

# Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails

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*Police misconduct is a multi-faceted problem that no city can permanently solve, but every city must struggle with. Local politicians, courts and police departments generally do not do enough to punish and deter routine acts of police misconduct or to reform problematic police department policies. As a result, many municipalities across America have used “civilian oversight of the police” to address the problem of police misconduct. Unfortunately, numerous civilian oversight bodies have failed and been abolished while others have endured despite being roundly condemned as failures. Existing studies of civilian oversight have done little to indicate how failed civilian oversight bodies can be and should be reformed. In order to build a roadmap for reform, this Note details the oversight gap that civilian oversight has been used to fill and explores strengths and weaknesses of different types of civilian oversight bodies. It then argues that New York City’s existing civilian oversight system has failed and proposes a series of reforms to improve how New York City’s civilian oversight system functions.*

## I. INTRODUCTION

Police misconduct is a persistent, multi-faceted problem that no city can permanently solve.<sup>1</sup> Cities must constantly struggle

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1. See 6 THE N.Y. CITY COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCS OF THE POLICE DEPT’, NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894–1994, 1 (Gabriel J. Chin ed.,

to deter police misconduct and prevent its damaging consequences. Corruption and brutality undermine the legitimacy of governmental authority and reduce the willingness of citizens to comply with the law.<sup>2</sup> Left unchecked, police misconduct often triggers racial tension because “[p]oor people of color bear the brunt of police abuse.”<sup>3</sup>

Many governments across America have attempted to employ civilian oversight of the police to reduce police misconduct. The term “civilian oversight” refers to governmental institutions that empower individuals who are not sworn police officers to influence how police departments formulate policies and dispose of complaints against police officers.<sup>4</sup> Civilian oversight bodies exist in roughly eighty percent of the large cities in America, and approximately one-hundred different civilian-oversight bodies currently operate in the United States.<sup>5</sup> The use of civilian oversight is limited neither to a particular region in America nor to municipalities with particular demographic characteristics.<sup>6</sup>

Civilian oversight has become commonplace because it satisfies a need in most American jurisdictions. Local executive branch officials, local legislatures, criminal courts, and civil courts generally do little to punish and deter routine acts of police misconduct or to reform problematic police-department policies.<sup>7</sup> When scandals erupt, crises occur, and police misconduct obtains momentary political salience, cities create civilian-oversight bodies to fill this oversight gap.<sup>8</sup>

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1997) [hereinafter MOLLEN COMMISSION] (noting the many sources of corruption and brutality).

2. Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING 487, 488 (2004) (noting that studies have shown that people are more likely to “defer to the law and refrain from illegal behavior” when police treat them fairly).

3. SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 4 (2001).

4. This definition is an expansion of Samuel Walker’s incomplete definition of civilian oversight. *Id.* at 5 (defining civilian oversight “as a procedure for providing input into the complaint process by individuals who are not sworn officers”).

5. *Id.* at 6.

6. Samuel Walker & Vic W. Bumphus, *The Effectiveness of Civilian Review: Observations on Recent Trends and New Issues Regarding the Civilian Review of the Police*, 11 AM. J. POLICE 1, 3 (1992).

7. *See infra* Part II.

8. *See* Andrew J. Goldsmith, *New Directions in Police Complaints Procedures: Some Conceptual and Comparative Departures*, 11 POLICE STUD.: INT’L REV. POLICE DEV. 60, 60 (1988) (noting that “reform of police complaints procedures is almost always preceded by some observable ‘crisis’ of public legitimacy in the police”); Walker & Bumphus, *supra*

The problem that most civilian-oversight bodies face is that, once they are created and the crisis passes, governments tend to ignore their need for adequate resources, political support, or amendments to their enabling legislation.<sup>9</sup> Similarly, activists once committed to creating civilian-oversight bodies often fail to provide continued support<sup>10</sup> and turn against established civilian-oversight agencies by criticizing them as inefficient and ineffective.<sup>11</sup> Such criticisms are often well-founded because resistance from rank-and-file police officers, police-department leaders, and police unions can cripple a civilian-oversight body. As a result, numerous civilian-oversight bodies have failed and been dissolved,<sup>12</sup> while others have endured despite being condemned as failures.<sup>13</sup>

Previous studies of civilian oversight have failed to produce a framework for reforming unsuccessful oversight bodies. Studies focused on the structure of civilian-oversight bodies have disregarded the importance of local politics and the place of civilian oversight within a broader system of accountability.<sup>14</sup> Studies regarding effectiveness of civilian oversight have not evaluated

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note 6, at 7 (noting that the creation of a civilian oversight body is almost always “the result of some immediate controversy” such as a high-profile incident involving excessive force).

9. COLLEEN LEWIS, *COMPLAINTS AGAINST THE POLICE: THE POLITICS OF REFORM* 87 (1999).

10. *See, e.g.*, WALKER, *supra* note 3, at 33 (attributing the failure of the Berkeley Police Review Commission to the fact that radical activists did not “follow through with sustained attention to the many practical problems related to the administration of a citizen complaint agency”).

11. *See* PETER FINN, *CITIZEN REVIEW OF POLICE: APPROACHES AND IMPLEMENTATION* 109 (2001), <http://www.ncjrs.gov/pdffiles1/nij/184430.pdf> (observing that, much like police departments and unions, local activists frequently criticize civilian oversight bodies).

12. *See, e.g.*, WALKER, *supra* note 3, at 38 (noting the failure of the Minneapolis internal affairs review team that was dissolved in 1990).

13. *See, e.g.*, Robert A. Perry, *NEW YORK CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994–2006* 1 (2007), [http://www.nyclu.org/files/ccrb\\_failing\\_report\\_090507.pdf](http://www.nyclu.org/files/ccrb_failing_report_090507.pdf) [hereinafter *NEW YORK CIVIL LIBERTIES UNION*] (detailing the shortcomings of New York City’s Civilian Complaint Review Board).

14. LEWIS, *supra* note 9, at 73. For representative studies, see *POLICE ASSESSMENT RES. CTR., REVIEW OF NATIONAL POLICE OVERSIGHT MODELS FOR THE EUGENE POLICE COMMISSION* (2005), [http://www.parc.info/client\\_files/Eugene/Review%20of%20National%20Police%20Oversight%20Models%20%28Feb.%202005%29.pdf](http://www.parc.info/client_files/Eugene/Review%20of%20National%20Police%20Oversight%20Models%20%28Feb.%202005%29.pdf), and Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 *ST. LOUIS U. PUB. L. REV.* 151 (2003).

the ability of civilian-oversight bodies to function despite limited resources and police department resistance.<sup>15</sup>

To build a roadmap for reforming failed civilian-oversight bodies, Part II of this Note details the oversight gap that civilian-oversight agencies fill by describing how other governmental institutions fail to adequately address the problem of police misconduct. Part III compares the four different types of civilian-oversight bodies to show how oversight systems can be structured to address a city's needs, despite the challenges limited resources and police resistance pose. Part IV applies the knowledge gained from this comparative study to the New York City Civilian Complaint Review Board (CCRB). It details how the CCRB has failed and suggests systematic reforms that can be implemented to create a more resilient civilian-oversight system in New York City.

## II. THE OVERSIGHT GAP

### A. EXECUTIVE BRANCH OVERSIGHT

Within local governments, one of the primary vehicles for executive branch oversight of the police is the prosecution of criminal misconduct, but prosecutions only occur in rare, highly-publicized cases.<sup>16</sup> Many cases that should be prosecuted are,

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15. See, e.g., DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW (1994). Perez sets forth three criteria for evaluating the effectiveness of civilian review. The first is "integrity" which "refers primarily to the thoroughness and fairness of the complaint investigation process." WALKER, *supra* note 3, at 60. The second is "legitimacy," which "refers to how the complaint investigation process is perceived by its clients, stakeholders, and audiences." *Id.* Third is "learning," which "refers to the extent to which the process provides meaningful feedback to responsible officials in such a way that allows them to make improvements in both the complaint process and the police department." *Id.* In his book, Walker treats these three criteria as relevant only for assessing how a civilian-oversight body contributes to the investigation of complaints and then focuses on independence to undercut their significance. Walker asserts that a civilian-oversight body that is independent of the police department will have integrity and that an agency that is perceived as independent and effective will be legitimate. *Id.* at 79.

16. Based on its study of police misconduct in fourteen American cities between 1995 and 1998, Human Rights Watch concluded that "victims of abuse correctly perceive that criminal prosecution . . . is rarely an option — except in highly publicized cases." HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 2 (1998). Civil libertarians correctly note that the "unjustified use of force is a crime" and that it is "no less a crime if committed by a police officer." NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 1. Because police officers need latitude to exer-

likely to be dropped because the interests of local executives and prosecutors generally militate against aggressive prosecution. Crime control is often a higher political priority than preventing police misconduct,<sup>17</sup> and police labor unions are generally highly organized and politically savvy.<sup>18</sup> As a result, the interests of local executives are often best served by “appeas[ing] police preferences for internal control” and “avoid[ing] embarrassing disclosures” regarding police misconduct.<sup>19</sup> Prosecutors are most likely to pursue police misconduct cases when the police department refers them, which permits police departments to frustrate accountability by serving as “initial screens to the prosecution of their own members.”<sup>20</sup>

While high-level political pressure may deter local executives from adopting policies favoring the prosecution of police misconduct, police departments can frustrate prosecution in specific cases through a number of informal mechanisms. When a case is referred for prosecution, a representative of the department can “strongly disparage the case, saying that ‘the witnesses cannot make up their minds’ or simply point[] out all the weak spots in the case” without “mentioning the strong ones.”<sup>21</sup> Furthermore,

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cise discretion to perform their duties, not every act of misconduct can or should be prosecuted. *See generally* *City of Chicago v. Morales*, 527 U.S. 41, 109 (1999) (Thomas, J., dissenting) (observing that the “police inevitably must exercise discretion” to “perform their peace-keeping responsibilities satisfactorily” and that “the law assumes that the police will exercise that discretion responsibly”).

17. *See, e.g.*, Al Baker, *Police Data Shows Increase in Street Stops*, N.Y. TIMES, May 6, 2008, at B1 (reporting that the number of people the NYPD stopped continued to increase even after NYPD tactics came under fire in the wake of the shooting of an unarmed man); Shanyndi Raice, *The Mayor’s Race: Focus on Crime and Safety*, OUR TOWN, Aug. 26, 2009, <http://ourtownny.com/?p=3987> (noting that New York City Mayor Michael Bloomberg has “largely avoided addressing critics’ complaints of racial profiling” while leading an “unprecedented effort against illegal guns in New York City”).

18. *See generally*, PEREZ, *supra* note 15, at 51; WALKER, *supra* note 3, at 30 (describing how the Patrolman’s Benevolent Association (“PBA”) in New York waged a successful public relations campaign to ensure that a popular referendum abolished New York City’s first civilian-oversight body in 1966); Dennis Hevesi, *Norman Frank, 82, Public Relations Adviser, Dies*, N.Y. TIMES, May 17, 2007, at B7 (describing how the campaign waged by the PBA in 1966 established the union as a force to be reckoned with for years to come).

19. Tim Prenzler & Carol Ronken, *Models of Police Oversight: A Critique*, 11 POLICING & SOC’Y 151, 152 (2001).

20. *John v. Jacobi, Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 804 (2000).

21. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 538 n.158 (1994) (quoting JAMES G. KOLTS ET AL., THE LOS ANGELES COUNTY SHERIFF’S DEPARTMENT 146 (1992) (commonly known as the report of the Kolts’ Commission)).

prosecutors have little incentive to aggressively pursue prosecutions of police misconduct because “irate rank and file [officers] can and often will find effective means for retaliating against a prosecutor considered overly active in the area of police misconduct.”<sup>22</sup> Thus, taking a laissez-faire attitude toward most acts of police misconduct generally serves the interests of officials at both the highest and lowest levels of the executive branch.

## B. LEGISLATIVE OVERSIGHT

Local legislators usually have the same institutional incentives as local executives to avoid engaging in extensive and aggressive oversight activities.<sup>23</sup> As a result, legislative committees that are involved with the operations of police departments are unlikely to launch investigations or hold hearings regarding misconduct absent a major public scandal.<sup>24</sup> Even advocates of legislative oversight of the police have acknowledged that its effectiveness is contingent on the “political will to launch an investigation into police practices” and a “problem of sufficient gravity to warrant the expenditure of time and resources.”<sup>25</sup>

## C. JUDICIAL OVERSIGHT IN CRIMINAL CASES

Judges presiding over criminal proceedings scrutinize the propriety of police action when they decide whether the exclusionary rule should be applied because the police obtained evidence unconstitutionally.<sup>26</sup> The fact that many police encounters that involve constitutional violations do not end in arrest limits judicial oversight.<sup>27</sup> As a result, criminal courts cannot provide redress to

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22. Wayne A. Kerstetter, *Who Disciplines the Police? Who Should?*, in *POLICE LEADERSHIP IN AMERICA* 149, 159 (William A. Geller ed., 1985).

23. See generally PEREZ, *supra* note 15, at 55 (noting that “political realities” make legislative oversight of the police “an unrealistic expectation” because questioning police practices is often considered to be “political suicide”).

24. See, e.g., NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 49 (arguing that the oversight committee of the New York City Council has failed to hold regular misconduct hearings despite manifest need).

25. Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 *J. LEGIS.* 1, 13 (2005).

26. See *United States v. Calandra*, 414 U.S. 338, 347 (1974) (noting that the “prime purpose” of excluding evidence “is to deter future unlawful police conduct”).

27. During a recent study of police behavior, trained observers documented 115 searches that police officers in a single department conducted. Bernard E. Harcourt,

many victims of police misconduct, and they can only provide a limited amount of deterrence.

Even when a court suppresses evidence, it usually has little impact on the individual officers who committed the constitutional violations.<sup>28</sup> Police departments have little incentive discipline officers when evidence is suppressed because it is easy to write off a few lost prosecutions<sup>29</sup> as a cost of doing business.<sup>30</sup> When evidence is suppressed, it remains off the streets. Criminals do not get their guns back simply because they are inadmissible as evidence. Consequently, a police department that focuses on preventing crime instead of prosecuting criminals can view illegal searches as productive searches.

#### D. JUDICIAL OVERSIGHT IN CIVIL CASES

Civil courts commonly review the propriety of police action when civilians bring suit under 42 U.S.C. § 1983 alleging that police officers violated their constitutional rights.<sup>31</sup> Even if a plaintiff can bring a successful § 1983 action,<sup>32</sup> money damages,

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*Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL'Y 363, 363 (2004) (citing Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004)). The study found that 30% of the searches were unconstitutional, but 31 out of 34 unconstitutional searches were "invisible to the [criminal] courts" because they did not end with the issuance of a summons or an arrest. *Id.* These results comport with actual statistics regarding street encounters. In 2008, the NYPD conducted more than 500,000 stops, and only 4% led to an arrest. Michael Powell, *Police Polish Image, but Concerns Persist*, N.Y. TIMES, Jan. 4, 2009, at A21.

28. See Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, at B1 (reporting that New York City Police Department officers were not sanctioned as the result of more than twenty cases in which federal judges suppressed guns).

29. Studies of suppression motions have found that "only a small percentage cases are lost because of illegal searches, generally less than 5% of all arrests . . ." Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 331 (2004) (citations omitted).

30. See, Weiser, *supra* note 28, at B1 (reporting that NYPD spokesman Paul Browne had commented that the fact that a gun was suppressed does not necessarily indicate that police officers "did something wrong" and that in each case a gun was suppressed "the suspect in fact had a gun").

31. See generally 42 U.S.C. § 1983 (2006) (providing that any person who deprives an individual of his or her constitutional rights under color of state law shall be liable to that individual).

32. The intricacies of § 1983 litigation are beyond the scope of this Note. It suffices to point out that *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and its progeny work in tandem with the doctrine of qualified immunity to frustrate civil suits under

the only commonly available remedy, do little to deter individual officers from engaging in illegal activity. The Supreme Court's decisions in *Rizzo v. Goode*<sup>33</sup> and *City of Los Angeles v. Lyons*<sup>34</sup> have ensured that equitable relief is virtually unavailable to private litigants challenging patterns of police misconduct.<sup>35</sup> When courts award damages, municipalities indemnify officers thereby ensuring that § 1983 actions have little impact on individual officers.<sup>36</sup>

At the same time, the capacity of large cities to self-insure against civil liability<sup>37</sup> can enable elected officials to “pay the cost of damage awards instead of taking the politically unpopular steps necessary to remedy . . . [patterns] of police abuse.”<sup>38</sup> New York City is an example of how a municipality can steadily incur civil liability from police misconduct without being forced to re-evaluate its policies. New York pays tens of millions of dollars in damages related to police misconduct annually, but does little to systematically analyze and limit its civil liability.<sup>39</sup> The civil liability the New York City Police Department (NYPD) incurs is, however, a relatively small percentage of the total civil liability

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§ 1983. See Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504–12 (1993).

33. 423 U.S. 362 (1976) (holding that a district court's equitable decree designed to remedy a pattern of police abuse in Philadelphia represented an unconstitutional intrusion into the administration of state and local government).

34. 461 U.S. 95 (1983) (holding that a plaintiff who had allegedly been subjected to a chokehold by a police officer in the City of Los Angeles lacked standing to seek equitable relief).

35. Hoffman, *supra* note 32, at 1512–14 (observing that the “combination of *Rizzo* and *Lyons* made it virtually impossible for private section 1983 litigants to obtain equitable relief against patterns or policies of police abuse” even when abuse is “the result of an official, acknowledged policy or practice”).

36. Hoffman, *supra* note 32, at 1507; see, e.g., THE ASS'N OF THE BAR OF THE CITY OF N.Y. COMM. ON N.Y. CITY AFF., THE FAILURE OF CIVIL DAMAGES CLAIMS TO MODIFY POLICE PRACTICES, AND RECOMMENDATIONS FOR CHANGE (2000), [http://www.abcny.org/Publications/reports/print\\_report.php?rid=32](http://www.abcny.org/Publications/reports/print_report.php?rid=32) [hereinafter NYC BAR REPORT] (noting that the New York City Corporation Counsel indemnifies police officers in the “overwhelming majority of civil claims”).

37. See, e.g., NYC BAR REPORT, *supra* note 36 (noting that New York City self-insures and pays civil damage awards “directly out of its fiscal resources”).

38. Hoffman, *supra* note 32, at 1509.

39. NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 47 (“Between 2000 and 2004 New York City taxpayers paid out \$224 million in damages pursuant to judgments or settlements in police-brutality lawsuits.”); NYC BAR REPORT, *supra* note 36.



the City of New York incurs in a fiscal year.<sup>40</sup> Thus, its impact on the city budget is generally insufficient to force political action.

Even assuming that civil liability could effectively incentivize cities to regulate police misconduct, it cannot reach some of the most routine and offensive acts of misconduct. For example, a police officer does not violate the Federal Constitution by calling someone an “asshole” while issuing him a parking ticket.<sup>41</sup> As a result, civil actions cannot effectively deter the mundane acts of misconduct<sup>42</sup> that seriously undermine the legitimacy of a police force.<sup>43</sup>

#### E. HOW INTERNAL OVERSIGHT FAILS TO FILL THE OVERSIGHT GAP

Local executives, local legislatures, criminal courts, and civil courts each provide extremely limited forms of police oversight. Individually and collectively, these governmental bodies do not detect, punish, or deter routine acts of police misconduct.<sup>44</sup> They also fail to provide sustained scrutiny of police department policies.<sup>45</sup> The resulting oversight gap defines the functions that a dedicated oversight body should be expected to perform.

Although internal oversight could fill the oversight gap, municipalities across the country have turned to civilian oversight because internal investigative units are often perceived as biased,

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40. Between Fiscal Year 1997 and 2006, the dollar amount paid out due to claims filed against the NYPD, including claims unrelated to police misconduct, represented less than eighteen percent of the city’s total civil liability during that time. WILLIAM C. THOMPSON, JR., CITY OF N.Y. OFFICE OF THE COMPTROLLER, CLAIMS REPORT FISCAL YEARS 2005–2006 55 (2007), [http://www.comptroller.nyc.gov/bureaus/bla/pdf/2006\\_Claims\\_Report.pdf](http://www.comptroller.nyc.gov/bureaus/bla/pdf/2006_Claims_Report.pdf).

41. WALKER, *supra* note 3, at 10 (“There is no [Supreme] Court decision barring a police officer from calling someone on the street a ‘scumbag’ or an ‘asshole.’”).

42. Discourteous comments are fodder for § 1983 actions only when combined with threats of force or the use of force. *See* WALKER, *supra* note 3, at 10 (observing that “pushing someone around in a way that is humiliating but not physically injurious falls below the level of constitutional scrutiny”); *see also* Mills v. Fenger, No. 03-0048-pr, 2006 U.S. App. LEXIS 31954, at \*9 n.1 (2d Cir. Dec. 26, 2006) (collecting cases).

43. *See* Carroll Seron et al., *Judging Police Misconduct: “Street-Level” versus Professional Policing*, 38 L. & SOC’Y REV. 665, 691–92, 697 (2004) (finding that citizens viewed discourteous and offensive language as serious police misconduct even in incidents where civilians committed crimes or police officers used excessive force).

44. *See supra* Part II.A–D.

45. *Id.*

ineffective, and illegitimate.<sup>46</sup> Since few people actually file complaints against the police,<sup>47</sup> negative perceptions are often based on the common-sense conclusion that “asking police to investigate their colleagues” through internal investigations “is akin to asking brothers and sisters to investigate each other or their parents.”<sup>48</sup>

Experience has shown that such perceptions are often well founded. The hostility and skepticism that police officers commonly display toward civilians who attempt to file complaints makes filing an “unnecessarily difficult” and “often intimidating” process.<sup>49</sup> For example, when Rodney King’s brother first tried to file a complaint, “the sergeant on duty treated him skeptically, asked him whether he had ever been in trouble, and never filled out a complaint form.”<sup>50</sup> Such failures are not unique to Los Angeles. In 1997, the New York City Internal Affairs Bureau failed to record the initial complaint regarding the Abner Louima incident.<sup>51</sup> When officers cannot even be trusted to record complaints, it is simply “unrealistic” to expect them to aggressively investigate “former partners, superiors or colleagues who, as members of the same closed system, have shared departmental, district and station problems and are inculcated with the same strong culture.”<sup>52</sup>

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46. HUM. RTS. WATCH, *supra* note 16, at 63 (noting that no outside review had “found the operations of internal affairs divisions in any of the major U.S. cities satisfactory”).

47. See WALKER, *supra* note 3, at 123–24 (arguing that it is difficult to know exactly how underreported police misconduct is, but concluding that “[m]ost people who feel that they have some reason to complain about a police officer do not do so”).

48. LEWIS, *supra* note 9, at 29.

49. HUM. RTS. WATCH, *supra* note 16, at 50. When the Mollen Commission investigated how the New York City Police Department’s Internal Affairs Division handled phone calls reporting police misconduct in 1994, it found that officers frequently spoke to callers in “harsh tones,” encouraged callers to hang up, or placed them on hold for long periods of time. MOLLEN COMMISSION, *supra* note 1, at 103.

50. HUM. RTS. WATCH, *supra* note 16, at 50.

51. COMM’N TO COMBAT POLICE CORRUPTION, PERFORMANCE STUDY: INTERNAL AFFAIRS BUREAU COMMAND CENTER 7 (1997), [http://www.nyc.gov/html/ccpc/downloads/pdf/command\\_center-october1997.pdf](http://www.nyc.gov/html/ccpc/downloads/pdf/command_center-october1997.pdf). The Louima incident remains one of the most infamous instances of police misconduct in New York City’s history. It garnered national media attention and a New York City Police officer ultimately pled guilty to sodomizing Mr. Louima, a Haitian immigrant, with a stick in the bathroom of a police precinct stationhouse. See generally David Barstow, *At Louima Church, Hymns and Hopes for Trial’s Reckoning*, N.Y. TIMES, May 24, 1999, at B1; *THE LOUIMA CASE; Volpe Recounts Night of Brutality, Threats and Rage*, N.Y. TIMES, May 26, 1999, at B8.

52. LEWIS, *supra* note 9, at 29.

### III. A COMPARISON OF FOUR TYPES OF CIVILIAN-OVERSIGHT BODIES

Civilian-oversight bodies can be structured in several different ways.<sup>53</sup> Most civilian-oversight bodies in America fall into four broad categories: (1) civilian in-house, (2) civilian external supervisory, (3) civilian external investigatory, and (4) civilian auditor.<sup>54</sup> No form of oversight is perfect and each has distinct weaknesses that can cause it to fail. Consequently, substituting one form of civilian oversight for another will not lead to long-term success. Multiple civilian-oversight bodies can, however, work alongside each other within a single municipality to form a civilian-oversight system that is stronger and more resilient than any single civilian-oversight body.

#### A. THE COMMON WEAKNESSES OF THE FOUR TYPES OF CIVILIAN-OVERSIGHT BODIES

Regardless of structure, almost all civilian-oversight bodies lack the authority to directly discipline officers and modify police department policies.<sup>55</sup> Most civilian oversight bodies may only recommend discipline for individual officers and recommend changes in departmental policy.<sup>56</sup> If an oversight body is unable or unwilling to exert pressure to ensure that its recommendations are followed, it is likely to seek out ways to appease the police

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53. See FINN, *supra* note 11, at 6 (identifying four types of structures); Goldsmith, *supra* note 8, at 63–65 (identifying six possible structures); Kerstetter, *supra* note 22, at 160 (identifying three possible structures).

54. The terms “civilian in-house,” “civilian external supervisory,” and “civilian external investigatory” are taken from Goldsmith, *supra* note 8, at 63–65. FINN, *supra* note 11, at 6, and WALKER, *supra* note 3, at 62, identify bodies based on these three models, and the civilian auditor model, as those that currently exist in the U.S.

55. See FINN, *supra* note 11, at 6 (noting there is no single model for oversight, but that most only have the power to make disciplinary recommendations); Walker & Bumphus, *supra* note 6, at 4 (noting that no civilian oversight body has the power to impose discipline directly). No comprehensive review of civilian oversight bodies has been conducted since Finn’s report. This makes it difficult to know how many civilian oversight agencies currently have the power to directly impose discipline.

56. FINN, *supra* note 11, at 6. This norm is not the result of historical accident. Granting supervisors within the police department the exclusive power to shape policy and impose discipline means that they can be held accountable for disciplinary lapses and unsound policies. See *infra* note 270.

department it oversees to secure its cooperation.<sup>57</sup> Such a strategy usually results in deference to police officers who are the subjects of complaints and deference to the police department regarding matters of departmental policy. Over time, this appeasement can undermine a civilian-oversight body<sup>58</sup> and transform it into a “whitewash” mechanism that does more to conceal misconduct than reveal it.<sup>59</sup> Although scholars debate what the best structure is for a civilian-oversight body,<sup>60</sup> every form can fail when a police department refuses to cooperate with the oversight process.

## B. CIVILIAN IN-HOUSE MODELS

There are two forms of civilian in-house oversight: (1) bottom-up, and (2) top-down. Both types have inherent flaws that make them unlikely to succeed if employed as the sole form of civilian oversight within a municipality. These flaws also make civilian in-house oversight difficult to incorporate into a system with multiple civilian-oversight bodies.

Bottom-up civilian in-house oversight entails hiring civilians to work for the internal-affairs unit of the police department and to conduct the investigations that sworn officers within the internal affairs would normally handle.<sup>61</sup> This oversight model places a civilian face on investigations, but it leaves decisions as to whether misconduct occurred in the hands of the senior police

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57. See Tim Prenzler, *Civilian Oversight of the Police: A Test of Capture Theory*, 40 BRIT. J. CRIMINOLOGY 659, 672 (2000).

58. This process has been aptly described by one scholar as “indirect [regulatory] capture through structural influences.” *Id.* (using the Criminal Justice Commission in Queensland, Australia as a case study in regulatory capture). A regulatory institution is captured when the entity it oversees has subverted the institution’s impartiality and zealousness. *Id.* at 662.

59. Failed civilian oversight agencies are often described as “whitewash” agencies. See, e.g., Editorial, *Eliminating Rogue Cops*, CHI. TRIB., July 22, 2007, at C6 (describing the Office of Professional Standards as an agency that has routinely “whitewashed bad behavior” when OPS was nearly abolished and transformed into the Independent Police Review Authority); WALKER, *supra* note 3, at 29 (noting that one expert characterized the original New York City Civilian Complaint Review Board as a “whitewash agency” in 1966).

60. See, e.g., Kerstetter, *supra* note 22, at 180–81 (arguing for adoption of the civilian auditor model); Prenzler & Ronken, *supra* note 19, at 152 (arguing for adoption of the civilian external investigatory model); POLICE ASSESSMENT RES. CTR., *supra* note 14, at 26 (observing that the civilian external supervisory model is most appropriate for some communities).

61. Goldsmith, *supra* note 8, at 64.

officers who review investigations once they are complete.<sup>62</sup> During its first thirty-three years of existence,<sup>63</sup> Chicago's Office of Professional Standards ("OPS") was an example of bottom-up civilian in-house oversight. It was structured as an independent civilian-investigative unit under the control of the Police Superintendent, who retained the authority to decide whether to sustain an allegation and impose discipline.<sup>64</sup>

Bottom-up civilian in-house oversight is inherently weak because it is premised on the flawed assumption that simply substituting civilians for sworn officers is enough to ensure strong oversight.<sup>65</sup> Civilian employees of a police department will have a limited capacity to challenge the sworn officers who employ them and to develop a uniquely "civilian" viewpoint regarding police misconduct. They are likely to become "police buffs," highly supportive of the police officers' points of view.<sup>66</sup> They will, therefore, be unable to ensure that oversight remains effective unless the department is committed to it. At the same time, placing civilians in charge of investigations does little to promote proactive policy review unless the department commits itself to aggregating information gleaned from complaint investigations. Given these inherent weaknesses, it is unsurprising that Chicago's OPS was effectively abolished amidst scandal in 2007 when it was revealed that the OPS and the police department had repeatedly ignored hundreds of complaints regarding a group of officers who were

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62. *Id.*

63. The Office of Professional Standards was created in 1974 and was structured as a civilian in-house body until it was reformed into the Independent Review Authority in 2007, which is an external investigative body. City of Chicago Independent Police Review Authority, About IPRA, <http://www.iprachicago.org/about.html> (last visited Oct. 1, 2009).

64. David Fogel, *The Investigation and Disciplining of Police Misconduct: A Comparative View — London, Paris, Chicago*, 10 POLICE STUD.: INT'L REV. POLICE DEV. 1 (1987).

65. It is often assumed that mere "civilianization" will solve oversight problems. For example, the Commission to Combat Police Corruption in New York City proposed that problems regarding how the Internal Affairs Bureau receives and records complaints could be solved by employing civilians to handle calls regarding misconduct. COMM'N TO COMBAT POLICE CORRUPTION, *supra* note 51, at 60.

66. LEWIS, *supra* note 9, at 65 (noting that civilians employed by a police department are not truly independent and collecting authorities maintaining that civilian employees "often become captured by the police to the point where they become defensive of police and cynical about complainants"). For a representative use of the term "police buff," see WALKER, *supra* note 3, at 31 (citing Ronald Khan, *Urban Reform and Police Accountability in New York City: 1950–1974*, in URBAN PROBLEMS AND PUBLIC POLICY 107, 118 (Robert L. Lineberry & Louis H. Masotti eds., 1975) (referring to how the first New York City Civilian Complaint Review Board failed in the 1960s)).

subsequently indicted for robbery and kidnapping.<sup>67</sup> Though OPS will remain a glaring example of the failure of one model for civilian in-house oversight, the inherent defects in the model are strong enough to make it unlikely that anybody modeled on the OPS could enjoy sustained success.

The second type of civilian in-house oversight is no less problematic. In contrast to the bottom-up approach to involving civilians in the complaint review process, Seattle has placed a civilian lawyer from outside the department in charge of its internal affairs unit, the Office of Professional Accountability (OPA).<sup>68</sup> The Director of the OPA reviews completed complaint investigations and may agree with the investigator's findings, direct further investigation, or recommend different findings.<sup>69</sup> The Director forwards substantiated complaints to the Chief of Police "for final decision and the imposition of discipline if warranted."<sup>70</sup> Positioned at the top of an internal affairs unit, a civilian director certainly has the nominal power to ensure that an internal-affairs unit effectively performs core functions. Like a local prosecutor, however, a civilian director will have incentives to appease the police department. A director must depend on police officers to conduct investigations, gather information, and help with the performance of everyday duties. As a result, the views of a civilian director of an internal-oversight agency are likely to reflect the views of the officers under her, and for this reason top-down in-house oversight is liable to fail in the same way as bottom-up in-house oversight.

### C. CIVILIAN-EXTERNAL-SUPERVISORY MODEL

Under a civilian-external-supervisory model, police officers from an internal unit investigate complaints, and an independent civilian board reviews completed investigations.<sup>71</sup> The extent to which external-supervisory bodies review complaints varies widely. Some bodies, such as the recently created City of Boston Community Ombudsman, only have the power to hear appeals

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67. Editorial, *Eliminating Rogue Cops*, *supra* note 59, at C6.

68. POLICE ASSESSMENT RES. CTR., *supra* note 14, at 19.

69. *Id.*

70. *Id.*

71. Goldsmith, *supra* note 8, at 64.

regarding closed internal investigations and to randomly audit internal investigations to ensure that they have been thorough and fair.<sup>72</sup> This limited form of external-supervisory oversight can potentially address concerns regarding the fairness and thoroughness of individual complaint investigations, but it is not a vehicle for effective, proactive policy review. Random auditing and appellate review can only provide a fragmentary picture of trends regarding misconduct within a department. Some external-supervisory bodies like the Los Angeles County Office of Independent Review do not suffer from this deficiency because they have the power to review all completed internal investigations and to make disciplinary recommendations to the police chief.<sup>73</sup>

Nevertheless, the abolition of many external-supervisory bodies has led many to conclude that external-supervisory-civilian oversight is inherently weak<sup>74</sup> and deferential to the police<sup>75</sup> because it relies on data from internal investigations. This analysis of the weakness of external-supervisory bodies is incomplete. An external supervisory body that simply reviews case files and does not directly interact with citizens cannot build legitimacy through positive interactions that create the appearance of procedural fairness.<sup>76</sup> Because there is a ninety percent chance that an external supervisory body will agree with the outcome of the police

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72. Donovan Slack, *Citizen Police-Review Board Stalled, Has Yet to Look at a Single Case*, BOSTON GLOBE, Oct. 12, 2007, at B1; COMTY. OMBUDSMAN OVERSIGHT PANEL OF THE INTERNAL AFFAIRS DIV. OF THE BOSTON POLICE DEP'T, ANNUAL REPORT 8–13 (2008), [http://www.cityofboston.gov/police/co-op/pdfs/CO-OP\\_Annual\\_Report\\_2008.pdf](http://www.cityofboston.gov/police/co-op/pdfs/CO-OP_Annual_Report_2008.pdf).

73. The Office of Independent Review monitors and directs ongoing internal investigations conducted by the Los Angeles County Sheriff's Department (LASD), makes disciplinary recommendations to the department based on closed investigations, and has the authority to make "recommendations for improvements in broader policies, practices and procedures." POLICE ASSESSMENT RES. CTR., *supra* note 14, at app. 2.14.

74. *Id.* at 26 (recommending that a municipality implement an external supervisory model only if relations between the police and the community are "minimally damaged").

75. Bobb, *supra* note 14, at 163 (noting that "[c]itizen review boards have not been effective at causing reform, and often are co-opted by the police department whose investigations they are supposed to review," and "wind up agreeing with the police department in almost all instances").

76. The "procedural justice" theory of legitimacy posits that belief in the legitimacy of a system arises out of interactions where authorities demonstrate that the procedures they follow are fair. David J. Smith, *The Foundations of Legitimacy*, in LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 30–31, 55–56 (Tom R. Tyler ed., 2007). Studies conducted to confirm the procedural justice theory have shown that perceived fairness has a greater impact than the substantive outcome of a case on whether an individual views a system as legitimate. *Id.*

department's internal investigation in any given case, it is unlikely that any civilian-external-supervisory body will be able to establish its legitimacy by providing civilians with favorable outcomes.<sup>77</sup> Therefore, civilian-external-supervisory bodies are likely to be perceived as engaging in "cheerleading instead of true oversight."<sup>78</sup>

#### D. CIVILIAN EXTERNAL INVESTIGATIVE MODEL

The power to investigate allegations of misconduct and conduct proactive policy review creates the appearance that civilian-external-investigative bodies are a superior form of civilian oversight.<sup>79</sup> External-investigative bodies, unlike civilian in-house bodies or external-supervisory bodies, have the power to directly interview officers and civilians and to obtain the documentary evidence needed to reach an informed, independent judgment regarding the merits of a complaint.<sup>80</sup> By conducting investigations in a manner that makes them appear to be procedurally fair, external-investigative bodies can establish their legitimacy<sup>81</sup> and bridge the credibility gap that a low substantiation rate inevitably creates.<sup>82</sup>

Nevertheless, having the power to investigate complaints does not automatically make external-investigative agencies the most

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77. WALKER, *supra* note 3, at 120 (noting that at least one study has found that municipal police departments sustain about ten percent of all complaints while civilian oversight agencies sustain between twelve or thirteen percent of all complaints). Scholars have generally accepted that allegations of police misconduct will inevitably be substantiated at a low rate. See, e.g., Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 656 (2004) (noting that citizen review agencies do not necessarily substantiate more complaints than internal investigative units).

78. Steve Miletich & Sara Jean Green, *City, Police Guild at Odds Again; Dispute Over Privacy — Sides Disagree on Whether Wording of Approved Contract Allows the Release of Disciplined Officers' Names*, SEATTLE TIMES, Aug. 3, 2008, at B1 (quoting Peter Holmes, former chairman of Seattle's review board).

79. Goldsmith, *supra* note 8, at 63–65.

80. See *id.*

81. See Joseph De Angelis & Aaron Kupchik, *Citizen Oversight, Procedural Justice, and Officer Perceptions of the Complaint Investigation Process*, 30 POLICING 651, 661, 665 (2007) (reporting that perceptions regarding the fairness of the complaint process turned on how soon officers were interviewed after the complaint was filed, whether officers were kept informed regarding the investigative progress, the timeliness of the investigation, and whether officers were notified about the results of the complaint).

82. PEREZ, *supra* note 15, at 74 (quoting PAUL HOFFMAN & JOHN M. CREW, *ON THE LINE* (1991)).



independent<sup>83</sup> or strongest<sup>84</sup> form of civilian oversight. Limited resources can rapidly undermine the effectiveness of external-investigative agencies because they need the staff, resources, and expertise to conduct investigations. The Office of Citizen Complaints (OCC) in San Francisco was once praised as an effective external-investigative body,<sup>85</sup> but is now an example of how even a well-run external-investigative agency can quickly start to fail. In 2007, the local press excoriated the agency<sup>86</sup> after an audit revealed that it had failed to complete many investigations in a timely manner, and that the statute of limitations on many complaints had expired before disciplinary action could be taken.<sup>87</sup> It was also alleged that OCC investigators discouraged individuals from filing complaints due to high caseloads.<sup>88</sup> Though other factors probably contributed to these failures, the agency's lack of resources clearly caused it to function in ways that undermined the integrity of the investigative process.<sup>89</sup>

#### E. CIVILIAN AUDITOR MODEL

The civilian auditor differs from the other three types of civilian-oversight bodies because it does not focus on the investigation of complaints. Rather, civilian auditors are typically granted full access to police department records and given wide-ranging authority to report on all aspects of departmental policy and to

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83. *Contra* WALKER, *supra* note 3, at 63.

84. *Contra* Kerstetter, *supra* note 22, at 160.

85. Press Release, American Civil Liberties Union of Eastern Missouri, *Citizen Oversight Agencies Effective in Fighting Police Misconduct*, (Nov. 14, 2000), <http://www.aclu-em.org/pressroom/2000pressreleases/civilianoversightofpolice.htm> (noting that Samuel Walker had identified the Office of Citizen Complaints as one of the "most effective oversight agencies").

86. *See* Editorial, *A Sick City Watchdog; SFPD Oversight Lacking*, S.F. CHRON., Jan. 28, 2007, at E4 (declaring that the Office of Citizen Complaints was "in shambles: poorly run, slow to perform and failing its duty to investigate citizen complaints").

87. Jaxon Van Derbeken, *Audit Rips Police Complaints Office*, S.F. CHRON., Jan. 23, 2007, at B2 (reporting that between 2003 and 2006, the agency had failed to meet its deadline of completing investigations within nine months and that this caused the one-year statute of limitations to expire on fifty-three percent of its complaints).

88. *Id.* (reporting that investigators were handling caseloads that were "double the average caseloads of equivalent agencies" in other cities and were avoiding being assigned to complaints handled over the phone by mailing out complaint forms).

89. *See id.* (reporting that the agency had been "shortchanged" by the city's budget and that investigators were handling caseloads that were "double the average caseloads of equivalent agencies" in other cities).

advocate for systemic reform.<sup>90</sup> The auditor model has enjoyed strong support within the academic community.<sup>91</sup> The well-publicized success of Merrik Bobb, who monitors the Los Angeles Sheriff's Department (LASD) as the Special Counsel for the County of Los Angeles,<sup>92</sup> has also strengthened support for this form of oversight.<sup>93</sup>

One should not, however, over-generalize based on the success of a single auditor because auditor type civilian oversight is not immune to failure. The auditor model's greatest strength is that one individual can often do the work of an auditor,<sup>94</sup> thus making the auditor a cost-effective form of oversight capable of functioning with more limited resources than an external-investigative agency. Unfortunately, the auditor model's greatest strength is also its greatest weakness. Because the model gives the power to conduct policy review to an individual or small group, the success of an auditor depends on the individual skill of the auditor and her staff and on their ability to maintain a reputation for fairness and impartiality.<sup>95</sup>

A civilian auditor must fight a three-front battle to satisfy the competing interests of politicians, the police department, and the general public. Unfortunately, auditors are not necessarily well-positioned to develop a strong relationship with the public. The

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90. See Bobb, *supra* note 14, at 159–61; see also POLICE ASSESSMENT RES. CTR., *supra* note 14, 22–25.

91. Kerstetter, *supra* note 22, at 166 (describing the civilian monitor as the most widely acclaimed and accepted form of civilian oversight).

92. Although other factors contributed to the gains that have been made, “excessive force has been substantially curbed” during Bobb’s tenure. Bobb, *supra* note 14, at 6 (noting that between 1991 and 2000 the number of suspects that the LASD killed or wounded dropped by approximately 70%). It should, however, be noted that the Special Counsel for the County of Los Angeles is one of three civilian oversight bodies that oversee the LASD but is the only one *not* focused on reviewing individual complaints. POLICE ASSESSMENT RES. CTR., *supra* note 14, at 22. The Office of Independent Review participates in and reviews complaints against the police and the Office of the Ombudsman reviews unfounded or unresolved complaints against LASD members. *Id.* at apps. 2.14, 2.16.

93. *Id.* at 26 (advising that, unlike other forms of oversight, auditors could have an impact in communities where relations between the community and the police are “seriously broken”).

94. Since an auditor does not need to process a large number of individual complaints, a single professional may be the only staffer needed to create an effective auditor. See FINN, *supra* note 11, at 134.

95. POLICE ASSESSMENT RES. CTR., *supra* note 14, at 26 (observing that an auditor “puts his own credibility on the line, and his analysis of progress (or lack of same) must be irrefutable and convincing”).

appointed auditor is usually a professional policing expert,<sup>96</sup> whose views of police activity differ from the general community.<sup>97</sup> Like external-supervisory bodies, auditors rely on the police department to obtain information and do not necessarily have public contact.<sup>98</sup> Consequently, the public may not perceive an auditor as a legitimate oversight authority because the auditor is an insider with an insider's perspective.<sup>99</sup> Auditors cannot pander to the public to combat this problem because they must temper their rhetoric to maintain their relationships with the police department and politicians.<sup>100</sup> As a result, a hostile police department or union that challenges the auditor's competence, impartiality, or conclusions can undermine an auditor's authority.<sup>101</sup>

#### F. MIXED SYSTEMS OF CIVILIAN OVERSIGHT

No single form of civilian oversight is the best response to the problem of police misconduct. Any civilian oversight body that stands alone is likely to fail over time when faced with resistance from the police department it oversees. The failure of first-generation civilian-oversight bodies has led to the creation of "stronger" external-investigative agencies in such cities as New York<sup>102</sup> and Chicago<sup>103</sup> and the creation of multiple civilian-oversight bodies in such cities as Denver,<sup>104</sup> Seattle,<sup>105</sup> and Port-

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96. See FINN, *supra* note 11, at 134 (noting that "only a professional has the expertise and time to conduct a proper audit"); see also POLICE ASSESSMENT RES. CTR., *supra* note 14, at 24 (noting that "the auditor is often a policing expert").

97. POLICE ASSESSMENT RES. CTR., *supra* note 14, at 24.

98. *Id.*

99. See *id.* at 25 (observing that an auditor does not involve the community the same way as other oversight models do and that this can lead some to believe that "oversight is not sufficiently connected to community interests and concerns").

100. See Bobb, *supra* note 14 at 161 (arguing that auditors must strip discussion of "blame, rhetoric and ideology").

101. See Kerstetter, *supra* note 22, at 166 (noting that a civilian auditor needs "substantial informal authority" based on a reputation for "fairness and good judgment" to effect change).

102. See *infra* Part IV.A.

103. See *supra* note 63 and accompanying text.

104. In 2005, Denver disbanded the Public Safety Review Commission, an external supervisory body that had existed since 1992, and replaced it with a civilian monitor and a new civilian oversight board. Editorial, *Police Oversight in Motion*, DENV. POST, Dec. 15, 2004, at B6; Joseph G. Sandoval, Editorial, *Police Oversight Not New 1992 Review Board Created Foundation*, DENV. POST, Nov. 28, 2004, at E1.

land.<sup>106</sup> Attempts to reform civilian oversight by installing the “right” form of oversight ignore the fact that no one type of civilian oversight is necessarily less likely to fail over time. Consequently, the creation of multiple oversight bodies is a more promising pathway for reform.

#### IV. HOW NEW YORK CITY’S CIVILIAN OVERSIGHT SYSTEM HAS FUNCTIONED AND FAILED

##### A. THE HISTORY OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD

The Civilian Complaint Review Board (CCRB) is a large, independent investigative agency that operates in New York City and employs more than 100 civilian investigators.<sup>107</sup> It represents the city’s third attempt to establish a mechanism to handle civilian complaints against the police.

Between 1953 and 1987, the CCRB was basically<sup>108</sup> an internal police-department unit “made up solely of police executives [non-uniformed members of the department] appointed by the police commissioner,” and its investigative staff was composed of New York City police officers.<sup>109</sup> It had the power to review reports that police department investigators prepared and then report its findings and recommendations to the police commissioner.<sup>110</sup>

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105. In Seattle, the OPA Director is part of a three-part system of civilian oversight that includes a board that reviews closed OPA investigations and a civilian auditor. POLICE ASSESSMENT RES. CTR., *supra* note 14, at apps. 3.40, 4.16.

106. *Id.* at app. 2.22 (describing the Citizen Review Committee and Independent Review Division of the City Auditor’s Office).

107. See N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT JANUARY-DECEMBER 2008 9, 17 (2009), <http://www.nyc.gov/html/ccrb/pdf/ccrbann2008.pdf> [hereinafter CCRB YEAR 2008 STATUS REPORT] (describing the core mission of the agency as the investigation and mediation of complaints, and noting that the agency is authorized to employ 147 investigators).

108. In 1966, Mayor John Lindsay altered the board’s structure by appointing four private citizens, but referendum quickly abolished this “mixed” board in November 1966. N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., TWENTY-SECOND STATUS REPORT ON THE GENERAL OPERATIONS OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD 3 (2005), <http://www.nyc.gov/html/ccrb/pdf/ccrbann2004.pdf> [hereinafter CCRB YEAR 2004 STATUS REPORT].

109. *Id.*

110. *Id.*

In 1987, the board was reorganized and expanded to include twelve members: six private citizens that the mayor appointed and six non-uniformed police executives.<sup>111</sup> This new board remained a unit within the police department but hired a number of civilian investigators to “complement its staff of police officer investigators” within its investigative unit, the Civilian Complaint Investigative Bureau.<sup>112</sup> Amid intense and racially-charged controversy,<sup>113</sup> the city council, with the support of Mayor David Dinkins, modified the city charter in 1992 to transform the CCRB into an external-investigative body.<sup>114</sup>

#### B. THE STRUCTURE OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD

The amendments to the New York City Charter established the CCRB “as a body comprised solely of members of the public with the authority to investigate allegations of police misconduct.”<sup>115</sup> The board consists of “thirteen members of the public” appointed by the mayor.<sup>116</sup> The city council nominates five members (one from each of the five boroughs), the police commissioner nominates three members with law enforcement experience,<sup>117</sup> and the mayor selects the remaining five members and the chair of the board.<sup>118</sup>

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111. *Id.*

112. *Id.*

113. See Catherine S. Manegold, *Rally Puts Police Under New Scrutiny*, N.Y. TIMES, Sept. 27, 1992, § 1, at 35; see also Jonathan P. Hicks, *Hearing on Police Board: Slurs and Deadlock*, N.Y. TIMES, Oct. 16, 1992, at B3.

On Wednesday, Sept. 16, after months of tension between Mayor David N. Dinkins and New York City’s police, more than 10,000 off-duty officers and their supporters gathered outside City Hall to protest . . . [T]he protest degenerated into a beer-swilling, traffic-snarling, epithet-hurling melee that stretched from the Brooklyn Bridge to Murray Street, where several politicians helped stoke the emotional fires.

Manegold, *supra*, at 35.

114. James C. McKinley Jr., *Council Backs New Board to Review Police Conduct*, N.Y. TIMES, Dec. 18, 1992, at B3; CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 3.

115. N.Y. CITY CHARTER ch. 18-A, § 440(a) (2009).

116. § 440(b)(1); CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 4.

117. § 440(b)(1).

118. *Id.* Nevertheless, no member of the board, other than the three members the police commissioner designates, may have prior law enforcement experience. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 4.

The charter dictates that the board has the power to “receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language.”<sup>119</sup> This provision establishes that the CCRB’s jurisdiction encompasses the four categories of police misconduct collectively referred to as “FADO”<sup>120</sup>: “excessive use of force, abuse of authority, discourtesy, [and] use of offensive language.”<sup>121</sup> When the CCRB receives a complaint that falls within its jurisdiction, it has the power to investigate and make findings of fact and conclusions of law.<sup>122</sup> The CCRB is also empowered to make disciplinary recommendations to the police commissioner.<sup>123</sup> State law dictates that officers who are subjects of CCRB complaints “must be disciplined or served with disciplinary charges within eighteen months of the date of the incident.”<sup>124</sup> By operation of state law

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119. N.Y. CITY CHARTER ch. 18-A, § 440(c)(1). The term “abuse of authority” has been interpreted to encompass instances in which police officers use their powers to intimidate or otherwise mistreat a civilian. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 4. Abuse of authority allegations “can include improper street stops, frisk, searches, the issuance of retaliatory summonses, and unwarranted threats of arrest.” *Id.* Discourtesy refers to inappropriate communicative conduct including vulgar words, curses, or obscene gestures. *Id.* Offensive language refers to inappropriate expressive conduct regarding “a person’s sexual orientation, race, ethnicity religion, gender or disability.” *Id.* Complaints regarding corruption remain under the jurisdiction of the NYPD’s Internal Affairs Bureau. *Id.* Complaints regarding non-criminal, non-FADO misconduct such as failure to provide police services remain under the jurisdiction of the Office of the Chief of Department, a division of the NYPD. *Id.*

120. *See, e.g.*, CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 4.

121. § 440(c)(1).

122. § 440(c)(1). When the CCRB reaches a finding on the merits, a complaint may be considered “substantiated,” “exonerated,” or “unfounded.” CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 7. “Substantiated” means that “[t]here is sufficient credible evidence to believe that the subject officer committed . . . misconduct” and that the board “can recommend to the police commissioner appropriate disciplinary action.” *Id.* “Exonerated” means that the “subject officer was found to have committed the act alleged, but the subject officer’s actions were determined to be lawful and proper.” *Id.* “Unfounded” means that there was “sufficient credible evidence to believe that the subject officer did not commit the alleged act of misconduct.” *Id.* When the CCRB is unable to reach a finding on the merits, a complaint may be closed as “unsubstantiated” or “officer(s) unidentified.” *Id.* A complaint is unsubstantiated when the “weight of available evidence is insufficient to substantiate, exonerate or unfind the allegation.” *Id.* A complaint is closed as “officer(s) unidentified” when the “agency was unable to identify the subject of the alleged misconduct.” *Id.*

123. § 440(c)(1).

124. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 8; (citing N.Y. CIV. SERV. LAW § 75(4) (McKinney 2009)).

and the New York City Charter, the police commissioner, who the mayor appoints,<sup>125</sup> has the ultimate authority to adjudicate complaints and to impose discipline.<sup>126</sup>

### C. THE CCRB PARTIALLY FILLS THE OVERSIGHT GAP IN NEW YORK CITY

The amendments to the New York City Charter that transformed the CCRB into an external investigative agency had two key defects. First, the amendments did not expressly grant the CCRB the power to review police department policy.<sup>127</sup> Second, they did not empower the CCRB to review incidents that resulted in the suppression of evidence in criminal cases or to review incidents that resulted in civil suits, damage awards and settlements.<sup>128</sup> These two omissions resulted in the creation of an oversight agency that does not focus on policy review and cannot serve as the missing link between the police department's disciplinary system and the courts.

The defects in the CCRB's enabling legislation are the artifacts of numerous, uncoordinated reforms of an institution that originally served as an internal mechanism for disposing of civilian complaints. The express powers of the CCRB are the powers necessary to "investigate allegations of police misconduct."<sup>129</sup> Accordingly, the CCRB has consistently maintained that its "core mission" is to investigate complaints "thoroughly and expeditiously."<sup>130</sup> The charter couples the CCRB's power to investigate complaints with a complementary duty to inform "the public about the board and its duties" and to "develop and administer an

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125. NYC.gov, Biography of Raymond W. Kelly, [http://www.nyc.gov/html/nypd/html/administration/headquarters\\_co.shtml](http://www.nyc.gov/html/nypd/html/administration/headquarters_co.shtml) (last visited Oct. 2, 2009).

126. See *Lynch v. Giuliani*, 755 N.Y.S.2d 6, 9, 14 (App. Div. 2003) (holding that section 440(e) of the New York City Charter "assigns the Police Commissioner absolute authority in matters of police discipline" and that McKinney's "Unconsolidated Laws § 891 requires that a police officer be removed from his or her position only after a hearing conducted by an individual actually employed by the Commissioner").

127. See § 440(a).

128. See *id.*

129. See *id.*

130. See, e.g., N.Y. CITY CIVILIAN COMPLAINT REVIEW Bd., TWENTY-EIGHTH STATUS REPORT ON THE GENERAL OPERATIONS OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, at xii (2008), [http://www.nyc.gov/html/ccrb/pdf/ccrbann2007\\_A.pdf](http://www.nyc.gov/html/ccrb/pdf/ccrbann2007_A.pdf). [hereinafter CCRB YEAR 2007 STATUS REPORT].

on-going program for the education of the public.”<sup>131</sup> As a result, the terms of the charter grant the CCRB the power to perform two functions: complaint investigation and community outreach.<sup>132</sup>

Despite the apparent limitations of its powers under the New York City Charter, the CCRB has historically exercised an implied power to engage in policy review, and the NYPD has acquiesced to this power.<sup>133</sup> The CCRB “has pledged” to perform policy review by “report[ing] to the police commissioner patterns of misconduct uncovered during the course of investigations” and by “report[ing] to the police commissioner relevant issues and policy matters coming to the board’s attention.”<sup>134</sup> Since 1998, the CCRB has routinely made policy recommendations upon which the NYPD has acted.<sup>135</sup> Thus, the CCRB has effectively established that it has the power to make non-binding policy recommendations.

Nevertheless, the CCRB’s formal structure weakens the agency. The New York City Charter does not place policy review or community outreach on an equal footing with complaint investigation. The eighteen-month statute of limitations that state law places on complaints ensures that complaint investigation is the only function that the CCRB performs according to a strict timetable.<sup>136</sup> Consequently, the structure of both the CCRB’s legal powers and its legal obligations ensures that, like other external investigative agencies, the CCRB has a strong incentive to forgo policy review and cut back on outreach when its investigative workload increases and agency resources are stretched thin.

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131. § 440 (c)(7).

132. *See id.*

133. *See* NYC.gov, CCRB Reports & Statistics, <http://www.ci.nyc.ny.us/html/ccrb/html/reports.html> (last visited Oct. 2, 2009) (listing some of the policy recommendations that the CCRB has made since 1998); *see also* N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT JANUARY-DECEMBER 2003, at 9–10 (2004), <http://www.nyc.gov/html/ccrb/pdf/ccrbann2003.pdf> [hereinafter CCRB YEAR 2003 STATUS REPORT] (detailing three CCRB policy recommendations that the NYPD acted on).

134. CCRB YEAR 2003 STATUS REPORT, *supra* note 133, at v.

135. *See, e.g., id.* at xviii (detailing three CCRB policy recommendations that the NYPD acted on).

136. *See supra*, note 124 and accompanying text.



#### D. STOP-AND-FRISK: THE ORIGIN OF AN OVERSIGHT CRISIS

To understand how civilian oversight has functioned and failed in New York City during the past decade, one must understand “stop-and-frisk.” The investigative technique commonly known as “stop-and-frisk” is “the lawful practice of temporarily detaining, questioning, and, at times, [frisking or] searching civilians on the street.”<sup>137</sup> In 2008, the NYPD conducted approximately 531,159 stops.<sup>138</sup> This number represented a record high<sup>139</sup> and a 446% increase over the number of stops conducted in 2002.<sup>140</sup>

Between 2002 and 2008, the NYPD’s commitment to using large numbers of stop-and-frisk encounters to suppress crime caused a rapid increase in the number of CCRB complaints filed.<sup>141</sup> This surge in complaints exposed the weaknesses within New York City’s civilian-oversight system.<sup>142</sup> It then led the NYPD to wrest control of the complaint process away from the CCRB to ensure that officers could continue to stop large numbers of citizens without sanctions stemming from stop-related complaints deterring them.<sup>143</sup>

The law applicable to stop-and-frisk activity is well-established but it does little to constrain the discretion of police officers on the street. In *Terry v. Ohio*, the Supreme Court held that an officer can stop an individual based on a reasonable suspicion that “criminal activity may be afoot” and frisk an individual if she reasonably believes that the individual is armed and dangerous.<sup>144</sup> A New York statute tracks *Terry*,<sup>145</sup> but the New

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137. C. R. BUREAU, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES, at iv (1999), [http://www.oag.state.ny.us/media\\_center/1999/dec/stp\\_frsk.pdf](http://www.oag.state.ny.us/media_center/1999/dec/stp_frsk.pdf) [hereinafter OAG REPORT].

138. See Press Release, Center for Constitutional Rights, New NYPD Data Shows Record Number of Stops-and-Frisks in 12-Month Period (Feb. 11, 2009), <http://ccrjustice.org/newsroom/press-releases/new-nypd-data-shows-record-number-stop-and-frisks-12-month-period>.

139. See *id.*

140. See Al Baker & Emily Vasquez, *Police Report Far More Stops and Searches*, N.Y. TIMES, Feb. 3, 2007, at A1 (reporting that the NYPD had stopped 97,296 individuals in 2002).

141. See *infra* note 176 and accompanying text.

142. See *infra* Part IV.D and Part IV.E.

143. See *infra* Part IV.F.

144. 392 U.S. 1, 30 (1968).

York Court of Appeals established in *People v. De Bour*<sup>146</sup> a “more nuanced (and arguably more stringent) multi-tiered standard for evaluating the propriety of police civilian street encounters.”<sup>147</sup> Every New York City police officer receives legal training regarding stop-and-frisk law, “as well as the basic factors which can and cannot create ‘reasonable suspicion.’”<sup>148</sup> But, as one former NYPD officer observed, the reasonable suspicion standard provides officers with a great deal of discretion to stop individuals because it sets “a very low bar floating somewhere between probable cause and ‘he just looked like a perp[etrator]’ — and tending toward the latter.”<sup>149</sup>

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145. It dictates that an officer may stop a suspect if he “reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.” N.Y. CRIM. PROC. LAW § 140.50(1) (2007). An officer may frisk an individual if he “reasonably suspects that he is in danger of physical injury. . . .” *Id.* § 140.50(3).

146. 40 N.Y.2d 210 (1976).

147. OAG REPORT, *supra* note 137, at 24. In *DeBour* the New York Court of Appeals established a graduated four-level test for evaluating street encounters that the police initiated:

[L]evel one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime . . . .

*People v. Moore*, 6 N.Y.3d 496, 498–99 (2006) (citations omitted).

148. OAG REPORT, *supra* note 137, at 61–62 (noting that NYPD officers receive training as recruits in the police academy and in-service training once they have graduated from the academy).

149. See Al Baker, *What He Learned as a New York Officer: He Was a Bad Fit*, N.Y. TIMES, Mar. 20, 2009, at A21 (quoting PAUL BACON, BAD COP: NEW YORK’S LEAST LIKELY POLICE OFFICER TELLS ALL (2009)). The Supreme Court has acknowledged that the concept of reasonable suspicion is “somewhat abstract” and deliberately ill-defined. See *United States v. Arvizu*, 534 U.S. 266, 274 (2002). To stop suspects based on reasonable suspicion, an officer must have a “particularized and objective basis” for suspecting that they are involved in legal wrongdoing. *Id.* at 273 (quoting *United States v. Cortez*, 499 U.S. 411, 417–18 (1981)). A mere “hunch” is insufficient to justify a stop. *Id.* at 274. Nevertheless, “the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard . . . .” *Id.* (citation omitted). To reach this low level of suspicion, officers may “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” *Id.* at 273 (quoting *Cortez*, 499 U.S. at 418).

Stop-and-frisk encounters have been an integral part of the NYPD's efforts to control crime since the early 1990s. In 1994, the NYPD implemented policing strategies based on the "broken windows" theory,<sup>150</sup> thereby focusing resources to address "low-level disorder problems that might invite more serious crime."<sup>151</sup> Stop-and-frisk activity was an integral part of the NYPD's brand of "broken windows" policing. Minor infractions were used as a pretext to approach, stop, and frisk individuals for weapons.<sup>152</sup> The goal was to prevent violent crimes and deaths by "getting guns off the streets."<sup>153</sup> The NYPD's Street Crime Unit (SCU) became synonymous with aggressive stop-and-frisk policing that pushes the limits of *Terry* and *De Bour*.<sup>154</sup> The SCU was "an elite unit of plainclothes officers" charged with policing areas of "concentrated criminal activity."<sup>155</sup> After officers from the SCU shot Amadou Diallo to death in 1999, the unit's aggressive tactics became the focus of intense criticism.<sup>156</sup>

The fallout from the Diallo shooting and the disbanding of the SCU still did not end the NYPD's commitment to proactive stop-and-frisk policing. Instead, it marked the beginning of a period in which the NYPD conducted more stops than ever before.<sup>157</sup>

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150. OAG REPORT, *supra* note 137, at 50. The "broken windows" theory is formally known as the "order maintenance" theory of policing. *Id.* at 49. The name of the "broken windows" theory is taken from George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, <http://www.theatlantic.com/doc/198203/broken-windows>. The theory's basic premise is that "low-level disorder in the streets — graffiti, aggressive panhandling, public drunkenness and the like — makes people fearful and weakens neighborhood social controls." OAG REPORT, *supra* note 137, at 50. By "actively combating low-level disorder," the police and the community can "signal to the criminal element their resolve that 'law breaking of any kind will not be tolerated — and thus begin to restore standards of behavior which make serious crime untenable.'" *Id.* (internal quotation marks and footnotes omitted).

151. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461 (2000).

152. OAG REPORT, *supra* note 137, at 53.

153. *See id.*

154. David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1 (noting that the officers of SCU made up less than two percent of the police force, stopped tens of thousands of people each year, and accounted for forty percent of NYPD gun seizures).

155. OAG REPORT, *supra* note 137, at 53 n.32.

156. William K. Rashbaum & Al Baker, *Police Commissioner Closing Controversial Street Crime Unit*, N.Y. TIMES, Apr. 10, 2002, at B1. Four white SCU officers fired 41 bullets at Mr. Diallo, a street peddler from West Africa, after mistaking his wallet for a gun. *Id.*

157. *See infra* notes 171–175 and accompanying text.

When Police Commissioner Raymond Kelly disbanded the SCU in 2001, he made clear that he was redeploying human resources and not rejecting the SCU's policing methods.<sup>158</sup>

The NYPD used "anticrime units" to replace the SCU and the officers from the SCU were redeployed to anticrime units within each of the city's eight patrol boroughs.<sup>159</sup> Anti-crime teams patrol the streets in plainclothes, drive unmarked cars,<sup>160</sup> and focus on preventing violent crime by apprehending individuals who illegally use or possess guns.<sup>161</sup> To make arrests, anti-crime teams frequently stop individuals on the street to conduct frisks and searches that might yield weapons or contraband.<sup>162</sup>

The NYPD has made few, if any, public statements about the role that stop-and-frisk activity plays in its current enforcement strategy.<sup>163</sup> Nevertheless, the sheer number of stops that the NYPD has been conducting demonstrates that stop-and-frisk is one of the hallmarks of NYPD policing. In 1999, the NYPD made 104,000 stops<sup>164</sup> and continued to conduct a similar number of

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158. Rashbaum & Baker, *supra* note 156 at B1.

159. *Id.* As the CCRB noted in 2003, "[t]he NYPD has divided the city into eight patrol boroughs: Manhattan North, Manhattan South, Bronx, Brooklyn South, Brooklyn North, Queens South, Queens North, and Staten Island. N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT JANUARY-DECEMBER 2002, at 21–22 (2003), <http://www.ci.nyc.ny.us/html/ccrb/pdf/ccrbann2002.pdf> [hereinafter CCRB YEAR 2002 STATUS REPORT].

160. Rashbaum & Baker, *supra* note 156 at B1.

161. N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., TWENTY-FOURTH STATUS REPORT ON THE GENERAL OPERATIONS OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD 19 (2006), <http://www.ci.nyc.ny.us/html/ccrb/pdf/ccrbann2005.pdf>.

162. *See generally*, Eric Nalder et al., *Anti-Crime Team Has Tough Reputation — Maybe Too Tough: Unit Racks Up Most "Obstructing" Arrests*. SEATTLE POST-INTELLIGENCER, Feb. 29, 2008, at A1 (reporting on the activities of the Seattle Police Department's West Precinct Anti-Crime Team). Anti-crime units and the tactics they employ are not unique to New York City. *See id.* Other cities such as Kansas City have used "proactive patrol" involving "safety frisks during traffic stops, plain-view searches and seizures, and searches incident to arrests on other charges" to suppress crime and increase gun seizures. *See* Anthony A. Braga, U.S. DEP'T OF JUSTICE OFFICE OF COMTY. ORIENTED POLICING SERVS., CRIME PREVENTION RESEARCH REVIEW NO. 2: POLICE ENFORCEMENT STRATEGIES TO PREVENT CRIME IN HOT SPOT AREAS 14–15, 18, 20 (2008), *available at* [www.cops.usdoj.gov/files/RIC/Publications/e040825133-web.pdf](http://www.cops.usdoj.gov/files/RIC/Publications/e040825133-web.pdf).

163. The NYPD's reticence is not a recent phenomenon; it is part of a continuing pattern of behavior. *See*, Fagan & Davies, *supra* note 151, at 475 ("The importance of stop frisk interventions to crime fighting was never formally acknowledged in official documents . . ."); OAG REPORT, *supra* note 137, at 56 (noting that the role of stop-and-frisk was "rarely referenced in publicly-disseminated Departmental strategy documents").

164. Kevin Flynn, *After Criticism of Street Frisk Records, Police Expand Report Form*, N.Y. TIMES, Jan. 5, 2001, at B6 (reporting that this number represented a 25% decline from the previous year).

stops each year through 2002.<sup>165</sup> Between 2002 and 2006, the number of stops steadily increased.<sup>166</sup> In 2006, the NYPD conducted 508,540 stops,<sup>167</sup> a 423% increase from 2002.<sup>168</sup> Statistics from recent years indicate that this increased level of stop-and-frisk activity is now a mainstay of NYPD policing strategy.<sup>169</sup> Given the fact that crime rates remained stable between 2002 and 2006, the explosion in stop-and-frisk activity must be attributed to strategic choice and not merely a response to increased street crime.<sup>170</sup>

The NYPD's commitment to proactive policing severely impacts New York City's minority communities. Most people the NYPD stops are young black and Latino men,<sup>171</sup> and the same demographic files most CCRB complaints involving stop-and-frisk encounters.<sup>172</sup> Regardless of legality, a stop-and-frisk encounter is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment."<sup>173</sup> Consequently, complaints regarding stops, whether lawful or unlawful, may reflect the psychological toll that stop-and-frisk activity has taken on New York City's minority communities.<sup>174</sup> Moreover, it is reasonable to assume that the NYPD's increased emphasis on

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165. See Baker & Vasquez, *supra* note 140, at A1 (reporting that the NYPD stopped 97,296 individuals in 2002).

166. Baker, *supra* note 18, at B1 (reporting that stops "gradually increased" from 97,296 in 2002 to 508,540 in 2006). The NYPD conducted 160,851 stops in 2003, 313,523 stops in 2004, 398,191 stops in 2005, 506,491 stops in 2006, and 472,096 stops in 2007. Jeffrey Fagan, *Transit Stops by Race* (March 17, 2009) (on file with author).

167. Baker, *supra* note 18, at B1.

168. N.Y. CITY CIVILIAN COMPLAINT REVIEW Bd., TWENTY-SIXTH STATUS REPORT ON THE GENERAL OPERATIONS OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD 1 (2007), <http://www.nyc.gov/html/ccrb/pdf/ccrbann2006.pdf> [hereinafter CCRB YEAR 2006 STATUS REPORT].

169. In 2007, the NYPD conducted 468,932 stops. Baker, *supra* note 18 at B1. In 2008, the NYPD conducted more than 500,000 stops; Powell, *supra* note 27 at A21.

170. See Baker & Vasquez, *supra* note 140 at A1 (quoting Professor Jeffrey Fagan's observation that "stop rates went up by 500% when crime rates were flat").

171. See, e.g., Powell, *supra* note 27, at A21 (reporting that, in 2008, more than eighty percent of the 500,000 New Yorkers stopped and frisked by the NYPD were young black or Latino men).

172. See, e.g., CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 5 (reporting that in 2007, more than eighty percent of the 4,912 CCRB complaints regarding stop-and-frisk activity were filed by blacks and Hispanics).

173. *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

174. See generally, Kocieniewski, *supra* note 154, at A1 (reporting that one community leader, who had received numerous complaints regarding stops conducted by the NYPD Street Crime Unit, believed that stops had created an "atmosphere of fear").

stops has raised the number of illegal stops involving young black and Latino men.<sup>175</sup>

## E. OVERSIGHT STOPPED: CCRB POLICY REVIEW AND COMMUNITY OUTREACH 2002–2007

### 1. *Agency Outreach*

Between 2002 and 2006, the NYPD's escalation of stop-and-frisk activity caused a sixty-six percent increase in the number of CCRB complaints.<sup>176</sup> Faced with stagnant funding during a period in which complaints skyrocketed, the CCRB took defensive action. It focused its limited resources on complaint investigation, reduced its community outreach activities, and gradually stopped engaging in policy review.<sup>177</sup> Though this strategy produced short-term gains, it caused long-term harm by inadvertently placing an unprepared CCRB on the road to open conflict with the NYPD.

When complaints rose between 2002 and 2006, the City did not respond by increasing the CCRB's funding. Between 2002 and 2006, the CCRB's annual operating budget remained at approximately ten-million dollars per year despite the sixty-six percent increase in complaints filed.<sup>178</sup> At first, the CCRB cut admin-

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175. In 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that the "friction between the police and minority groups" caused by the misuse of stop-and-frisk tactics "increases 'as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.'" *Terry*, 392 U.S. at 14 n.11 (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183–84 (1967)).

176. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 1 (reporting the sixty-six percent increase in complaints and attributing it, in part, to a rise in stop-and-frisk related abuse-of-authority cases). Between 2000 and 2004, the CCRB reported a 327% increase in the number of allegations that an officer improperly questioned and/or stopped a civilian. CCRB Year 2004 Status Report, *supra* note 108, at 17 (reporting an increase in filings from 353 in 2000 to 1,509 in 2004).

177. See *supra* notes 168–71 and accompanying text, 192–93 and accompanying text (community outreach); see also *infra* notes 187–91 and accompanying text (policy review).

178. See, e.g., N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT JANUARY-DECEMBER 2001, at 12 (2002), <http://www.ci.nyc.ny.us/html/ccrb/pdf/ccrbann2001.pdf> [hereinafter CCRB YEAR 2001 STATUS REPORT] (reporting that the operating budget in 2001 was \$9,185,934 and that the fiscal year 2002 budget increased to \$11,009,219); CCRB YEAR 2002 STATUS REPORT, *supra* note 159, at 11 (reporting budget cuts in excess of \$1 million that reduced the 2003 operating budget to \$10,216,952); CCRB YEAR 2006

istrative staff, ceased hiring investigators, and focused its resources on complaint investigations in response to the resource strain.<sup>179</sup>

As part of this process, the CCRB curtailed its community outreach activities. In most years, the CCRB reported that its outreach efforts focused on sending staffers from its “Outreach Unit” to attend public meetings and provide members of the community with information regarding the agency’s activities and the complaint process.<sup>180</sup> In 2004, the CCRB cut staffing in its four person Outreach Unit in half.<sup>181</sup> By 2006, this staffing reduction had resulted in a proportionate reduction of community meetings that outreach staff attended.<sup>182</sup> In effect, the CCRB began doing less to connect with the community and market its services during a period in which it also started to cut back on the quality of its investigations.<sup>183</sup>

The CCRB’s decision to reallocate resources probably damaged public perception of the agency.<sup>184</sup> Studies suggest that individual

STATUS REPORT, *supra* note 168, at 15 (reporting an operating budget of \$10,062,468 for fiscal year 2006).

179. N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., TWENTY-FOURTH STATUS REPORT ON THE GENERAL OPERATIONS OF THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD 27 (2006), <http://www.nyc.gov/html/ccrb/pdf/ccrbann2005.pdf> [hereinafter CCRB YEAR 2005 STATUS REPORT]. In fiscal year 2001, the CCRB’s budget was \$9,185,934 and the CCRB employed 119 investigators and 50 administrative staff. CCRB YEAR 2001 STATUS REPORT, *supra* note 178 at 12. In 2004, the CCRB maintained a staff of 136 investigators and 37 non-investigative staff members (including executive administrative, outreach and mediation staff) and had an operating budget of \$10,094,517. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 11–12.

180. *See, e.g.*, CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 9.

181. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 9.

182. The CCRB has used the number of public meetings that staffers attend as a way of empirically measuring the quantity of its outreach activity. Between 1998 and 2000, the CCRB participated in an annual average of 109 meetings. CCRB YEAR 2003 STATUS REPORT, *supra* note 133, at 1 (detailing the number of meetings attended); N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT JANUARY-JUNE 2001, at xi (2001) (describing the nature of the meetings attended). In 2003, the CCRB reported that it had participated in 92 public meetings, which was an increase for the second year in a row from 56 in 2001 and 72 in 2002. CCRB YEAR 2003 STATUS REPORT, *supra* note 133, at 10. In 2005, the two-person outreach unit attended only 80 public informational meetings. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 9. In 2006, the unit attended 42 meetings. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 13.

183. *See infra* Part III.E (detailing how the CCRB implemented efficiency measures in 2004 that curtailed certain types of investigative activity).

184. It is impossible to accurately gauge how these actions actually affected citizen attitudes regarding the CCRB because there has been little empirical study regarding this matter. The Vera Institute conducted the most commonly cited study regarding citizen attitudes towards the CCRB in 1989. *See* Walker & Bumphus, *supra* note 6, at 14–15

complainants are often dissatisfied with the complaint process<sup>185</sup> because it is lengthy,<sup>186</sup> time consuming,<sup>187</sup> impersonal,<sup>188</sup> and unlikely to result in a finding that misconduct occurred.<sup>189</sup> Community outreach is the one aspect of a civilian-oversight agency's operations that is most likely to have a positive impact on relations between the police and the community, and between the community and the oversight process.<sup>190</sup>

The results of the CCRB's only reported attempt to engage in focused police officer outreach suggest that such activity can have equally beneficial effects. In 2005, staffers from the CCRB's Outreach Unit conducted training sessions with officers from Police Service Area Two ("PSA-2")<sup>191</sup> to help supervisors reduce the

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(citing MICHELLE SVIRIDORFF & JEROME E. MCELROY, VERA INST., PROCESSING COMPLAINTS AGAINST POLICE: THE CIVILIAN COMPLAINT REVIEW BOARD — EXECUTIVE SUMMARY (1988), <http://www.vera.org/download?file=1036/1240.pdf>). The only other study was conducted by law student researchers in 2004. See NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 45 (citing RACHEL LIPPMANN ET AL., POLICING THE POLICE: A REPORT ON COMMUNITY PERCEPTIONS OF THE CIVILIAN COMPLAINT REVIEW BOARD AND POLICE MISCONDUCT IN 2004 (2004), <http://www.nycpr.org/documents/193241advpiCover%20pageandcopppaper.pdf>). They interviewed students at five large ethnically and racially diverse high schools in Brooklyn and Manhattan and found that only twenty percent of the students had heard of the CCRB and that an even smaller number understood the agency's purpose or operations. *Id.*

185. See WALKER, *supra* note 3, at 159–60 (collecting studies regarding complainant satisfaction).

186. Between 2002 and 2006, it took the CCRB an average of 276 days to complete a full investigation. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 85.

187. The CCRB cannot conduct a complete investigation without obtaining a sworn, in-person statement from a civilian. See *infra* note 212 and accompanying text. Absent exceptional circumstances, a complainant must travel to the CCRB's offices in lower Manhattan during business hours on a weekday to provide a statement. NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 13–14. This may force the complainant to take time off work and risk losing pay or employment. *Id.*

188. See WALKER, *supra* note 3, at 160, 162 (noting that complainants often desire to meet the officer who they filed a complaint against face-to-face). After the filing of a CCRB complaint, the CCRB will only bring the officer and complainant together to meet each other face-to-face if both voluntarily agree to have the complaint resolved through mediation, which is an alternative to the investigative process that is used to dispose of an extremely small number of CCRB complaints. See CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 1, 10 (describing the mediation process, but reporting that less than four percent of cases closed in 2006 were closed through mediation).

189. WALKER, *supra* note 3, at 120 (noting that civilian oversight agencies sustain between twelve or thirteen percent of all complaints).

190. WALKER, *supra* note 3, at 163.

191. PSA-2 is the common name for Police Service Area 2, an NYPD Housing Bureau command that patrols public housing developments in Brooklyn, New York. NYC.gov, NYPD Housing Bureau Home Page, [http://home2.nyc.gov/html/nypd/html/housing\\_bureau/housing.html](http://home2.nyc.gov/html/nypd/html/housing_bureau/housing.html) (last visited Oct. 3, 2009).



number of complaints filed against their officers.<sup>192</sup> The CCRB training contributed to an immediate reduction in complaints against PSA-2, which had previously received the most complaints of any similar NYPD command.<sup>193</sup> Though other factors probably contributed to the reduction in complaints,<sup>194</sup> this successful outreach effort marks a path not taken.

When complaint filings started to increase, CCRB could have marketed its services to the NYPD and sought out a cooperative way to respond to the problem. It is impossible to know if such an effort would have been successful, but it is clear that by choosing to focus staff resources on investigation instead of outreach, the CCRB did little to improve its relations with the community and the NYPD.<sup>195</sup>

## 2. Board Outreach and Policy Review

When complaints increased by sixty-six percent between 2002 and 2006,<sup>196</sup> the workload of the thirteen-member board that heads the CCRB increased by the same amount.<sup>197</sup> To cope with

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192. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 11.

193. *Id.*

194. The efforts of the police department supervisors in command of the officers at PSA-2 probably contributed greatly to the decline in the number of complaints filed against officers from PSA-2. In 1999, the Vera Institute of Justice conducted a study of two precincts in the south Bronx that had been able to reduce the number of complaints filed against their officers. ROBERT C. DAVIS & PEDRO MATEAU-GELABERT, RESPECTFUL AND EFFECTIVE POLICING: TWO EXAMPLES IN THE SOUTH BRONX (1999), [http://www.vera.org/publication\\_pdf/respectful\\_policing.pdf](http://www.vera.org/publication_pdf/respectful_policing.pdf). The study found that “the most likely explanation for the decline in civilian complaints” was the “particularly effective manner in which the precinct commanders implemented departmental policies” designed to promote courteous and effective policing. *Id.*

195. See *infra* Part III.F (detailing how a rise in substantiated complaints regarding stop and frisk triggered conflict between the CCRB and the NYPD).

196. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 1.

197. Unless a case is reviewed by the full board, the findings of the board reflect the findings of a three member panel composed of one board member who was chosen by the mayor, one nominated by the city council, and one nominated by the police commissioner. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 7. The charter dictates that the board may review cases in three-member panels, but such panels cannot be composed exclusively of members “designated by the counsel, or designated by the police commissioner, or selected by the mayor.” N.Y. CITY CHARTER ch. 18-A, § 440(c)(2). In 2002, three-member board panels met 44 times and reviewed an average of 105 cases during each meeting. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 26. In 2006, the panels met 40 times and reviewed an average of 175 cases per meeting. *Id.* For a discussion of the consequences of this increase in workload, see Anemona Hartocollis, *Rights Group Cites Backlog of Complaints About Police*, N.Y. TIMES, Nov. 15, 2006, at B5.

this increased workload, the board gradually stopped engaging in policy review and completely halted its outreach efforts.

Before its workload nearly doubled in 2002, the board was a dynamic body that actively engaged in both policy review and outreach. Committees of the board issued detailed and insightful reports regarding important matters of police department policy, such as hollow point bullets<sup>198</sup> and pepper spray,<sup>199</sup> and stop-and-frisk activity.<sup>200</sup> Once the board's workload increased, the breadth of its policy review narrowed. Between 2002 and 2006, the board issued a series of short policy-recommendation letters regarding issues that emerged during complaint investigations.<sup>201</sup> In a marked departure from its past conduct, the board has not issued a published policy recommendation since 2006, despite the pressing need to revisit the stop-and-frisk issue.<sup>202</sup>

The board has curtailed its community outreach activities in a similar manner. In 2001, the CCRB reported that it conducted its "first" series of town hall meetings in each of New York City's five boroughs to provide "an open forum" where members of the public could ask board members questions and register complaints.<sup>203</sup> The CCRB has not reported conducting a similar series

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198. RICHARD CONDON ET AL., N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., REPORT OF THE COMMITTEE ON HOLLOW POINT-BULLETS PRESENTED TO THE CIVILIAN COMPLAINT REVIEW BOARD ON JULY 8, 1998 (1998), <http://www.ci.nyc.ny.us/html/ccrb/pdf/hollow.pdf>.

199. CHARLES M. GREINSKY ET AL., REPORT OF THE PEPPER SPRAY COMMITTEE OF THE CIVILIAN COMPLAINT REVIEW BOARD (1997), <http://www.ci.nyc.ny.us/html/ccrb/pdf/pepper1997.pdf>; CHARLES M. GREINSKY ET AL., REPORT OF THE PEPPER SPRAY COMMITTEE OF THE CIVILIAN COMPLAINT REVIEW BOARD (2000), <http://www.ci.nyc.ny.us/html/ccrb/pdf/pepper2000.pdf>.

200. CIVILIAN COMPLAINT REVIEW BD., STREET STOP ENCOUNTER REPORT: AN ANALYSIS OF CCRB COMPLAINTS RESULTING FROM THE NEW YORK POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES (2001), <http://www.ci.nyc.ny.us/html/ccrb/pdf/stop.pdf>.

201. See, e.g., FLORENCE L. FINKLE, POLICY RECOMMENDATION MEMORANDUM — CCRB CASE 200104846 (2003), <http://www.ci.nyc.ny.us/html/ccrb/pdf/20010481.pdf>; FRANKLIN H. STONE & FLORENCE L. FINKLE, RECOMMENDATION RELATING TO POLICE UNION "COURTESY" CARDS (2006), [http://www.ci.nyc.ny.us/html/ccrb/pdf/recommPBA\\_20061109.pdf](http://www.ci.nyc.ny.us/html/ccrb/pdf/recommPBA_20061109.pdf).

202. NYC.gov, *supra* note 133. In 2008, the CCRB did, however, make two tacit policy recommendations, which it did not publicly report until 2009 after the NYPD acted upon them. See CCRB YEAR 2008 STATUS REPORT, *supra* note 107, at 24 (noting that the NYPD had instituted policy changes in response to CCRB policy amendments regarding officers' failure to appropriately document activity in their memo books and a CCRB policy recommendation regarding officer's knowledge of the rules governing photography and videography in New York City subway stations).

203. N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., STATUS REPORT JANUARY-DECEMBER 2001, at 15 (2002), <http://www.ci.nyc.ny.us/html/ccrb/pdf/ccrbann2001.pdf>.

of meetings since 2001, and this is due, in part, to the increase in the board's investigative workload. By failing to continue to hold open meetings, the board denied itself the opportunity to gather information regarding police activity outside of the rigid investigative process. The board also missed valuable opportunities to reinforce its legitimacy by directly demonstrating that it was willing to listen and respond to the concerns of citizens during a period when stop-and-frisk activity was generating grave anger and resentment in New York's minority communities.<sup>204</sup> Taken together with the board's decision to curtail research and policy review, limiting outreach meant that the board did little to create a credible record of how the NYPD's choice to increase stop-and-frisk activity had affected the community, complaint activity, and CCRB operations prior to 2008.

#### F. OVERSIGHT STOPPED: CCRB COMPLAINT INVESTIGATIONS 2002–2007

The CCRB's reallocation of resources to increase the size of its investigative staff did not enable it to cope with the rising number of complaints. Between 2002 and 2004, CCRB investigator caseloads rose fifty-three percent,<sup>205</sup> roughly tracking the fifty-one percent increase in complaint filings between 2000 and 2004.<sup>206</sup> In 2004, the average investigator's caseload was twenty-six cases, which was the highest it had been in seven years.<sup>207</sup> Comparative analysis suggests that the rise in investigative caseloads that occurred between 2002 and 2004 was significant enough to undermine the CCRB's efficacy and force the agency to make operational changes. Similar external-investigative agencies have reported that caseloads approaching thirty cases per investigator

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204. See, e.g., Diane Cardwell, *After Bell, Critics Want Mayor to Broaden Focus on Police*, N.Y. TIMES, Mar. 21, 2007 (reporting that the police shooting of Sean Bell, an unarmed man, prompted criticism of the NYPD's "overly aggressive tactics and racial profiling").

205. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 25.

206. *Id.* at 1.

207. *Id.* at 22. To put this in perspective, the average CCRB investigator's caseload was eighteen cases in early 2001 before complaint filings began to spike. N.Y. CITY CIVILIAN COMPLAINT REVIEW BD., *supra* note 182, at 9. The CCRB did not report the yearly average caseload per investigator in its 2001 report. See CCRB YEAR 2001 STATUS REPORT, *supra* note 178.

are highly problematic.<sup>208</sup> It is difficult to speculate on what an optimal caseload might be.<sup>209</sup> It is, however, clear that the CCRB faced a serious problem in the first half of 2004 when the average investigator's caseload hit twenty-eight cases.<sup>210</sup>

The CCRB attempted to avert crisis in 2004 by instituting two new policies designed to streamline the investigative process and promote investigative efficiency. First, the CCRB curtailed "prolonged and focused attempts" to locate and interview those complainants, victims and witnesses who were reluctant to participate in investigations.<sup>211</sup> This policy shift was significant because the New York City Charter dictates that the CCRB cannot completely investigate a complaint unless it obtains a sworn statement from a civilian complainant or victim.<sup>212</sup> Second, the CCRB started to focus its investigative "resources on cases in which the facts and legal issues are not clear-cut."<sup>213</sup> Though rational, such a policy is potentially problematic because what is "clear-cut" can change throughout any fact-finding procedure. By cutting off investigations earlier in the process, an investigative agency will likely abandon some meritorious investigations.

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208. In the third quarter of 2008, the Office of Citizen Complaints in San Francisco reported that its substantiation rate, which had historically averaged between eight and ten percent, had dropped to three percent in the first nine months of 2008. OFFICE OF CITIZEN COMPLAINTS, THIRD QUARTER 2008, at 2 (2008), [http://www.sfgov.org/site/uploadedfiles/occ/OCC\\_3Q08.pdf](http://www.sfgov.org/site/uploadedfiles/occ/OCC_3Q08.pdf). Although the agency declined to attribute the drop to any one cause, it noted that the drop might be due to the "heavy investigator caseload" of twenty-seven cases per investigator. *Id.* at 2-3. In Chicago, the Independent Review Authority started to outsource complaint investigations when staffing shortages caused investigators to carry an "unacceptable" caseload of more than thirty cases per investigator. David Heinzmann & Steve Mills, *Cop-case Backlog Too Much; Outside Help Sought*, CHI. TRIB., Jan. 16, 2008, at C1. Thirty cases per investigator represented a sharp increase from ten years before, when investigators in the Office of Professional Standards handled approximately twelve investigations. *Id.*

209. No consensus has emerged regarding what actually constitutes an optimal caseload or adequate staffing for an external-investigative agency. Neither the International Association for Citizen Oversight of Law Enforcement nor the National Association for Citizen Oversight of Law Enforcement has developed any standards that can be used to determine what constitutes the proper level of staffing for an oversight agency. WALKER, *supra* note 3, at 77-78.

210. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 2.

211. *Id.* at 25.

212. N.Y. CITY CHARTER ch. 18-A, § 440(c)(1)(2009) (providing that the board cannot make a finding or recommendation "based solely upon an unsworn complaint or statement"). A complaint that is closed without a full investigation is called a "truncated" case. CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 14.

213. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 25.

The CCRB's two policy changes gradually transformed it into an agency that investigates fewer complaints and is more deferential to the police.<sup>214</sup> Institutional deference to the police is generally the path of least resistance for an external investigative agency. Quality investigations uncover misconduct, but they are resource-intensive.<sup>215</sup> Since 2004, the rate at which the CCRB has found misconduct occurred has steadily declined.<sup>216</sup> At the same time, the rate that the CCRB closes cases without conducting a full investigation has steadily climbed.<sup>217</sup> This change in agency performance appears to have affected investigations of even the most serious allegations of misconduct. Since 2004, the rate that excessive force complaints are substantiated has declined substantially,<sup>218</sup> and the rate that force complaints are exonerated has risen.<sup>219</sup> Although the policy changes instituted in 2004 increased the number of cases investigators could close<sup>220</sup> and re-

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214. In 2005, the CCRB truncated fifty-six percent of its investigations, which represented a slight increase over 2004 and 2003, when it truncated fifty-four and fifty-five percent respectively. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 29. By 2006, the truncation rate climbed to the point where the CCRB was forced to dispose of sixty percent of all complaints filed without completing a full investigation. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 31. This represented a ten percent rise since 2000 when the CCRB truncated fifty percent of its investigations. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 29.

215. In substantiated cases investigated during 2004, CCRB investigators interviewed an average of 3.8 civilians and 4.01 officers. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at 25. During that same year, investigators interviewed an average of 1.98 civilians and 2.51 officers in cases where the board closed all allegations as unfounded or exonerated. *Id.* Since 2004, the CCRB has not released any information regarding the number of interviews investigators conducted.

216. *See* CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 19 (noting a decline in the substantiation rate for all allegations between 2004 and 2007).

217. *See id.* at 14 (noting that the truncation rate had risen from fifty-five percent of all cases closed in 2003 to sixty-two percent); *see also supra* note 212 (defining truncated case).

218. After substantiating 5.1% of all force allegations in 2004, the CCRB substantiated only 2.7% in 2005, 1.4% in 2006 and 1.7% in 2007. CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 19.

219. When the CCRB substantiated approximately one percent and exonerated forty-nine percent of force complaints in 2006, it represented a significant deviation from the five-year average of four percent substantiated and forty-seven percent exonerated. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 39.

220. *Id.* at 26 (reporting that the average CCRB investigator closed forty cases in 2003 and fifty-one cases in 2006, which represented a 27.5% increase in closures per investigator).

duced dockets,<sup>221</sup> these short-term gains probably came at the expense of investigative quality.

#### G. OVERSIGHT ARRESTED: HOW THE NYPD SEIZED CONTROL OF THE CIVILIAN-OVERSIGHT SYSTEM

By focusing on individual complaint investigations instead of policy review and community outreach, the CCRB walked blindly into a confrontation with the NYPD. When stop-and-frisk activity began driving up complaints in 2002, it also drove up the CCRB's substantiation rate. Between 2002 and 2004, the substantiation rate for all allegations climbed from seven percent to eleven percent,<sup>222</sup> and the rate that the CCRB closed a case with at least one substantiated allegation doubled.<sup>223</sup>

In 2005 and 2006, the NYPD radically shifted its disciplinary policy and reduced penalties on officers in response to the rise in complaint filings and the CCRB's substantiation rate.<sup>224</sup> Between

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221. *Id.* at 27 (reporting that the average investigative caseload decreased from a high of "26 in 2004 to 19 in 2005, and 20 in 2006").

222. *Id.* at 39.

223. The rate at which the CCRB substantiated at least one allegation in a case nearly doubled from 3.8% in 2000 to 6.9% in 2004. CCRB YEAR 2004 STATUS REPORT, *supra* note 108, at xv. This rise in substantiations tracked a dramatic rise in abuse-of-authority complaints the CCRB received and substantiated. For example, in 2002 the CCRB substantiated 11.8% of "frisk and/or search" allegations. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 38. This rate climbed to 19.6% in 2003 and then to 24.4% in 2004. *Id.* During this same time period the rate at which the CCRB substantiated discourtesy, offensive language and physical force allegations remained relatively flat. *Id.* This rise in substantiations was probably not an anomaly because evidence suggests that many stops the NYPD conducts are of dubious legality. When the New York Attorney General's Office reviewed reports filed by officers regarding stop-and-frisk encounters that occurred in 1998 and the first three months of 1999, it found that 15.4% of all reports regarding stops did not demonstrate that the officer had reasonable suspicion to stop the suspect. OAG REPORT, *supra* note 137, at xiv. The Attorney General's Office also found that 23.5% of the forms did not state a sufficient factual basis to allow a reader to determine whether reasonable suspicion supported a stop. *Id.*

224. When the CCRB substantiates an allegation of misconduct made against a police officer, the NYPD can discipline an officer in three different ways. CCRB YEAR 2002 STATUS REPORT, *supra* note 159, at 9 (detailing the three types of NYPD discipline: instructions, command discipline and charges and specifications). "Instructions" are the weakest form of discipline. *Id.* When an officer receives instructions, he or she will receive training from his or her commanding officer regarding proper procedures or be sent out for retraining. *Id.* A command discipline represents stiffer punishment but is less severe than charges and specifications. *Id.* When an officer receives a command discipline, his or her commanding officer imposes discipline directly, which may range in severity from a warning and admonishment to a loss of up to ten vacation days. *Id.* Charges and specifications "involves the lodging [of] formal administrative charges against the

2002 and 2004, less than twenty-eight percent of the officers who were disciplined because of a substantiated CCRB complaint received instructions,<sup>225</sup> which are the weakest form of discipline.<sup>226</sup> During the first half of 2005 this rate suddenly shot up to fifty-two percent, and in the second half of 2005 it rose to seventy-three percent.<sup>227</sup> The CCRB did not report that the NYPD provided any reason for this change in policy in 2005,<sup>228</sup> and the CCRB did not offer one when this trend continued in 2006.<sup>229</sup>

The statistics regarding complaint dispositions do, however, suggest that the shift in disciplinary policy was designed to limit the impact of CCRB substantiations stemming from stop-and-frisk encounters<sup>230</sup> to ensure that officers remained motivated to continue stopping individuals.<sup>231</sup> In fact, the primary beneficiaries of the NYPD's shift in disciplinary policy were probably officers assigned to anti-crime teams who conduct a large number of stops. A few officers, most likely assigned to anti-crime teams,<sup>232</sup> are responsible for the vast majority of stops in New York City.<sup>233</sup>

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subject officer, who, as a result, may face loss of vacation time, suspension, or termination from the police department." *Id.*

225. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 36.

226. *See supra* note 224.

227. Emily Vasquez, *Discipline for Officers is Less Harsh, Report Says*, N.Y. TIMES, Dec. 12, 2006, at B2. Figures at the end of 2005 revealed that the NYPD had imposed the weakest forms of discipline in fifty-nine percent of all cases. CCRB YEAR 2005 STATUS REPORT, *supra* note 179, at 36.

228. *See id.* at xv-xvi, 2, 35-37.

229. *See* CCRB YEAR 2006 STATUS REPORT, *supra* note 168 at xv-xvi, 2, 45. In 2006, seventy-three percent of all officers who were disciplined as the result of a substantiated complaint received instructions and twenty-seven percent received more serious discipline. *Id.* This represented a complete reversal of the statistics from 2002 when only twenty-five percent of the officers received instructions. *Id.*

230. In 2005, the NYPD issued instructions to fifty-five percent of the officers it disciplined as a result of abuse of authority allegations. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, 44. That same year, officers received instructions in only thirty-eight percent of discourtesy cases. *Id.* This makes little sense because discourtesy is generally considered to be a less serious form of misconduct. *See* Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 662 (2004) (arguing that more serious allegations and more serious offenders should not be treated the same as minor offenses like discourtesy).

231. *See generally*, Baker, *supra* note 18, at B1 (noting that CCRB spokesman Andrew Case observed that reduced discipline "might reduce the disincentives for committing bad stops" and might ensure that officers "have less to fear if a stop is questionable").

232. *See supra* notes 159-62 and accompanying text (detailing how anti-crime teams are assigned to conduct stops).

233. *See* Al Baker, *City Police Stop Whites Equally but Frisk Them Less, a Study Finds*, N.Y. TIMES, Nov. 21, 2007, at B1 (reporting that seven percent of the NYPD's officers accounted for fifty-four percent of all street stops in 2006). The RAND Corporation

Since anti-crime units routinely receive the most complaints per officer and the most substantiated complaints per officer,<sup>234</sup> it is reasonable to assume that the NYPD's desire to shield the work of its anti-crime teams from the effects of CCRB scrutiny was a driving force behind the department's policy shift.

The fact that anti-crime teams and other officers implementing the NYPD's policing strategy accumulated multiple complaints ensured that the NYPD could not continue to issue instructions in response to stop-and-frisk-related substantiations. During a hearing before the New York City Council in 2006, Charles Campisi, the NYPD Chief of Internal Affairs, testified that instructions were generally appropriate in abuse-of-authority cases because (1) these cases "often involve mistakes or misinterpretations of the law rather than intentional misconduct" and (2) "officers receiving instructions are invariably found not to receive the same type of complaint again."<sup>235</sup> A July 2008 CCRB report correctly noted that both of Chief Campisi's assertions were incorrect. First, the CCRB does not substantiate allegations against officers who act in good faith and do not violate clearly established law.<sup>236</sup> Second, a significant number of officers who received instructions between 2003 and 2007 "received another

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was given access to the data concerning which officers were responsible for stops in 2006, but this data was not released to the public. Moreover, data relevant to other years has not been released to the public.

234. In 2004 and 2005, the CCRB reported that "four of the top ten commands, as measured by complaints per uniformed officer, were anti-crime units." CCRB YEAR 2005 STATUS REPORT, *supra* note 179 at 19. In 2006, Patrol Borough Brooklyn North Anti-Crime and an anti-crime unit with the NYPD's Housing Bureau ranked first and second, respectively, in both complaints per uniformed officer and substantiated complaints per uniformed officer. CCRB YEAR 2006 STATUS REPORT, *supra* note 168, at 23.

235. CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 23 (quoting Chief Charles Campisi).

236. *Id.* In this regard the CCRB applies a standard for misconduct that is similar to the standard that the court applies when assessing a police officer's qualified immunity defense in a 42 U.S.C. § 1983 action. Due to qualified immunity, "government officials performing discretionary functions are immune from liability for damages when they act in good faith and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Di Palma v. Phelan*, 578 N.Y.S.2d 948, 950 (App. Div. 1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The CCRB considers the basic tenants of the law relevant to stop-and-frisk as articulated in *People v. DeBour*, 40 N.Y.2d 210 (1976) to be "well articulated," which means that it will substantiate allegations against officers who violate *DeBour* by conducting improper stops, frisks, and searches. CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 24.



complaint with the same allegation.”<sup>237</sup> These criticisms of NYPD policy clearly had some effect because the NYPD soon changed tactics.

In 2007, the NYPD directly challenged the authority and the legitimacy of the CCRB by “civilianizing” the Department Advocate’s Office (“DAO”) and using the office’s power of prosecutorial discretion to nullify CCRB substantiations. When the CCRB substantiates a case, it transfers it to the DAO, which is responsible for the administrative prosecution of police officers within the police department’s internal disciplinary system.<sup>238</sup> Once the DAO receives a substantiated case from the CCRB, the DAO may exercise unfettered prosecutorial discretion.<sup>239</sup> It need only prosecute cases when it concludes that the accused officer violated established police department procedures or the law.<sup>240</sup> To respond to previous charges of incompetence and prepare to publicly challenge the authority of the CCRB, the NYPD “civilianized” the DAO in 2007.<sup>241</sup> The NYPD replaced the office’s group of former officers-turned-attorneys with veteran litigators drawn primarily from district attorneys’ offices and the Legal Aid Society.<sup>242</sup>

Under the leadership of Julie L. Schwartz,<sup>243</sup> former chief of the Sex Crimes and Special Victims Bureau at the Brooklyn District Attorney’s Office,<sup>244</sup> the newly civilianized DAO declined to

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237. *Id.* at 23–25 (reporting that ninety out of 645 officers, or 14%, received another complaint with the same allegation). This number of identified recidivists may seem insignificant, but police misconduct is a severely underreported phenomenon. WALKER, *supra* note 3, at 123–25. It is, therefore, notable when any officer receives multiple complaints.

238. CCRB YEAR 2005 STATUS REPORT, *supra* note 182, at 35.

239. *See generally* Christine Hauser, *When the Police Put Their Own on Trial*, N.Y. TIMES, May 29, 2008, at B3. The prosecutorial discretion of the DAO is derived from the authority of the police commissioner to discipline police officers. *See supra* note 126 and accompanying text.

240. For an overview of the system, *see* Christine Hauser, *When the Police Put Their Own on Trial*, N.Y. TIMES, May 29, 2008, at B3.

241. *See* NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 36 (alleging that, as the Commission to Combat Police Corruption had previously found, the DAO lawyers were incompetent, and the “NYPD’s prosecution of disciplinary cases failed to meet minimum standards of professionalism and competence”).

242. Thomas Adcock, *A ‘Civilianized’ Sea Change, New York Police Department Taps Veteran Litigators for Internal Prosecution Office*, N.Y. L.J., Mar. 28, 2008, at 28.

243. *See id.* (reporting that when Ms. Schwartz was hired by the NYPD, she was given the title of Deputy Commissioner, which means that she has complete control over the DAO and answers directly to the police commissioner).

244. *Id.*

prosecute an unprecedented number of substantiated complaints,<sup>245</sup> many of which related to stop-and-frisk activity.<sup>246</sup> Ms. Schwartz's public explanation for declining to prosecute so many cases was that the CCRB board did not "understand the everyday reality of a police officer."<sup>247</sup> Ms. Schwartz specifically attacked the CCRB on the issue of stops, stating that "[t]here are generally legitimate reasons for the stops" and that she did not "understand why the CCRB doesn't understand that."<sup>248</sup> New York City Police Commissioner Raymond Kelly commented that the shift in the number of cases dropped by DAO "reflected the departmental shift from prosecution by police officers to prosecution by civilians over the last year."<sup>249</sup> Although Commissioner Kelly declined to reveal the underlying reason why the NYPD civilianized the DAO and began declining to prosecute stops, Ms. Schwartz's comments were less guarded. She stated that her office would not alter its policies because she hoped that the CCRB would change.<sup>250</sup>

Ironically, the CCRB had already changed significantly. By July 2008, limited resources and the 2004 efficiency initiatives had helped drive the substantiation rate for all allegations to historic lows.<sup>251</sup> Nevertheless, the CCRB still presented a problem for the NYPD's stop-and-frisk policy because it continued to subs-

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245. The NYPD "declined to prosecute 102 cases out of 296 substantiated complaints in 2007." Michael Wilson, *Board Complaints that Fewer Police Officers Are Being Charged with Misconduct*, N.Y. TIMES, July 8, 2008, at B3. This represented a second major policy shift in as many years because, between 2002 and 2006, "the department reported it had been unable to prosecute a total of only 49 officers..." Al Baker, *Board Calls Police Dept. Lax on Cases of Misconduct*, N.Y. TIMES, Aug. 4, 2007, at B2. In 2006, the DAO declined to prosecute 3.3% of substantiated cases, but in 2007 it declined to prosecute 34% percent of substantiated cases. Tommy Hallissey, *NYPD, CCRB Clash on Drop in Cop Prosecutions; Expertise, Fairness Questioned*, THE CHIEF, July 18, 2008, <http://www.thechief-leader.com/news/2008/0718/news/011.html>.

246. In August 2007, the CCRB reported that between March 1 and June 30, 2007, the NYPD had declined to prosecute thirty-one officers, "most of whom were facing charges of stopping people in the street without probable cause or reasonable suspicion . . . ." Baker, *supra* note 245, at B2.

247. Hallissey, *supra* note 245.

248. *Id.*

249. *Id.*

250. *Id.* (reporting that Ms. Schwartz said, "I'm hoping they will change").

251. CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 17-18.

tantiate abuse-of-authority allegations at more than twice the rate of other allegations.<sup>252</sup>

Since it had not engaged in any significant policy review regarding stop-and-frisk activity since 2001, the CCRB had to defend itself against the NYPD's attack in narrow legalistic terms favorable to the NYPD. The CCRB argued that its declining substantiation rate provided evidence that the board had "taken a stricter view of what constitutes misconduct."<sup>253</sup> As further evidence that it was applying the law correctly, the CCRB highlighted that in 2007 it hired four attorneys to review all cases in which the investigator intends to recommend that the board substantiate allegations.<sup>254</sup> The CCRB's defense of its integrity and its authority was woefully inadequate because it did not explain why the civilianized DAO was declining to prosecute large numbers of cases and calling for the CCRB to change. Without the ability to explain these phenomena, the CCRB was forced to defend the merits of individual complaints and the integrity of individual investigations.

The conflict between the NYPD and the CCRB produced an impoverished dialogue that did not trigger any true reform. The NYPD and the CCRB never directly addressed the merits or consequences of the NYPD's commitment to stop-and-frisk policing. Instead, the two sides traded blows over who was handling cases properly.<sup>255</sup>

Despite some calls for sweeping reform,<sup>256</sup> the narrow legalistic debate between the CCRB and the NYPD produced an equally unsatisfactory compromise. In September 2008, the CCRB and the NYPD jointly announced that under a "pilot project" lawyers

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252. *Id.* at 19 (reporting a rate of seven percent for abuse-of-authority allegations, 2.3% for discourtesy allegations, and 1.7% for both offensive language and excessive force allegations).

253. *Id.* at 23.

254. *Id.* at 25.

255. In the annual report it issued in 2008, the CCRB included three brief summaries of cases involving stops that the NYPD had declined to prosecute. CCRB YEAR 2007 STATUS REPORT, *supra* note 130, at 27–28. The NYPD responded in kind by pointing out cases where it believed the CCRB had erred. *See* Hallissey, *supra* note 245.

256. *See, e.g.*, Editorial, *Fair Hearings on Police Misconduct*, N.Y. TIMES, Aug. 11, 2008, at A16 (endorsing the Citizens Union's proposal to give the CCRB the power to prosecute its own cases); N.Y. CIVIL LIBERTIES UNION, NYCLU: HUGE INCREASE IN POLICE MISCONDUCT CASES NOT PROSECUTED BY NYPD MEANS CITY MUST TAKE PROSECUTIONS AWAY FROM DEPARTMENT (2008), <http://www.nyclu.org/node/1708>.

from the CCRB would serve as “second seat” prosecutors at administrative trials.<sup>257</sup> The compromise did not signal that the NYPD had altered its position that “only department lawyers have the expertise to decide which cases to prosecute.”<sup>258</sup> The pilot project ensured only that CCRB lawyers would participate in the prosecution of the cases that the department had already chosen to prosecute.<sup>259</sup> As a result, the DAO remains free to use its prosecutorial discretion to control the disciplinary process by dictating which CCRB substantiations will have effect.<sup>260</sup>

#### H. BAILING OUT OVERSIGHT: SYSTEMIC REFORMS TO RESPOND TO SYSTEMIC FAILURE

Between 2002 and 2008, New York City’s civilian oversight system was tested and it failed. First, it failed to punish and deter individual acts of misconduct when stop-and-frisk activity increased complaints. The rise in the CCRB’s substantiation rate between 2002 and 2004 suggests that the NYPD’s increased emphasis on proactive stop-and-frisk policing caused police officers to begin conducting more illegal stops and related acts of misconduct.<sup>261</sup> Since 2004, fewer complaints have been substantiated,<sup>262</sup> and fewer substantiated complaints have resulted in discipline.<sup>263</sup> There is, however, no evidence that misconduct has become less prevalent. The civilian oversight system’s increasing failure to detect, punish and deter misconduct since 2004 should be attributed to the efficiency initiatives that the CCRB instituted in 2004, and to the NYPD’s effective campaign to capture control of the complaint process. But it must also be attributed to the CCRB’s failure to comprehensively reexamine NYPD policies regarding stop-and-frisk policing.

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257. Christine Hauser, *Complaint Board Lawyers Will Assist at Police Trials*, N.Y. TIMES, Sept. 11, 2008, at B3.

258. *Id.*

259. *Id.*

260. The New York Civil Liberties Union correctly attacked the agreement as meaningless insofar as it did nothing to address the fact that the department was dropping cases or imposing minor discipline long before trials or plea negotiations could occur. *Id.*

261. *See supra* notes 222–223 and accompanying text.

262. CCRB YEAR 2008 STATUS REPORT, *supra* note 107, at 22–23 (detailing how the substantiation rate for all allegations fell between 2004 and 2008).

263. *Id.* at 10 (noting that the NYPD declined to seek discipline in three percent of cases in 2004 and more than 30 percent of cases in 2007 and 2008).

When the NYPD chose to increase its stop-and-frisk activity, the CCRB did not examine the choice and study its implications. Instead, it focused on investigating complaints, and it substantiated complaints against an increasing number of individual officers who conducted stops in accordance with departmental policy, if not the law.<sup>264</sup> This process was unfair to the officers involved because it turned them into scapegoats for departmental policy.<sup>265</sup> It was also unfair to the citizens of New York City because it denied them an opportunity to participate in an informed, democratic discussion regarding a police-department policy choice that has had a severe impact on the city's minority communities. New York City's civilian-oversight system must be reformed to ensure that it fosters real democratic accountability and provides meaningful oversight.

To improve how the city's oversight system handles individual complaints, the power to prosecute substantiated complaints must be removed from the Department Advocate's Office. The way that the civilianized DAO has acted solely in the NYPD's best interests and has nullified the CCRB's power to independently determine misconduct shows that prosecutorial discretion should not be entrusted to the DAO simply because it is ostensibly "civilian." Even when civilian in-house oversight bodies are created with the best intentions, they are problematic because civilians working in-house tend to be unduly influenced by their supervisors or employees, who are police personnel.<sup>266</sup> The way in which the DAO has undermined the CCRB's authority demonstrates that civilian in-house oversight has no legitimate place within New York City's oversight system. Supposedly civilian institutions controlled by the NYPD cannot be trusted to perform their duties impartially.

There are no legal impediments to granting the CCRB the power to prosecute the allegations of it substantiates<sup>267</sup> and the

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264. See *supra* Part IV.C–D.

265. See Cheh, *supra* note 25, at 9 (arguing that focusing solely on individual investigations can make individual police officers scapegoats for patterns of misconduct); see also WALKER, *supra* note 3, at 99 (observing that officers may legitimately voice opposition to civilian oversight investigations when such investigations make individual rank-and-file officers "scapegoats for police department management problems").

266. See *supra* Part III.B.

267. In 2001, at the urging of Mayor Rudolph Giuliani and Police Commissioner Bernard Kerik, the CCRB and the NYPD entered into a memorandum of understanding that

transfer of prosecutorial power would create both accountability and transparency. By law, the police commissioner is the only official with the power to administratively discipline NYPD officers.<sup>268</sup> This power should remain in the hands of the police commissioner. It enables the mayor, who appoints the commissioner,<sup>269</sup> and the democratic process to hold the commissioner accountable if he fails to maintain discipline throughout the department.<sup>270</sup> The problem is that the civilianized DAO has enabled Commissioner Kelly to hide his views regarding the CCRB from the public and avoid responsibility for fundamentally altering NYPD's disciplinary policy between 2005 and 2007.<sup>271</sup> Transferring prosecutorial authority to the CCRB would enable the current legal regime to function as intended by forcing the

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would have transferred prosecutorial authority to the CCRB on June 25, 2001. CCRB YEAR 2001 STATUS REPORT, *supra* note 178, at 12. The proposed transfer of authority never occurred because several police unions brought suit and won an injunction barring the implementation of the agreement in 2003. *Id.* The transfer agreement would have violated state and local law by transferring trials to an administrative court outside of the police department. *See Lynch v. Giuliani*, 755 N.Y.S.2d 6, 8, 14 (App. Div. 2003) (holding that § 440(e) of the New York City Charter “assigns the Police Commissioner absolute authority in matters of police discipline” and that McKinney’s “Unconsolidated Laws § 891 requires that a police officer be removed from his or her position only after a hearing conducted by an individual actually employed by the Commissioner”). Nevertheless, the court held that the Police Commissioner could delegate to the CCRB the authority to prosecute cases. *Id.* at 13. Such a delegation could be revoked at any time, but once the power was delegated it would set a precedent that would be hard to overturn in the future without creating the appearance of impropriety. *Id.*

268. *See supra* note 126 and accompanying text.

269. NYC.gov, *supra* note 133.

270. If the commissioner and supervisors within the department were relieved of the “unpleasant responsibility for deterring and punishing misconduct,” they could “abdicate all responsibility for controlling misconduct.” Kerstetter, *supra* note 22, at 164. Since the NYPD has actively resisted outside oversight, placing disciplinary authority in the hands of any outside agency would probably cause first-line and more senior NYPD supervisors to line up with their subordinates in order to avoid being disciplined by the “resented ‘others.’” *Id.*

271. The attacks that the DAO publicly launched against the CCRB in 2008 reflect Commissioner Kelly’s thoughts regarding the CCRB. Before the CCRB released its year 2007 annual report to the public, Commissioner Kelly reviewed a preliminary copy of it and responded by sending a heated letter to the board, which he did not release to the public. Letter from Franklin H. Stone, Chair of the Civilian Complaint Review Board, to Police Commissioner Raymond W. Kelly, Police Commissioner of the City of New York, (June 16, 2008), <http://www.nyc.gov/html/ccrb/pdf/StoneLettertoKelly.pdf> (responding to the letter and summarizing some of the points made in it). In his letter, Commissioner Kelly repeatedly asserted that the CCRB has “a bias against members of the New York City Police Department” and maintained that “good faith by the officer” is “rarely credited in his or her favor.” *Id.*

commissioner to either impose discipline where appropriate or face the political consequences of his policy decisions.

Further reforms are, however, necessary to ensure that the police commissioner and the mayor are held accountable for policy decisions regarding policing. As the New York Civil Liberties Union noted, New York City's political leaders have left the CCRB to "fight its own battles with the police department," and the CCRB has been "badly outclassed."<sup>272</sup> During his tenure, Mayor Michael Bloomberg distinguished himself from his predecessor by quickly denouncing high-profile acts of misconduct,<sup>273</sup> and Commissioner Kelly has followed suit.<sup>274</sup> Nevertheless, Commissioner Kelly aggressively defended the NYPD's stop-and-frisk practices, while Mayor Bloomberg has remained silent on the issue.<sup>275</sup> This calculated two-track approach to police misconduct has prevented outrage over individual incidents from turning into calls for sweeping reforms and has forced the CCRB board, which is composed of mayoral appointees, to struggle with the NYPD without any active support from the mayor.

The New York City Charter should be amended to create a civilian auditor that can complement the CCRB by performing the kind of high level policy review that CCRB is not expressly empowered to perform. A civilian auditor that the city council appoints would be a cost-effective way to compensate for the fact that the mayor appoints the CCRB board while ensuring that policy review continues when budgets are tight and complaints increase.<sup>276</sup> The legislative act creating the auditor should require

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272. NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 3.

273. See, e.g., Randal C. Archibold, *Mayor's Handling of Harlem Death is Praised*, N.Y. TIMES, May 27, 2003, at B4 (reporting that one of New York's "most prominent black leaders" praised Mayor Bloomberg for setting himself apart from Mayor Giuliani by apologizing for Ms. Spruill's death); Michael Cooper, *Mayor's Response to a Fatal Police Shooting a Departure from His Predecessors*, N.Y. TIMES, Jan. 26, 2004, at B4 (reporting that, in contrast to the Giuliani administration, Mayor Bloomberg's administration was "swift to take responsibility" when NYPD officers fatally shot Timothy Stansbury Jr., an unarmed nineteen year-old).

274. See, e.g., William K. Rashbaum, *Report by Police Outlines Mistakes in Ill-Fated Raid*, N.Y. TIMES, May 31, 2003, at A1 (reporting that Commissioner Kelly immediately released a detailed report regarding the NYPD failures that led to the death of Ms. Spruill during a botched search-warrant execution).

275. See Powell, *supra* note 27, at A21.

276. *Contra* NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 18, 49 (arguing that the mayor should appoint an "Inspector General" to act as an auditor/monitor and mediate disputes between the CCRB and the NYPD). An auditor appointed by the city council

the auditor to issue regular reports regarding civil suits and settlements regarding police misconduct. It should also require the auditor to report on criminal cases in which evidence has been suppressed. This reform would establish the link between the courts and the civilian-oversight system that has been missing in New York City.<sup>277</sup> Finally, the auditor should have the power to compel both the CCRB and the NYPD to provide documents and information to guarantee that unbiased input supports the auditor's recommendations, making them more credible.

Despite what some have argued, the CCRB's existing problems should not be addressed by granting the civilian auditor the power to audit CCRB investigations.<sup>278</sup> Such a power would imply that the office of the auditor is superior in power and dignity to the CCRB. It would place too much power in the hands of a single individual and violate basic principles regarding the separation of powers.

The CCRB's problems should be addressed by amending the city charter to (1) mandate greater disclosure, (2) expand the board and (3) explicitly require the board to conduct more policy review and outreach. The CCRB should be obligated to release more detailed statistics regarding how its investigators are performing their duties so that the effects of understaffing and underfunding can be more clearly understood, staffing standards can be developed, and elected officials can be held accountable when the CCRB is denied adequate funding.<sup>279</sup> The board should be expanded because rise in complaints that occurred between 2002 and 2006 revealed the limits of a thirteen-member board's capacity.<sup>280</sup> Expanding the board and granting it the express power to make policy recommendations regarding issues that arise from complaints would enable it to once again engage in

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would serve as a check on the mayoral appointees who dominate both the CCRB and the NYPD. An auditor appointed by the mayor would, however, be redundant because the mayor has the power to mediate disputes among his appointees using the informal power of his office and by formally threatening to deny reappointment.

277. See *supra* Part II.C-D.

278. *Contra* NEW YORK CIVIL LIBERTIES UNION, *supra* note 13, at 18, 49 (arguing that the mayor should appoint an "Inspector General" with the power to audit CCRB operations and act as a mediator in disputes between the CCRB and the NYPD).

279. At a minimum, these statistics should include information that details the relationship between investigative caseloads, the number of interviews that investigators conduct, and investigative outcomes.

280. See *supra* Part IV.E.2.



policy review without making the auditor's broader policy review redundant.<sup>281</sup> The duties of the expanded board must, however, extend beyond complaint investigation and policy review. The charter should be amended to require the board to engage in more community and police department outreach because experience has shown that outreach can improve police-community relations and increase the legitimacy of the oversight system in ways that investigations cannot.<sup>282</sup>

## V. CONCLUSION

The New York City CCRB is part of a failed civilian-oversight system that marks the endpoint of one pathway for reform. During its history, the CCRB has evolved from an internal-oversight mechanism into an external-supervisory body and then into an external-investigative agency. The CCRB's failure to adequately address the oversight gap in New York City indicates that it is time for the city to move in a new direction and seek out ways to create a more robust oversight system that includes multiple oversight bodies.

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281. Limiting the CCRB's policy review power to issues arising from complaints would mean the CCRB could only speak on FADO-related issues. *See supra* notes 117–118 and accompanying text.

282. Currently the charter provision governing the CCRB does not require it to conduct any police department outreach. *See* N.Y. CITY CHARTER ch. 18-A, § 440(a) (2009). The town hall meetings conducted in 2001 and the outreach conducted at PSA-2 serve as useful examples of the kinds of activities that should be part of the CCRB's core responsibilities.