hereinafter Amar, *Reinventing Juries*].

425. TOCQUEVILLE, *supra* note 38, at 262.

426. Amar, *Fourth Amendment First Principles*, *supra* note 285, at 818; *cf.* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 77 (2000) (praising "the sound instincts of ordinary Americans"); Akhil Reed Amar, *Three Cheers (and Two Quibbles) for Professor Kennedy*, 111 HARV. L. REV. 1256, 1265 n.26 (1998) [hereinafter Amar, *Three Cheers*] (arguing that juries "should function as the democratic lower house of a bicameral judiciary," facilitating "a common conversation affirming and nurturing a deliberative democracy"). Amar's work is part of a broader academic trend toward renewed appreciation for the virtues of juries as instruments of participatory and deliberative democracy. For other notable examples, see JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 6 (1994) (praising juries for reflecting "the values and common sense of the people"); Lani Guinier, *No Two Votes: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1485-87 (1991) (proposing "to promote the deliberative process" by restructuring local legislative bodies "in the image of the ideal, consensus-driven jury"); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003) (describing the jury as a "model deliberative democratic body"); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1538 (1993) (arguing that juries can and should provide "community representation in criminal trials"); and Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1420 (1997) (arguing that "[t]he conception of democracy most appropriate to juries" is a "form of deliberative democracy . . . that sees deliberation as a means to the accurate discovery of exogenous facts"). The Supreme Court, too, now inclines toward seeing the jury as a model instrument of democracy. *See* Blakely v. Washington, 124 S. Ct. 2531, 2539 (2004) (reasoning that "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary").

Or, closer to home, consider the enthusiasm that Kahan and Meares show for local communities taking law enforcement into their own hands.[427] That enthusiasm extends not just to the direct involvement of private citizens in policing through volunteer patrols, campaigns of unofficial "shaming," and collaborations with law enforcement by churches and civic organizations. It also includes efforts by local governments to strike their own balances between liberty and security. If a particular community believes it needs, say, an aggressive anti-loitering policy to combat street gangs, or blanket inspection of homes for evidence of drug trafficking, Kahan and Meares think courts should look askance on claims that the policy violates civil liberties.[428] Now that racial minorities "are no longer excluded from the nation's democratic political life," courts by and large should honor the outcome of the local democratic process.[429]

Like Amar, Kahan and Meares share none of the discomfort the pluralists showed with widespread political participation. Also like Amar, they rest their argument on an assumption the pluralists found utterly untenable: that there exists, in any particular polity, an identifiable "public" or "community" position on controversial policy questions, embraced by ordinary citizens as well as political leaders, and rising above the narrow interests of particular groups.[430] That assumption in turn rests on other beliefs, also rejected by the pluralists: that ordinary people are rational and well-informed about matters of public concern and that politics can and does proceed through reasoned discussion. Inner-city residents, in particular, "are

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427. *See, e.g.*, Kahan, *Collective Action*, *supra* note 12; Kahan & Meares, *The Coming Crisis*, *supra* note 305; Meares, *Praying*, *supra* note 12. For a more qualified argument along similar lines, see Livingston, *supra* note 413, at 646-50, 653-70.

428. *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197 [hereinafter Meares & Kahan, *Antiquated Procedural Thinking*].

429. *Id.* at 207; *see also, e.g.*, Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: Chicago's Paradox of Unwanted Rights*, BOSTON REV., April/May 1999, at 4, 5 [hereinafter Meares & Kahan, *When Rights Are Wrong*]; *cf.* Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1126-28 (2003) (suggesting that rising political power of racial minorities has rendered increasingly irrelevant "the great theme of the Warren Court — that the criminal justice system had to be massively reformed to protect the constitutional rights of all citizens").

430. This assumption is also shared by another important strand of contemporary criminal procedure scholarship: the strand calling for greater participation of victims in the criminal justice system. George Fletcher, for example, argues for increased participation of victims in criminal trials in order to "facilitate the public's expressing solidarity with victims." GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 257 (1995). On the growing use of criminal victimization to build social solidarity, see GARLAND, *supra* note 280, at 143-44; Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1042-43 (2002); and Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1128-35 (2000).

reasonable people,"[431] and if left to their own devices will decide questions of criminal procedure through a process of collective deliberation.[432]

Now, Kahan and Meares do not write chiefly about democracy. As coauthors they are concerned first and foremost with the informal social mechanisms — the "norms" — of crime control. Nor is Amar writing mainly about democracy. The vision of democracy one encounters in the work of these scholars is largely implicit. For all that, the vision is recognizably rooted in the antipluralist tradition of participatory democracy and deliberative democracy. Here, for example, are Kahan and Meares:

> [T]he worst consequence of the ongoing commitment to the 1960s conception of rights may be its *disempowering* effect on inner-city communities. Criminologists have long recognized that . . . crime both creates and is sustained by atomization and distrust, which in turn make it harder for individuals to engage in the cooperative self-policing characteristic of crime-free communities. A healthy democratic political life can help repair these conditions. That is precisely what residents of the inner city enjoy when they are free to decide for themselves whether to adopt building searches, gang-loitering ordinances, curfews and the like. Thus, in addition to standing in the way of potentially effective law-enforcement policies, the 1960s conception of rights pre-empts deliberative experiences that reduce crime through their effect on public dispositions and habits.[433]

It is all there: the concern with "atomization" and "disempowerment," the emphasis on cooperation and deliberation, the focus on habits of participation, and the metaphor of social "health."[434] The vision of participatory democracy invoked by Kahan and Meares is far from precise. They are vague, for example, regarding the contours of the inner-city "community," what it means for members of that community to decide matters "for themselves," and what the preconditions for "deliberative experiences" might be, other than the withdrawal of judicial oversight. Their vagueness on these matters is noteworthy, and we will return to it later. For now, though, the important points are these. First, Kahan and Meares, like Amar, draw on a vision of democracy. Second, that vision of democracy,

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431. Tracey L. Meares & Dan M. Kahan, *Meares and Kahan Respond*, BOSTON REV., April/May 1999, at 22.

432. Meares & Kahan, *When Rights Are Wrong*, *supra* note 429, at 6.

433. *Id.*; *accord* Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1179.

434. The health metaphor is also found in many discussions of community policing. The Oakland Police Department's early effort at community policing, for example, used the slogan "Beat Health." *See* SKOLNICK & BAYLEY, *supra* note 401, at 159-62. The idea of neighborhood "health" resonates strongly with the theme of orderliness, to which we will return below.

although thinly articulated, parts with pluralism in placing great weight on notions of community participation. Third and finally, the kind of participation that Kahan and Meares have in mind is, essentially, the kind of participation we already have today: the only structural change they propose is a relaxation of judicial review. Their argument is consistent with what I have called the status-quo version of participatory democracy.[435]

An enthusiasm for community participation, even in its status-quo version, is difficult to reconcile with the thrust of current criminal procedure doctrine, most of which was constructed during the Warren and Burger Court eras and, as we have seen, echoes democratic pluralism both in stressing the protection of individual dignity and in giving little weight to majoritarianism. This is precisely the reason Kahan and Meares think that criminal procedure faces a "coming crisis."[436] The Supreme Court has yet to modify criminal procedure doctrine to place greater weight on local participatory politics. But there are scattered signs that it may be moving in that direction. Community participation still plays no formal role in criminal procedure doctrine, but it has begun to be part of the rhetorical atmosphere of some of the Court's decisions.

The change may be most striking in the Court's treatment of searches in public schools. The Burger Court had treated searches of students by school personnel the way it treated other searches by government agencies other than the police: subject to lesser restraints than police searches, but still requiring a "balance" between government objectives (here, the "need to maintain an environment in which learning can take place") and individual dignity ("the schoolchild's legitimate expectations of privacy").[437] For the Burger Court, the notion that school teachers should be seen as agents of their students' parents — the old doctrine of *in loco parentis* — flew in the face of "contemporary reality."[438] Teachers and school administrators were not parents; they were "representatives of the State."[439] In contrast, when the Rehnquist Court upheld a school district policy mandating drug testing for student athletes, Justice Scalia's opinion for the majority explicitly embraced the doctrine of *in loco parentis* and stressed, furthermore, that before adopting the policy the district had solicited the views of parents at a public meeting and that the parents

435. *See supra* text accompanying notes 341-346.

436. Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1154.

437. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

438. *Id.* at 336.

439. *Id.*

in attendance all favored the proposed rule.[440] Several years later, when the Court upheld a policy by a different school district requiring drug tests not just for athletes but for all students engaged in extracurricular activities, Justice Breyer took occasion to show the practical implications of the views he had expressed in his lecture on "participatory democratic self-government."[441] Concurring in the Court's decision, Breyer emphasized that the local school board had held "public meetings designed to give the entire community 'the opportunity to be able to participate' in developing the drug policy."[442] Since the ultimate question of constitutional interpretation raised in the case seemed "close," Breyer thought it "important" that the school board had used a "democratic, participatory process to uncover and to resolve differences."[443]

Scalia and Breyer are not generally seen as kindred spirits. They have staked out starkly adverse positions, for example, on the appropriate methods of constitutional adjudication.[444] When they are both drawn to emphasize community participation in thinking about student drug testing, despite the fact that current Fourth Amendment doctrine makes this factor irrelevant, something is afoot.

The student drug testing cases are not, strictly speaking, cases about the police, even though the threat of police involvement always hovers in the background. But notions of community participation have also begun to seep into the rhetoric of cases addressing police practices, if only, so far, in the dissents. Take *City of Chicago v. Morales*,[445] which addressed the constitutionality of a Chicago ordinance that criminalized loitering by gang members — an ordinance that Kahan and Meares defended as precisely the kind of "innovative community policing measures" that inner-city residents

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440. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650, 654-55, 665 (1995). Kahan and Meares read *Vernonia* to stand, in fact, for the proposition that "random drug-testing of student athletes is exempted from the warrant requirement" because parents, "who naturally take their children's interests to heart," have "significant influence in the political process." Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1173. Well, yes and no. The political participation of parents played no role in the formal, doctrinal explanation the Court gave for its decision, but it surely was part of the rhetorical atmosphere of the Court's opinion.

441. *See supra* notes 364-367 and accompanying text.

442. Bd. of Educ. v. Earls, 536 U.S. 822, 841 (2002) (Breyer, J., concurring).

443. *Id.* Predictably, Justice Breyer is also impressed with the democratic function juries serve in representing the moral sense of the community. *See* Ring v. Arizona, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring).

444. Compare, for example, the textualist manifesto in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1977), with the call for greater attention to "real-world consequences" in Breyer, *supra* note 364, at 246-47, 249, 269-71.

445. 527 U.S. 41 (1999).

wanted and should be allowed to adopt.[446] The Illinois courts struck the measure down on vagueness grounds, and the Supreme Court affirmed. For a majority of the justices, the case was not about community self-determination; it was about unconstrained police discretion.[447] But the dissents, by Justice Scalia and Justice Thomas, saw the case roughly the same way as Kahan and Meares. Justice Thomas, in particular, pointed out that the ordinance was the product of a "democratic process" that included "extensive hearings" at which "[o]rdinary citizens" came forward to testify about gangs in their neighborhoods.[448]

The dissenters touched relatively lightly on this theme; their chief concern was not community participation but the need to allow police officers some discretion in order to maintain "a safe and orderly society."[449] We will return to that concern below. For now, though, the most important point about the Supreme Court's decision in *Morales* is that democracy entered into the discussion *only* through the limited use that the dissenters made of the rhetoric of community participation and self-determination. The majority never tied its concerns about police discretion to any recognizable notion of democracy. There was no discussion of police states, no coded references to authoritarian mentalities.[450] As a result, the focus on

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446. Kahan & Meares, *Antiquated Procedural Thinking*, *supra* note 428, at 198; *see also* Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1166; Dan M. Kahan & Tracey L. Meares, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 820-21 (1998) [hereinafter Kahan & Meares, *Order in the Inner City*]; Tracey L. Meares, Place *and Crime*, 73 CHI.-KENT L. REV. 669, 700 (1998). When the Supreme Court took up *Morales*, Kahan and Meares filed an amicus brief on behalf of twenty Chicago neighborhood groups supporting the loitering law. *See* Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner at 2, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121). Other neighborhood groups, and several prominent organizations representing members of racial minorities, joined amicus briefs opposing the ordinance. *See* Brief Amicus Curiae of See Forever/The Maya Angelou Public Charter School in Support of Respondents, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121); Brief of Amici Curiae National Black Police Association, et al., in Support of Respondents, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121); Brief of Chicago Alliance for Neighborhood Safety, et al., as Amici Curiae in Support of Respondents, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121); Brief of National Law Center on Homelessness & Poverty, et al., as Amici Curiae Supporting Respondents, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121).

447. *Morales*, 527 U.S. at 60-64; *see also id.* at 70 (Breyer, J., concurring).

448. *Id.* at 100-01 (Thomas, J., dissenting); *see also id.* at 97-98 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined the dissent by Justice Thomas. *Id.* at 98.

449. *Id.* at 87 (Scalia, J., dissenting); *see also id.* at 98 (Thomas, J., dissenting) (charging that the Court had "unnecessarily sentenced law-abiding citizens to lives of terror and misery").

450. Professor Raymond points to other evidence that the trope of the police state may be going out of fashion in criminal procedure jurisprudence, or at least that consensus regarding the rhetoric's acceptability may be breaking down. *See* Raymond, *supra* note 240, at 1223-24.

police discretion felt a little rootless and insubstantial. Even two of the justices who joined in the judgment felt obliged to agree with Justice Thomas that "some degree of police discretion is necessary to allow the police 'to perform their peacekeeping responsibilities satisfactorily.'"[451]

2. *The Premium on Transparency*

The enthusiasm for community involvement in contemporary criminal procedure scholarship is accompanied by, and often overlaps with, an emphasis on the public exposure of policing strategies. This theme is muted in the work of Amar (although congenial to his focus on popular sovereignty), and it is largely absent from the work of Kahan and Meares. It is front and center, though, in Erik Luna's recent argument that democracy requires "transparent policing," by which he means visibility of what the police do and how they decide to do it.[452] And Luna has good company. Jerome Skolnick, for example, has recently called openness "a master ideal of democratic policing," and William Bratton — who formerly headed New York City's police department and now is Chief of Police in Los Angeles — has stressed the need for police agencies to open themselves up to "scrutiny and public exposure."[453]

Pluralism, with its emphasis on elites, made widespread dissemination of information about the government seem relatively unimportant — perhaps even counterproductive. Partly for this reason, public visibility of policing never became a central part of criminal procedure law or scholarship in the Warren and Burger Court eras. True, certain key rulings of the Warren Court were motivated by a concern about police secrecy. One thinks particularly of the rulings giving criminal defendants the right to counsel at custodial interrogations and postindictment lineups; in each case the Court made clear that part of its objective was to give defense counsel the

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451. *Morales*, 527 U.S. at 65 (O'Connor, J., concurring) (quoting *id.* at 109 (Thomas, J., dissenting)). Justice Breyer joined Justice O'Connor's concurrence. *Id.* at 64. That opinion was also notable for its pointed suggestions regarding how the Chicago ordinance might be redrafted to cure its vagueness. *Id.* at 66. The ordinance was subsequently reenacted in a form that incorporated most of Justice O'Connor's suggestions. *See* HARCOURT, *supra* note 293, at 51-52; Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1141-43 (2000). On the equivocal tone taken by the justices in the majority, see, for example, Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 144-45.

452. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000).

453. JEROME H. SKOLNICK, ON DEMOCRATIC POLICING 2 (1999); William J. Bratton, *Dispelling New York's Latest Fear*, N.Y. TIMES, Feb. 28, 1999, § 4, at 19. For other echoes of Luna's argument, see, for example, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2167, 2180 (2002).

information they would later need to challenge the admissibility of evidence obtained improperly.[454] The point, though, was to get information *to the defense* in order to improve the fairness of the adversarial process, not to expose the police to general public scrutiny.

Theories of participatory democracy and deliberative democracy, on the other hand, make the broad visibility of government decisionmaking much more important.[455] This may be particularly true of a status-quo theory of participatory democracy like the one Justice Breyer has defended: a theory that ties the legitimacy of our current system of government to the metaphorical "conversation" that takes place in the media, at public hearings, at professional meetings, and so on.[456] Without disclosure, this conversation cannot take place; with disclosure, legitimacy becomes almost automatic. It is therefore not surprising that Luna draws heavily on rhetoric similar to Breyer's, stressing the role of transparency in "[e]mpowering citizens," "giving them a voice in the decisionmaking process," and "establish[ing] a basis for trust in otherwise distrusting communities."[457]

3. *The Distrust of Elites and Expertise*

The enthusiasm for community involvement and the premium placed on public discussion are only two of the contemporary trends in criminal procedure that reflect a shift from democratic pluralism to theories of participatory democracy and deliberative democracy. Another is the strain of anti-elitism. This often takes the form, both in scholarship and in jurisprudence, of hostility to claims of professional expertise and pronounced distrust of the "political stratum" in which the pluralists placed so much confidence — particularly judges, administrators, and civil libertarians.

The problem of police discretion, such a central preoccupation of Warren Court criminal procedure, exercises the current generation of criminal procedure scholars much less. Kahan and Meares are hardly

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454. *See* United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966).

455. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 339, at 95-127.

456. *See supra* notes 364-366 and accompanying text.

457. Luna, *supra* note 452, at 1120. Luna strives for a degree of catholicity regarding democratic theory; he claims that transparent policing is important under any plausible view of collective self-rule. *Id.* at 1130-31. But he sees only "two rough approaches to democratic decisionmaking in American politics: populism and progressivism." *Id.* at 1127. That framework blurs the differences between varieties of participatory democracy, and it hides the significance of democratic pluralism by reducing it to simply another version of progressivism. The heart of Luna's argument, in any event, appeals to the need to build trust and legitimacy by giving people a "voice" in decisionmaking — the characteristic agenda of what I have been calling status-quo participatory democracy.

alone in calling for a relaxation of "discretion suspicion."[458] But the remedy of judicial oversight, which made so much sense from the perspective of democratic pluralism, worries scholars today — including Amar, Kahan, and Meares — a good deal more. Because they understand democracy in vaguely Rousseauian terms, as the collective formation of a community will, judicial review does not strike them as exercise in the mediation of intergroup conflicts. Rather it appears to them as it always appeared to the Warren Court's critics: as the abrupt imposition of a decision from above. It looks like the polar opposite of democracy. This is an increasingly common theme of the Supreme Court's criminal procedure jurisprudence as well, particularly the opinions of Justice Scalia and Justice Thomas.

The notion is hardly new that judicial oversight of policing frustrates democracy. Again, this was always part of the case against the Warren Court. But the argument has clearly gained ground over the past couple of decades. One reason for that — although certainly not the only reason — is that background ideas about democracy have changed. Democratic pluralism has lost its hold, and the theories of participatory democracy and deliberative democracy that have supplanted it make judicial oversight harder to defend.

They make other forms of elite governance harder to defend, as well, including the reliance on expertise of varying kinds — judicial, administrative, and clinical — in the formation and execution of criminal- justice policy. Jonathan Simon and others seem right, for example, to link the recent popularity of mandatory sentences and "zero-tolerance" policies to disenchantment with the kind of "individualized justice" previously dispensed by "expert judges, and supported by a panoply of normalizing professionals (psychologists, social workers, probation officers, and so on)."[459]

Like many of today's criminal procedure scholars, Meares is an empiricist. So is Kahan, to a lesser extent. This creates for them a problem similar to the one that confronted the pluralists: in principle

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458. *See* Tracey L. Meares, Terry *and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343 (1998); Kahan & Meares, *When Rights Are Wrong*, *supra* note 429, at 5; *see also, e.g.*, Livingston, *supra* note 413, at 650-70.

459. Jonathan Simon, *Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1418 (2002); *see also* GARLAND, *supra* note 280, at 150-52; Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on 'Three Strikes' in California*, 28 Pac. L.J. 243, 253-56 (1996). Tellingly, the federal sentencing guidelines, which are an important part of the trend that these scholars describe, *see* GARLAND, *supra* note 280, at 151; Zimring, *supra*, at 256, have themselves been attacked as an exercise in anti-democratic "technocracy." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 586 (2001). Stuntz probably reflects the general view among scholars today when he suggests that "[t]o the extent that criminal law deals with contestable, and contested, moral questions, one might imagine trading a good deal of expertise for a little democracy." *Id.*

they believe that claims of expertise should bow to politics, but they also think that social science has important lessons to teach about current problems and their solutions. Meares, in fact, has called repeatedly for greater reliance on social-science research in criminal procedure.[460] The pluralists' respect for social science led them toward a broader respect for professional and technical expertise.[461] But for scholars like Meares and Kahan, anti-elitism appears to trump scientism. (It is hard to tell for sure, because Meares and Kahan see no conflict between what social science has to say about policing and what inner-city residents already know.)[462] Although Meares argues that *judges* should pay more attention to recent work in criminology, she never makes a similar claim about local politicians or community activists. With Kahan, she respects the unmediated "local knowledge" of "average citizens," and presumes that community leaders speak on behalf of their constituents.[463]

4. *The Preoccupation with Legitimacy*

The status-quo version of participatory democracy shares with deliberative democracy, in its most common forms, an overriding emphasis on legitimacy, both actual and perceived. Deliberative democracy, as we have seen, is first and foremost a theory *about* legitimacy: that is to say, about what makes democracy both worthy of respect (actual legitimacy) and likely to achieve respect (perceived legitimacy). Likewise, the status-quo version of participatory democracy — the version reflected in the criminal procedure work of scholars like Amar, Kahan, and Meares, and the version that has begun to make itself felt in criminal procedure jurisprudence — stresses the value of participation in making governmental decisions more acceptable to those affected by them.

In the last decade or so the theme of legitimacy has become increasingly prominent in criminal procedure jurisprudence and scholarship. One way this has happened is through renewed attention in criminal procedure to the "countermajoritarian difficulty," a development that also reflects, as we have seen, a strain of anti-elitism. Amar, along with other scholars, sees the jury as in large part a device for giving "legitimacy" to the criminal justice system.[464] Amar argues

460. *See* sources cited *supra* note 421.

461. *See supra* text accompanying notes 150-152.

462. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1163.

463. *Id.* at 1176-80; *see also id.* at 1168.

464. *See* Amar, *Reinventing Juries*, *supra* note 424, at 1182; *see also, e.g.*, Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 681-82 (1996) [hereinafter Amar, *Sixth Amendment First Principles*]; Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 50-51 (1995).

for textualism in similar terms: "A Constitution that speaks in the name of the people and that draws its legitimacy from ratification by the people — ordinary citizens — should be presumed to use words in their ordinary sense, absent a strong countervailing argument."[465] And legitimacy looms large for Kahan and Meares, as well. It figures not only in their arguments for increasing community participation in policing,[466] but also in their enthusiasm for law enforcement strategies and penal policies that rely less on deterrence than on the moral authority of the law,[467] and on the trust that police departments build in the communities they patrol.[468]

Trust and moral authority were important to the pluralists, too, but in different ways. The pluralists thought that a successful democracy required widespread commitment, particularly among elites, to a set of core values. Most of these — the "rules of the game" — had to do with the peaceful resolution of intergroup conflicts. In the 1960s and 1970s, therefore, the perceived legitimacy of the criminal justice system tended to be valued not as a goal in and of itself, nor even as a way to make the system more effective in controlling crime, but rather as a way to protect social stability by building nationwide consensus. And the chief strategy for bolstering that legitimacy was not widespread participation in policing, or in government more generally; it was instead the visible commitment by political elites, including the Supreme Court, to substantive values thought to transcend group politics, particularly human dignity.[469]

5. *The Retreat from Modernity*

As we have seen, criminal procedure doctrine and scholarship in the 1960s and 1970s echoed the pluralist embrace of modernity in

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465. Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1048 (1998).

466. *See, e.g.*, Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1184; *see also* Kahan, *Collective Action*, *supra* note 12, at 1531-35; Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859 (1999) [hereinafter Kahan, *Privatizing Criminal Law*]; Meares, *Praying*, *supra* note 12, at 1612-29.

467. *See, e.g.*, Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000) [hereinafter Meares, *Legitimacy and Law Enforcement*].

468. *See, e.g.*, *id.* at 414; Kahan, *Collective Action*, *supra* note 12, at 1530, 1536-37; Meares, *Praying*, *supra* note 12, at 1629; Meares, *supra* note 306, at 216. Luna, similarly, stresses the importance of trust in the police. Transparent policing, he explains, is not itself trust, but is "a process that helps build trusting relationships." Luna, *supra* note 452, at 1194. This is also why William Bratton values openness in policing: "A police organization that willfully shuts itself off from scrutiny and public exposure can lose public trust." Bratton, *supra* note 453.

469. *See supra* Part II.F.

three ways: in an enthusiasm for the new, quasi-scientific, technology-intensive methods of "second wave" police professionalism; in the abandonment of original intent as a guide to interpreting the criminal procedure provisions of the Constitution; and in the relatively low priority given to values of order, decorum, and safety.[470] Criminal procedure today, both in the courts and in the academy, is marked by the opposite tendencies: a disenchantment with police professionalism; a return to original intent; and a renewed appreciation for order, decorum, and safety. In each of these respects, contemporary criminal procedure reflects the backward-looking posture characteristic of much (although certainly not all) of the rhetoric associated with participatory democracy and deliberative democracy.

We have already touched on the disenchantment with the technologically-intensive form of police professionalism epitomized in the 1950s and early 1960s by William Parker's Los Angeles Police Department. The roots of the community policing movement lay in that disenchantment. Even today, the manifold strategies grouped together under the umbrella of community policing probably share, above all else, a rejection of Parker-style police professionalism. (That may be one reason why the LAPD has found it particularly difficult to align itself credibly with the new orthodoxy.)[471] Criminal procedure scholars overwhelmingly join in that rejection and in the embrace of community policing. Kahan and Meares have been particularly vocal champions of community policing, but their enthusiasm is widely shared.

Amar's efforts to return criminal procedure to "first principles" through a renewed attention to original intent have been more controversial. But they have drawn so much criticism in part because, in many quarters, they have been so well-received. Even some of Amar's critics now fight on the ground of original intent.[472] In sharp contrast to the situation twenty-five years ago, when both the Supreme Court and its critics seemed in broad agreement that neither the language nor the history of the Fourth Amendment were of any

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470. *See supra* Part II.E.

471. *See, e.g.*, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL: A REPORT TO THE LOS ANGELES BOARD OF POLICE COMMISSIONERS CONCERNING THE OPERATIONS, POLICIES, AND PROCEDURES OF THE LOS ANGELES POLICE DEPARTMENT IN THE WAKE OF THE RAMPART SCANDAL 56-62 (2000) [hereinafter REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL].

472. *See, e.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996) (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning (1991) (unpublished Ph.D. dissertation, Claremont Graduate University) (on file with author)); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997).

help,[473] many if not most criminal procedure scholars now view history as "crucial to an understanding of the Fourth Amendment" — and, for that matter, of the Fifth and Sixth Amendment as well.[474]

Today's Supreme Court is of a similar mind. Led by Justice Scalia and Justice Thomas, the Court over the last decade has started paying much more attention to history in criminal procedure. The trend is particularly striking in Fourth Amendment law, where a solid majority of the Court has made the primary criterion for identifying constitutional violations "whether a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed."[475]

Amar's work exemplifies not only the return to history in constitutional criminal procedure but also the heightened appreciation for orderliness. The orderliness that most concerns Amar is jurisprudential: he has a pronounced aversion to doctrinal "mess,"[476] and a strong attraction to interpretations that are "snug," "well-fitting," and "aesthetically pleasing."[477] Complaints about the untidiness of Fourth Amendment law are hardly new,[478] but Amar makes those complaints with special insistence. The heavy emphasis he places on doctrinal coherence and consistency is mirrored by a

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473. *See supra* note 275 and accompanying text.

474. Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1169 (1998); *see also, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3 n.1 (1997) (noting that history "is becoming the dominant subject matter" of Fourth Amendment studies).

475. Wyoming v. Houghton, 526 U.S. 295, 299 (1999); *accord* Florida v. White, 526 U.S. 559, 563 (1999); Wilson v. Arkansas, 514 U.S. 927, 931 (1995). For discussions of this development, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000), and Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 411-12 (2001).

476. *E.g.*, Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1814 (1997); Amar, *Fourth Amendment First Principles*, *supra* note 285, at 759, 761; Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1126 (1996); Amar, *Sixth Amendment First Principles*, *supra* note 464, at 712.

477. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1659, 1662 (1997); *see also, e.g.*, Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 684 (2002). Amar recognizes that the Constitution is not "a mere objet d'art," Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 799 (1999), and that "proper constitutional interpretation must in the end be more than merely aesthetically pleasing," Akhil Reed Amar, *Continuing the Conversation*, 33 U. RICH. L. REV. 579, 582 (1999). But he has a plain preference for interpretations that clear away "jumble," *e.g.*, Amar, *Fourth Amendment First Principles*, *supra* note 285, at 758, and that make text and doctrine "beautifully cohere[]," Akhil Reed Amar, *The Constitution Versus the Court: Some Thoughts on Hills on Amar*, 94 NW. U. L. REV. 205, 214 (1999).

478. *See, e.g.*, Wayne R. LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255.

more general appreciation for the virtues of order, decorum, and safety. Among the central themes of his work has been the importance of factual accuracy in criminal procedure: the importance of avoiding not only the conviction of the innocent, but also the acquittal of the guilty. In interpreting the Fourth Amendment, for example, he urges us to keep in mind that "the people are *more* 'secure in their persons, houses, papers, and effects'" when "rapists, burglars, and murderers are convicted."[479]

In this respect he is representative. It is hard today to find scholars who think the "basic purpose" of criminal procedure is solely to protect the individual from the state, or that "[i]t inflicts no tangible harm on anyone when a criminal evades punishment."[480] Resignation about the risks of criminal victimization has become much less common. In part this reflects the successful, and long overdue, effort by feminist scholars over the past twenty years to draw greater attention to the gendered tilt of private violence, and to the systems of subordination it enforces.[481] But it also reflects a renewed emphasis on order and safety more broadly, and a diminished willingness to accept a certain level of crime as the price of freedom, spontaneity, and the related attractions of modern urban life.

The freedom and spontaneity of modern urban life, in fact, have lost much of their luster. The "broken windows," or "order maintenance," approach to policing pioneered by James Q. Wilson in collaboration with George Kelling — an approach sometimes taken as the essence of community policing — views street-level urban disorder as the seedbed of crime, and treats it accordingly. Kahan and Meares have been especially taken with the broken-windows theory,[482] but in this respect they have hardly been outliers among criminal procedure scholars: on the contrary, this is another respect in which their work has seemed to have captured the moment.[483] Dissenting voices are

479. Amar, *Fourth Amendment First Principles*, *supra* note 285, at 793. On Amar's overarching effort "to reorient criminal procedure toward questions of factual guilt and innocence," see Seidman, *supra* note 305, at 2283.

480. Luban, *supra* note 282, at 91.

481. *See, e.g.*, Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 507-09 (1992); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 46-48 (1990).

482. *See, e.g.*, Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2488 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367-73 (1997); Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1163-64; Kahan & Meares, *Order in the Inner City*, *supra* note 446, at 822-24.

483. *See, e.g.*, Livingston, *supra* note 413, at 578-91. Dorothy Roberts exaggerated little in 1999 when she described scholarly, political, and media support for the broken windows theory as "virtually unanimous." Dorothy E. Roberts, *Foreword: Race, Vagueness, and the*

starting to be heard, and even Kahan's enthusiasm has grown more qualified.[484] But broken-windows policing, and the "aesthetic of orderliness"[485] to which it appeals, continue to enjoy broad support. Some of that support may reflect the way in which the image of clean, orderly neighborhoods resonates with the nostalgia often associated with participatory democracy and deliberative democracy.

Many of the criticisms of order-maintenance policing have themselves appealed to notions of democracy — including, in particular, notions of popular participation and public deliberation. In different ways, Bernard Harcourt and Jonathan Simon have both suggested that the aggressive patrol tactics associated with broken-windows policing can corrode the sense of shared fate and collective agency required for meaningful self-government.[486] The fact that both champions and critics of order-maintenance policing draw on the rhetoric of participation and deliberation is a sign of the degree to which pluralism has been supplanted as the dominant theory of American democracy. But it also reflects the malleability of the new rhetoric, and it underscores the need for greater rigor in discussions of the relationship between democracy and policing.

6. *The Continued Treatment of the Police as a Breed Apart*

One way in which theories of participatory democracy and deliberative democracy have *not* influenced contemporary thinking about the police is by altering the longstanding conception of the police as a breed apart. The notion of an "authoritarian personality" has fallen into disfavor, but scholars today still show little affinity for any vision of democracy that includes political participation by, or deliberation among, police officers themselves. The experiments

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Social Meaning of Order-Maintenance Policing, 89 J. CRIM. L. & CRIMINOLOGY 775, 778 (1999).

484. For a particularly important critique, see HARCOURT, *supra* note 293, at 59-216, which draws in part on Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603 (1999). Kahan gives broken windows policing a "mixed" assessment in Kahan, *Collective Action*, *supra* note 12, at 1527-30. Even Wilson now calls the broken windows theory "speculation" and expresses uncertainty regarding whether "improving order will or will not reduce crime." Dan Hurley, *On Crime as Science (A Neighbor at a Time)*, N.Y. TIMES, Jan. 6, 2004, at F1 (quoting James Q. Wilson).

485. HARCOURT, *supra* note 293, at 27.

486. *See, e.g.*, *id.* at 180; Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179, 202 n.7 (2000); Jonathan Simon, *Governing Through Crime*, *in* THE CRIME CONUNDRUM, *supra* note 284, at 171, 180, 185. Simon expands his argument in his forthcoming book, JONATHAN SIMON, GOVERNING THROUGH CRIME: CRIMINAL LAW AND THE RESHAPING OF AMERICAN GOVERNMENT, 1965-2000 (forthcoming).

during the 1970s with bringing participatory management and rank-and-file intellectual engagement to policing have not been renewed. The rhetoric of community policing, meanwhile, calls for the police to be *partners* of the community, not part of the community itself. In reality, the relationship falls far short of true partnership: community policing as actually practiced rarely intrudes much on the operational autonomy of the police.[487] But community policing does even less to make the police a genuine part of the community. Almost always, a police department engaged in community policing remains, in every significant respect, "a force of outsiders."[488]

It is telling in this regard that the reinstatement of residency requirements for police officers has never become part of the community policing agenda. Even James Q. Wilson — no fan of community control of the police — had some sympathy in the late 1960s for the view that officers should live in the neighborhoods they patrol.[489] A few departments in fact brought back residency requirements in the early 1970s, but police unions strongly opposed the idea, and in most cases the opposition was successful.[490] Since the 1970s, the number of departments imposing a residency requirement appears to have declined.[491] The notion that police officers should be fully "integrated with the community" — the notion that appealed so strongly to George Berkley and William Westley at the end of the 1960s — has been all but discarded.[492] So too has the related notion, also shared by Berkley and Westley, that the internal operations of police forces should conform as closely as possible to the democratic "norms and values" of the larger society.[493]

Democratic pluralism did not lead to calls for greater participation by police officers in the internal operation of police departments or in the political life of the broader community because pluralism de-emphasized political participation as a *general* matter, particularly among people, like police officers, who might be expected to have authoritarian personalities. Pluralism inclined scholars to think of the police as a breed apart, moreover, because pluralism suggested that *all* groups were essentially breeds apart, and that only the political elite could be counted on to share democratic values. Theories of

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487. *See, e.g.*, Frug, *supra* note 13, at 81.

488. *Id.*

489. *See* WILSON, POLICE BEHAVIOR, *supra* note 3, at 291.

490. *See, e.g.*, FOGELSON, *supra* note 251, at 306-07.

491. *See* Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable With the Others?*, 34 GA. L. REV. 1253, 1295-96 (2000).

492. WESTLEY, *supra* note 14, at xvii, 193; *see also* BERKLEY, *supra* note 1, at 39.

493. BERKLEY, *supra* note 1, at 29; *see also* WESTLEY, *supra* note 14, at xvii-xviii.

participatory democracy and deliberative democracy might be thought more amenable to the idea that the police, along with everyone else, should participate as much as possible in collective self-governance. And for a few years in the early 1970s that idea was in fact sympathetically received. The dictates of democracy for people in general were thought fully applicable to the police. For a variety of reasons, though, largely having to do with the specific politics of the late 1960s and early 1970s, that notion has largely been abandoned. Thus this first point of continuity with pluralist-influenced thinking about police.

7. *The Persistent De-emphasis of Institutional Structure*

As we have seen, the theories of participatory democracy and deliberative democracy that have gained favor in the last few decades share with democratic pluralism an emphasis on culture rather than on institutions. Like pluralism, that is to say, the new theories are grounded in what I have called the social-science paradigm: the inclination of American intellectuals since the late nineteenth century to take psychology and sociology, rather than political economy, as the keys to understanding politics and society. The continuing hold of this approach has meant that today, as in the 1950s and 1960s, most thinking about reconciling police with democracy focuses heavily on issues of culture and tends to neglect questions of institutional structure: both the internal decisionmaking structures of police departments and the external processes of political control. This is the second point of continuity with the ideas about the police developed during the Warren and Burger Court eras.

Discussions of the inner workings of police departments persist in stressing the group psychology of the police and in treating formal structures of decisionmaking as largely irrelevant. In the words of one police scholar, "[r]esearchers have generally neglected studying police organizations in favor of studying police work — including situations, encounters, strategies, and occupational characteristics — and police officers — their attitudes, feelings, beliefs, behaviors, and interactions."[494] A recent overview finds that theories about the causes of police misconduct, for example, fall into three categories: "*sociological* theories which focus on situational factors such as the conduct of suspects, the context of suspect-police encounters and such factors as gender, race, and socioeconomic status; *psychological* theories, which emphasize officer attitudes and personality traits; and *organizational* theories, which explore the role of organizational

494. EDWARD R. MAGUIRE, ORGANIZATIONAL STRUCTURE IN AMERICAN POLICE AGENCIES 39 (2003).

culture."[495] Sociology, psychology, and culture — institutions are not in the picture. Similarly, the blue-ribbon commissions appointed after each police scandal inevitably underscore the importance of changing the culture and mindset of the department at issue.[496] The emphasis that scholars like Kahan and Meares have placed on extralegal norms has, if anything, only increased the interest of scholars and policymakers in the "milieu" of policing and drawn attention even further away from institutional structure.[497] The questions that rarely get asked about policing today are the ones that would have seemed most obvious to, say, the authors of *The Federalist Papers*, had they foreseen the emergence of modern police departments: How should law enforcement be organized to best assure that the powers given to police officers are used wisely and fairly? What departmental structures will best harness and counterbalance the ambitions of police officers, aligning their collective objectives with public purposes?

Criminal procedure scholars rarely ask structural questions about external political control of police departments either. In fact, the declining influence of democratic pluralism may have pushed scholars further away from these questions. Kahan and Meares again are illustrative. They argue that a range of strategies they associate with "the new community policing" — specifically, loitering laws, curfews, and blanket searches of housing projects — deserve judicial deference because they reflect the considered judgments of the affected, inner-city communities about how best to "balance liberty and order."[498] But they give little attention to the structures through which these communities actually make decisions, in large part because they see this matter as unproblematic: inner-city communities deliberate, reach collective agreements, and then have those agreements carried out by their political representatives. In the 1960s, it is true, "law enforcement

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495. Barbara E. Armacost, Organizational Culture and Police Misconduct 5 (May 2003) (unpublished paper), *available at* http://ssrn.com/abstract=412620 (last visited Mar. 18, 2005). A revised version of the paper appears under the same title at 72 GEO. WASH. L. REV. 453 (2004).

496. *See, e.g.*, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL, *supra* note 471, at 48-71.

497. Armacost, *supra* note 495, at 6; *see also, e.g.*, Waldeck, *supra* note 491, at 1263-71. Erik Luna's recent call for greater attention to the "institutional design" of policing is noteworthy in two respects: first, because his attention to institutional questions is unusual, and second, because so many of his institutional recommendations turn out to be aimed, in fact, at altering the culture of policing — modifying "social norms," facilitating "discourse and deliberation," creating a "sense of empathy," and so forth. Erik Luna, *Race, Crime, and Institutional Design*, 66 L. & CONTEMP. PROBS. 183 (2003). On the "social meaning turn" in criminal law scholarship, see Harcourt, *supra* note 486, and Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467 (2003).

498. *See, e.g.*, Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1160-61, 1167, 1177, 1183.

officials were accountable only to representatives of the white majority."[499] But voting-rights legislation fixed that problem. So today courts should get out of the way and allow inner-city residents "to decide for themselves whether to adopt building search, gang-loitering ordinances, curfews and like policies."[500] Chicago's gang-loitering law deserved particular deference, because it "was to be enforced only after consultation with 'local leaders' and 'community organizations' — the representatives of the average citizen."[501]

The heavy emphasis the pluralists placed on interest groups forced them to pay a certain, minimal amount of attention to institutional structure: elections had to keep government officials in check, and decisionmaking needed to be sufficiently decentralized to allow multiple points of access. But where the pluralists saw interest groups competing with each other, Kahan and Meares see a unified community.[502] They vacillate about whose views they are describing — sometimes it is "inner-city residents," sometimes "inner-city minorities," sometimes "African Americans." But the views ascribed to the community in question, however it is defined, are clear and coherent: a desire for more law enforcement; fervent support for "the new community policing"; a "strong sense of 'linked fate' with inner-city law-breakers, with whom they are intimately bound by social and familial ties"; "an intense commitment to individual liberty"; sensitivity to "the risks associated with excessive discretion" and to "the political dynamics that surround law enforcement"; and, ultimately, a "judgment that in *today's* political and social context, the continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police."[503]

This faith in a coherent, unified public will — the same faith that has Amar praising the ability of juries to "represent the people"[504] — is part of what leads Kahan and Meares to disregard questions about the structure of democratic decisionmaking. They applaud, for example, the "strategic alliance[s]" that police in Boston and Chicago have

499. *Id.* at 1159.

500. *Id.* at 1179.

501. *Id.* at 1183; *see also id.* at 1170.

502. For criticism of Kahan and Meares on this score, particularly in connection with the Chicago loitering law, see, for example, Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 482-88 (2001), and Roberts, *supra* note 483, at 822-26.

503. Kahan & Meares, *The Coming Crisis*, *supra* note 305, at 1163, 1165-67, 1170, 1178.

504. *E.g.*, Amar, *Reinventing Juries*, *supra* note 424, at 1182; Amar, *Three Cheers*, *supra* note 426, at 1265 n.26.

formed with Black church leaders; they see these alliances, which have included police-sponsored prayer vigils and arrangements giving selected church authorities "a say in the disposition of potential offenders," as promising examples of "the New Community Policing."[505] Kahan and Meares are hardly alone here, and the arrangements in question may in fact deserve praise. But they raise some fairly obvious questions about evenhandedness and democratic control — leaving aside the problem of religious establishment. Those questions all but disappear when Kahan and Meares discuss police-church collaboration, because church leaders and everyone else in the inner city are assumed to share the same interests.[506] For similar reasons, the threats to democratic control posed by privatized policing more generally vanish from Kahan's perspective. Even unofficial campaigns of sustained harassment — "private shaming" — strike Kahan as unqualified blessings.[507] From his perspective, in fact, this is community policing at its best. Because these campaigns are conducted not by the police but by that imagined collective — "the citizens themselves" — Kahan sees little reason to fear abuse.[508]

The institutional mechanisms traditionally relied upon for democratic control of the police — city councils, mayors' offices, and, more recently, civilian oversight agencies — continue to receive relatively little attention from criminal procedure scholars.[509] The matter of civilian oversight deserves special comment. Agencies of this kind continue to proliferate; there are now perhaps a hundred across the country. The vast majority of big-city police departments are now subject to some form of civilian oversight.[510] The institutional structure of that oversight varies widely. There are boards of part-time volunteers and offices of full-time professionals. Some oversight agencies have independent investigative authority; some do not. Some agencies review citizen complaints; others advise the police on matters of policy. Some consist only of civilians; others include some police officers.[511] Very little scholarly attention has been paid to how well

505. Kahan, *Collective Action*, *supra* note 12, at 1527, 1531-34; *see also* Kahan, *Privatizing Criminal Law*, *supra* note 466, at 1862-66; Meares, *Legitimacy and Law Enforcement*, *supra* note 467, at 413-14; Meares, *Praying*, *supra* note 12. Both Kahan and Meares stress, in particular, the mantle of trust and legitimacy that Black church leaders can give to the police.

506. Kahan has recently qualified his enthusiasm, but only with the warning that collaborations with the clergy can "embroil the state in . . . religious rivalries" and thereby "extinguish trust." Kahan, *Collective Action*, *supra* note 12, at 1535.

507. *See* Kahan, *Privatizing Criminal Law*, *supra* note 466, at 1870.

508. See Kahan, *Collective Action*, *supra* note 12, at 1535-38.

509. For notable exceptions, see WALKER, *supra* note 302; Kim, *supra* note 502; Luna, *supra* note 452, at 1167-69.

510. *See* WALKER, *supra* note 302, at 40.

511. *See* Kim, *supra* note 502, at 476-77.

these agencies operate or to whether certain variations have been more successful than others in making the police, in one sense or another, more democratic. In particular, an unusual coalition of police administrators and liberal-minded police reformers have warned for decades that certain common forms of civilian review can actually *undermine* democratic control of police forces by diffusing responsibility and undermining the chain of command.[512] We know far less than we should about whether they have been proved right.

8. *The Comparative Neglect of Inequality*

The emphasis that both pluralism and its rivals have placed on culture at the expense of structure is related to another point of continuity: the tendency to downplay what the political theorist Ian Shapiro recently has called "the oppositional traditions of democratic politics"[513] — those dimensions of democracy, that is to say, that have to do less with collective self-government than with ongoing resistance to "arbitrary hierarchy and domination."[514] Shapiro points out that, both historically and in our time, "[t]hose who fight for democracy often define their goals reactively"; they are driven less by a utopian vision than by the conviction that certain existing and unjustified forms of domination should be abolished.[515] There is a long history of viewing this leveling impulse as the core of democracy. Tocqueville, for example, thought the democracy he found exemplified in America was first and foremost a matter of "equality of condition[s]" — and, more precisely, a matter of sweeping aside the powers and privileges of monarchs and aristocrats.[516] Lincoln famously drew on the same idea when he tied democracy to ending slavery: "As I would not be a

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512. *See, e.g.*, BERKLEY, *supra* note 1, at 146-47; GOLDSTEIN, *supra* note 4, at 142, 150-51. Chief William Bratton of the Los Angeles Police Department has made the same complaint about the system under which serious disciplinary actions against LAPD officers are adjudicated by a Board of Rights, consisting of two command officers and a civilian: "[A]s chief of police, I lack the necessary ability to control and impose discipline on my staff. Giving the chief — a chief who is directly accountable to civilian management — that power would help ensure the proper delivery of the appropriate message." William J. Bratton, *Power to Discipline LAPD Officers is Out of the Chief's Hands*, L.A. TIMES, July 1, 2003, at B13.

513. Ian Shapiro, *Three Ways to Be a Democrat*, 22 POL. THEORY 124, 138 (1994) [hereinafter Shapiro, *Three Ways*], *reprinted in* IAN SHAPIRO, DEMOCRACY'S PLACE 109-36 (1996) [hereinafter SHAPIRO, DEMOCRACY'S PLACE].

514. IAN SHAPIRO, DEMOCRATIC JUSTICE 30 (1999) [hereinafter SHAPIRO, DEMOCRATIC JUSTICE]; *see also* IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 3-4, 50-52 (2003) [hereinafter SHAPIRO, THE STATE OF DEMOCRATIC THEORY].

515. SHAPIRO, DEMOCRATIC JUSTICE, *supra* note 514, at 1.

516. TOCQUEVILLE, *supra* note 38, at 3-6. On Tocqueville's use of old-world aristocracy as the "contrast-model" for democracy, see, for example, Connolly, *supra* note 36, at 22.

slave, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy."[517] And when W.B. Gallie identified democracy a half-century ago as an "essentially contested concept," he argued that what held the concept together was "a long tradition (perhaps a number of historically independent but sufficiently similar traditions) of demands, aspirations, revolts and reforms of a common *anti-in*egalitarian character."[518] The core use of the term democracy, Gallie suggested, was to invoke "certain political aspirations which have been embodied in countless slave, peasant, national, and middle-class revolts and revolutions, as well as in scores of national constitutions and party records and programs" — aspirations that were "centered in a demand for increased equality" and were advanced against regimes committed to prolonging "gross forms of *in*equality."[519]

As Shapiro points out, this understanding of democracy, which subjects all patterns of social hierarchy to "presumptive, but rebuttable, suspicion," has been pushed to the sidelines since the rise of pluralism in the 1950s.[520] The faith the pluralists put in leadership elites, the emphasis they placed on stability, the confidence they had in the complex balance of cross-cutting interest groups — all these factors led the pluralists to downplay concerns of continuing inequality, and gave them little enthusiasm for the notion of democracy as a tradition of opposition. Political equality has played a larger role in theories of participatory democracy and deliberative democracy. These theories, as we have seen, were crafted largely in response to pluralism's perceived defects, not the least of which was its elitism. But in the mainstream version of participatory democracy, the version that has had the most influence on criminal procedure, the element of egalitarianism has lost most of its bite. Like the pluralists, people who invoke the mainstream version of participatory democracy tend to start with the assumption that, in pertinent respects, the United States is *already* egalitarian.[521] (Kahan and Meares are good examples.) That assumption — particularly when combined with the apologetic cast of mainstream participatory democracy, and the emphasis it shares with deliberative democracy on "getting along" —

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517. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 532 (Roy P. Basler ed., 1953). On the rhetorical tradition invoked by Lincoln's definition of democracy — a tradition that saw slavery less as the antithesis of freedom than as "the antipode of democratic equality" — see David Brion Davis, *American Equality and Foreign Revolutions*, 76 J. AM. HIST. 729, 744-46 (1989).

518. Gallie, *supra* note 32, at 136.

519. *Id.* at 134.

520. Shapiro, *Three Ways*, *supra* note 513, at 138.

521. On this theme, see *supra* note 367 and accompanying text.

minimizes the ongoing significance of "demands, aspirations, revolts and reforms."[522]

Despite the half-century tendency of democratic theory to neglect the "anti-inegalitarian" dimension of democracy, criminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race. Pluralism had little to do with this preoccupation, but it may, as I have already suggested, have contributed to Supreme Court's reluctance to tackle the problem of racism in the criminal justice system explicitly, and its tendency to treat instances of inequity as aberrational rather than systemic. The gingerly, subtextual manner in which the Warren Court pursued racial equality in criminal justice eventually made it much easier for its successors to drop the pursuit altogether.[523] It would not have been so easy, perhaps, if the accounts of democracy that have largely supplanted pluralism underscored the importance of continuing opposition to entrenched systems of unjustified hierarchy — if, that is to say, the most influential theories of participatory democracy and deliberative democracy incorporated the "spirit of democratic oppositionalism."[524] But they did not.

The spirit of democratic oppositionalism is missing not just from current criminal procedure jurisprudence, but also, as I have suggested parenthetically, from the work of scholars like Kahan and Meares. The most troubling assumption of that work — the assumption of a unified, coherent, and easily identified community will — diverts attention not only from questions of institutional structure but also, and more fundamentally, from the ongoing power dynamics of inner-city politics. It tends to obscure, too, the ways in which local police practices can reinforce (or alleviate) regional and nationwide patterns of domination, matters to which I will return below.

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It bears reiterating that the work of Kahan and Meares, like the work of Amar, is neither a microcosm of criminal procedure scholarship today nor a reliable reflection of the state of criminal procedure jurisprudence. On the whole, for example, criminal

522. On the tendency of recent democratic theory to overlook the value of dissensus, see, for example, SHAPIRO, DEMOCRATIC JUSTICE, *supra* note 514, at 14-15; Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 386-87 (1993); and Shapiro, *Three Ways*, *supra* note 513, at 133-34.

523. On the lost subtext of racial equality in criminal procedure jurisprudence, see, for example, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 974-1034 (2002), and David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316-23.

524. Shapiro, *Three Ways*, *supra* note 513, at 139.

procedure scholars cannot be faulted for ignoring the relationship between police practices and racial inequality, although they rarely view that relationship through the lens of "anti-inegalitarianism." Still, the manner in which Amar, Kahan, and Meares draw on theories of participatory democracy and deliberative democracy is instructive. It demonstrates again that ideas about democracy influence ideas about policing. It helps explain why criminal procedure scholarship and jurisprudence from the 1960s and 1970s, written under the sway of democratic pluralism, can seem incomprehensible or silly to scholars and judges writing today, with different notions about democracy. It warns us about issues that criminal procedure scholarship more broadly continues to slight. And it underscores the need for more careful thinking about the relationship between democracy and policing.

It is not just that pluralism remains, in many ways, an attractive account of democracy. It is also that theories of participatory democracy and deliberative democracy have never been as coherent and consistent as pluralism, so that precision is particularly important when invoking them. Democratic pluralism is democratic pluralism, but the participatory democracy of Arnold Kaufman is not the participatory democracy of Richard Nixon.

The first step in thinking more carefully about the relationship between policing and democracy is to understand the dilemmas, contradictions, and choices presented by democratic theory, and to see how those difficulties have manifested themselves in discussions about the police. That has been the chief task of this Article. The final part of the Article draws some brief, provisional lessons from the discussion so far.

V. TOWARD A ROUNDED UNDERSTANDING OF DEMOCRATIC POLICING

What lessons does all this offer for criminal procedure scholars and other students of policing? I think there are several.

The first and most obvious lesson is to take democracy seriously. Ideas about democracy have long influenced ideas about the police. Conceivably they should not. But anyone taking that view has a heavy burden of tradition to discredit, and much of that tradition cannot be understood — let alone challenged — without an appreciation of the manifold ways in which criminal procedure and policing studies have reflected and incorporated distinct theories of democracy.

The second lesson, which by now should be almost as obvious, is not to oversimplify. Ideas about democracy have come in complicated clusters. Those clusters have generally included suppositions about four different things: the basic *purposes* of democracy, the distinctive *processes* of democracy, the *proximity* of current arrangements to the

democratic ideal, and the cultural and geographic *particularity* of what democracy means. The answers given to each of these four questions over the past half century have varied. The main purposes of democracy have sometimes been thought to be social stability and the avoidance of authoritarian repression; sometimes the facilitation of human development; and sometimes the "legitimacy" of government, both actual and perceived. The bedrock processes of democracy have sometimes been found in elections, group politics, and leadership elites; sometimes in mass participation; and sometimes in respectful deliberation. Sometimes the participation or deliberation thought central to democracy has been roughly the same kind of participation or deliberation we already have; sometimes it has been a good deal more. Sometimes American democracy has been seen as idiosyncratic; at other times it has not. All of these permutations have had implications for how we think about the police and, more specifically, about what it means for law enforcement to be "democratic."

The third and final lesson, which builds on the other two, is to watch for blind spots. Every theory of democracy highlights certain parts of our experience and directs attention away from other parts. It therefore helps to keep in mind the realities and possibilities that current ways of thinking about democracy tend to mask.

Today that means, first and foremost, taking into account democratic pluralism, because the principal unifying thread of democratic theory over the past thirty years has been the reaction *against* pluralism. There was a lot to react against. The pluralists' own blind spots were legion. But if pluralism never deserved the uncritical acceptance it won in the 1950s, even its toughest critics acknowledged that the theory triumphed in part because it incorporated some genuine insights. Those insights included, I believe, the usefulness of group theory as a way of understanding American politics and the corresponding dangers of assuming a unified public; the grounds for skepticism about the feasibility, necessity, and desirability of universal political engagement; the limited but real ability of elections to keep government in check; and the democratic attractions of modernity. In the context of policing, keeping these insights in mind can help to guard against several kinds of mistakes: a romanticized picture of local politics; an overoptimistic expectation of community involvement in questions about policing; a neglect of the dangers of placing police powers in private hands; and a sentimental nostalgia for a clean and orderly past.

If appreciating pluralism can help guard against some of the blind spots of current thinking about democratic policing, so can appreciating the ambitious varieties of participatory democracy that gained currency in the 1960s and 1970s. The gulf between those theories and the watered-down, status-quo version of participatory

democracy that has grown so familiar can be hidden by their common vocabulary. So it helps to keep in mind what seemed like live options not so long ago. In the context of law enforcement, this means considering the possibilities of greatly strengthening neighborhood control of police departments and of involving rank-and-file officers, intellectually if not politically, in shaping the nature of their work. It also means, necessarily, grappling with the tension between these two agendas. Any theory of democratic policing that valorizes the participation of ordinary citizens in the decisions that affect their lives needs to address police officers themselves as well as the communities they patrol.

Along with pluralism and thoroughgoing participatory democracy, there is a third perspective, even more foreign, it is helpful to hold in mind: eighteenth-century political economy. The great insights of that perspective are that institutions matter, that the rational pursuit of individual objectives matters, and that the former should take account of the latter. In the context of policing, this means that an appreciation for the role of culture in policing — the role of norms and personality and discourse — should not blind us to the role of institutional structure — chains of command and routes of advancement within police departments, occupational opportunities and rewards, systems established for internal review, mechanisms of civilian oversight, and external political checks. Of course culture matters. But structure matters, too.

Last but emphatically not least, efforts to think systematically about the relationship between policing and democracy should strive to incorporate the perspective from which democracy is less about a stable system of collective self-government than about opposition to entrenched patterns of unjustified inequality. This view of democracy, what Ian Shapiro calls the spirit of democratic oppositionalism, seems a particularly promising vantage point for discussions of law enforcement because it makes apparent, in ways that pluralism and its most visible rivals have not, precisely why police practices matter so much for democracy. Why are law-enforcement policies more important for democracy than, say, trash-collection policies? Why should democracy have more implications for police departments than for sanitation departments? Pluralism offers no answer, beyond suggesting that the occupational psychology of police officers may be particularly worrisome. Participatory democracy and deliberative democracy provide no real answer, either. But once democracy is understood to involve ongoing opposition to patterns of unjustifiable hierarchy, the special salience of the police immediately becomes clear: the police are both a uniquely powerful weapon against private systems of domination and a uniquely frightening tool of official domination.

From this perspective, making policing more democratic entails making it as effective as possible in combating unjustified patterns of private domination and unthreatening as possible as a tool of official domination. Reconciling these goals is of course quite difficult, and so is balancing them against other things we want the police to do (for example, protecting us against crime even when it has at most a tenuous connection with patterns of dominance) and other things we want the police to avoid (for example, spending money that could better be spent elsewhere). But we knew all along that policing requires trade-offs. The virtue of the "anti-inegalitarian" view of democracy is that it makes clear certain important aspects of those trade-offs, including the fact that democracy is, as it were, on both sides of the balance.

Ian Shapiro has usefully identified three basic tactics for pursuing an agenda of anti-inegalitarian democracy, one substantive and two procedural. The substantive tactic has already been mentioned: "presumptive, but rebuttable suspicion" of all systems of hierarchy. The notion is not that hierarchies should be eliminated, even were that possible. The idea rather is that patterns of inequality can easily "atrophy into systems of domination which impose on people unnecessarily"[525] and, worse, with a false appearance of benignity: "escapable hierarchies masquerade as inescapable ones, involuntary subordination is shrouded in the language of agreement, unnecessary hierarchies are held to be essential to the pursuit of common goals, and fixed hierarchies are cloaked in myths about their fluidity."[526] The procedural tactics are, first, to make mechanisms of collective decision as inclusive as possible and second, to clear space, institutionally, for opposition and dissent.[527] Both of these procedural principles are, in part, efforts to accommodate and to capitalize on disagreement and conflict. They reflect a view of dissensus as not just a sign of a well-functioning democracy but a precondition for it, a view that "one person's consensus is often another's hegemony."[528]

This Article is not the place for a thorough exploration of how Shapiro's principles might be pursued in the context of law enforcement, nor for systematic application of the other lessons I have outlined above. I will not attempt here a complete answer to the question with which we started: What is democratic policing? But I do

525. SHAPIRO, DEMOCRACY'S PLACE, *supra* note 513, at 11.

526. Shapiro, *Three Ways*, *supra* note 513, at 137-38.

527. *See, e.g.*, SHAPIRO, DEMOCRACY'S PLACE, *supra* note 513, at 7.

528. Shapiro, *Three Ways*, *supra* note 513, at 134; *see also, e.g.*, SHAPIRO, THE STATE OF DEMOCRATIC THEORY, *supra* note 514, at 14-15. For a similar argument, see Gardbaum, *supra* note 522, at 386-87.

want to sketch in a preliminary way some of the implications for law enforcement of a more rounded understanding of democracy. In particular, I want suggest how such an understanding of democracy — an understanding sensitive to the tradition of democratic oppositionalism, and mindful of the core insights of democratic pluralism, 1960s-style participatory democracy, and eighteenth-century political economy — might begin to affect our thinking about five important topics in contemporary policing: community policing, racial profiling, police privatization, police personnel practices, and public disclosure of law enforcement practices. Necessarily, the discussion of each of these topics will be tentative and incomplete — provisional roadmaps for arguments to be made more fully elsewhere. What I hope to demonstrate here is not what democracy, properly understood, has to say about these areas of controversy, but the kind of inquiries required in order to answer that question.

A. *Community Policing*

A notoriously varied collection of programs march under the banner of community policing, and some of them claim justification for reasons related only tangentially to any theory of democracy. Even the most sophisticated understanding of democracy therefore cannot tell us, by itself, which of these programs deserve support. But it can warn us away from certain mistakes in trying to answer that question, and it can flag certain issues that deserve close attention.

First and foremost, a rounded view of democracy makes clear why community policing, no matter how it is defined, should not be understood or defended as a way to make the police more answerable to "the public." This way of thinking ignores what the pluralists rightly stressed: the heterogeneity of interests in any community — particularly in a modern, urban community. Ignoring that heterogeneity means ignoring the ways in which law enforcement tactics can reflect and reinforce patterns of social hierarchy. The interests of shopkeepers are not necessarily the interests of the homeless, the interests of African Americans in the inner city may differ from those of Latinos, and so on. No single set of interests should be valorized as belonging to "the community."[529]

This does not mean that community policing cannot be justified as an exercise in promoting democracy. It simply means that the justification, to be plausible, cannot rely on the notion that there is a unified community with desires that are clear, coherent, and

529. For thoughtful elaboration of this point, see Kim, *supra* note 502. For evidence that Chicago's community policing programs have been less successful and less popular among the city's burgeoning Latino population than among Blacks, see WESLEY G. SKOGAN ET AL., COMMUNITY POLICING AND "THE NEW IMMIGRANTS": LATINOS IN CHICAGO (2002).

consistent. A promising account that carefully avoids that fallacy has been provided by the police scholar David Thacher. He describes community policing as an effort to reduce the "institutional segregation" of police departments by opening new channels of communication and cooperation with a variety of outside groups, both governmental and nongovernmental.[530] These groups are inevitably "more localized than 'the general public,'" and Thacher warns against reducing community policing to "an apple-pie issue of 'getting closer to the community.'"[531] But he points out that the very existence of fundamental disagreement within the community can make community policing valuable for two related reasons. The first is that different kinds of channels give voice to different groups and can even elicit different sentiments from the same group.[532] The second reason, which flows from the first, is that creating multiple channels for public communication with the police makes it more likely the police will be forced to confront conflicts between values. That process of confrontation makes space within police decisionmaking for the articulation of "dissident values," and it also helps officers to develop precisely the kind of professional maturity that William Muir praised a quarter-century ago.[533]

Institutional segregation has its advantages, of course. Asking a single organization like a police department to reconcile conflicting objectives, like keeping the peace while seeking justice and maximizing liberty, can be a recipe for paralysis — or for giving some goals little more than lip service. Sometimes the best strategy is to allow each organization to pursue its own, narrow mission, with values balanced through interagency competition.[534] This was more or less the strategy of democratic pluralism: police pursue crime control, courts pursue the rule of law, prosecutors pursue justice, and they all keep each other in check. It was a more successful strategy than we

530. Thacher, *supra* note 418, at 765, 768. Elsewhere, Thacher has given a slightly different account of community policing, suggesting that the partnerships it forges function as "sites of public deliberation about the common good." David Thacher, *Equity and Community Policing: A New View of Community Partnerships*, 20 CRIM. JUST. ETHICS 3, 5 (2001). I prefer the account focusing on a reduction in institutional segregation: among its attractions is precisely that it avoids reliance on the vague, Rousseauian notion of "the common good." (I am influenced here, as well, by Ian Shapiro, who points out that an anti-inegalitarian conception of democracy has the advantage, among others, that it "does not revolve around trying to render Rousseau's project coherent." SHAPIRO, DEMOCRACY'S PLACE, *supra* note 513, at 6-7; *see also, e.g.*, SHAPIRO, THE STATE OF DEMOCRATIC THEORY, *supra* note 514, at 10-34.)

531. Thacher, *supra* note 418, at 791-92.

532. *See id.*

533. *See id.* at 722, 792-95.

534. Thacher points this out himself. *See id.* at 767 & n.3.

sometimes acknowledge. But there is no doubt that the extreme degree of institutional segregation achieved by big-city police departments in the 1950s and 1960s made some problems associated with the police much worse and too often made the police instruments for the reinforcement of social hierarchy rather than tools for empowering the disempowered. So Thacher seems right that community policing, understood as a program for opening up new channels of communication with the police, can be an attractive way to democratize law enforcement.

Whether community policing serves that purpose, though, will depend on the kinds of channels that it opens up — whether it gives voice to disempowered groups and marginalized perspectives or simply grants another avenue of access to people and viewpoints already well served by the political process. More avenues of the latter sort may be beneficial — but not because they promote democracy. And in some circumstances they may be harmful, precisely because they may exacerbate the risk that the police will become instruments for reinforcing unjustifiable forms of hierarchy. For community policing to be democratizing in the way Thacher identifies, it should help lend influence to groups and interests to whom the police otherwise unlikely to be adequately attentive.

On this score, some structural strategies for community participation are more promising than others. In Chicago, for example, a citywide program of "beat meetings," strongly supported by the police department and accompanied by energetic efforts at outreach, appears to have drawn disproportionately heavy participation from Black residents of economically depressed, high-crime neighborhoods — not a group traditionally well represented in the formulation of law enforcement policy. The degree to which the beat meetings have actually affected policing practices remains unclear, and rates of participation among Latinos have been disappointing. But the levels of attendance in poor Black neighborhoods have been impressive, and the meetings appear to be genuine exercises in two-way communication.[535] In contrast, Chicago's system of district advisory

535. *See* WESLEY G. SKOGAN ET AL., TAKING STOCK: COMMUNITY POLICING IN CHICAGO 8-11 (2002) [hereinafter SKOGAN ET AL., TAKING STOCK]; Archon Fung, Street Level Democracy: Pragmatic Popular Sovereignty in Chicago Schools and Policing 14, 30-33 (1999) (unpublished manuscript), *available at* http://www.archonfung.net/papers/SLD99.pdf (last visited Mar. 18, 2005). Aside from their democratizing effects, Chicago's beat meetings probably have other important benefits. By getting residents to work together on neighborhood problems, *see* SKOGAN ET AL., TAKING STOCK, *supra*, at 10, the meetings appear to build the "collective efficacy" that recent, influential research suggests may reduce violent crime. *See* Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918 (1997); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603 (1999). Sampson and his coauthors define "collective efficacy" as "social cohesion among neighbors combined with their willingness to intervene on behalf of the common good." Sampson et al., *supra*, at 918.

committees — groups of community leaders who meet with their local police commander — have been far less successful, partly because the committee members have been selected by the police and tend, by definition, to come from what the pluralists called "the political stratum." The team of researchers led by the crime scholar Wesley Skogan, who have generally been quite impressed by community policing in Chicago, report that the district advisory committees tend not to represent residents' views, but instead pursue an agenda set largely by the police department, and "receive more advice than they give."[536] Moreover, the committees often "are dominated by long-established leaders with an insular view of their functions," who "fail to reach out to new members of their community."[537] As a result, the committees "noticeably under-represent Latinos, even in heavily Latino areas,"[538] and entirely exclude "smaller but rapidly growing immigrant groups (particularly Asians)."[539]

Some of the success of the beat meetings, and some of the failure of the district advisory committees, may have to do with factors unique to Chicago. The point I wish to stress here is not that "town hall" exercises like Chicago's beat meetings are likely to do better than police-appointed committees of worthies in introducing new voices into police policymaking (although that probably is true, at least when the "town hall" exercises are executed as well as they have been in Chicago, and — a matter to which we will return later — receive the kind of institutional support they have enjoyed there).[540] The point simply is that different programs of community participation in policing can be expected to have different levels of success in exposing the police to "dissident values," and that those differences deserve attention if we truly want community policing to make policing more democratic.

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536. SKOGAN ET AL., TAKING STOCK, *supra* note 535, at 12.

537. WESLEY G. SKOGAN ET AL., CHICAGO COMMUNITY POLICING EVALUATION CONSORTIUM, COMMUNITY POLICING IN CHICAGO, YEAR SEVEN: AN INTERIM REPORT 6 (2002); *see also id. at* 96-103.

538. *Id.* at 6.

539. SKOGAN ET AL., TAKING STOCK, *supra* note 535, at 12.

540. "During the 1990s, an average of seven police officers attended each beat meeting, including the beat sergeant, the beat officers on duty, and a few beat team members from other shifts. To encourage attendance by the latter, they are paid overtime at a yearly cost of nearly $1 million." SKOGAN ET AL., TAKING STOCK, *supra* note 535, at 8. The department also trained both officers and civilian participants in decisionmaking and interpersonal skills, and the city paid for "roving teams of community organizers and trainers" to "mobilize residents around public safety issues." Fung, *supra* note 535, at 19. Whether support at these levels can be expected in the future is uncertain. *See id.*; SKOGAN ET AL., TAKING STOCK, *supra* note 535, at 30.

A rounded view of democracy — in particular, a view that incorporates a degree of presumptive discomfort with entrenched social hierarchies and, relatedly, an appreciation for the benefits of dissensus — has another implication for the broad array of programs lumped together under the title of community policing. It gives reason to be wary of a certain subset of those programs, the segment associated with the "broken windows" or "order maintenance" strategy of controlling crime by suppressing street-level disorder. The pluralists were right to see democratic value in the freedom and fluidity of modern urban life, just as Tocqueville was right to praise the "tumult" and "confusion" he found in nineteenth-century America. Disorder loosens things up; it clears space for dissent and makes patterns of dominance easier to attack. It can also be its own worst enemy: taken too far, it can make self-government impossible and clear the way for new, more malignant forms of dominance. But once democracy is understood as, at least in large part, a matter of anti-inegalitarianism, the are strong grounds to think that it benefits from a strong dose of disorder. That is why people like Bernard Harcourt and Jonathan Simon have cause to worry that broken-windows policing, with its heavy emphasis on orderliness, may undermine democracy.

That does not mean broken-windows policing should be abandoned. In some circumstances, it may do more to help democracy than to hurt it. If, for example, street-level disorder really does breed serious crime — a matter that is far from certain — then allowing that disorder to continue may create worse patterns of dominance than the ones it helps to alleviate. Even if street-level disorder has little to do with serious crime, it may threaten democracy in other, more direct ways. It might chill grass roots political participation, for example, by making people afraid of their neighbors and dispirited about the prospects for community improvement. And even if a particular level of disorder is, on balance, good for democracy, that benefit may not be worth the costs. Democracy is not the only thing we care about.[541] Still, a rounded view of democracy gives reason to be concerned about the "aesthetic of orderliness, cleanliness, and sobriety"[542] that accompanies and motivates broken-windows policing. This is not the only consideration weighing against the broken-windows approach, and it may not be a dispositive one. But it deserves more attention than it has received.

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541. On the reasons to think that order maintenance might be "an intrinsically appropriate goal for policing," regardless whether the strategy actually reduces serious crime, see, for example, David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381, 387 (2004).

542. HARCOURT, *supra* note 293, at 27.

B. *Racial Profiling*

While not nearly so ill-defined as "community policing," the term "racial profiling" has been applied to a spectrum of different police practices, relying on race to various degrees, in assorted ways, and in a range of factual settings.[543] As with community policing, a rounded view of democracy cannot tell us precisely what to think about all of these practices, or even what to think of the paradigmatic case: the systematic use of race (almost always along with other factors) in selecting subjects for investigative attention. Once again, though, it can highlight some important questions and help guard against certain kinds of mistakes.

It can warn us, in particular, not to be too quick to minimize the social costs, and more specifically the democratic costs, of systematically focusing law enforcement scrutiny on members of traditionally disfavored minority groups. For reasons I will explain, a rounded view of democratic policing casts doubt on two related notions about racial profiling. The first is that racial profiling is tangential to the central concerns of criminal procedure; this is a view to which the Supreme Court has appeared sympathetic.[544] The second notion is that racial profiling is troubling chiefly to the extent that it is irrational — to the extent, that is to say, that it reflects raw racial animus, a "taste for discrimination,"[545] or fails to take into account the ways that racial profiling can wind up posing practical problems for law enforcement.

What these ways of thinking overlook are the heavy burdens that racial profiling can place on democracy. Those costs are hard to appreciate without a view of democracy that includes a healthy element of anti-inegalitarianism. For an unreconstructed pluralist, racial profiling presents no special problem: racial minorities, like all other groups, are assumed capable of defending themselves through the political process. For a believer in participatory democracy — even in its watered-down, mainstream version — things are more complicated. By insulting its targets, undermining their trust in law enforcement, and giving them a sense of second-class citizenship, racial profiling could alienate them from the whole project of

543. For a helpful overview, see Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

544. *See* Whren v. United States, 517 U.S. 806 (1996); Sklansky, *supra* note 523, at 277-79, 284-91, 307-23.

545. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 16-17 (2d ed. 1971). For a helpful overview and critique of studies of racial profiling proceeding from this assumption, see Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1291-1314 (2004).

collective self-government. On the other hand, perhaps the sting of unfairness will galvanize the victims of racial profiling, making them *more* likely to become politically active. It could go either way.

Once democracy is understood as in large part a matter of anti-inegalitarianism, the democratic costs of racial profiling become more apparent. Racial profiling threatens to reentrench patterns of social hierarchy — and not just any patterns of hierarchy, but the ones based on race. It may reinforce, that is to say, those systems of illegitimate dominance most notorious, at least in America, for their severity, pervasiveness, and intractability. It could do this in three different ways.

The first way racial profiling may reinforce racial hierarchy is through sheer numbers, imprisoning and otherwise bringing within penal supervision a greatly disproportionate number of minority group members, with a range of familiar, impoverishing consequences for their families and neighborhoods. Bernard Harcourt has shown that the disproportion in rates of arrest and incarceration can greatly exceed any preexisting difference in rates of offending, even if profiling is assumed to be a "rational" policy, pursued only to the point at which minority rates of offending match those among the wider population — a result he calls the "ratchet effect."[546] The second way racial profiling can reinforce racial hierarchy is by training members of minority groups in patterns of public subservience. Stopped by the police again and again, they learn to adopt roles of exaggerated deference and severely diminished self-agency — roles that can easily carry over to other arenas of social life.[547] The third way is by confirming racial stereotypes: suggesting, through higher rates of arrest, prosecution, and incarceration, that the profiled groups really are more prone to crime.[548]

Several things are worth noting about the mechanisms through which racial profiling threatens to reinforce racial hierarchy. First, they are mutually reinforcing. The ratchet effect can exacerbate the disproportionate numbers of African Americans and Latinos in prisons and on probation or parole, and thereby worsen the apparent

546. *See* Harcourt, *supra* note 545, at 51-54. On the consequences of high rates of arrest and incarceration on minority neighborhoods, see also, for example, Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 594-97 (2003); Roberts, *supra* note 483, at 815-16 & n.143.

547. The best discussion of this problem I know is Carbado, *supra* note 523. On the ways in which criminal justice practices can help to shape self-identity, particularly with respect to race, see also IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003). "More than ever," Haney López argues, "we know ourselves by how the police and the courts treat us. If we receive respect, courtesy, fair treatment, and due process, we are white; if we are harassed, beaten, arrested, or detained by executive fiat, we are black, brown, yellow, or red." *Id.* at 11.

548. *See, e.g.*, Banks, *supra* note 546, at 577-78, 598.

confirmation of racial stereotypes.[549] The diminished self-agency taught through repeated contacts with the police may wind up reinforcing racial stereotypes, too. In turn, racial stereotypes — particularly the assumption that certain groups are more prone to criminality — can raise the level of subservience that members of those groups feel obliged to perform for the police.[550]

Second, profiling threatens to reentrench dominance in the ways I have described only to the extent that it targets a traditionally disadvantaged group. Selectively stopping white motorists, for example, will not trigger these mechanisms of hierarchy reinforcement. (It might trigger *other* mechanisms of hierarchy reinforcement, depending on why the white motorists are stopped and what happens after they are stopped. Imagine, for example, that they are stopped in a minority neighborhood to warn them that the area is unsafe.) So it is probably a mistake to lump tactics of that kind together with the targeting of racial minorities under the term "racial profiling." On the other hand, profiling on the basis of a characteristic such as religion or national origin could easily reentrench dominance in the same way as profiling on the basis of race: applying selective scrutiny to Moslems or to Arab Americans is, in this respect, very much like applying selective scrutiny to African Americans.[551]

Third, the concerns that racial profiling raise for democracy by threatening to reinforce racial hierarchy do not depend on the fact that profiling involves conscious discrimination by law enforcement officers. Any law enforcement tactic resulting in heavily disproportionate rates of arrest, conviction, and incarceration of members of racial minorities may reinforce racial hierarchy by disrupting minority neighborhoods and reinforcing racial stereotypes. Minority group members are most likely to feel the need to adopt roles of exaggerated deference and subservience if they believe that they attract suspicion because of their race, but that impression can be created by the presence of pervasive stereotypes of minority criminality, with or without a conscious policy of racial profiling. Accordingly, the problems that racial profiling poses for democracy

549. *See* Harcourt, *supra* note 545, at 53-54.

550. *See* Carbado, *supra* note 523, at 982.

551. At least from the standpoint of democracy — and probably from any other standpoint — the Justice Department therefore has placed itself on thin ice by distinguishing sharply between "racial profiling," which it continues to condemn, and profiling based on nationality, which it defends. *See* Gross & Livingston, *supra* note 543, at 1419-21. There is a difference, of course, between discriminating on the ground of *nationality* and discriminating among United States citizens on the ground of *national origin*. But Gross and Livingston seem right that "[t]he Department's focus on visitors from countries with an active al Qaeda presence . . . raises the specter of ethnic profiling," by "produc[ing] an interview list that is dominated by Middle Eastern men." *Id.* at 1419-20.

may also be posed by other law enforcement practices that lack the element of conscious targeting but nonetheless have a lopsided impact on minority suspects. Richard Banks may be right, for example, that much of the opprobrium directed at racial profiling should be applied more broadly to the war on drugs.[552]

Fourth and finally, though, there is another side to the equation, just as with order-maintenance policing. Crime hurts minority neighborhoods, too. Higher rates of criminal victimization, in fact, are probably among the worst of the multiple inequalities suffered by members of racial minorities. So if racial profiling, or other tactics that focus law enforcement disproportionately on racial minorities, succeeds in reducing crime in minority neighborhoods, the gains for democracy — both in terms of wider participation and in terms of diminished inequality and the amelioration of hierarchy — may be greater than the costs. This is an empirical question; it is a question that no theory of democracy, no matter how sophisticated, can hope to resolve. Again, what a richer account of democracy does is make clearer the questions that need to be asked, and what turns on the answer.

C. *Police Privatization*

The past several decades have seen a dramatic shift of policing responsibilities from public agencies to the private sector. In the heydays of democratic pluralism and police professionalism — the 1950s and 1960s — Pinkerton guards, private eyes, and the whole, old-fashioned apparatus of private peacekeeping and criminal apprehension seemed on their way out. RAND researchers concluded in 1971 that public law enforcement already employed more people than private security, and that by mid-decade the disparity would be nearly two-to-one.[553] Instead, the private security industry has exploded, and growth in public law enforcement has slackened. Private guards now greatly outnumber sworn law enforcement officers throughout the United States, and the discrepancy 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

552. *See, e.g.*, Banks, *supra* note 546, at 593-98.

553. JAMES S. KAKALIK & SORREL WILDHORN, THE PRIVATE POLICE INDUSTRY 34 (1971).

of the protection of our people, their property and their businesses, has been turned over to private security."[554]

Whether this is a good or bad thing has been widely debated, but the debate has largely overlooked the implications of police privatization for democracy. A fair amount of attention has been paid to the question of how adequately private security guards are screened, trained, and regulated. Some attention has also been to the relative costs and "effectiveness" of public and private policing, and to differences in the degree of "accountability" shown by public police agencies and private security firms.[555] But there has been remarkably little discussion of the key democratic question: effectiveness and accountability for whom?

The oversight is understandable, for at least three reasons. First, the push for police professionalism in the 1950s and 1960s succeeded so well at insulating police departments from political interference that even today, after nearly two decades of "community policing" reforms, police departments often seem to operate outside the normal processes of local government, accountable to no one. (In fact, as we have seen, community policing rarely reduces the operational autonomy of the police. Community policing is about partnership, and sometimes about consultation; it is rarely if ever about control.)[556] Against this backdrop, *any* accountability can seem like an improvement.

But that is an illusion. Even the most autonomous police departments are subject to *some* political oversight — more public supervision, almost certainly, than virtually any private security firm.[557] Public police agencies, moreover, understand their *charge* as protecting everyone within their jurisdiction. Their day-to-day practices and priorities may often fall far short of that ideal, but at least the ideal remains in view. And structures of local government, including those pertaining to the police, can be reconfigured. If we

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554. *Hearings Regarding Private Security Guards: Hearing on H.R. 1534 Before the Subcomm. on Human Res. of the House Comm. on Educ. & Labor*, 103d Cong. 132 (1993) (statement of Ira Lipman, President, Guardsmark, Inc.). On the growth of private security, see David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1171-82 (1999). The trend in the United States has been mirrored throughout much of the developed world. *See id.* at 1181.

555. I summarize these debates in Sklansky, *supra* note 554, at 1188-93.

556. *See supra* notes 416 & 487 and accompanying text.

557. The Los Angeles Police Department, for example, enjoys a notorious degree of independence under the city charter, because the civilian commissioners who nominally run the department serve part-time with only modest staff support. Virtually the only real leverage the commissioners can exercise is to fire the police chief, but that leverage has turned out to be significant — as the two last chiefs of the department, both ousted by the commission, can testify.

want police departments that are less insulated from politics, we can get them. We had them, after all, before the 1950s.

There is a second reason that the democratic question is rarely asked about private policing. It is the same reason that relatively little academic attention has been paid to alternative institutional arrangements that would strengthen the political accountability of the police while avoiding, if possible, some of the abuses that fueled the drive for political insulation of police departments in the first place. The reason is the pervasive and excessive de-emphasis, since the 1950s, of the role of institutional structures in democracy. This de-emphasis, as we have seen, is one the chief points of continuity between democratic pluralism and the theories of participatory and deliberative democracy that have largely supplanted it. If structure does not matter — if democracy is mainly a matter of culture — then the loci of institutional power lose their importance.

There is a third and final reason for the general neglect of the questions that private policing raises for democracy. Those questions have seemed less pressing than they should because private policing is often assumed — erroneously — to supplement public law enforcement rather than displace it. In the short run, of course, private policing usually does supplement public law enforcement. It may even assist neighborhoods too poor to afford private security services by freeing up resources that are no longer needed in areas that *can* afford private security. Over the long term, though, police expenditures are unlikely to stay constant. The shift to private security represents what Robert Reich calls the "secession of the successful."[558] Why should Bel Air residents vote for higher taxes to pay for policing throughout Los Angeles, when they can — and already do — hire private patrols for their own neighborhood? It is not idle to worry that, as two prominent scholars of policing have suggested, "[t]he rich will be increasingly policed preventively by commercial security while the poor will be policed reactively by enforcement-oriented public police," with both the private and public sector working to "protect the affluent from the poor — the one by barricading and excluding, the other by repressing and imprisoning."[559] That is a troubling prospect not just because it seems harsh, but because it seems radically anti-democratic — something much easier to see with a rounded view of democracy, incorporating a strong element of anti-inegalitarianism.

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558. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16.

559. David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 LAW & SOC'Y REV. 585, 594, 602 (1996). For anecdotal evidence that the growing reliance on private security has undermined political support for higher public expenditures on law enforcement, see Sklansky, *supra* note 554, at 1224 n.342.

One implication of such a view of democracy is that questions of democratic policing will often be distributive. We have grown accustomed to thinking that reconciling policing with democracy is largely a matter of deciding how much policing we will have, and that the more we have — for example, the more leeway and resources we give to the police — the more democracy is imperiled. This way of thinking is among the lasting legacies of democratic pluralism; it follows naturally from the assumption that the chief rival to democracy is authoritarianism, and more specifically the "police state." But if democracy consists in large part of a presumptive hostility to hierarchy, things are more complicated in two different ways.

First, policing is among other things "a form of redistribution."[560] It redistributes resources in the same way as other government-funded services, from fire protection to social security, and — going beyond those other programs — it uses the redistributed resources to reallocate power by curbing the private use of coercive force. (Murray Kempton once described the supplanting of the Pinkerton Detective Agency by the FBI as "the only episode in our social history to realize Marx's prescription for the transformation of capitalistic private property into socialized property."[561] But the episode is better understood as part of the broader socialization of law enforcement in the late nineteenth and early twentieth centuries.)[562]

Police privatization directly threatens this redistributive project. That does not mean that private policing is always a bad thing. There are aspects of democracy other than anti-inegalitarianism, and there are things that we care about other than democracy. In some cases, moreover, market-supplied policing may redistribute power downward in ways that public law enforcement has failed to do — as, for example, when private patrols hired by merchants make the streets safer and more welcoming for the physically frail. But the interests of merchants depart in predictable ways from the interests of their poorest neighbors, at least in anything but the very long term, and private security firms focus, understandably, on the interests of their customers.

Leave aside the ugliest ways in which that kind of accountability can manifest itself — for example, harassment of deviants, physical

560. Seidman, *supra* note 305, at 2315.

561. Murray Kempton, *Son of Pinkerton*, N.Y. REV. OF BOOKS, May 20, 1971, at 22.

562. For a nice discussion of this point, see Steven Spitzer & Andrew T. Scull, *Privatization and Capitalist Development: The Case of the Private Police*, 25 SOC. PROBS. 18 (1977).

assaults of the homeless, and so on.[563] The more important point is that private police are not even nominally committed, as public police are, to the egalitarian project of protecting all citizens from private violence. The defining characteristic of private policing is its "client-driven mandate."[564] Take, for example, the more than 100 private guards now employed in downtown Los Angeles by business improvement districts — nonprofit groups of merchants and property owners funded by self-imposed tax assessments. The president of the largest of these groups brushes off calls for stronger public oversight of the guards: "If people are saying more accountability, than I say accountability to whom? . . . It's not the city's money; it's the property owner's money."[565]

Second, funding levels affect not just the amount of policing the state provides, but also the kind of policing. Efforts to open up channels of communication between the police and traditionally marginalized groups — like the "beat meetings" that have apparently achieved some success in Chicago — are expensive. Efforts to involve police officers themselves in departmental reform — like the Oakland violence study of the early 1970s — are expensive. Alternatives to racial profiling can be expensive. So can effective institutions of civilian oversight. The history of police reform is littered with promising innovations abandoned when budgets tightened. (The Peer Review Panel that grew out of the Oakland violence study is a good example.) High funding levels certainly do not guarantee innovative policing, but low funding levels make it much less likely. The kind of protection the police provide, no less than the amount of protection they provide, is thus partly — although only partly — a matter of the resources they are given. This means that the success of things like community policing, nondiscriminatory policing, and workplace democracy in policing are, in part, budgetary matters. And *that* means, in turn, that police reform, like the level of policing, will often have a redistributive dimension: it involves public expenditures for the benefit of whichever groups profit from the reforms at issue. The

563. *See, e.g.*, MUIR, *supra* note 303, at 73-77 (discussing tactics employed by private police in Oakland's skid row in the early 1970s); Heather Barr, *More Like Disneyland: State Action, 42 U.S.C. § 1983, and Business Improvement Districts in New York*, 28 COLUM. HUM. RTS. L. REV. 393, 400-03 (1997) (describing similar tactics by private security personnel in midtown Manhattan in the 1990s); William Wan & Erin Ailworth, *Flak Over Downtown Security Guards*, L.A. TIMES, June 8, 2004, at B1 (reporting allegations of similar conduct by private guards patrolling downtown Los Angeles).

564. Elizabeth Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 62 (2004); *see* Clifford D. Shearing & Philip C. Stenning, *Private Security: Implications for Social Control*, 30 SOC. PROBS. 493, 499 (1983).

565. Wan & Ailworth, *supra* note 563, (quoting Carol Schatz, president of the Downtown Center Improvement District). On business improvement districts and their role in the privatization of policing, see Barr, *supra* note 563, and Sklansky, *supra* note 554, at 1178 n.56.

presence of this redistributive dimension makes it particularly important, from a democratic perspective, to identify the beneficiaries of particular forms of policing. Whether the redistribution at issue advances or retards the cause of anti-inegalitarianism will depend on who stands to win and who stands to lose.

D. *Police Personnel Practices*

I have already discussed one set of ideas about police personnel practices that a rounded view of democracy provides reason to examine (or rather, to reexamine): namely, the proposals made in the 1970s for involving rank-and-file law enforcement officers in the development and refinement of police operating procedures.[566] I want here to discuss a different set of issues raised by any effort to apply a rounded view of democracy to policing, issues having to do with the demographics of law enforcement, particularly with regard to race, gender, and sexual orientation.

Those demographics have changed dramatically since the 1960s. In 1970, Blacks made up somewhere around 6% of sworn officers in the 300 or so largest American police departments; today the figure is around 18%.[567] In cities with populations over 250,000, 20% of sworn officers are Black, and 14% are Latino — up from figures of 18% and 9%, respectively, in 1990.[568] In some major metropolitan departments, white officers are now a minority.[569] Women were 2% of sworn officers in large police agencies in 1972; today they are close to 13%.[570] Again,

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566. *See supra* notes 392-407 and accompanying text.

567. Justin McCrary, The Effect of Court-Ordered Hiring Quotas on the Composition and Quality of Police 44 (Nov. 30, 2003) (unpublished manuscript), *available at* http://www-personal.umich.edu/~jmccrary/mccrary2004.pdf (last visited Mar. 18, 2005).

568. BRIAN A. REAVES & MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, POLICE DEPARTMENTS IN LARGE CITIES, 1990-2000, at 3 (2002).

569. White officers comprise 48% of the police force in San Antonio, 46% in Los Angeles, 34% in Detroit, and 28% in Washington, D.C. *Id.* at 11.

570. *See* KIM LONSWAY ET AL., FEMINIST MAJORITY FOUND., EQUALITY DENIED: THE STATUS OF WOMEN IN POLICING: 2001, at 6 (2002) [hereinafter LONSWAY ET AL., EQUALITY DENIED]. These figures are for departments with 100 or more sworn personnel. *Id.* at 2. In the largest departments, which serve cities with populations over 250,000, women are 16% of sworn officers. REAVES & HICKMAN, *supra* note 568, at 3. 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. LONSWAY ET AL., *supra*, at 8. Largely to save money, American police departments have greatly increased their reliance on civilian employees in recent years; large departments now employ more civilians than sworn officers. *See, e.g.*, REAVES & HICKMAN, *supra* note 568, 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 civilian employees treated as second-class citizens. For a discussion of this problem in the

the figure in some departments is significantly higher, although it tops out around 25%.[571] It is much harder to estimate the number of gay and lesbian officers, even those who are open about their status. But 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.[572]

To a great extent, of course, the dramatic changes over the past several decades in the demographics of policing were produced by court-ordered programs of affirmative action. It is far from clear whether comparable gains can be expected in the future, now that such programs have grown less common.[573] The increase in the representation of women in large police departments, for example, appears to have stalled since 1999; in fact, that number has declined slightly.[574] And minority officers and female officers alike remain concentrated in the lower ranks of police departments.[575]

The dramatic increase in the diversity of American police forces and the grounds for uncertainty regarding whether that trend will continue have important consequences for the relationship between policing and democracy — at least under any view of democracy that includes a healthy element of anti-inegalitarianism. Three sets of consequences deserve special attention.

The first pertains to the long tradition of law enforcement work — like teaching, nursing, and certain other occupations — providing a means of upward mobility for marginalized social groups, particularly immigrants. The police professionalism movement disapproved of that tradition, and did a good deal to weaken it, by encouraging departments to abolish residency requirements, recruit outside their

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Los Angeles Police Department, see REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL, *supra* note 471, at 62-66.

571. In 2000, female officers comprised 21% of the police force in Chicago, 24% in Philadelphia and Washington, D.C., and 25% in Detroit. REAVES & HICKMAN, *supra* note 568, at 11.

572. San Francisco had no openly gay officers as late as 1979; Chicago had none as recently as 1991. STEPHEN LEINEN, GAY COPS 11 (1993); Katy Butler, *The Gay Push for S.F. Police Jobs*, S.F. CHRON., Apr. 9, 1979, at A1. On the growing but still incomplete acceptance of gay officers, see, for example, Aaron Belkin & Jason McNichol, *Pink and Blue: Outcomes Associated With the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department*, 5 POLICE Q. 63 (2002); Tracy Gordon Fox, *Seminar to Focus on Gay Officers*, HARTFORD COURANT, May 5, 2004, at B11; and James Sterngold, *Possible Candidate for LAPD's Top Job is Gay — So What?*, S.F. CHRON., Aug. 26, 2002, at A1.

573. *See* LONSWAY ET AL., EQUALITY DENIED, *supra* note 570, at 11-12; William G. Lewis, *Toward Representative Bureaucracy: Blacks in City Police Organizations, 1975-1985*, 49 PUB. ADMIN. REV. 257 (1989); Susan E. Martin, *The Effectiveness of Affirmative Action: The Case of Women in Policing*, 8 JUST. Q. 489 (1991); McCrary, *supra* note 567 (manuscript at 1-7, 32).

574. LONSWAY ET AL., EQUALITY DENIED, *supra* note 570, at 6.

575. *Id.* at 7; SAMUEL WALKER, CASSIA SPOHN & MARIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA 116 (2d ed. 2000).

own communities, adopt written entrance exams, insulate themselves from local politics, and so on. These measures helped to create the virtually all-white police forces that patrolled major American cities in the 1960s and that did so much to antagonize minority residents.[576] The dramatically increased presence of racial minorities in law enforcement, as in some other professions, is to be welcomed in part because it reopens a traditional channel of social mobility and thereby serves to loosen patterns of racial hierarchy.

The remaining two consequences of more diverse departments are specific to policing. The first of these is that the police are less likely to serve as an effective weapon against private systems of entrenched dominance if the police themselves are drawn exclusively from the dominant group. This is not just a matter of symbolism, although the symbolism is important enough. It is a matter of with whom, and how strongly, the police are likely to sympathize — a matter of whose concerns get taken seriously and how seriously they get taken. Among the most important reasons to applaud the increased presence of women in American police departments, and to worry about the slow pace of that change, is that female officers appear to respond more effectively to complaints of domestic violence than male officers.[577] That is a critical difference, not just because domestic violence — typically committed by men against women — accounts for half of all violent crime calls to the police,[578] but also because it has played such a large role in day-to-day patterns of subjugation shaping women's lives.[579] Likewise, among the most important effects of the increased racial diversity of American police forces since the 1960s is that police today are much less likely to ally themselves, in an organized fashion, with those openly hostile to the claims of equality pressed by racial minorities.[580] Gay officers doubtless have played a similar, if less

576. *See* FOGELSON, *supra* note 251, at 248-60.

577. *See* KIM LONSWAY ET AL., FEMINIST MAJORITY FOUND., HIRING & RETAINING MORE WOMEN: THE ADVANTAGES TO LAW ENFORCEMENT AGENCIES 7-8 (2003) [hereinafter LONSWAY ET AL., HIRING AND RETAINING WOMEN]. Female officers may have other comparative strengths. Surveys suggest they are less likely to use excessive force, in part because they have better communication skills. *Id.* at 5-6. It is worth remembering, in this context, one of the principal lessons that William Muir drew from his field observations of twenty-eight police officers in Oakland in the early 1970s — a group of officers who, unremarkably at the time, were all male. MUIR, *supra* note 303, at 11. Becoming a good officer, Muir concluded, required "developing an enjoyment of talk" — a trait that "enriches [an officer's] repertoire of potential responses to violence," "permits him to touch the citizenry's souls," and, of equal importance, "provides him the chance to associate with his fellow officers." *Id.* at 4.

578. *See* LONSWAY ET AL., HIRING AND RETAINING WOMEN, *supra* note 577, at 8.

579. *See, e.g.*, Becker, *supra* note 481, at 507-09.

580. There is also some evidence that hiring more minority officers increases arrests of white suspects but not of minority suspects, whereas hiring more white officers does just the

public, role in the slow transformation of the treatment of gays by the police.[581]

The last consequence of more diverse police departments pertains to the longstanding understanding of police officers as a "conflict group," unified in their estrangement from the broader society and monolithic in their hostility to outside meddling. Whatever validity this picture of the police had in the 1960s and 1970s, it has far less now — in part because of the success of affirmative action in law enforcement and in part, ironically, because of its failure. Affirmative action programs succeeded in opening the doors of police departments to large numbers of Blacks, Latinos, and women. But it failed, often, at fully integrating them into the social fabric of those departments. It is not just that minority and female officers remain concentrated in lower ranks. Black and Latino officers have typically formed their own organizations, parallel to — and often openly suspicious of — the benevolent associations and police unions established when police workforces were homogeneously white. Often, too, patterns of friendship and informal networks of mentoring and trust have broken down along lines of race and gender. Similar but less pronounced divides have emerged between openly gay officers and officers who, for religious or other reasons, are uncomfortable around gays or who suspect that gays have received preferential treatment in promotions.[582] The result is that police ethnographies have begun to

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opposite. *See* John J. Donohue III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367 (2001). Whether and how minority officers affect the incidence of racial profiling, in any of its various guises, is a more difficult question. *See, e.g.*, Francie Latour & Bill Dedman, *Minority Officers are Stricter on Minorities*, BOSTON GLOBE, July 20, 2003, at A19. Even where there is no effect on the rates at which whites and minorities are stopped, of course, there may be effects on the *ways* in which the stops are carried out, and on how they are perceived.

581. *See, e.g.*, LEINEN, *supra* note 572, at 97-121; *see also, e.g.*, John Cloud, *The New Face of Gay Power*, TIME, Oct. 13, 2003, at 52; John Leland, *Silence Ending About Abuse in Gay Relationships*, N.Y. TIMES, Nov. 6, 2000, at A18; Kenneth Reich, *Fourth Hate Crime Probed*, L.A. TIMES, Sept. 24, 2002, at B1 (reporting statement by Sgt. Don Mueller of the Los Angeles Sheriff's Office to the West Hollywood City Council that "the ferocious relationship that used to exist between the sheriff's station and the gay community is a thing of the past," that "[t]here are now many gay officers in the station, including myself," and that "we are determined to bring [a string of suspected hate crimes against gays in West Hollywood] to an end"). The systematic, often brutal harassment of gays by the police may have had repercussions for law enforcement more generally. William Westley, in his pioneering ethnography of the police, concluded that the police accurately understood the public to approve "extremely rough treatment" in "sex cases" — a category in which homosexuality was lumped together with rape, exhibitionism, and "peeping toms" — and that the experience of the police in these cases "enourage[d] them to use violence as a general resource." WESTLEY, *supra* note 14, at 61-63, 89-90, 107; Westley, *Violence and the Police*, *supra* note 178, at 37-38.

582. *See* Belkin & McNichol, *supra* note 572.

report not "a single, unified occupational culture," but a workplace marked by "variation," "division," and "segmentation."[583]

Division and segmentation of this kind is was just what some opponents of affirmative action in law enforcement feared. Even some police officials sensitive to the need to diversify their departments worried that hiring quotas would undermine solidarity among officers by provoking resentments, hardening group identities, and promoting factionalism.[584] The gender and race divisions that have come to characterize police departments may not in fact owe much to affirmative action; they may have more to do with the need that minority and female officers have felt to band together for mutual protection against remnants of bigotry and institutionalized discrimination.[585] The extent of the factionalism, in any event, should not be exaggerated. Particularly in situations where an officer is physically endangered, there is a good deal of truth to the claim of many officers that "blue is blue." But solidarity among the rank and file does appear to have declined; police forces today are less cohesive than they used to be, and much of the division runs along lines of race and gender.

The balkanization is unfortunate in some ways, but it turns out to have a silver lining. Racial and gender divisions have cleared space for dissent and debate within police workforces, opening up avenues of reform that might otherwise have remained blocked by monolithic police opposition, and bringing a healthy dose of "democratic oppositionalism" to the internal politics of law enforcement agencies. Organizations representing Black officers, for example, have often parted company with older, more established police unions in welcoming civilian review, in lobbying for restrictions on racial profiling, in supporting the reimposition of residency requirements, and more generally in calling on police departments to pay more attention to the needs and interests of minority residents.[586]

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583. Robin N. Haarr, *Patterns of Interaction in a Police Patrol Bureau: Race and Gender Barriers to Integration*, 14 JUST. Q. 53, 53, 80 (1997); *see also, e.g.*, Susan E. Martin, *"Outsider Within" the Station House: The Impact of Race and Gender on Black Women Police*, 41 SOC. PROBS. 383 (1994).

584. *See, e.g.*, Samuel L. Williams, *Law Enforcement and Affirmative Action*, POLICE CHIEF, Feb. 1975, at 72.

585. *See, e.g.*, NICHOLAS ALEX, BLACK IN BLUE: A STUDY OF THE NEGRO POLICEMAN 85-113 (1969); KENNETH BOLTON JR. & JOE R. FEAGIN, BLACK IN BLUE: AFRICAN-AMERICAN POLICE OFFICERS AND RACISM 273 (2004); HERVEY A. JURIS & PETER FEUILLE, POLICE UNIONISM 31, 165 (1973).

586. *See* JURIS & FEUILLE, *supra* note 585, at 165-75; WALKER, SPOHN & DELONE, *supra* note 575, at 115-16; NAT'L ORG. OF BLACK LAW ENFORCEMENT EXECUTIVES, A NOBLE PERSPECTIVE: RACIAL PROFILING — A SYMPTOM OF BIAS-BASED POLICING (May 3, 2001), *available at* http://www.noblenational.org/pdf/RacialProfiling901.pdf (last visited

All of this suggests that the demographics of a police department may have a lot to do with whether, and in what ways, the department advances or retards at least one component of democracy, the agenda of anti-inegalitarianism. This suggests, in turn, that reformers who want to make policing consistent with democracy should pay attention not just to the operational practices of the police, but also to the various internal policies and procedures that wind up shaping who the police are — policies and procedures that include not only hiring standards, but also recruitment tactics, workplace climate, promotion practices, and so on.[587]

They should pay attention, too, to the new possibilities that are opened up by the growing diversity of law enforcement personnel. The social fragmentation of police forces today, the splintering of the "police subculture," provides an additional reason for reexamining old proposals to give officers a greater role in shaping their work. The large influx of minority and female officers has made the internal politics of police departments far less monolithic and reactionary than they were thirty years ago.[588] As a result, police departments may be safer places today for experiments in workplace democracy.

E. *Transparency*

Eric Luna has a performed a service in calling attention to the strong connection between democracy and the transparency of police decisionmaking. Luna's argument is rooted in the mainstream version of participatory democracy: he stresses the manner in which trust in the police depends on the police operating under rules and practices adopted openly, with ample opportunity for public input.[589] But the

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Mar. 18, 2005); NAT'L BLACK POLICE ASS'N, POSITIONS OF THE NATIONAL BLACK POLICE ASSOCIATION, *at* http://www.blackpolice.org/Positions.html (last visited Mar. 18, 2005).

587. On the manifold barriers to further integration of police departments, see, for example, BOLTON & FEAGIN, *supra* note 585, at 119-70. The advantages of increasing the racial diversity of American police forces might be outweighed by the costs, if, as John Lott has concluded, the "lower hiring standards involved in recruiting more minority officers" has raised crime rates, particularly in Black neighborhoods. John R. Lott, Jr., *Does a Helping Hand Put Others at Risk?: Affirmative Action, Police Departments, and Crime*, 38 ECON. INQUIRY 239 (2000). Lott's results have not been duplicated, though, and Justin McCrary's recent paper calls them into serious question. McCrary, *supra* note 567. Using data regarding hiring of police officers in New York City, McCrary finds that "even aggressive hiring quotas change the test score distribution of new hires only minimally." McCrary, *supra* note 567 (manuscript at 26-31, 33). McCrary also did a time series comparison of crime rates in cities that had been sued for discriminatory police hiring and in cities that had not, and an "event study" analysis of crime rates before and after litigation. He found little evidence that litigation was related to crime rates. *Id.* (manuscript at 26-29).

588. Samuel Walker has been pressing this point for twenty years. *See* WALKER ET AL., *supra* note 575, at 115; Samuel Walker, *Racial Minority and Female Employment in Policing: The Implications of "Glacial" Change*, 31 CRIME & DELINQ. 555, 556, 565 (1985).

589. *See supra* notes 452-457, 468 and accompanying text.

argument for transparency is, if anything, strengthened by a conception of democracy as, in large part, an oppositional tradition — a tradition of anti-inegalitarianism. Oppositional traditions require breathing space for criticism and debate; this is why people like Ian Shapiro are right to stress the importance of dissensus for democracy.[590] And dissensus is greatly facilitated by the free flow of information. It is hard to dissent about policies and practices that no one really knows about.[591] (Effective criticism of racial profiling of minority motorists, for example, arose only when statistical studies by journalists and social scientists demonstrated its widespread presence.)

As always, there are trade-offs. Sometimes effective law enforcement depends on a degree of secrecy — a point Luna is careful to acknowledge.[592] Less obviously, there are trade-offs here between different components of democracy. Deliberative self-governance often requires a degree of confidentiality. That is why the Constitutional Convention met behind closed doors; it is why jury deliberations are not made public; and it is why the researchers who organized and documented the Oakland violence project promised and gave anonymity to the officers who participated. Efforts to involve police officers intellectually in shaping the nature of their work will always be in some tension with the desire to open all processes of police decisionmaking to public scrutiny. Similar tensions may arise between the goal of transparency and the goal of opening up channels of candid communication between the police and a wide range of outside groups.

Right now, though, these trade-offs are of little practical significance. Given how far we are from giving rank-and-file police officers meaningful powers of self-governance, or from meaningfully reducing the operational autonomy of police departments, there is little reason to worry about the potentially anti-democratic effects of increasing the transparency of law enforcement. In the short run, even in the medium run, Luna seems right to view transparency as a key component of efforts to make policing more democratic.

CONCLUSION

By now it should be clear why I promised only a tentative and suggestive discussion of the implications for policing of a more

590. *See supra* notes 527-528 and accompanying text.

591. Regarding the naïve view that genuine dissensus is most likely to arise in response to clumsy efforts at repression, and conversely that independent thought is smothered rather than assisted by official facilitation of dissent, it is still worth reading LASCH, *supra* note 52, at 203-04 & n.5.

592. *See* Luna, *supra* note 452, at 1165.

rounded view of democracy. Working out those implications with care would require spelling out the details of the "more rounded view of democracy," in the same way that tracing the implications for policing of democratic pluralism and participatory democracy required a nuanced account of those sets of ideas, as they were actually held by flesh-and-blood people. Ultimately it will not suffice simply to suggest, as I have here, that a more rounded view of democracy should be sensitive to certain insights of pluralism, 1960s-style participatory democracy, and eighteenth-century political economy, and attentive to ongoing resonance of the tradition of democratic oppositionalism. We need a more complete account of the rounded view of democracy. What does it take to be the aim — or aims — of democracy? What empirical assumptions does it make about the essential processes of democracy? What assessment does it make about the democratic quality of our current arrangements, including those arrangements for ongoing criticism and reform? And how tied is this account to current, American conditions?

For now, I leave those questions unanswered, and therefore, necessarily, I have offered only a provisional sketch of what a more rounded view of democracy might mean for policing. But I hope that even that provisional sketch has proven useful. I hope it has suggested the ways in which different ideas about democracy might lead us to different ideas about policing. I hope that in so doing it has reinforced one of the chief lessons of the earlier sections of this Article: that our thoughts about policing are bound up with, and depend upon, the way we understand democracy. The widespread intuition that democracy and policing have important implications for each other is well founded. Indeed the implications are wider and more various than is often assumed. But the implications also turn out to depend powerfully on our understanding of democracy — what it is, and what it can and should be. Our notions of democratic policing can be no more sophisticated, and no better, than our notions of democracy.