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THE COMING CRISIS IN LAW ENFORCEMENT AND HOW FEDERAL INTERVENTION COULD PROMOTE POLICE ACCOUNTABILITY IN A POST-FERGUSON UNITED STATES

*Kami Chavis Simmons**

INTRODUCTION¹

Officer Darren Wilson's fatal shooting of Michael Brown has reignited a fierce debate about the issue of racial bias in law enforcement.² Although tensions between racial minorities and police officers have long existed in our nation, the civil unrest in Ferguson, Missouri following Michael Brown's death has catapulted the issue to the forefront of the criminal justice reform agenda. The small St. Louis suburb has become synonymous with tanks, tear gas, and rubber bullets after many people gathered in the street and marched to express outrage at the shooting of the unarmed teen.³ In the days that followed, supporters of Michael Brown, and even the journalists

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1. I have borrowed a portion of my title from the 1998 essay by Dan M. Kahan and Tracey L. Meares published in the *Georgetown Law Journal* entitled "The Coming Crisis of Criminal Procedure." Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998). In this essay, Kahan and Meares argued that the continued adherence to antiquated rules of criminal procedure that initially were developed to protect previously disenfranchised groups represented the "coming crisis in criminal procedure." *Id.* Kahan and Meares argued that it was no longer necessary to adhere strictly to certain rules in criminal procedure because these groups had achieved an increased level of political power and now could determine the scope of their own rights. *Id.* at 1154. Nearly fifteen years later, I contend, instead, that the crisis in criminal procedure has arrived and it can be characterized by aggressive police tactics, racial bias in policing, and a lack of accountability of law enforcement officers, all of which are largely due to a continued lack of political power of underrepresented groups.

2. On August 9, 2014, Officer Darren Wilson fatally shot an unarmed teen, Michael Brown, in Ferguson, Missouri, sparking several vigorous protests and clashes with police. See Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES, Aug. 11, 2014, at A11; Adeel Hassan, *Your Friday Briefing*, N.Y. TIMES (Aug. 15, 2014), <http://www.nytimes.com/2014/08/15/us/your-friday-briefing.html> (identifying the officer responsible for the shooting).

3. Monica Davey et al., *Missouri Tries Another Idea: Call in Guard*, N.Y. TIMES, Aug. 19, 2014, at A1.

covering the unfolding events, experienced first hand the aggressive police tactics that many inner city urban residents have complained about for years.⁴ The proliferation of aggressive, and sometimes militarized, police tactics represents the “coming crisis” in law enforcement, although many residents of these communities might argue that the crisis arrived long ago. Even more disturbing is that these heavy-handed police strategies are employed almost exclusively against racial and ethnic minorities.⁵

This crisis in policing will not only negatively impact police departments and hinder their efforts to keep the public safe, but this crisis will also have negative and lasting effects on the communities experiencing these tactics.⁶ After decades of discussion devoted to “community policing,” the events surrounding Michael Brown’s shooting and the police treatment of supporters in the initial days following the shooting are symptoms of a larger endemic within local police departments in the United States.⁷ Criminal justice advocates would agree that police brutality, racial profiling, and over-militarization of police forces represent core civil rights issues of the twenty-first century and deserve immediate attention.⁸ Aggressive

4. Abby Phillip, *Police in Ferguson Arrest and Threaten More Journalists*, WASH. POST (Aug. 18, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/18/police-in-ferguson-arrest-and-threaten-more-journalists/>.

5. For example, it is widely known that “[r]esidents of poor neighborhoods are more frequently subject to searches of their person in the form of overly aggressive stop and frisk tactics.” Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 317 (2011).

6. See Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 41–43 (2011) (detailing the harms of racially biased policing and aggressive law enforcement tactics).

7. Community policing has been defined as a form of policing that “emphasizes problem-solving and partnerships between police and the communities they serve.” Kami Chavis Simmons, *Stakeholder Participation in the Selection and Recruitment of Police: Democracy in Action*, 32 ST. LOUIS U. PUB. L. REV. 7, 8 (2012).

8. See, e.g., Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. C.R. L.J. 219, 219 (2005) (arguing that “racial profiling, a term virtually unheard of five years ago, is now part of the national lexicon” being that “[t]he last several years have seen a growing crescendo of voices concerned over racial discrimination by America’s law enforcement agencies”); Sheila A. Bedi, *Seeking Transformative Justice in Ferguson, Dearborn, and Beyond*, HUFFINGTON POST (Sept. 3, 2014, 12:07 PM), http://www.huffingtonpost.com/sheila-a-bedi/seeking-transformative_b_5755076.html (finding that both “the over-militarization of our police,” and “cops around the country behav[ing] with impunity, despite national movement-based efforts to integrate transparency and accountability into policing” are to blame for the events in Ferguson); Kara Dansky, *The Real Reason Ferguson Has Military Weapons*, CNN (Aug. 19, 2014, 6:03 PM), <http://www.cnn.com/2014/08/19/opinion/dansky-militarization-police/index.html> (“What we’re witnessing is the militarization of policing,” which “has become commonplace in towns across America.”). Another related issue is the school-to-prison pipeline, which represents a phenomenon where students go directly from

police strategies are typically reserved for marginalized members of society, and there is a consensus that minorities experience a greater rate of police brutality and misconduct than their white counterparts.⁹ For example, one expert explains that “police are more likely to engage in force when dealing with members of outgroups (those who are poor or minority or gender non-conforming) than when dealing with members of ingroups.”¹⁰ The existence and severity of biased policing and its detrimental impact on racial minorities are well documented.¹¹

school into the prison system, as well as the vast racial disparities in the U.S. education and criminal justice systems. Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 *FORDHAM URB. L.J.* 1009, 1018–20 (2009).

9. See, e.g., Human Rights Watch, *Race as a Factor, in SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* (1998), available at <http://www.hrw.org/legacy/reports98/police/uspo17.htm>; CHARLES J. OGLETREE, JR. ET AL., *BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES* 6–7, 16–17 (1995) (discussing police officers’ disproportionate use of excessive force against inner city residents and minorities, which has become “commonplace” and is often caused by “the forces of racism and police militarism”); RONALD WEITZER & STEVEN A. TUCH, *RACE AND POLICING IN AMERICA: CONFLICT AND REFORM* 71–72 (2006) (finding that “blacks and Hispanics are at heightened risk of mistreatment by police,” with “[y]oung minority males [being] significantly more likely” to report having experienced mistreatment by police than their older minority male, same-age minority female, and white male counterparts); Clifford L. Broman et al., *The Experience and Consequences of Perceived Racial Discrimination: A Study of African Americans*, 26 *J. BLACK PSYCHOL.* 165, 174–75 (2000) (examining data that suggests younger blacks are more likely to experience discrimination from the police than older blacks, and black males are more likely than black women to perceive discrimination from the police); Craig B. Futterman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System*, 1 *DEPAUL J. FOR SOC. JUST.* 251, 283 (2008) (finding that among a sample of police officers from the Chicago Police Department, abuse against civilians was more prevalent with those who were working in “certain parts of the City—generally lower-income African American and Latino communities”); Tracey Maclin, *Race and the Fourth Amendment*, 51 *VAND. L. REV.* 333, 388–90 (1998) (providing an example of the New York City police force, which claims to be “the nation’s most professional and well-trained police force,” and yet “deadly force, brutality, and abuse of power by officers remains a problem in [the city’s] minority communities”).

10. I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 *FORDHAM URB. L.J.* 959, 982 (2013) (citing statistical evidence presented in *Tennessee v. Garner*, 471 U.S. 1 (1985), that showed “significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as a result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects”).

11. For example, in 1968, The National Advisory Commission on Civil Disorders (also known as the Kerner Commission), found that “[a]lmost invariably the incident that ignites disorder arises from police action. Harlem, Watts, Newark and Detroit—all the major outbursts of recent years—were precipitated by arrests of Negroes by white officers for minor offenses.” OTTO KERNER ET AL., *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 93 (1968). As a result, “to many Negroes police have come to symbolize white power, white racism, and white repression.” *Id.* Yet, “many

The recalcitrance of local police departments and municipalities to implement meaningful changes is equally well documented, and many jurisdictions with serious police accountability issues have required federal intervention.¹² Policing experts have identified several characteristics of organizational police culture, including group loyalty, aggressive police tactics, and ineffective supervision and discipline of police officers, that lead to a lack of accountability and exacerbate police-community tensions.¹³ These institutional factors make it difficult to properly investigate allegations of wrongdoing, including racial profiling and police brutality.

This Essay argues that in order to alleviate racial bias in policing and gain the trust and legitimacy of police officers in racially and ethnically diverse communities, local police departments must not only ensure that they are hiring police officers capable of implementing community policing, but must also focus on institutional reforms of the larger police organization. Increased transparency and accountability, as well as meaningful involvement of community members, will be hallmarks of any reform agenda aimed at curing the coming crisis in law enforcement. This Essay also addresses the important role that the federal government can and should play in achieving these goals.

I. THE IMPORTANCE OF ADDRESSING BIAS IN THE CRIMINAL JUSTICE SYSTEM

A. *Perceptions of Biased Policing Create Distrust*

Given the history that our nation's racial and ethnic communities have had with law enforcement, it is not surprising that there is widespread distrust among racial minorities when it comes to law enforcement.¹⁴ Nearly every major moment of civil unrest in the last sixty years—including those in the Watts section of Los Angeles in 1965, Los Angeles in 1992, Cincinnati in 2001, Oakland in 2009, and most recently Ferguson, Missouri—can be linked to an incident sparked by allegation of police misconduct. Even more sobering is

police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread perception among Negroes of the existence of police brutality and corruption and of a 'double standard' of justice and protection—one for Negroes and one for whites." *Id.*

12. The U.S. Department of Justice has intervened in Seattle, New Orleans, Los Angeles, and Oakland, among others. Justin Worland, *These 4 Cities Show What Federal Intervention Could Look Like in Ferguson*, TIME (Aug. 15, 2014), available at <http://time.com/3114010/ferguson-st-louis-missouri-obama/>.

13. See Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 381–89 (2010) (describing police organizational culture).

14. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 2 (2011) (noting that underenforcement, overenforcement, and "testilying" in cases involving minority defendants is pervasive and that these methods of policing contribute to racial tension and continuing high levels of distrust between minorities and police).

that each of the victims of the purported misconduct has invariably been a black male.¹⁵ These historical events live alongside the countless anecdotal experiences with police officers that many blacks share with each other.¹⁶ These experiences undoubtedly contribute to the negative views that blacks have regarding law enforcement. For example, a 2014 study showed that seventy percent of blacks say that police officers do a poor job of treating racial and ethnic groups equally.¹⁷ An identical percentage of blacks say police departments around the country do a poor job in holding officers accountable for misconduct.¹⁸ Unfortunately, even police officers themselves have acknowledged some degree of racial bias among their colleagues. For example, the Christopher Commission found that in Los Angeles, 24.5% of the 650 officers surveyed believed that “racial bias on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.”¹⁹ There is also empirical evidence to suggest that these biases are not merely perceptions, given that racial minorities are disproportionately the victims of police brutality.²⁰

15. See Cynthia Lee, *“But I Thought He Had a Gun”: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 23 (2004) (noting that the 2001 riots in Cincinnati were incited by citizen indignation of perceived brutality against African American males after six years of police shootings killed fifteen African American males); Bryce Clayton Newell, *Crossing Lenses: Policing’s New Visibility and the Role of “Smartphone Journalism” as a Form of Freedom-Preserving Reciprocal Surveillance*, 2014 U. ILL. J.L. TECH. & POL’Y 59, 66–67 (noting that riots in Oakland, California started after a white officer was convicted of involuntary manslaughter, rather than murder, in the shooting death of Oscar Grant, a young, black man, who was shot for “resisting restraint”); L. Darnell Weeden, *Johnnie Cochran Challenged America’s New Age Officially Unintentional Black Code; A Constitutionally Permissible Racial Profiling Policy*, 33 T. MARSHALL L. REV. 135, 148 (2007) (noting that the Watts Riots started after eye witnesses reported that white police officers used excessive force in arresting two African American suspects).

16. See, e.g., Michaela Angela Davis, *Black Moms Shouldn’t Have to Have ‘The Talk,’* CNN (Aug. 25, 2014, 10:03 AM), <http://www.cnn.com/2014/08/20/opinion/davis-michael-brown-mother/index.html>.

17. PEW RESEARCH CTR., FEW SAY POLICE FORCES NATIONALLY DO WELL IN TREATING RACES EQUALLY 2 (2014), available at <http://www.people-press.org/files/2014/08/8-25-14-Police-and-Race-Release.pdf>.

18. *Id.*

19. See INDEP. COMM’N ON THE L.A. POLICE DEPT’, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 69 (1991) [hereinafter THE CHRISTOPHER COMMISSION], available at http://www.parc.info/client_files/special%20reports/1%20-%20christopher%20commision.pdf.

20. See I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 846 (2008) (citing statistical information that blacks and Hispanics are disproportionately victims of police violence); see also AMNESTY INT’L, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 27 (1996), available at <http://www.amnesty.org/en/library/asset/AMR51/036/1996/en/7b6bf842-eb05-11dd-aad1-ed57e7e5470b/amr510361996en.pdf> (reporting that nearly all victims who died in New York City police custody between 1988 and 1995 were racial minorities).

B. *Negative Implications of Distrust*

The recent unrest in Ferguson underscores the need to address the underlying issues that sparked the community's outrage. Unfortunately, the issues surrounding the Michael Brown shooting are not unique to Ferguson, and many residents of racially diverse communities have perceptions of racial bias in policing. For example, in New York, the stop-and-frisk policy has faced fierce criticism with many arguing that the policy is implemented in a racially discriminatory manner.²¹ The full impact that this practice has had on police-community interactions is yet to be seen, but there is evidence that stop-and-frisk, as implemented by the New York Police Department, has alienated many residents of neighborhoods where it has been enforced.²² A recent study by the Vera Institute for Justice found that young people who have been stopped more than once are less willing to report crimes to police, even when they are the victims.²³ Also, only four in ten people surveyed for the study said that they would be comfortable seeking help from the police if they were in trouble.²⁴ These troubling findings show that the people in communities where stop-and-frisk policies have been implemented not only distrust police when they are the subjects of stops or investigations, but they also do not even trust police to adequately help them when they are in need.

Furthermore, numerous studies demonstrate how poor police-community relations may negatively impact a community. In order to engage in effective crime detection and prevention, police officers need the trust and cooperation of residents.²⁵ It can be difficult to form those helpful partnerships if residents have no faith in the legitimacy of the law enforcement institution.²⁶ In addition to the negative implications for the communities as a whole, perceptions of racial bias in policing negatively impact individuals as well. The stigma and marginalization of the victims of racial bias exact a heavy

21. See Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 ALB. L. REV. 1187, 1195, 1197 (2012–2013) (“[T]he NYPD brazenly uses *Terry* to defend, and perpetuate, vast numbers of stops-and-frisks and enormous racial disparities in who gets stopped.”).

22. See JENNIFER FRATELLO ET AL., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, SELF-PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 16 (Vera Inst. for Justice 2013), available at <http://www.vera.org/sites/default/files/resources/downloads/stop-and-frisk-summary-report.pdf> (discussing public perceptions of New York City police, in light of the stop-and-frisk policy wherein only fifteen percent of those polled believed that the police were honest and only twelve percent believe that residents of their neighborhood trust the police).

23. *Id.* at 17.

24. *Id.* at 15–16.

25. Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

26. *Id.* at 238–39.

psychological toll.²⁷ Despite many studies and the findings of several independent commissions charged with examining and addressing the issues of racial disparity in law enforcement,²⁸ the realities and perceptions of racial bias in policing persist. However, there are several concrete policy solutions the federal government could use to alleviate police-community tension and increase the transparency that is often lacking in law enforcement agencies.

II. THE FEDERAL GOVERNMENT'S CRITICAL ROLE IN POLICE REFORM

In the wake of the Michael Brown shooting in Ferguson, there were calls for the federal government to initiate an investigation. The symbolism of a federal investigation into allegations of police misconduct and civil rights abuses should not be underestimated. Criminal justice issues are typically viewed as “local issues,” but federal intervention is sometimes necessary where the local government has neither the resources, nor the resolve to ensure a fair proceeding or the implementation of sustainable reforms.²⁹ Furthermore, federal intervention can be particularly symbolic where the local community does not trust the local officials to conduct a complete investigation.³⁰

27. See, e.g., FRATELLO ET AL., *supra* note 22, at 19 (citing two studies that found an increase in “deviant persona and behavior” by individuals who were frequently stopped by police officers).

28. See, e.g., WILLIAM J. BRATTON, NEIGHBORHOOD POLICING: A PLAN OF ACTION FOR THE BOSTON POLICE DEPARTMENT 29 (1992), http://www.popcenter.org/library/unpublished/OrganizationalPlans/17_Neighborhood_Policing.pdf (examining the Boston Police Department and its relation to racial tensions in the community); THE CHRISTOPHER COMMISSION, *supra* note 19, at 3–4 (explaining that the Christopher Commission was formed in 1991 to study the Los Angeles Police Department in the wake of the Rodney King beating); MILTON MOLLEN ET AL., REPORT OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 1 (1994), http://www.parc.info/client_files/special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf (explaining how the Mollen Commission was formed in 1992 to study the New York City Police Department and racial tensions that had been a major issue).

29. See 42 U.S.C. § 14141 (2006) (authorizing the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”); see also *Special Litigation Section Cases and Matters*, U.S. DEPT OF JUST., <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Sept. 25, 2014) (linking to cases and matters in Los Angeles, the District of Columbia, Portland, East Haven, and several other cities that have experienced federal intervention into criminal justice issues).

30. Robert N. Driscoll, *Don't Expect the Feds to Find Much in Ferguson*, NAT'L REV. ONLINE (Aug. 16, 2014, 4:00 AM), <http://www.nationalreview.com/article/385538/dont-expect-feds-find-much-ferguson-robert-n-driscoll> (“The community in Ferguson . . . demand[s] justice, including the prosecution of the officer for murder, or in the alternative, prosecution by the United States Department of Justice Civil Rights Division for violation of Brown’s civil rights.”).

While federal intervention can have a powerful symbolic impact in restoring faith and trust, there are several tangible solutions the federal government could offer to alleviate racial bias and increase transparency. The federal government could be a powerful engine to encourage reform by offering technical assistance to local jurisdictions, ensuring they meet minimum standards of accountability, and by providing monetary support to local communities, incentivizing innovation in the development of effective and sustainable reforms.

A. Federal Dollars Should Incentivize Local Police Departments to Improve Hiring Practices and Promote Diversity

Community policing requires more than just investigating and responding to crime. This form of policing requires police officers to engage the community to set criminal justice priorities and to form partnerships that serve public-safety goals.³¹ One of the primary tenets of community policing is for the community and police to work alongside each other toward the mutual goal of improving public safety.³² Therefore, local police departments should pay attention to the types of officers they hire, and should focus on whether these officers have the “soft” skills necessary to engage with the community, while still providing effective law enforcement. This model of policing requires a different skill set than just effectuating arrests and arming someone with paramilitary equipment. Effective community policing requires good communication, interpersonal skills, and the ability to engage in problem solving.³³

Furthermore, it is important that police departments make efforts to diversify their ranks such that the department reflects the diversity of the community it serves. During the unrest in Ferguson, many commentators focused on the fact that while the city was sixty-seven percent black, there were only three nonwhite members of the police force.³⁴ Such lack of racial diversity unsurprisingly sends the wrong message to residents. For example, as Paul Frymer and John D. Skrentny have noted, “to police a minority community with only

31. Simmons, *supra* note 7.

32. *Id.*

33. David L. Carter, *Human Resource Issues for Community Policing*, MICH. ST. U. SCH. CRIM. JUST. 1, 1 available at <http://cj.msu.edu/assets/Outreach-NCCP-ES3.pdf> (last visited Sept. 28, 2014) (describing some of the characteristics necessary for police officers doing community policing); ELLEN SCRIVNER, INNOVATIONS IN POLICE RECRUITMENT AND HIRING: HIRING IN THE SPIRIT OF SERVICE, U.S. DEPT’ OF JUST. 81, 87–96 app. A, available at <http://www.cops.usdoj.gov/Publications/innovationpolicerecruitment hiring.pdf> (last visited Sept. 28, 2014) (explaining the various competencies that should be evaluated during the hiring process within police departments, as well as positive and counterproductive behaviors of potential officers, as outlined by the California Commission on Patrol Officer Psychological Screening Dimensions).

34. Glenn E. Rice & Tony Rizzo, *Like Ferguson, Area Police Departments Lack Racial Diversity*, KANSAS CITY STAR (Aug. 25, 2014, 1:46 PM), <http://www.kansascity.com/news/local/crime/article1282013.html>.

white police officers can be misinterpreted as an attempt to maintain an unpopular status quo rather than to maintain the civil peace.”³⁵

Thus, there has been much focus on increasing the diversity of local police departments. The view is that “minority officers can break down prejudice and stereotypes in the minds of majority officers, and . . . minority officers are better able to police a minority community because of their familiarity with the culture.”³⁶ Moreover, studies show that black officers “get more cooperation than white officers from black citizens and that black officers are less prejudiced against blacks and know more about the black community.”³⁷

The federal government has provided funding to local law enforcement agencies for developing innovative programs designed to recruit and retain police officers to implement community policing, and many of these efforts have specifically funded projects that engage community members in the hiring process. Hiring in the Spirit of Service (“HSS”) was a federally funded project in which police departments recruited community residents to assist the department in the hiring process.³⁸ Participating agencies included: Burlington, Vermont; Sacramento, California; Detroit, Michigan; Hillsborough County, Florida; and King County, Washington.³⁹ The HSS program should be reevaluated and present in other jurisdictions to encourage police departments to involve community members in the hiring process. Involving the community at this early stage might encourage strong partnerships and help rebuild trust and legitimacy where it is lacking.

However, it is important to note that there is also conflicting evidence on whether more diverse police forces actually improve police-community relations. For example, there are studies finding that

black officers shoot just as often as white officers; that black officers arrest just as often as white officers; that black officers are often prejudiced against black citizens; that black officers get less cooperation than white officers from black citizens; and that black officers are just as likely, or even more likely, to elicit citizen complaints and to be the subject of disciplinary actions.⁴⁰

35. Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 691 (2004).

36. *Id.*

37. David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1224–25 (2006).

38. See ELLEN SCRIVNER, U.S. DEP'T OF JUST. OFF. OF CMTY. ORIENTED POLICING SERVS., INNOVATIONS IN POLICE RECRUITMENT AND HIRING: HIRING IN THE SPIRIT OF SERVICE 16 (2006), available at <http://www.cops.usdoj.gov/pdf/vets-to-cops/innovationpolicerecruitmentandhiring.pdf>.

39. *Id.* at 11.

40. Sklansky, *supra* note 37, at 1124.

This evidence suggests that black officers are subject to the same strong institutional factors that other officers experience. Therefore, it is important to ensure that the police organizational culture reflects standards of integrity and accountability regardless of the level of diversity within a police department.⁴¹

B. The Federal Government Must Vigorously Enforce Its Pattern or Practice Authority to Require Reform of Local Law Enforcement Agencies

There is widespread consensus among police experts that police officers are operating within a larger organization, and that the organizational culture of a local police department can have a powerful impact upon individual officers.⁴² Prior to 1994, it was not legally possible for the government to require a local police department to institute reforms directed at the organizational culture.⁴³ However, with the enactment of 42 U.S.C. § 14141, the federal government now has the authority to address the institutional factors that lead to distrust and a lack of public accountability. The “pattern or practice” authority of the U.S. Department of Justice (“DOJ”) has been used to implement organizational reforms in several jurisdictions, and the government currently has an investigation pending in Ferguson.⁴⁴ DOJ has reached agreements with several local police departments, and many of these agreements specifically include provisions to develop and implement written policies against discrimination in policing, including: nondiscrimination in traffic stops; documentation of all traffic stops by recording the driver’s race, ethnic origin, and gender; the reason for the stop and the nature of any post-stop actions; improved supervisory review of traffic stops; implementation of early warning tracking systems to identify officers who receive multiple complaints; and development and review of “use of force” policies.⁴⁵ These reforms are all aimed at increasing

41. See Simmons, *supra* note 6, at 46–47.

42. See Simmons, *supra* note 13, at 381 (noting that the basis of police misconduct is the organizational culture of police departments); see also Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455 (2004) (asserting that it is a mistake to view misconduct as the result of the flawed judgments of individual officers rather than as induced by an organizational culture); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 24 (2003) (noting that it is the organizational culture of law enforcement agencies and not the conduct of individual officers that breeds police misconduct).

43. See 42 U.S.C. § 14141 (2006).

44. Pete Williams, *Justice Department to Investigate Ferguson, Missouri, Police*, NBC NEWS (Sept. 3, 2014, 8:32 PM), <http://www.nbcnews.com/storyline/michael-brown-shooting/justice-department-investigate-ferguson-missouri-police-n195271>.

45. See, e.g., MEMORANDUM OF UNDERSTANDING BETWEEN, THE MONTANA ATTORNEY GENERAL, THE MISSOULA COUNTY ATTORNEY’S OFFICE, MISSOULA COUNTY, AND THE UNITED STATES DEPARTMENT OF JUSTICE (June 10, 2014),

transparency and accountability within the department. In addition to training and developing policies to increase transparency, future agreements should squarely address issues related to promoting a diverse police department, as well as to implementing community policing.

One critique of this legislation, because it is enforced at the discretion of the Attorney General, is that enforcement may vary based upon changes in political whims, enforcement priorities within DOJ, or resource allocations.⁴⁶ Similarly, it is practically impossible for the small group of attorneys at DOJ to investigate, sue, or negotiate agreements with all of the departments nationwide that might warrant this intervention. Typically, the government has initiated investigations after a high-profile case brings attention to underlying problems. For example, the Michael Brown shooting death, although perhaps the most serious allegation of police misconduct, was not the first in Ferguson. Prior to the shooting, there had been evidence that the department disproportionately stopped black residents.⁴⁷ However, it was not until the public outcry that the federal government initiated the investigation.

While the federal government can wield a powerful weapon in the battle against police misconduct, it should not bear the sole responsibility for holding local police departments accountable. States should be encouraged to enact pattern or practice legislation based upon the federal pattern or practice legislation. In the absence of such legislation at the state level, the federal government can still play a vital role in encouraging reform and experimentation at the local level. Since 1994, the Office of Community Oriented Policing Services (“COPS”) has distributed over \$12 billion of federal money to states.⁴⁸ Similarly, the federal government can also use its spending power to withhold federal funds from departments that consistently demonstrate patterns of unconstitutional conduct. Furthermore,

available at http://www.justice.gov/crt/about/spl/documents/missoula_settle_6-10-14.pdf (listing the different procedures the police department was required to implement pursuant to the written policy) (punctuation of title original).

46. See Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 515–19 (2008) (citing lengthy investigation periods, lack of aggressive enforcement, and lack of political will among critiques of § 14141).

47. In 2013, the Ferguson Police Department stopped 686 whites compared to 4632 blacks. MO. ATT’Y GEN.’S OFFICE, RACIAL PROFILING DATA: FERGUSON POLICE DEPARTMENT 1 (2013), available at <http://ago.mo.gov/VehicleStops/2013/reports/161.pdf>. According to the Missouri Attorney General’s Office, the disparity index (the proportion of stops divided by the proportion of the population) is .38 for whites and 1.37 for African-Americans. *Id.* A disparity index value greater than 1 indicates over-representation and a disparity index value less than 1 indicates under-representation. *Id.*

48. See DREW DIAMOND & DEIRDRE MEAD WEISS, DEP’T OF CMTY. ORIENTED POLICING SERVS. U.S. DEP’T OF JUST., COMMUNITY POLICY: LOOKING TO TOMORROW 38 (2009), available at <https://www.ncjrs.gov/pdffiles1/Archive/227424NCJRS.pdf>.

COPS funding can be used to incentivize local police departments to create innovative training, recruitment, and reform agendas.⁴⁹

CONCLUSION

While it is important to increase diversity within local police departments, it is perhaps more important to have officers who demonstrate the skills necessary to implement a policing model that engages rather than alienates the community. Police departments must focus on the types of officers they hire. It is logical that psychological testing of police department candidates should include tests that seek to determine the level of implicit biases an officer may harbor against particular groups. Police departments should also focus on the interpersonal skills of their officers. For example, can the officer communicate effectively with residents? Will the officer develop, or at least attempt to implement, creative solutions for crime detection and prevention? Most importantly, regardless of the officers a department hires, it is imperative that these officers are working in an organizational culture that does not tolerate or cultivate police misconduct.

49. See generally Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 349 (2011) (explaining of how the federal spending power might be used to encourage police reform at the local level).