CREATING SPACE FOR COMMUNITY REPRESENTATION IN POLICE REFORM LITIGATION

Ayesha Bell Hardaway[*]

Input from affected communities is an essential component of the reform process aimed at remedying unconstitutional police practices. Yet, no court in DOJ-initiated police reform consent decree cases has ever granted a community organization's motion to intervene as a matter of right. Judicial opinions in those cases have largely truncated the Federal Civil Rule 24 analysis when evaluating the interests of impacted communities. Thus, the most success achieved by a small few has been permissive intervention or amici status. The models used by the Department of Justice to elicit the community perspective have largely been frustrating and have failed to incorporate community voice with equal weight and authority in the process. This Article identifies a uniform standard for courts to utilize in public law cases when community organizations seek intervention and proposes an alternative approach to the composition and structure of organizations so that the voices and input of those affected by police brutality are included in a meaningful way. The solution proposed by this Article involves applying an adequate representation analysis more suitable for the dynamic relationship between the federal government and marginalized communities. The right to intervene can be attained by those impacted by police violence while alleviating practical and representative concerns articulated by the judiciary in prior reform cases.

INTRODUCTION

ourts overseeing police reform consent decrees have presumed that the federal government adequately represents the interest of communities impacted by police violence. This presumption is derived from judicial interpretations of Rule 24 of the Federal Rules of Civil Procedure which

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[*] Assistant Professor of Law, Social Justice Law Center Director. My sincere gratitude to Sunita Patel, Bill Quigley, Alexis Karteron, Jonathan Adler, Andrew Pollis, Avidan Cover, Jessie Hill, and participants of the Lutie Lytle Black Women Law Faculty Workshop and Writing Retreat for their insightful feedback. Special thanks to Sarajean Petite and Shannon Doughty for their research assistance. I also extend an abundance of gratitude to the *Georgetown Law Journal* for their superb editorial assistance.

governs when a third party can successfully intervene in existing litigation.[1] Those interpretations, however, are not rooted in the origins or purpose of that rule. Courts managing Department of Justice ("DOJ")-initiated consent decrees have failed to acknowledge the unique relationship between the federal government and communities impacted by police violence. They have, instead, relied heavily on the traditional legal theory that the government speaks for its citizens. This misapplication not only frustrates the purpose of Rule 24(a), but also serves to undermine the legitimacy of police reforms.

Impacted communities[2] have attempted to have their insight and lived

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[1] FED. R. CIV. P. 24(a). Intervention of Right.

> On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(b). Permissive Intervention.

> (1) In General. On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.
> (2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
> (A) a statute or executive order administered by the officer or agency; or
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

[2] This Article deliberately focuses on communities impacted by police violence. Marginalized communities—including communities of color, members of LGBTQ communities, and those experiencing mental health crises—have historically been, and are presently being, subjected to disproportionate incidents of violence, searches, and arrests by police officers serving their communities. Federal investigations into patterns and practices of unconstitutional policing and any subsequent interventions have

experience included in various approaches to police reform. One way those efforts have been seen is in attempts to intervene in consent decrees initiated by the DOJ. Those intervention attempts have been made by community members impacted by police misconduct and the organizations representing their interests. No federal trial court in that context has ever recognized the right of a community organization to intervene as a party. Courts have at most granted permissive intervention, and that was granted only after appeal.[3] The essential nature of impacted community inclusion carries much more weight than permissive intervention connotes. By granting the intervention request permissively, the court refused to recognize that the community organization had a right to intervene. The denial of the right to formally participate in DOJ-initiated police reform litigation compounds the pre-existing marginalization of impacted communities.

Disregarding the voices of those harmed by police violence is not new.[4] The presumption by courts that the federal government adequately represents the interests of impacted communities only serves to reinforce that marginalization.

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been necessary in those communities. It is, therefore, not surprising that communities unaffected by police violence and misconduct have not attempted to initiate police reform efforts in their communities. In contrast, it is the communities impacted by unconstitutional policing that have been engaged in efforts to reform police practices. And it is on the misconduct disproportionately experienced by these communities that federal intervention efforts have been focused. Nothing in this Article aims to oversimplify the myriad of viewpoints and opinions that communities impacted by unconstitutional policing have regarding the scope and depth of reforms that members of impacted communities desire to see in the places where they live and work.

[3] *See* United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002).

[4] *See* N.Y.C. CIVILIAN COMPLAINT REVIEW BOARD, A MUTATED RULE: LACK OF ENFORCEMENT IN THE FACE OF PERSISTENT CHOKEHOLD COMPLAINTS IN NEW YORK CITY 19 (2014) http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf [https://perma.cc/3C78-WUZT] (finding the number of chokehold complaints had increased despite a city ban); G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. REV. 329, 330–31, 343 (2014) (discussing the failures of Chicago public defenders to investigate instances of torture recounted by defendants and the refusal of the State's Attorney to instigate and prosecute police officers for reported acts of racially motivated, systemic torture)

A great degree of contemporaneous and historical irony exists in that presumption. The Trump Administration has disavowed any prior commitment to federal efforts of police reform.[5] The Office of the Attorney General declared unmitigated allegiance to its partnerships with local law enforcement agencies. In doing so, it failed to acknowledge any role in ensuring accountability of local police agencies.[6] The memorandum concludes with directives to department employees to evaluate existing or "contemplated" consent decrees "to ensure conformity."[7] The Trump Administration's attempt to renege on the pattern or practice reforms in Baltimore began during the Obama Administration is a salient example of the temporal nature of the federal government's interest in police reform. It also provides an example of the federal judiciary's rejection of community efforts to intervene.

Prior to the 2016 election, the DOJ launched an investigation of the Baltimore Police Department following the in-custody death of Freddie Gray.[8] On April 12, 2015—just after 8:30 in the morning—Gray was reportedly chased by Baltimore police officers after he glanced at them and then ran.[9] Video of the arrest shows that officers took Gray down with a "leg lace" maneuver and held him in handcuffs while waiting for a police van to arrive on scene.[10] A bystander recording the arrest observed that another

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[5] *See* OFFICE OF THE ATT'Y GEN., MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS AND UNITED STATES ATTORNEYS, SUPPORTING FEDERAL, STATE, LOCAL AND TRIBAL LAW ENFORCEMENT (2017) ("It is not the responsibility of the federal government to manage non-federal law enforcement agencies.").

[6] *Id.*

[7] *Id.* at 2.

[8] *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016).

[9] *Arrest to Death: What Happened to Freddie Gray*, CBS NEWS (May 1, 2015, 9:10 PM) https://www.cbsnews.com/news/arrest-to-death-what-happened-to-freddie-gray/ [https://perma.cc/2Y5R-HPAF]; Statement of Charges, Maryland v. Grey, No. 6B02294074 (D. Md. April 12, 2015), https://www.documentcloud.org/documents/2071377-gray-charging-documents.html.

[10] *Arrest to Death: What Happened to Freddie Gray*, *supra* note 9; Catherine Rentz, *Videographer: Freddie Gray Was Folded Like*

officer also had a knee in Gray's neck.[11] Gray is heard telling officers he cannot breathe and requesting an inhaler.[12] He is then heard screaming in pain while being dragged to the van.[13]

An investigation by the Baltimore State's Attorney, Marilyn Mosby, revealed that two officers and a lieutenant placed Mr. Gray face down on the floor of the back of the police van.[14] His hands, and eventually his feet, were bound but he was not secured in a seatbelt.[15] Departmental policy reportedly required officers to secure Mr. Gray in a seatbelt.[16]

Mosby concluded that Mr. Gray "suffered a severe and critical neck injury" while being transported in the police van.[17] The officer driving the van reportedly stopped several times to check on Mr. Gray's condition.[18] Police accounts acknowledged that, at least twice, Mr. Gray stated he needed medical attention.[19] At no point during the estimated hour that Mr. Gray was under arrest did any of the officers seek medical care.[20] Instead, they took Gray to the police station where he was found unconscious and not

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"Origami", BALTIMORE SUN (Apr. 23, 2015), https://www.baltimoresun.com/news/crime/bs-md-gray-video-moore-20150423-story.html.

[11] *Rentz*, *supra* note 10.

[12] *Id.*

[13] *Id.*

[14] *Arrest to Death: What Happened to Freddie Gray*, *supra* note 9.

[15] Eyder Peralta, *Timeline: What We Know About the Freddie Gray Arrest*, NPR (May 1, 2015, 8:23 PM), https://www.npr.org/sections/thetwo-way/2015/05/01/403629104/baltimore-protests-what-we-know-about-the-freddie-gray-arrest [https://perma.cc/6QCR-DKEB].

[16] *Id.*

[17] *Arrest to Death: What Happened to Freddie Gray*, *supra* note 9.

[18] See id.

[19] *Id.*

[20] Peralta, *supra* note 15.

breathing.[21] Freddie Gray was pronounced dead seven days later on April 19, 2015.[22]

Mr. Gray's killing also prompted the DOJ to begin an investigation into the pattern and practices of the Baltimore Police Department.[23] A Baltimore officer who spoke with the DOJ characterized the transport process that led to Gray's death as a "load and go . . . with little regard for seatbelts."[24] The investigation found, among other things, that Mr. Gray and other Black residents were disparately impacted and perhaps intentionally discriminated against by the Baltimore police at every stage of interactions, from initial stops up to and including uses of force.[25] The DOJ Findings Report concluded that racially disparate treatment "erode[s] the community trust that is critical to effective policing."[26]

On January 12, 2017, the DOJ and the City of Baltimore filed a proposed settlement agreement.[27] Both parties indicated in the filing that resolving the case via consent decree was fair, adequate, reasonable, and in the interest of the public.[28] That proposed consent decree[29] detailed comprehensive reforms

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[21] *Id.*

[22] Erik Ortiz, *Freddie Gray: From Baltimore Arrest to Protests, a Timeline of the Case*, NBC NEWS (May 1, 2015, 4:46 PM), https://www.nbcnews.com/storyline/baltimore-unrest/timeline-freddie-gray-case-arrest-protests-n351156 [https://perma.cc/RN54-95JD]

[23] *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016).

[24] *Id.* at 114.

[25] *Id.* at 7.

[26] *Id.*

[27] *See* Memorandum of Law in Support of Joint Motion for Entry of Consent Decree at 3, United States v. Balt. Police Dep't, 249 F. Supp. 3d 814 (D. Md. 2017) (No. 1:17-CV-00099-JKB).

[28] *Id.* at 3.

[29] A consent decree, in this context, is a judicially approved and monitored settlement agreement. That agreement comes about after the filing of an action and as a result of negotiations related to the terms. The settlement

for the Baltimore Police Department.[30]

The Trump Administration, however, disavowed the federal government's commitment to police reform.[31] The Office of the Attorney General under this administration has expressly left the protection of civil rights to local law enforcement. It also expressly left local governments in control of protecting those rights.[32] The DOJ filed a motion to stay the Baltimore consent decree proceedings while the administration took time to "assess whether and how the provisions of the proposed consent decree interact with the directives of the President and Attorney General."[33]

With the future of the consent decree in doubt, a lifelong community member and an organization representing a group of local churches filed a motion to intervene.[34] The organization declared a "strong interest in ending unlawful and discriminatory practice[s] that have harmed them in the past" along with their desire to see the proposed consent decree fully enforced.[35] It cited the "new and different institutional priorities" of the federal government due to the change in administration to support its assertion that the interests of Baltimore residents impacted by police violence would not be adequately

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agreement does not become a consent decree unless and until the court presiding over the litigation makes such an order. Black's Law Dictionary defines "consent decree" as "[a] court decree that all parties agree to." *Consent Decree*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[30] *See* Consent Decree, *Balt. Police Dep't*, 249 F. Supp. 3d 814 (No. 1:17-CV-00099-JKB).

[31] OFFICE OF THE ATT'Y GEN., *supra* note 5. (stating "[l]ocal law enforcement must protect and respect the civil rights of all members of the public. Local control and local accountability are necessary for local policing. It is not the responsibility of the federal government to manage non-federal law enforcement agencies.")

[32] *Id.*

[33] Motion for Continuance of Public Fairness Hearing at 4, *Balt. Police Dep't*, 249 F. Supp. 3d 814 (No. 1:17-CV-00099-JKB).

[34] *See* Proposed Intervenors' Community Churches for Community Development, Inc., and Ralph E. Moore, Jr.'s Motion to Intervene, *Balt. Police Dep't*, 249 F. Supp. 3d 814 (No. 1:17-CV-00099-JKB).

[35] *Id.*

represented by the DOJ.[36]

Like each of the other courts that had previously ruled on the right to intervene by community organizations asserting a right to join DOJ-initiated police litigation, the federal court in Baltimore denied community efforts to intervene.[37] This is true even though consent decrees initiated by the DOJ are designed to rectify unconstitutional patterns and practices of local police departments and, thereby, resolve a significant and pressing societal issue. As it currently stands, those public law cases are proceeding through the federal court system with no actual representation of members of the community impacted by police misconduct.

It is important to recognize that this inquiry goes beyond the politics of changing presidential administrations. Administrations under both political parties have either been slow to intervene or have refused to intervene at all. But even federal administrations friendly to police consent decrees have yet to convince many community organizations that they adequately represent impacted communities.[38]

Existing scholarship argues that police policies and procedures are created in an undemocratic manner because they fail to go through a

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[36] *Id.* at 5.

[37] *See* United States v. Balt. Police Dep't, 249 F. Supp. 3d 814, 815 (D. Md. 2017) (addressing two discrete issues in its order: whether the putative intervenors are needed to "support[] the approval of the Consent Decree" and whether they were needed to seek enforcement of the Decree against the Baltimore Police Department).

[38] Sunita Patel's work exploring the undemocratic nature of community engagement models has identified key issues across various consent decrees. Patel's research found that—even under the consent-decree friendly Obama administration—DOJ-initiated reforms efforts were less than ideal in their approach to incorporating impacted community voices. She highlighted three indicators to support her finding: (1) existing tension between community groups in some jurisdictions and the DOJ; (2) the community engagement structures developed under certain DOJ consent decrees failed to thrive; and (3) a lack of agreement across jurisdictions that community engagement could correct the power differential between police and the communities they serve. *See* Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 797 (2016).

legislative process that promotes democratic accountability.[39] Other literature has examined how collaborative efforts between community organizations, police departments, and the DOJ have proven useful in reforming police departments.[40]

Many scholars have also identified the shortcomings of the statute that authorizes the federal government to initiate police reform litigation[41] and have proposed a variety of solutions that each ultimately suggest that individuals be given a private right of action in structural police reform litigation.[42] Others have specifically identified the lack of community inclusion in reform efforts led by the DOJ and the resulting undemocratic nature of these efforts.[43] Scholarship has also challenged us to imagine a transformative approach to addressing police violence.[44]

There remains, therefore, a central question of how best to include the

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[39] *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1843–48 (2015).

[40] *See* Jonathan M. Smith, *Closing the Gap Between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 342–46 (2016).

[41] *See* 34 U.S.C. § 12601(b) (2018) (formerly 42 U.S.C. § 14141).

[42] *See* Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 423-424 (2018); *see generally* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (proposing an amendment to pattern and practice litigation that permits the DOJ to deputize select private citizens to seek injunctive relief for persistent police abuses).

[43] *See* Patel, *supra* note 38, at 799; Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 416–17 (2010).

[44] *See generally* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 418-434 (2018) (juxtaposing DOJ reports on Ferguson and Baltimore against the transformative approach embraced by the Movement for Black Lives; including the emphasis on the demand for community control instead of community input).

insight, experiences, and needs of impacted communities in structural police reform litigation. That question remains regardless of presidential priorities. This Article seeks to expand the discussion of democratic police reforms through the use of formal intervention.

The Federal Rules of Civil Procedure provide the procedural mechanism by which community organizations have sought to join the litigation. Rule 24 provides two pathways for potential litigants to become a party.[45] The first pathway under 24(a) requires the movant, or putative intervenor, to establish a legal right to intervene either by federal statute or by satisfying three requirements under the rule.[46] The second pathway under 24(b) requires the movant to have conditional statutory authority or a question of law or fact in common with the main action in order to join the litigation.[47] This Article makes the unique contribution of exploring judicial analyses of motions to intervene using the first pathway. It also fills a gap in the existing literature as it explores the use of Rule 24(a) in police reform litigation to create a more representative and participatory reform process.

Part I summarizes the origins and scope of authority under 34 USC § 12601. and explores the evolution of attempts by the DOJ to engage community members in police consent decrees and why those efforts have been less than optimal. Part II discusses the standard set forth for intervention under Federal Rule 24, its purpose, and the equity-driven motivation behind the 1966 amendment to the rule. This Part also explores the issue of standing as well as the adequate representation factor in Rule 24(a) and how the courts have typically approached its analysis. Part III provides a comprehensive analysis of all community organization attempts to intervene in DOJ-police consent decrees on behalf of impacted community interests.

Part IV discusses the courts' failure to appropriated consider whether impacted communities are adequately represented in DOJ-initiated police reform litigation and argues that the faulty analysis in this subset of cases ignores controlling case law. Part V proposes a solution that engages an analysis firmly rooted in the issues of marginalization, autonomy, inclusion and distrust present in American policing. It uses relevant portions of the prior cases as the foundation for a proposed solution that provides community organizations the right to intervene as a party in DOJ-initiated reform efforts while addressing the practical and representative concerns articulated by the judiciary in prior cases. The solution provides a novel approach to address the unmet needs of structural police reform litigation as well as a means of

[45] *See supra* note 1.

[46] *Id.*

[47] *Id.*

sustainability. It also provides courts with a model by which invested organizations can organize and collaborate with aggrieved communities to address the current lack of representation.

I. DOJ-INITIATED POLICE REFORM LITIGATION

Congress granted the United States Attorney the right to investigate and sue municipal and state governments to remedy unconstitutional police practices.[48] The following Part proceeds in two sections. First, it briefly explores the events leading up to the passage of the Violent Crime Control and Law Enforcement Act of 1994.[49] It then details the three iterative processes used by the DOJ in its police reform litigation.

A. Passage of the Violent Crime Control and Law Enforcement Act

The United States government has a legitimacy problem with marginalized communities of color. Governmental action purportedly aimed to promote safety and rule of law has been viewed as social control over marginalized populations. An examination of the entire Violent Crime Control and Law Enforcement Act illustrates this point. The Act simultaneously increased incarceration of inmates through measures expanding death penalty crimes, criminalizing gang membership, and reducing opportunities for parole while empowering the federal government to enjoin unconstitutional police practices.[50] The shift in scope and duration of criminal punishments in America created an indelible and disparate impact on the lives and communities inhabited by people of color. The conflicting and dual nature of the federal intervention is not limited to just one administration or one act of Congress.[51]

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[48] *See* 34 U.S.C. § 12601(b) (2018) (formerly 42 U.S.C. § 14141); *see also* Ayesha B. Hardaway, Time is Not on Our Side, 15 STAN. J. C.R. & C.L. 137, 145–53 (2019) (discussing the persistent problem of police violence in America).

[49] Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at various locations in U.S.C, including 31 U.S.C. § 6715 (2018) and 34 U.S.C. § 12601 (2018)).

[50] 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141).

[51] The Supreme Court decision in *Adarand Constructors, Inc. v. Pena* arguably stands for the proposition that the federal government is in no better place to address matters of racial discrimination than state governments. The Court applies strict scrutiny to determine the

Video footage capturing the barbaric beating of Rodney King on a Los Angeles highway nearly eight years after the Supreme Court's decision in *Los Angeles v. Lyons*[52] prompted Congress to hold hearings regarding police brutality.[53] Federal lawmakers sought to "know how widespread . . . police misconduct [was] in Los Angeles and nationwide."[54] Congress passed the Violent Crime Control and Law Enforcement Act in response.[55] That statute authorizes federal intervention into unconstitutional police practices.[56] It limits the Department of Justice to seek injunctive and equitable relief from the courts.[57] Section 12601 does not provide private

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constitutionality of government contract funding essentially based on race and rejected prior decisions that presumed the federal government should be trusted to appropriately determine what constitutes "benign" racial classifications without being subjected to the highest level of judicial scrutiny. 515 U.S. 200, 227 (1995).

[52] 461 U.S. 95 (1983) U.S. Supreme Court refused to grant injunctive relief to Aldoph Lyons, a Black man, regarding the Los Angeles Police Department's excessive and routine use of chokeholds during routine traffic stops.

[53] *See Police Brutality: Hearing Before the H. Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 1 (1991).

[54] *Id.* at 1 (statement of Rep. Don Edwards, Chairman, Subcomm. on Civil & Constitutional Rights).

[55] *See* Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 12 (D.D.C. 2001) ("According to the defendants, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994 in response to the beating of Rodney King by members of the Los Angeles Police Department.")

[56] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1877 (codified at 31 U.S.C. § 6715 (2018)).

> § 6715. Enforcement by the Attorney General of prohibitions on discrimination
> The Attorney General may bring a civil action in an appropriate district court of the United States against a unit of general local government that the Attorney General has reason to believe has engaged or is engaging in a pattern or practice in violation of section 6711(a) or (b). The court may grant—
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> (1) a temporary restraining order;
> (2) an injunction; or
> (3) an appropriate order to ensure enjoyment of rights under section 6711(a) or (b), including an order suspending, terminating, or requiring repayment of, payments under this chapter or placing additional payments under this chapter in escrow pending the outcome of the action.

Id.

[57] *See id*.

plaintiffs with the authority to seek similar relief.[58] The statutory power to litigate the issue of pattern and practice unconstitutional policing rests solely with the Attorney General as head of the DOJ.[59]

The absence of the private right of action was not merely an oversight. In an earlier version of the bill titled the Police Accountability Act, Congress rejected legislation that would have provided a private right of action[60] and detailed measures dedicated to police accountability.[61] Congress initially aimed to give both the Attorney General and injured individuals the right to seek remedies from police departments engaged in a pattern or practice of unconstitutional policing.[62] The backlash to the proposed right of action for individual plaintiffs was swift.[63] Opponents to the bill, including conservative lawmakers and police advocates, voiced concerns about law enforcement agencies being subjected to frivolous lawsuits from individuals characterized as likely to abuse the newfound authority.[64] At least one article has proposed the notion that objectors were concerned with more than protecting local governments from the cost and annoyance of frivolous lawsuits from community members.[65] Marshall Miller proffers that lawmakers were concerned that rightful claims by injured individuals under the proposed statute would essentially empower federal judges to make decisions about the manner in which police departments are run, a role he seems to believe lawmakers wanted to leave to the elected and appointed officials in charge of the local government.[66] This concern, in

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[58] 34 U.S.C. § 12601 (2018).

[59] *See id.*

[60] Police Accountability Act, H.R. 2972, 102nd Cong. § 2(a)(3) (1991). This bill was never adopted by Congress.

[61] *Id.*

[62] *See id.*

[63] Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 174–75 (1998).

[64] *See* Gilles, *supra* note 42, at 1403 (quoting a letter from Assistant Attorney General W. Lee Rawls to Representative Henry Hyde addressing the expense and time local governments and agencies would expend defending against pattern or practice lawsuits if individuals were granted statutory authority to commence such litigation).

[65] *See* Miller, *supra* note 63, at 175.

[66] *Id.*

many ways, echoed that of the U.S. Supreme Court.[67] The individual right of action was removed from the draft bill in an effort to accommodate the stated objections.

Ultimately, the Police Accountability Act never advanced out of committee.[68] The authority for the Attorney General to pursue pattern or practice litigation against offending police departments was included instead in the Violent Crime Control and Law Enforcement Act of 1994.[69] It was enacted by Congress without any authority for individuals to pursue injunctive and declaratory relief on their own behalf. There is not a mechanism by which aggrieved individuals or organizations could assert an interest and seek to secure a remedy.[70]

Research by Myriam Gilles aptly points out that the absence of the individual, private right to seek remedies for alleged unconstitutional government conduct is in some ways unique to police misconduct. Her work details how individuals have successfully challenged school segregation, environmental hazards, housing discrimination, legislative reapportionment, and antitrust violations.[71] The federal government has indeed relied on private individuals to be "eyes on the ground" to enforce the law through private actions in these other areas.[72] The Justice Department under the Obama administration looked for a way to include community perspectives in the reform efforts initiated under the authority of the Violent Crime Control and Law Enforcement Act of 1994. As discussed in Part II, those efforts have taken the form of outreach and engagement, but concerns abound.

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[67] *See* Rizzo v. Goode, 423 U.S. 362, 380 (1976) (rejecting the lower court's finding of federal judicial power to supervise police department functioning).

[68] Gilles, *supra* note 42, at 1403 (citing Joan Biskupic, Crime Measure Is a Casualty of Partisan Skirmishing, 49 Cong. Q. Wkly. Rep. 3528, 3528–30 (1991)).

[69] *See* 31 U.S.C. § 6715 (2018).

[70] *See* Cover, *supra* note 42, at 379.

[71] Gilles, *supra* note 42, at 1393, 1429-1430; *see* also Clayton Act of 1970 §4, 15 U.S.C. §15; Hardin v. Ky. Utils. Co., 390 U.S. 1, 6 (1968).

[72] Gilles, *supra* note 42, at 1386 (discussing the sweeping structural reforms brought about through private litigants seeking to remedy constitutional violations in education, prison conditions, abortion access, and more). In this way, private litigants have filled the gap when the federal government has failed to act.

B. The Evolution of Community Input in DOJ Litigation

Some may ask whether it is appropriate for communities impacted by police abuses to have a role in pattern or practice litigation initiated by the Department of Justice. After all, the controlling statute gives sole authority to bring suit to the federal government through the Attorney General.[73] This perspective ignores the integral value of community input and engagement, which is widely recognized by the DOJ (at least during the Obama Administration) and law enforcement.[74] To that end, the federal government has committed significant resources to the effort of reforming unconstitutional police practices.[75] Those resources have been devoted to a myriad of activities, including engaging community leaders and others impacted by police violence in response to their requests to investigate the patterns and practices of police departments.[76] This is a considerable evolution from early consent decree processes that included minimal, if any, community engagement efforts. More recent DOJ-initiated consent decrees demonstrate that progress has been made towards an understanding that community engagement and the establishment of

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[73] 34 U.S.C. § 12601(b) (2018).

[74] *See* Kami Chavis Simmons, *Stakeholder Participation in the Selection and Recruitment of Police: Democracy in Action*, 32 ST. LOUIS U. PUB. L. REV. 7, 18–19 (discussing how the lack of community involvement undermines the legitimacy and sustainability of federal police reform efforts); TRENT IKERD & SAMUEL WALKER, U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., MAKING POLICE REFORMS ENDURE: THE KEYS FOR SUCCESS 25 (2010), https://cops.usdoj.gov/RIC/Publications/cops-p176-pub.pdf [https://perma.cc/5XVD-URHM] (identifying community involvement as an essential component to organizational change in police departments); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 13–14 (2017) [hereinafter PATTERN AND PRACTICE POLICE REFORM WORK], https://www.justice.gov/crt/file/922421/download [https://perma.cc/B2AQ-27GL] (explaining that the evidence the Civil Rights Division gathers from communities affected by police misconduct plays a critical role in federal pattern and practice investigations).

[75] *See* U.S. DEP'T OF JUSTICE OFFICE OF INSPECTOR GEN., AUDIT OF THE DEPARTMENT OF JUSTICE'S EFFORTS TO ADDRESS PATTERNS OR PRACTICES OF POLICE MISCONDUCT AND PROVIDE TECHNICAL ASSISTANCE ON ACCOUNTABILITY REFORM TO POLICE DEPARTMENTS 5 (2018), https://oig.justice.gov/reports/2018/a1814.pdf [https://perma.cc/3B7F-LR7C] (noting that the DOJ Civil Rights Division, Special Litigation Section spent over $6.7 million in costs related to pattern and practice enforcement in 2016).

[76] PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74.

positive community-police relations are essential components to successfully reforming police departments.[77]

The DOJ has gradually increased its outreach and integration of the community into federal police reform efforts. Understanding the continuum of those engagement efforts is essential to identifying potential ways to improve. This subsection explores the continuum of those engagement efforts. First, it details the cursory nature of community engagement provisions within DOJ-initiated consent decrees during the early years. Second, it explores the community engagement model employed by the DOJ during the next phase of consent decrees. It uses the New Orleans consent decree to illustrate the expanded nature of community engagement requirements during that time. Finally, it examines the use of Community Police Commissions as the most recent DOJ approach to engaging the community in its police reform efforts.

1. First Wave—Cursory Community Engagement

Settlement agreements initially reached after the passage of the Violent Crime Control and Law Enforcement Act contained only cursory statements requiring the subject police departments to engage with the community.[78] A review of settlement agreements over the years illustrates a marked change.

The Clinton Administration pursued its first pattern or practice suit to remedy alleged unconstitutional policing in Pittsburgh, Pennsylvania. The 1997 court-ordered reform efforts between the United States and the City of Pittsburgh consisted of eighty-three paragraphs; only two of which addressed "Community Relationships."[79] Those references acknowledged that the officer representative attended community meetings within their assigned zones and that the Office of Municipal Investigations, the entity required to investigate complaints against the police, performed outreach to inform the community of its purpose.[80] The paragraphs simply required

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[77] *Id.* at 40.

[78] *See, e.g.*, Consent Decree at 19–20, United States v. City of Pittsburgh, No. 2:97-CV-00354-RJC (W.D. Pa. Feb. 26, 1997), No. PN-PA-003-002. By contrast, the Steubenville consent decree ordered the same year had only one reference to community. Consent Decree at 7, United States v. City of Steubenville, No. 2:97-CV-966 (S.D. Ohio Aug. 28, 1997), No. PN-OH-0002-0005. That reference was not related to officer engagement or accountability. *Id.*

[79] *See* Consent Decree, United States v. Pittsburgh, *supra* note 78, at 19–20.

[80] *See id*.

the Pittsburgh Bureau of Police to continue its current practices of attending community meetings and producing television broadcasts (as well as using other means of outreach) to inform the public of the function and complaint process employed by the Office of Municipal Investigations.[81]

The Pittsburgh consent decree required the Pittsburgh Bureau of Police to do nothing more than what they had already been doing. It did not contain any information on the desired goal to be achieved through these mandates. For example, the decree could have required the Pittsburgh Bureau of Police to analyze the data gathered from civilian complaints to inform its policies or gauge the effectiveness of their community outreach efforts. It could have also required the Bureau to incorporate into its policies and training any insight or feedback it may have gained from community meetings.

The Los Angeles consent decree filed four years later took minimal steps toward including issues relevant to that community.[82] Like the Pittsburgh decree before it, the Los Angeles decree required the Los Angeles Police Department ("LAPD") to meet periodically with community advisory groups.[83] There was no requirement that the LAPD incorporate community input into the mandated reforms. The Los Angeles decree did include more prescriptive requirements for the LAPD related to community engagement. These requirements included: distribution of forms needed to file a complaint to community groups and centers;[84] ensuring that Field Training and Gang Unit officers demonstrate "proficiency" in "cultural and community sensitivity";[85] and provide training to all officers on community policing and cultural diversity.[86] Perhaps the most significant provision related to community involvement in the Los Angeles consent decree was the creation of a program dedicated to "Community Outreach and Public

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[81] *See id*.

[82] *See* Consent Decree, United States v. City of Los Angeles, No. 2:00-CV-11769-GAF-RC (C.D. Cal. June 15, 2001), ECF No. 123.

[83] *See id*. at 73.

[84] *Id.* at 30.

[85] *Id.* at 47, 56.

[86] *Id.* at 57.

Information."[87] This mandate prescribed the frequency and manner by which the LAPD had to provide the community with details about the consent decree and how community members could file complaints alleging officer misconduct.[88] The decree, however, failed to include any requirement that the LAPD collaborate or coordinate with community groups while carrying out its mandates.

Detroit was the next city to execute a consent decree with the federal government to reform its police department. If the progressive nature of police-related consent decrees can be measured by the number of ways departments are required to engage, consult, and inform the community it serves, the Detroit consent decree took a step backward. Like the Los Angeles and Pittsburgh decrees, it required Detroit to perform outreach to the community to ensure civilians were aware of (and had forms for) the civilian complaint process.[89] The Detroit Police Department was also required to provide their "proposed policy revisions to the community."[90] However, the decree failed to include any requirement that the Detroit Police Department solicit and incorporate recommendations from the community, as appropriate, into those proposed policy revisions. The final reference to community in the Detroit decree required that officers participate annually in topics related to Fourth Amendment such as probable cause, arrests, and custodial detention..[91]

2. Second Wave—More Detailed Community Engagement

The next iteration of DOJ-initiated police consent decrees—which began in 2011 under the Obama Administration—involved an increased scope and depth of outreach to communities impacted by police misconduct and violence.[92] This change was demonstrated in two ways. The first was the

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[87] *Id.* at 72.

[88] *Id.*

[89] *See* Consent Judgment at 18–19, United States v. City of Detroit, No. 2:03-CV-72258 (E.D. Mich. July 18, 2003), ECF No. 22.

[90] *Id.* at 20.

[91] *Id.* at 33-34.

[92] The Department of Justice entered into the first consent decree of the Obama Administration in *United States v. Territory of the Virgin Islands*. *See* Consent Decree, United States v. Territory of the Virgin Islands, 3:08-cv-00158-CVG-RM (D.V.I. Mar. 24, 2009); *see also* PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 44 (detailing the timeline of the investigation and consent decree). The underlying pattern or

manner in which the DOJ described the importance of community involvement in its efforts to reform police misconduct in both its stand-alone reports and Finding Letters. A published report by the DOJ identified restoring public trust as a specific aim of its pattern and practice reform efforts.[93] Community engagement became seen as integral to improving police-community relations as well as accountability of officers.[94] This recognition of the importance of community can also be gleaned from DOJ Findings Letters detailing the scope and frequency of its efforts to interview community leaders and organizers throughout the process of making departmental findings.[95] The second demonstration can be found in the terms of negotiated settlement agreements reached between 2012 and 2015.[96]

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practice investigation took place prior to Obama's election and the parties signed the agreement in March 2009. *See* PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 44. It should come as no surprise that the Virgin Island consent decrees largely mirrors the first wave of consent decrees; particularly in the minimal ways the provisions of the decree sought to expressly involve community. *See* Consent Decree at 8, United States v. Territory of the Virgin Islands, 3:08-cv-00158-CVG-RM (D.V.I. Mar. 24, 2009).

It is worth acknowledging that the Department of Justice likely has a broad view of community in this context. Their engagement efforts seek to include a cross-section of representatives from diverse backgrounds and experiences. This is no small effort and deserves recognition. This all-encompassing approach, however, fails to recognize the critical importance of including specific segments of the community that have been disproportionately impacted by police violence in the litigation.

[93] *See* PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 1, 4.

[94] *Id.* at 29.

[95] *See, e.g.*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF SEATTLE POLICE DEPARTMENT 1 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/MCT8-EPTL]; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF BALTIMORE CITY POLICE DEPARTMENT 4 (2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/7XC7-W25H]; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., LETTER TO MAYOR RICHARD BERRY RE: ALBUQUERQUE POLICE DEPARTMENT 2 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf [https://perma.cc/Q453-6XCX]; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., LETTER TO MAYOR SAM ADAMS RE: INVESTIGATION OF THE PORTLAND POLICE BUREAU 4 (2012), https://www.portlandoregon.gov/police/article/469399 [https://perma.cc/G9GJ-EFZ2].

[96] *See* Settlement Agreement, United States v. City of Albuquerque, No. 1:14-CV-01025-RB-SMV (D.N.M. Nov. 14, 2014); Consent Decree Regarding the New Orleans Police Department, United States v. City of New Orleans, No. 2:12-CV-01924-CM-JCW (E.D.

The decree between the City of New Orleans and the federal government[97] is illustrative of both the growth and limitations in efforts to include impacted communities in police reform efforts. The sheer number of references to community in the New Orleans agreement increased more than twentyfold in comparison to the first-wave of consent decrees.[98] The decree included provisions that the New Orleans Police Department ("NOPD") would: (1) work with community advocates to distribute police policies related to immigration status,[99] and (2) build relationships with community organizations for the purpose of ensuring language services would be available to community members who speak Spanish and Vietnamese.[100] It also required the NOPD to include community mental health professionals in its crisis intervention work.[101]

3. Third Wave—Community Police Commissions

As detailed above, community feedback and input have generally been sought, in some form, through DOJ-initiated consent decrees. The City of Seattle and the DOJ utilized a new model of community engagement in their 2012 agreement to reform the city's police department.[102] For the first time, a DOJ-initiated consent decree required a local jurisdiction to create a stakeholder group comprised of community representatives from the many diverse communities within Seattle. Credit allocation for the creation of the Seattle Community Police Commission ("CPC") was a point of contention among the parties.[103] Motivation to create the CPC may have been driven,

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La. Jan. 11, 2013), ECF 159-1; Settlement Agreement, United States v. City of Portland, No. 3:12-CV-02265-SI (D. Or. Dec. 17, 2012).

[97] Consent Decree, United States v. City of New Orleans, *supra* note 96.

[98] *See id*.

[99] *Id*. at 50.

[100] *Id*. at 52.

[101] *Id*. at 35.

[102] *See* Settlement Agreement and Stipulated [Proposed] Order of Resolution at 2–4, United States v. Seattle, No. 2:12-CV-01282-JLR (W.D. Wash. July 27, 2012).

[103] *See* Letter from United States Dep't of Justice & United States Attorney, W. Dist. of Wash., to Community Police Commission (Oct. 21, 2013); Letter from Mike McGinn, Mayor of Seattle, to Community Police Commission (Oct. 23, 2013) (detailing his "recollection of the course of negotiations" in which the DOJ credited the Mayor for the idea of the CPC); Jim Brunner, McGinn Seeks to Set Record Straight After DOJ Criticism, SEATTLE TIMES (Oct. 24, 2013, 9:31 PM), https://www.seattletimes.com/seattle-news/mcginn-seeks-to-set-record-straight-after-doj-criticism/. In a letter from the DOJ to

in part, by questions of sustainability that have dogged federal interventions in local police departments where a pattern or practice of unconstitutional policing has been found.[104] The Seattle consent decree stressed the vital importance of input from the community on proposed changes:

> The community is a critical resource. Certain aspects of the reform efforts embodied in the Agreements are best developed by dialogue and wide-spread input. Moreover, ongoing community input into the development of reforms, the establishment of police priorities, and mechanisms to promote community confidence in SPD will strengthen SPD and facilitate police/community relationships necessary to promote public safety.[105]

The Cleveland consent decree also created a Community Police Commission as a "formal" mechanism to "promote public trust and confidence . . . constitutional and effective policing, officer and public safety, and the sustainability of reforms."[106] As detailed above, the DOJ is on record as being committed to incorporating community input into the processes detailed above during the fact-gathering phase and while the DOJ considers which provisions it deems essential in the negotiation of settlement terms. It appears, however, that the importance of community input and engagement wanes during the implementation portion of the reform efforts. Specifically, the DOJ has opposed efforts by community organizations and leaders to be included as a party to the underlying litigation driving the reform efforts.[107] This is true despite

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the Community Police Commission, the DOJ provided the federal government's account of their efforts to engage Seattle community members, detailing moments in the negotiation when the process stalled as it related to a number of topics, including community engagement, and stating that the DOJ proposed the agreement include a "Community Monitoring Board." Letter from United States Dep't of Justice & United States Attorney, W. Dist. Of Wash., *supra*. The letter goes on to clarify that Seattle had a role in creating what became known as the CPC and asserting that the DOJ never stalled the process out of concern that the community was involved. *Id.*

[104] PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 18, 23–24.

[105] Settlement Agreement and Stipulated [Proposed] Order of Resolution, *supra* note 102, at 2.

[106] Settlement Agreement at 4–5, United States v. City of Cleveland, No. 1:15-CV-01046-SO (N.D. Ohio May 25, 2015), ECF No. 7-1.

[107] *See, e.g.*, United States' Response to the Detroit Coalition Against Police Brutality's Motion for Intervention as of Right, United States v. City of Detroit, No. 2:03-cv-72258-AC-DRG (E.D. Mich. July 10, 2003), ECF No. 14; Memorandum in Opposition to

acknowledgement by the DOJ that community involvement is essential to the sustainability of reform efforts[108] and that the failures of prior efforts have generated deep distrust of governmental authority within certain communities.[109]

This evolution is shared to provide context and illustrate how current practices still fall short of meaningful inclusion. Outreach and engagement are distinctly different from the inclusion that party-status can provide. Federal Rule of Civil Procedure 24 was created to provide that type of inclusion. Rule 24, however, has been utilized to no avail by impacted individuals and community organizations representing their interests. The next Part will discuss the creation, purpose, and other issues relevant to Rule 24.

II. FEDERAL RULE 24

Intervention attempts as a mechanism to transform societal issues are not new to public-law litigation.[110] The reform cases initiated by the DOJ are currently designed and purportedly used to resolve a significant and pressing societal ill without any actual representation from members of the public thereby impacted. The federal courts have largely refused to recognize the unique set of interests shared by communities impacted by police abuses. The perspective, insight, and experiences that shape those interests could prove indispensable to the law reform process. Judicial decisions that fail to account for the unique interests of impacted communities can result in the denial of opportunity to meaningfully participate in reform litigation and have done so in a manner that frustrates the intent and purpose of Federal Rule 24(a). This Part discusses the history of Federal Rule 24 and the court decisions that drove its

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Proposed Intervenor-Defendant Portland Police Association and Proposed Intervenor-Plaintiff AMA Coalition's FRCP 24 Motions to Intervene, United States v. City of Portland, No. 3:12-CV-02265-SI (D. Or. Jan. 22, 2013), ECF No. 25; United States' Opposition to Motion to Intervene by Disability Rights New Mexico, ACLU of New Mexico, and Native American Voters Alliance Education Project, United States v. City of Albuquerque, No. 1:14-CV-01025-RB-SMV (D.N.M. Apr. 22, 2015), ECF No. 120.

[108] PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 2, 18, 30.

[109] *Id.* at 13. Undoubtedly, there are many more layers of government failures that contribute to this distrust. Some of those will be explored *infra*.

[110] Justin P. Gunter, *Dual Standards for Third-Party Intervenors: Distinguishing Between Pubic-Law and Private-Law Intervention*, 66 VAND. L. REV. 645, 648–49 (2013) (discussing the development of public law and its reliance on the federal judiciary to enforce the "social reform" goals of the public law through litigation).

promulgation. It also explores the relevant issues of standing and adequate representation. This Part concludes with a brief description of the interplay between the rule in Equal Employment Opportunity Commission and affirmative action cases to demonstrate how the rule has been applied in non-police reform cases.

A. History of Federal Rule 24

The federal procedural rule that permits an unnamed party to join a lawsuit[111] was originally adopted in 1938.[112] The introduction of the concept was initially viewed as contradictory to traditions that viewed plaintiffs as the "master of the suit."[113] A derivative of Equity Rule 37,[114] Federal Rule 24 was designed to give interested individuals the ability to assert a right in the litigation.[115] But unlike its predecessor, the new rule did not require the intervening interest to be subordinate to the original lawsuit.[116]

Federal Rule 24 has undergone only one significant amendment since its original adoption.[117] That revision occurred in 1966. At that time, the Advisory Committee recommended that parties entitled to intervention as a matter of right under subdivision (a) of the rule be redefined. The amendment resulted in a number of revised provisions aimed at adjusting the manner in which courts applied the rule.[118] As it relates to the changes

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[111] FED. R. CIV. P. 24(a)–(b).

[112] CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7C FEDERAL PRACTICE AND PROCEDURE § 1903 (3d ed. 1998).

[113] *Id.*

[114] The former Equity Rule provided that "[a]ny one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7C FEDERAL PRACTICE AND PROCEDURE § 1903 n.2 (3d ed. 1998); *see generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (discussing how the events and individuals responsible for the adoption of the Federal Rules were champions of equity as opposed to adherents of the common law).

[115] John E. Kennedy, *Let's All Join in: Intervention Under Federal Rule 24*, 57 KY. L. J. 329, 331–32 (1969).

[116] WRIGHT & MILLER, *supra* note 112.

[117] *See* FED. R. CIV. P. 24 advisory committee's notes to 1946, 1948, 1963, 1966, 1987, 1991, 2006, and 2007 amendments.

[118] FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

in the text, the provision reduced what had been two separate clauses into one clause.[119] It also removed language that indicated the interest in question had to be property related.[120] The two remaining revisions were designed to address concerns about the ways courts placed additional hurdles in the path of movants seeking to intervene.[121]

Under the prior Federal Rule 24 (a), successful intervenors, were required to demonstrate that their interests were inadequately represented and that they would be legally bound by the outcome as a result of res judicata.[122] The Supreme Court's decision in *Hansberry v. Lee* revealed the insurmountable challenge those two requirements posed for potential litigants.[123] Carl Hansberry and other similarly situated Black landowners appealed a prior decision from the Illinois State Supreme Court.[124] The land they purchased was purportedly subject to a restrictive covenant barring them from ownership because of their race.[125] In affirming the decision of the lower court, the Illinois Supreme Court had held that litigation aimed at adjudicating the validity of the restrictive covenants was barred by res judicata, despite Mr. Hansberry not being a party to the prior suit.[126]

The U.S. Supreme Court reversed the prior decision and held that class action judgments were invalid against a non-party that was not adequately

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See,* Sutphen Estates, Inc. v. United States, 342 U.S. 19, 21 (1951) (citing language of prior Federal Rule 24(a) "when the representation of the applicant's interest by existing parties is or may be inadequate ***and*** the applicant ***is or may be bound by a judgment*** in the action" in its finding that the adverse interests of the movant-intervenor were not barred by res judicata and denying his motion to intervene (emphasis added)).

[123] 311 U.S. 32 (1940). While *Hansberry v. Lee* is commonly referred to in the class action context, it would be a mistake to not recognize its impact on the rule of intervention. This is largely because the Rules of Civil Procedure on joinder, intervention, and class actions were revised to maintain symmetry across all three. *See* Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 342–346 (2017) (discussing the deliberations of the Rules Committee as it related to res judicata and the *Hansberry* case).

[124] *Id.* at 37–38.

[125] *Id.*

[126] *Id.* at 38.

represented.[127] But recall that the prior rule of intervention required a movant to demonstrate that they were both inadequately represented **and** bound by a prior judgment.[128] What *Hansberry v. Lee* resolved for the petitioners in that case created an impossible conundrum for future litigants.[129]

Rule 24 was amended to abandon the "formal, legalistic restrictions and [instead use] pragmatic solutions that guarantee fairness and orderly procedure."[130] The removal of the res judicata bar from the current version sought to achieve that goal. The rule, as amended, set forth a more liberal test than its predecessor.[131] A movant is now required to show: (1) an interest in the subject of the litigation; (2) a lack of adequate representation of that interest by the existing parties; and (3) that the outcome of the case may impair or impede the movant's ability to protect that interest.[132] Despite the amendment to the rule and recognition that the res judicata requirement created an unreasonable bar to intervention, courts have substituted that requirement with a strict reading of the third factor.

It is important to understand the context and purpose of Rule 24 beyond the Advisory Committee notes and relevant scholarship during that time. Scholars view the Supreme Court's decision in *Sam Fox Publishing Co. v. United States*[133] as a catalyst for the rule's amendment.[134] The underlying case in *Sam Fox* involved a government anti-trust action under the

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[127] *Id.* at 45–46.

[128] *See supra* note 122.

[129] *See* Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 691–92 (1961); *see also* Kennedy, *supra* note 115, at 350 (explaining that *Hansberry v. Lee* created "a logical impossibility on the face of Rule 24 (a) (2) in that the conjunctive requirements of inadequate representation and binding effect could be considered to be mutually exclusive").

[130] Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1229 (1966).

[131] Coleman Capital Corp. v. Fidelity & Deposit Co. of Md., 43 F.R.D. 407, 408 (S.D.N.Y. 1967).

[132] FED. R. CIV. P. 24(a)(2).

[133] 366 U.S. 683 (1961).

[134] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 402–03 (1967).

Sherman Act against the American Society of Composers, Authors and Publishers ("ASCAP").[135] The proposed intervenor, Sam Fox, was a small-sized publisher concerned that the reforms provided under the ASCAP consent decree were insufficient to protect his interests and that the representation provided was inadequate to serve those interests.[136] The parties agreed to terms in the decree that required the ASCAP Board to be elected by membership vote and for revenue distributions to be made on an equitable basis.[137] The government sought to modify the decree twice out of concern for "'democratic administration of [ASCAP's internal affairs]' and for an equitable distribution of . . . revenues."[138]

It was at this point in the twenty-year litigation process that Sam Fox and a small group of publishers sought to intervene.[139] Justice Harlan's opinion affirming the denial of intervention reportedly drew concern from lower courts and scholars.[140] That concern was rooted in the notion that movant intervenors were left with no viable recourse. Rule 24(a)(2), as interpreted by the Court, meant that intervention of right was not available if the representation was inadequate since that would render the judgment defective and not binding, thereby not meeting the res judicata requirement necessary for intervention.[141] Satisfactory representation also precluded intervention.[142] It was this dilemma, along with efforts to maintain continuity across rules, that drove the lone substantive amendment to Federal Rule 24.[143]

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[135] *Sam Fox*, 366 U.S. at 685.

[136] Kaplan, *supra* note 134, at 402.

[137] *Sam Fox*, 366 U.S. at 686–87.

[138] *Id.* at 687 (citing the modified consent decree).

[139] *Id.*

[140] *See, e.g.*, Reich v. Webb, 336 F.2d 153, 156 (9th Cir. 1964); Int'l Mortg. & Inv. Corp. v. Von Clemm, 301 F.2d 857, 861 (2nd Cir. 1962) (applying a practical test for the "is or may be bound" standard); Atl. Ref. Co. v. Standard Oil Co., 304 F.2d 387, 393–94 (D.C. Cir. 1962); John W. Stack, Comment, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2)*, 50 CALIF. L. REV. 89, 91–92 (1962).

[141] Kaplan, *supra* note 134, at 401–402.

[142] *Id.* at 402.

[143] *Id.* at 403.

As discussed above, Federal Rule 24 has its historical pinning in equity. The 1966 amendment to the rule was aimed to solidify the rule's purpose under 24(a)(2)—to provide access to the courts for those who had a broadly conceived legal interest and met the remaining requirements of the rule.[144] This was done with the goal of promulgating a liberal intervention standard.[145] Satisfying the remaining requirements stated in the rule can be a significant hurdle for those seeking intervention.[146] As discussed below, existing parties have introduced the issue of standing as a possible bar to intervention in some instances.[147] The following Sections briefly discuss how standing and adequate representation can impact third-party intervention.

B. Federal Rule 24 and Standing

In *Town of Chester v. Laroe Estates, Inc.*, the Supreme Court considered whether a putative intervenor must have standing in order to intervene as a matter of right.[148] There was disagreement across federal circuit courts on that issue prior to the decision in *Laroe Estates*.[149] Some circuits held that putative intervenors met the standing requirement provided standing existed for the original party on the same side of the litigation.[150] Others held that the party seeking intervention must have independent standing to properly seek intervention.[151]

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[144] *See* FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

[145] Kaplan, *supra* note 134, at 403.

[146] This Article focuses on the adequate representation factor of Rule 24(a). The remaining requirements under the rule are that the motion to intervene be timely and that it assert a significant interest in the litigation that is likely to be impaired or impeded by the litigation. FED. R. CIV. P. 24(a).

[147] *See, e.g.*, Defendant City of Albuquerque's Response in Opposition to APOA's Motion to Intervene at 14–15, United States v. City of Albuquerque, No. 1:14-cv-01025-RB-SMV (D.N.M. Jan. 29, 2015); Proof Brief for the United States as Appellee at 14 & n.2, United States v. City of Detroit, No. 03-2343 (6th Cir. Apr. 8, 2004); Arakaki v. Cayetano, 324 F.3d 1078, 1088 (9th Cir. 2003).

[148] 137 S. Ct. 1645, 1648 (2017).

[149] *Id.* at 1650.

[150] *E.g.*, San Juan County v. United States, 503 F.3d 1163, 1171 (10th Cir. 2007).

[151] *E.g.*, *In re* Endangered Species Act Section 4 Deadline Litig., 704 F.3d 972, 976 (D.C. Cir. 2013).

Laroe Estates provided some resolution to the circuit split on the issue of standing. The putative intervenor, Laroe Estates, paid significant money as an investment in plaintiff Sherman's real estate project.[152] Laroe Estates argued that it was the equitable owner of the property and sought damages in its name.[153] The Court unanimously held that a movant-intervenor is required to satisfy standing requirements if it seeks a remedy different from that of a party with standing.[154] This recent decision leaves open the possibility that a putative intervenor is not required to satisfy standing requirements when it seeks the same relief as an existing party. It is therefore reasonable, in the police reform litigation context, for a movant-intervenor desiring injunctive relief similar to that of the federal government to not be required to satisfy standing requirements under *Laroe Estates*.

C. Federal Rule 24 and Adequacy of Representation[155]

Federal Rule 24(a) recognizes the rights of third parties to join existing litigation.[156] To intervene under Rule 24(a), a movant must show (1) an interest in the matter at hand, (2) that its interest may be impaired by the litigation, and (3) that its interest is not adequately represented by an existing party.[157]

The extent to which a putative intervenor must show inadequate representation varies by circuit. Three circuits require only a minimum showing of inadequate representation. The Sixth Circuit has consistently held that an intervenor only needs to point to "a potential for inadequate representation."[158] The Ninth Circuit uses a three-factor analysis to

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[152] *Laroe Estates*, 137 S. Ct. at 1649.

[153] *Id.*

[154] *Id.* at 1651.

[155] This is not to be confused with the requirements for class action certification under Federal Rule of Civil Procedure 23(a). A court, under that rule, must consider whether a named plaintiff is the appropriate representative for a class.

[156] *See* FED. R. CIV. P. 24(a).

[157] *Id.*

[158] *See, e.g.*, Davis v. Lifetime Capital, Inc., 560 Fed. App'x 477, 495–96 (6th Cir. 2014) (quoting Grutter v. Bollinger, 188 F.3d 394, 400 (6th Cir. 1999)) ("'[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments.' 'If the interest of the absent party is not represented at all, or if all existing parties are adverse to the absent party, then she or he is not adequately

determine whether existing representation is inadequate.[159] It examines not only whether the existing parties will undoubtedly make all of the proposed intervenor's arguments but also if they are capable and willing to do so.[160] The Ninth Circuit is expressly concerned about the ability of a proposed intervenor to offer any necessary elements to the proceedings that the existing parties would neglect.[161] The Tenth Circuit goes beyond a minimal showing requirement and affirmatively rejects the presumption that the government adequately represents the interests of its citizens unless the interests are "identical."[162] Moreover, a presumption of identical interests can be successfully rebutted if the government is obligated to consider interests different from those of the intervenor.[163]

The majority of the remaining circuits' presumption of adequate representation analyses rely heavily on whether interests are aligned. Movants within other circuits must show something akin to their "interest [being] in fact different from that of the [government] and that the interest will not be represented by [the government]."[164] The Fourth Circuit reasons

represented.'" (first quoting Grutter v. Bollinger, 188 F.3d 394, 400 (6th Cir. 1999); and then quoting Grubbs v. Norris, 870 F.2d 343, 347 (6th Cir. 1989))).

[159] *See* Citizens for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893, 898 (9th Cir. 2011) (detailing the Ninth Circuit's three-factor adequacy of representation analysis: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect" (quoting Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003))).

[160] *Id.*

[161] *See id.* (holding that an advocacy group was allowed to intervene in a case surrounding a challenge to an ordinance limiting snowmobile use).

[162] *See* Kane County v. United States, 928 F.3d 877, 892 (10th Cir. 2019) (quoting Bottoms v. Dresser Indus., Inc., 797 F.2d 869, 872 (10th Cir. 1986).

[163] *Id.*

[164] Texas v. United States, 805 F.3d 653, 662 (5th Cir. 2015) (quoting Edwards v. City of Houston, 78 F.3d 995, 1005 (5th Cir. 1996) (en banc)); *see* Pennsylvania v. President of the United States, 888 F.3d 52, 60–61 (3rd Cir. 2018) (holding that there was a compelling showing for a religion non-profit to intervene where Pennsylvania was suing the U.S. government for allowing an exemption for religious business to pay for contraceptive coverage); FTC v. Johnson, 800 F.3d 448, 452 (8th Cir. 2015) (holding that there is a greater burden to overcome the presumption of adequate representation when the court finds that interests are shared between the movant and a governmental party (citing Little Rock Sch. Dist. v. N. Little Rock Sch. Dist., 378 F.3d 774, 780 (8th Cir. 2004)).

that movants must make a strong showing of governmental inadequacy because it presumes that government agencies are best situated to defend the constitutionality of existing laws.[165] A successful movant in the Seventh Circuit will only effectively rebut the presumption of adequate governmental representation by a showing of "gross negligence or bad faith."[166]

Part IV below discusses the adequate representation factor and the manner in which courts have analyzed it when deciding motions to intervene filed on behalf of community organizations in police pattern or practice litigation.[167] That Part also explores how those decisions, particularly those that assert the federal government adequately represents the interests of community organizations, have run far afield of the amended purpose of Federal Rule 24.

D. Rule 24 in EEOC and Affirmative Action Cases

Decisions in structural reform litigation regarding police practices have largely truncated the analysis when evaluating the interest of those asserting the right to party-status in the litigation on behalf of affected communities. No trial court decision in a police reform consent decree case has ever granted a community organization's motion to intervene as a matter of right. The most success achieved by a small few has been permissive intervention in one case and amici status in others.[168] But input from affected communities is an essential component of the reform process aimed at remedying the effects of unconstitutional policing.[169] The model used by the Department of Justice to elicit the community perspective through newly created hybrid Commissions has largely been frustrating and ineffective at developing community voice with equal weight and

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[165] *See* Stuart v. Huff, 706 F.3d 345, 353 (4th Cir. 2013) (holding that abortion providers could not intervene to defend a constitutional challenge to abortion laws).

[166] *See* Planned Parenthood of Wisconsin, Inc. v. Kaul, 942 F.3d 793, 799 (7th Cir. 2019) (quoting Ligas *ex rel.* Foster v. Maram, 478 F.3d 771, 774 (7th Cir. 2007)) (holding that the state legislature could not intervene to defend a challenge against Wisconsin's new abortion laws because they could not show that the Attorney General would not provide adequate representation).

[167] *See infra* Part IV.

[168] *See infra* Part III.

[169] PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 13.

authority in the process.[170] More importantly, there are other areas within American law and government that demonstrate how community and third-party input have been designed to have more integrated roles.

Individuals who pursue employment discrimination redress through the Equal Employment Opportunity Commission ("EEOC") have intervened in enforcement actions initiated by that federal agency. Though the Supreme Court has referred to the EEOC as "master of its own case,"[171] individuals allegedly aggrieved by an employer's actions expressly retain the right to intervene in an action brought by the EEOC.[172] The right of intervention initially created under the Federal Rules of Civil Procedure has been codified by statute in the employment discrimination context.[173] The EEOC itself has recognized that employees may need to intervene in litigation brought by the agency.[174] This need exists because "it is possible the Commission's objectives and the [employee's] interests will diverge during the litigation."[175] The EEOC identifies its overall mission as the pursuit of public interest in correcting employment discrimination.[176] The agency recognizes that what it deems to be in the best interest of the general public may not be aligned with the specific interests of a singular aggrieved individual.[177] The classification of who qualifies as an aggrieved party under the statute has been broadly defined by some courts.[178]

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[170] *See* Betsy Graef, *The Seattle Community Police Commission: Lessons Learned and Considerations for Effective Community Involvement*, 14 SEATTLE J. SOC. JUST. 1, 49–51 (2015).

[171] *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002).

[172] 42 U.S.C. § 2000e-5(f)(1) (2018).

[173] *See id.*

[174] U.S. EQUAL EMP. OPPORTUNITY COMM'N, REGIONAL ATTORNEY'S MANUAL ON NOTICE TO CHARGING PARTIES OF COMMISSION SUITS, https://www.eeoc.gov/eeoc/litigation/manual/2-2-e_notice_to_cps.cfm [https://perma.cc/2LF5-NG9D].

[175] *Id.*

[176] *See id.*

[177] *See id.*

[178] *See, e.g.*, EEOC v. Albertson's LLC, 579 F. Supp. 2d 1342, 1347 (D. Colo. 2008) ("[A] plaintiff who failed to file a charge of discrimination with the EEOC, but who asserts she

Intervention attempts in affirmative action cases by putative intervenors impacted by discrimination have been met with mixed judicial results.[179] Black employees, applicants, and contractors were generally granted the right to intervene in lawsuits that sought to undo affirmative action policies and ordinances.[180]

The same has not always held true in higher education affirmative action cases.[181] Circuit courts deciding those motions to intervene have diverged. In *Grutter v. Bollinger*, a law school affirmative action case, the Sixth Circuit acknowledged the right of intervention of community organizations as well as interested enrolled and prospective African-American students.[182] That court was persuaded that the movant intervenors met all requirements of Rule 24(a) and expressly rejected the presumption of adequate representation when government entities are a party to the action.[183] The First Circuit, in *Students for Fair Admissions, Inc. v. President and Fellow of Harvard College*, found that the minimal showing requires movant-intervenors to "produce 'something more than speculation as to the purported inadequacy' of representation."[184] Unlike the successful intervenors in *Grutter*, the putative intervenors in *Students for Fair*

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was subject to similar discrimination by the same actors during the same time frame as the charging parties, is an 'aggrieved person' within the meaning of section 2000e-(f)(1).") (citing EEOC v. Outback Steakhouse of Fla., Inc., 245 F.R.D. 657, 660 (D. Colo. 2007).

[179] *See* Danielle R. Holley, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 CASE W. RES. L. REV. 103, 111 (2003).

[180] *See* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 267 n.15 (1999).

[181] *See id.* at 266–67 (identifying cases in which students or organizations of color at the Boston Latin Academy, the University of Texas Law School, and the University of Washington were not granted the right to intervene in lawsuits challenging affirmative action policies at those institutions, but identifying successful attempts by students and organizations of color to intervene in affirmative action cases involving the University System of Georgia, the University of Maryland, and the University of Michigan's law school).

[182] 188 F.3d 394, 401 (6th Cir. 1999).

[183] *See id.* at 400–01. (declining to require a heightened requirement when a governmental entity is a party, and citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) and its holding that only a minimal showing required to meet the inadequate representation factor).

[184] 807 F.3d 472, 475 (1st Cir. 2015) (quoting Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979)).

Admissions were required to demonstrate with some specificity how its interests would not be adequately represented.[185]

As detailed above, federal law provides aggrieved employees the express right to intervene in litigation commenced by the EEOC against an employer deemed to have engaged in discriminatory practices. Likewise, some marginalized movant-intervenors have found success in utilizing Federal Rule 24 to join affirmative action cases aimed at curtailing the consideration of race in admissions policies by higher education institutions. Despite these mixed results, community organizations seeking to intervene as a matter of right under Federal Rule 24 in federal police reform cases have been met for with unabashed rejection across all federal circuits. The following Part details the litigation efforts of those community organizations.

III. EFFORTS BY COMMUNITY ORGANIZATIONS TO ENGAGE IN POLICE REFORM

The presumption that a governmental authority can speak for marginalized communities impacted by police violence promotes paternalistic, hierarchal principles that are antithetical to contemporary notions of democracy.[186] Impacted community members' desire to have a voice that is heard, respected, and affords them self-governance in a similar fashion to those who are not marginalized. As discussed in greater detail below, those desires have been the subject of motions to intervene in a number of jurisdictions involved in DOJ-initiated reforms.

A. Individual Plaintiffs and Community Organizations Rebuffed by Federal Courts

Community organizations have attempted to gain party status in police reform consent decrees[187] under Federal Rule 24 since the year 2000.[188] Those attempts by interested community organizations have continued in

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[185] *See id.* at 476.

[186] *See* Patel, *supra* note 38, at 805–806 (arguing that a direct correlation exists between "[m]eaningful inclusion of directly impacted voices" and the fundamental democratic "principles of self-determination, anti-subordination, and individual liberty").

[187] See Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 for a discussion and explanation of the distinct meaning of a consent decree—not a contract and not a judgment—as well as an explanation of what typically occurs once a lawsuit is filed that leads to the entering of a consent decree.

[188] *See* United States v. City of Los Angeles, 288 F.3d 391, 396–97 (9th Cir. 2002).

numerous jurisdictions where the DOJ has found a pattern or practice of unconstitutional policing.[189] And while the DOJ has highlighted its efforts to gain input from certain community stakeholders during both the investigative and settlement negotiation stages,[190] community leaders and organizations have reported feeling left out of the negotiating and implementation phases of the reform process.[191] Indeed, the DOJ has formally opposed motions to intervene filed on behalf of community organizations.[192] The absence of formal inclusion and authority is of particular concern considering that one of the central aims of the police structural reform efforts led by the DOJ is to foster trust and improved relations between police departments and the communities they serve.[193]

Building collaborative working relationships is essential to gaining valuable insight into the experiences and needs of affected communities. This is no small feat. A long history of abuse and distrust between affected

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[189] *See infra* Section III.B.

[190] *See* PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74.

[191] *See* Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 525–26 (2008); Jo Ann Hardesty, *Failure of Leadership, Lack of Accountability, in Police Contract*, ST. ROOTS NEWS (Oct. 13, 2016), https://news.streetroots.org/2016/10/13/failure-leadership-lack-accountability-police-contract [https://perma.cc/KXU7-TQCD] ("All bodies, purportedly designed to gather public testimony on civil rights and policing, are effectively suppressed."); https://www.chicagotribune.com/investigations/ct-police-discipline-transparency-20171113-story.html; *Fighting Police Abuse: A Community Action Manual*, ACLU, https://www.aclu.org/other/fighting-police-abuse-community-action-manual [https://perma.cc/4JRQ-8D5D] (last visited Sept. 30, 2020); *Civil Rights Organizations Demand Police Reform Documents from Justice Department*, ACLU (Jan. 14, 2018), https://www.aclu.org/press-releases/civil-rights-organizations-demand-police-reform-documents-justice-department [https://perma.cc/3A8M-ZZJQ]; https://fas.org/sgp/crs/misc/R43904.pdf

[192] *See, e.g.*, United States' Opposition to Motion to Intervene by Disability Rights New Mexico, ACLU of New Mexico, and Native American Voters Alliance Education Project, United States v. City of Albuquerque, No. 1:14-CV-01025-RB-SMV (D.N.M. Apr. 22, 2015), ECF No. 120; United States' Combined Response to the CPC's Motion to Partially Intervene and to the City and the CPC's Motions to Extend Certain Deadlines, United States v. City of Seattle, No. 2:12-cv-01282-JLR (W.D. Wash. Nov. 5, 2013), ECF No. 96; Memorandum in Opposition to Proposed Intervenor-Defendant Portland Police Association and Proposed Intervenor-Plaintiff AMA Coalition's FRCP 24 Motions to Intervene, United States v. City of Portland, No. 3:12-CV-02265-SI (D. Or. Jan. 22, 2013), ECF No. 25.

[193] PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 25.

communities and police exists in the United States.[194] This absence of trust undeniably adds to the difficulty of structural reform efforts.[195] Fostering trust and positive relationships under such circumstances cannot be achieved overnight or with a perfunctory approach. A critical component of the effort to build better relationships is to create a reform process that the community views as valuable and likely to affect positive, meaningful change.[196] Community leaders and organizations have expressed the importance of being present and heard when policy revisions and community engagement plans are being made.[197]

But the desire for community leaders and organizations to be a part of the reform process goes even further than policy revisions and recommendations. Not being heard and seen in the process compounds the marginalization of affected communities[198] who have, in various ways over

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[194] *See generally* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 143–44; 302–04 (1968); *See* Terry v. Ohio 392 U.S. 1, 17 (1968); Ayesha B. Hardaway, *Time is Not on Our Side*, 15 STAN. J. C.R. & C.L. 137, 148 (2019); LOS ANGELES POLICE DEPARTMENT, BOARD OF INQUIRY INTO RAMPANT AREA CORRUPTION INCIDENT (Mar. 1, 2000) http://assets.lapdonline.org/assets/pdf/boi_pub.pdf pg.287; Erwin Cherminsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L.R. 545, 570, 620 (2001); *Public Trust and Law Enforcement—A Discussion for Policymakers*, CONGRESSIONAL RESEARCH SERVICE (Dec. 13, 2018) https://crsreports.congress.gov/product/pdf/R/R43 904/15; Lawrence W. Sherman, *Trut and Confidence in Criminal Justice*, UNIV. PENN. (2001) https:// www.ncjrs.gov/pdffiles1/nij/189106-1.pdf; *A report to the Los Angeles Board of Police concerning the operations, policies, and procedures of the Los Angeles Police Department in the wake of the Rampart scandal*, Berkley L. (Nov. 16, 2000) https://www.law.berkeley.edu/phpprograms/faculty/facultyPubs PDF.php?facID=4878&pubID=16; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5388955/.

[195] *See* Simmons, *supra* note 191, at 524 (explaining reform processes with questionable legitimacy run the risk of causing stakeholders to become "distrustful of federal intervention")

[196] *See id.* at 527 (discussing the essential function of positive relationships between police and community partnerships in policies focused on community policing)

[197] *Id.* at 525–26 (highlighting how the DOJ reform process involving the Los Angeles Police Department alienated community groups who became distrustful of "'secret' negotiations")

[198] *Marginalized populations*, 2 SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 495 (Lisa M. Given ed., 2008) ("Marginalized populations are those excluded from mainstream social, economic, cultural, or political life. Examples of marginalized

the years, unsuccessfully sought relief from the judiciary or elected officials.[199]

Efforts by individuals to initiate structural reforms within problematic police departments have historically been rebuffed by the federal courts and American legislators. Lawsuits filed both pre- and post-*Monell v. Department of Social Services of New York* [200] seeking structural improvements in response to police abuses committed by officers in Los Angeles and Philadelphia were ultimately rejected by the U.S. Supreme Court. The Court held in *Rizzo v. Goode* that federalism and equitable restraint principles precluded the trial court from granting individuals and community organizations in Philadelphia injunctive relief to address discriminatory police practices within that police department.[201]

In *City of Los Angeles v. Lyons*, the Court denied efforts by Adolph Lyons to enjoin officers in Los Angeles from using deadly chokeholds during

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populations include, but are by no means limited to, groups excluded due to race, religion, political or cultural group, age, gender, or financial status.")

[199] *E.g.*, Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo, 357 F.Supp. 1289 (E.D. Pa. 1973). This case involved two consolidated cases wherein Black plaintiffs alleged widespread constitutional violations of their rights by the Philadelphia Police Department, including specific officers as well as elected and appointed officials. *Id.* at 1290. The district court found that Black community members and those critical of the police department were too often subjected to unconstitutional conduct from officers, and the defendants were ordered create a civilian complaint process. *See id.* at 1321. Three years later, the U.S. Supreme Court found that the district court improperly "injected itself by injunctive decree into the internal disciplinary affairs of" the police department. Rizzo v. Goode, 423 U.S. 362, 380 (1976).

Individuals may pursue police misconduct claims under 42 U.S.C. § 1983, but not without significant limitations. Proof that an officer injured or violated the rights of the individual plaintiff is not enough to recover damages. Plaintiffs must first contend with claims that the officer's conduct is barred from liability on qualified immunity grounds. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (holding that qualified immunity will bar recovery under a Section 1983 claim unless the officer's conduct violated a clearly established constitutional right) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)). Plaintiffs able to surpass that hurdle must also prove that the violating conduct was the result of departmental policy or custom. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

The Supreme Court's subsequent decision in *City of Canton v. Harris* interjected a deliberate indifference standard that places another hurdle in the path of recovering against municipalities for failing to properly train officers. 489 U.S. 378, 389 (1989).

[200] 436 U.S. 658 (1978).

[201] *See* 423 U.S. 362, 380 (1976); Hardaway, *supra* note 48, at 155.

interactions with individuals who posed no threat of serious injury or threat to those officers.[202] Mr. Lyons had been strangled until he lost consciousness and control over his bladder and bowels during a traffic stop for a burned out taillight.[203] After a volley of appeals disrupted a series of short-lived alternating victories by Mr. Lyons and the City of Los Angeles, the Supreme Court ultimately found that the past wrongs of LAPD officers failed to provide standing for Mr. Lyons to enjoin the future conduct of officers on the streets of that city.[204] That ruling seemed to deliver a fatal blow to individual efforts aimed at using injunctive relief to structurally change improper police practices in order to improve the manner in which policing is delivered in communities.[205]

It is with that backdrop that this Part discusses the formal attempts of community organizations to be included in structural litigation efforts to rectify alleged unconstitutional policing and to provide meaningful input. Individuals and community organizations have been engaged in efforts to remedy the abuses suffered largely by Black community members for several decades.[206] These efforts predate the passage of federal legislation aimed at rooting out pattern and practice violations by law enforcement. The following subsection provides the unique contribution of examining each of the seven instances where community organizations have sought to intervene in DOJ-initiated police consent decrees.

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[202] *See* 461 U.S. 95, 97–98, 112 (1983).

[203] *Id.* at 114–15 (Marshall, J., dissenting).

[204] *See id.* at 111.

[205] This is not to ignore the private right of action that still exists for anyone to claim damages against local police departments and individual officers a result of any alleged unconstitutional policing they may suffer.

[206] *See infra* Part IV.

B. Community Organizations' Efforts to Gain Party Status after the Passage of the Violent Crime Control and Law Enforcement Act

Community organizations have attempted to intervene in seven[207] of the total twenty DOJ-initiated consent decrees[208] aimed at reforming alleged pattern and practice violations by law enforcement. Five of those seven sought intervention as a matter of right. Motions to intervene as a matter of right have been denied and affirmed in all of those instances. The only time a community organization has been allowed to intervene occurred following an appeal was in *United States v. City of Los Angeles*, as discussed below.[209] This section details the manner in which courts have analyzed community organizations' motions to intervene filed in DOJ-initiated police pattern and practice lawsuits.

1. Los Angeles

In *United States v. City of Los Angeles*, five community organizations and impacted individuals collectively moved to intervene.[210] The court noted that these organizations worked for a number of years with impacted communities and the Los Angeles Police Department on reform efforts.[211] The community organizations identified their motivation for intervention as centered around ensuring both that the consent decree-related reforms were successful and their ability to continue to participate in reform

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[207] *See* United States v. City of Los Angeles, 288 F.3d 391 (9th Cir. 2002); United States v. Detroit, No. 03-72258-AC-DRG (E.D. Mich. Aug. 26, 2003), ECF No. 31; Motion to Intervene, United States v. New Orleans, No. 12-1924 (E.D. La. Aug. 7, 2012), ECF No. 11; United States v. Portland, 2013 WL 12309780 (D. Or. Feb. 19, 2013); United States v. City of Seattle, No. 2:12-CV-1282-JLR, (W.D. Wash. Nov. 26, 2013), ECF No.106; United States v. Albuquerque, No. 1:14-CV-01025, (D. N.M. Feb. 19, 2015), ECF No. 102; United States v. Baltimore Police Dep't, No.1:17-CV-00099-JKB, (D. Md. Apr. 10, 2017), ECF no.4. *See* section III.B, *infra.*

[208] https://www.justice.gov/crt/page/file/922456/download. Note that the reform agreements counted here do not include all investigations or reform efforts that fell short of official consent decrees. Instead, the 20 cases referenced here only included instances where a suit initiated by the Department of Justice under the Violent Crime Control and Law Enforcement Act resulted in a federal consent decree.

[209] *See* 288 F.3d 391 (9th Cir. 2002).

[210] *See id.* at 397. They included the ACLU of Southern California, Asian Pacific American Legal Center, Homeboy Industries, Radio Sin Fronteras, and Southern Christian Leadership Conference of Los Angeles. *Id.* at 397 n.3.

[211] *See id.* at 397.

efforts.[212] The parties representing both the federal and municipal governments opposed intervention out of concern that allowing others into the litigation would slow down the progress of a complex negotiation process.[213] The court considered the intervention of right and permissive intervention questions separately.[214]

Intervention as a matter of right was characterized by the Ninth Circuit as guided by practical and equitable considerations that generally fall in the favor of the proposed intervenors.[215] The purpose of such purported liberal intervention is to ensure four general aims: (1) efficiency; (2) broadened access to courts; (3) to prevent or simplify future cases; and (4) to allow "additional interested part[ies] to express [their] views before the court."[216] Arguably, this liberal standard of guiding principles for determining intervention as a matter of right might lead one to believe that most intervenors would gain party-status with relative ease. That has not been the case, and it is not what happened in *United States v. City of Los Angeles*.

Instead, the Ninth Circuit affirmed the lower court's decision denying the putative community intervenors motion for intervention as a matter of right for two reasons. First, the court found that the movants failed to meet the "impair or impede" requirement because the consent decree litigation did not bar individual plaintiffs from pursing their own action against the LAPD for unconstitutional policing, nor did it prevent the community organizations from ceasing efforts to reform the department.[217] The court also made a second finding that the movant community organizations failed to successfully rebut the presumption that the federal government provided adequate representation of their interests.[218] Seeking strict enforcement of the decree alone was not enough to demonstrate inadequate representation for the Ninth Circuit. The opinion indicates that the

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[212] United States v. Los Angeles, 288 F.3d at 397.

[213] *Id.* at 404.

[214] *See id.* at 402–03.

[215] *See id.* at 397.

[216] *Id.* at 397–98.

[217] *See id.* at 402.

[218] *See id.*

movants needed to point to some failing or dispute concerning the terms of the consent decree.[219]

2. Detroit

A motion to intervene filed by the Coalition Against Police Brutality ("the CAPB" or "the Coalition") was denied in 2003 by the federal district court in Detroit.[220] The Coalition was comprised largely of individuals impacted by violence during encounters with Detroit Police officers.[221] The Coalition efforts to address unconstitutional policing in that city date back to 1998.[222] At that time, the organization presented a report to Detroit City Council during a hearing on the need for police reform.[223] It was reportedly their efforts, in collaboration with the NAACP and Amnesty International, which contributed to the city's decision to request a Section 14141 investigation by the Department of Justice four years later.[224]

The Coalition's motion to intervene argued that its significant interests were three-fold: (1) the pending complaints against Detroit officers lodged by some of its members; (2) ensuring that "true reform" took place through the DOJ process; and (3) making certain that existing community input from citizens and those impacted by police misconduct were not curtailed by the current reform process.[225]

The Coalition pointed to the broad analysis employed by the Sixth and Ninth Circuits when determining what constitutes a significant, protectable interest.[226] They also cited a finding by the Fifth Circuit that the National Organization of Women had a significant interest for purposes of intervention in an action filed by the federal government against steel

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[219] *See id.*

[220] Order, United States v. City of Detroit, No. 2:03-cv-72258-AC-DRG (E.D. Mich. Aug. 26, 2003), ECF No. 31 (order denying motions to intervene).

[221] Coalition Against Police Brutality's Motion for Intervention as of Right at 2, United States v. Detroit, No. 2:03-cv-72258-AC-DRG (E.D. Mich. July 1, 2003), ECF No. 10.

[222] *Id.* at 11.

[223] *Id.* at 12.

[224] *Id.*

[225] *See id.* at 3.

[226] *See id.* at 14–15.

employers for gender discrimination.[227] The Coalition also pointed to a district court finding that the NAACP in Los Angeles had a sufficient interest to intervene in an action filed by contractors alleging that minority contracts set aside under the Public Work Employment Act were unconstitutional.[228]

As to whether the interests of the Coalition would be adequately represented or protected by one of the existing parties, the Coalition argued that neither the City of Detroit nor the DOJ was in a position to do so.[229] They pointed to two failings on the part of the existing parties. First, the City and the DOJ failed to seek input from the organization regarding the proposed settlement prior to its filing.[230] Second, the parties also failed to hold community meetings to understand the perspective and concerns of community members.[231]

The City's opposition to intervention asserted that those possible interests were represented by both the federal government and the City of Detroit by way of the elected City Council.[232] An upcoming City Council meeting was

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[227] *See id.* at 15 (citing United States v. Allegheny-Ludlum Industries Inc., 517 F.2d 826, 845 (5th Cir. 1975)).

[228] *See id.* (citing Associated Gen. Contractors of California v. Sec'y of Commerce, 459 F. Supp. 766, 771 (C.D. Cal. 1978)).

[229] *See id.* at 17–19.

[230] *Id.* at 17–18.

[231] *Id.*

[232] Respondent City of Detroit's Response to Petitioner Coalition Against Police Brutality's Motion for Intervention as of Right at 2–3, United States v. City of Detroit, No. 2:03-cv-72258-AC-DRG (E.D. Mich. July 11, 2003), ECF No.17.

In a somewhat perplexing twist, the Detroit City Council had previously filed a Motion to Intervene approximately three weeks prior to the Coalition. *See* Detroit City Council's Motion to Intervene at 4–6, United States v. City of Detroit, No. 2:03-cv-72258-AC-DRG (E.D. Mich. June 18, 2003), ECF No. 6. The Council's Motion to Intervene asserted that, contrary to the City Charter, the decision by the Mayor and Detroit Police Department to enter into the consent decree was made without the approval of Council. *See id.* at 3. The Council also asserted a conflict of interest between their body and the Mayor because the mayor stepped outside of his authority by appropriating funds to be spent on the decree. *See id.* at 5. The Council also complained that it was unaware of the terms of the consent decree and that they had no input into the selection of the monitor. *See id.* at 6. The motion by Council called into question its ability to represent the interests of the Coalition.

identified as the public's opportunity for "community input and outreach."[233] The federal government denied any impropriety in the negotiation of the agreement and asserted the adequacy of its representation by virtue of DOJ's goal to "bring about reform in the [Detroit Police Department] to stem the pattern and practice of constitutional violations."[234]

The filings by the putative intervenors and the City of Detroit presented issues relevant for judicial consideration. Those issues included whether the government should consult with impacted communities in order to adequately represent them and whether a general interest in a similar result is enough to satisfy the adequate representation factor. The Coalition's motion for intervention was denied by the district court without written explanation.[235]

3. New Orleans

In New Orleans, the Community United for Change ("CUC") sought to intervene[236] in litigation related to a proposed consent decree.[237] Procedurally, the motion of the organization was timely. It was submitted just 14 days after the complaint and proposed consent decree were filed by the DOJ and by the court-ordered deadline for such motions.[238] CUC was described as "a non-profit association of people in New Orleans who have done admirable work for decades to transform the New Orleans Police Department [NOPD] into a constitutional policing department that

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[233] Respondent City of Detroit's Response to Petitioner Coalition Against Police Brutality's Motion for Intervention as of Right, *supra* note 232, at 3.

[234] United States' Memorandum of Law in Support of its Response to the Detroit Coalition Against Police Brutality's Motion for Intervention as of Right at 7, United States v. City of Detroit, No. 2:03-cv-72258-AC-DRG (E.D. Mich. July 10, 2003), ECF No. 14.

[235] *See* Order, *supra* note 220.

[236] Louisiana state law also provides organizations like CUC the right to intervene: "An unincorporated association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding." LA. STAT. ANN. § 12:507(A) (2019).

[237] *See* Motion to Intervene, United States v. City of New Orleans, No. 2:12-01924-SM-JCW (E.D. La. Aug. 7, 2012), ECF No. 11 [hereinafter CUC Motion to Intervene].

[238] United States v. City New Orleans, No. 2:12-01924-SM-JCW, 2012 WL 12990388, at *6 (E.D. La. Aug. 31, 2012).

respects the rights of all residents."[239] The organization reportedly "works with and on behalf of resident victims of NOPD."[240] It was CUC that made the initial request to the DOJ for an investigation into the conduct of the NOPD.[241] Similar to the efforts of community organizations in other cities, CUC facilitated meetings for community members to detail their experiences and concerns related to the NOPD.[242] DOJ representatives were reportedly in attendance at some of those meetings.[243]

CUC reform efforts did not begin with gaining the attention of the DOJ. More than two years before the federal consent decree was approved by the court, CUC reportedly compiled a "31 page Peoples Consent Decree" detailing the reforms deemed necessary from the perspective of impacted communities.[244] According to CUC, its efforts to provide community input through elected officials were rebuffed by the New Orleans City Council.[245] CUC sought intervention because, in its view, "the remedies suggested in the proposed consent decree are too little and too weak and not at all likely to force the major transformation needed" to ensure constitutional policing in New Orleans.[246] CUC's filing in support of its intervention asserted that none of the existing parties "adequately represent[ed] the interests of the people who are the primary victims of the culture of corruption pointed out by the DOJ."[247]

The DOJ opposition focused on two points related to adequate representation. First, it argued that CUC failed to rebut the presumption that a government entity adequately represents the interests of "all its

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[239] *See id.*

[240] CUC Motion to Intervene, *supra* note 237, at 1.

[241] *Id.*

[242] *See id.* at 2.

[243] *Id.*

[244] *See id.*

[245] *Id.* The Peoples Consent Decree was submitted to the Department of Justice. *Id.*

[246] *Id.* at 5.

[247] Memorandum in Support of Motion to Intervene at 4, United States v. City of New Orleans, No. 2:12-01924-SM-JCW (E.D. La. Aug. 7, 2012), ECF No. 11-1.

citizens."[248] It further argued CUC was required to demonstrate that its interests were both different and not adequately represented by the government.[249] Next, the DOJ argued that CUC could not overcome a second presumption of adequate representation recognized by the Fifth Circuit because the federal government and CUC shared the same goal of constitutional policing.[250]

In denying CUC's motion to intervene, the district court employed a limited reading of the legally protectable interest required under Rule 24(a). The opinion of the court takes issue with the fact that CUC's interest in police reform was not based in a contractual relationship or property right that could be impacted by the remedies instituted through the litigation.[251] Not only does the court's interpretation of the legally protectable interest go beyond that required by Rule 24(a), but the analysis of the court diminishes the importance of the interest CUC asserted. It is difficult to reconcile the notion that a community organization devoted to ensuring the constitutional protections of impacted community members would not have a legally protectable interest in constitutional policing. Moreover, the expectation that CUC would have a legally binding agreement or property right to aid in the protection of those interests is contrary to the articulated equitable purpose of Rule 24 to ensure and misplaced in this context.[252] To support its position, the court cited an oil and gas pipeline case,[253] a citation that demonstrates the court's effort to fit a square peg into a round hole as it relates to its application of the Rule 24(a) standard in the context of police reform litigation.

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[248] United States' Memorandum in Response to Motions to Intervene at 17–18, United States v. City of New Orleans, No. 2:12-01924-SM-JCW (E.D. La. Aug. 14, 2012), ECF No. 27 (citing Hopwood v. Texas, 21 F.3d 603, 605 (5th Cir. 1994)).

[249] *Id.* at 17.

[250] *Id.* at 18.

[251] United States v. City New Orleans, No. 2:12-01924-SM-JCW, 2012 WL 12990388, at *6 (E.D. La. Aug. 31, 2012).

[252] *See* FED. R. CIV. P. 24 advisory committee's note to 1966 amendment (articulating a desire to remove property interest as a fulcrum to interventions as a matter of right in adopted the 1966 amendment to Rule 24).

[253] *See City of New Orleans*, 2012 WL 12990388, at *6 (citing New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984)).

Finally, the court found that even if CUC did have a protectable interest, the proposed consent decree process will not impair their ability to bring a separate action against officers for constitutional violations.[254] This approach ignores Supreme Court decisions that make it virtually impossible for individuals to successfully file suits to enjoin systemic police misconduct.[255] The decision in this case also fails to adhere to interests of judicial efficiency and frustrates the general purpose of the rule of intervention.[256] Moreover, the rationale of the court ignores the unique opportunity that the federally initiated structural reform litigation presents. The court's opinion did not specifically address whether the interests asserted by CUC were adequately represented by an existing party.

The New Orleans decree and those that come after it fail in some key areas. From a practical standpoint, an analysis of the New Orleans consent decree reveals several ways in which that project could have benefited from robust and inclusive interfacing with CUC. For instance, the decree required the NOPD to ensure that the stops, searches, and arrests it conducted would be "consistent with community priorities for law enforcement."[257] It contains no direction on how any such priorities would be identified and incorporated into the reform process.

The decree also required the NOPD to provide police services that "promote[] broad community engagement and confidence" in the police force.[258] While this is a positive objective essential to building healthy relationships between the police and the community they serve, the stated goal alone is not enough. Aside from a requirement that the bias-free training include both community and police perspectives on discriminatory policing,[259] the decree provides no guidance or opportunity for the community to provide insight on what type of interactions could lead to greater confidence and engagement.

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[254] *See City of New Orleans*, 2012 WL 12990388, at *6.

[255] *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); United States v. Lyons, 740 F.3d 702 (1st Cir. 2014).

[256] *See* FED. R. CIV. P. 24 advisory committee's note to 1966 amendment; Kaplan, *supra* note 134, at 401.

[257] Consent Decree Regarding the New Orleans Police Department, *supra* note 96, at 38.

[258] *Id.* at 48.

[259] *See id.*

The absence of collaboration with impacted community organizations is particularly apparent in the sections of the decree entitled, "Community Engagement"[260] and "Community-Based Restorative Justice Project."[261] In contrast to the portions of the decree focused on victim-centered policing for those who have suffered sexual or domestic violence,[262] the "Community Engagement" and "Restorative Justice Project" provisions are light on details. The Community Engagement section identifies no community organizations with which the department should collaborate.[263] Instead the decree requires officers to continue to attend Department-sponsored community meetings.[264] It failed to require the NOPD to collaborate with

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[260] *Id.* at 60.

[261] *Id.* at 108.

[262] *Id*. at 54–59.

[263] *Id*. at 60–63. Contrast this with the fact that the section on "Policing Free of Gender Bias" requires NOPD to collaborate closely with victim-centered community organizations—specifically the New Orleans Family Justice Center ("NOFJC")—to make sure that the department's response to sexual assaults and domestic violence incidents are free of gender bias and are a part of thorough investigations. *Id.* at 58. This is important, yet the decree only reinforces an already established relationship between NOPD and NOFJC. The organization is estimated to receive sixty percent of its funding from the federal government. Jacqueline Quynh, *New Orleans Family Justice Center in Jeopardy During Government Shutdown*, 4WWL (Dec. 26, 2018, 7:29 PM CST), https://www.wwltv.com/article/news/local/new-orleans-family-justice-center-in-jeopardy-during-government-shutdown/289-ee1cfa8c-cc87-49e5-b7f7-21749ee8a261 [https://perma.cc/S6DK-ZXJV]. The organization also had an existing relationship with the local prosecutor. DOMESTIC VIOLENCE UNIT STANDARD OPERATING GUIDELINES, https://www.nola.gov/getattachment/NOPD/Policies/Domestic-Violence-Unit-Standard-Operating-Guidelines.pdf/ [https://perma.cc/JZ8D-UYRM]. This mandate at best attempts to strengthen an existing positive relationship. It does not do anything to reform or establish non-existing relationships between the police and the communities impacted by police violence—not citizen-on-citizen violence. This decree mandate specifically protects the federal government interest in the federal funds it provided to NOFJC. *The New Orleans Police Department and Gender-Biased Policing*, UNITED STATES DEPARTMENT OF JUSTICE ARCHIVES (Mar. 23, 2011), http://www.justice.gov/archives/opa/blog/new-orleans-police-department-and-gender-biased-policing [https://perma.cc/4MFX-7S4S]. Provisions related to NOFJC and fortifying its relationship with NOPD span six pages of the decree. Consent Decree Regarding the New Orleans Police Department, *supra* note 96, at 54–60.

[264] *See* Consent Decree Regarding the New Orleans Police Department, *supra* note 96, at 61 (referencing New Orleans Neighbors & Police Anti-Crime Council ("NONPACC") meetings which are found on the New Orleans Police Department Event Calendar. *NOPD Event Calendar*, CITY OF NEW ORLEANS, https://www.nola.gov/nopd/calendar/ (click the "next" button until NONPACC meetings appear in the "event" column).

community organizations that have demonstrated, longstanding interest and efforts toward ending unconstitutional police violence. Instead, the decree narrowly requires the NOPD to collaborate with the community to address issues related to "safety and quality of life."[265]

The Restorative Justice Project is even more devoid of information and details than the Community Engagement section. The brief paragraph makes the laudable acknowledgment that the parties need to create a project aimed at "remedy[ing] mistrust between NOPD and the . . . community."[266] It contains no information on how the project would be implemented, including who would fund and run it.[267]

Granted, it would be impossible to include every detail on how the NOPD was to go about fulfilling its obligations under the decree. That effort would require a type of mystical foresight not seen in structural reform litigation. In large measure, the information provided fits the general spirit of consent decree settlement agreements and can be viewed as a commitment of the parties to work collaboratively to accomplish the agreed upon terms. However, the repeated amorphous use of "community" hints at two glaring problems with the current approach to DOJ-initiated police reforms.

The first is that the decree largely refuses to identify impacted communities as the segment of community with which the police and federal government should be collaborating. If the reform efforts exist to end unconstitutional policing and repair the relationship between police and the affected communities, specifically naming that goal and identifying the organizations working toward the same goal should be given. The second glaring problem is the failure of the decree to specifically require the police to work in concrete, measurable, and verifiable ways with organizations representing impacted communities. Without the community at the table during the formative phases of plans designed to repair police-community relationships and increase officer accountability, the DOJ and federal court simply required the NOPD to have a one-sided conversation.

4. Portland

The Albina Ministerial Alliance Coalition for Justice and Police Reform ("AMA") filed a motion to intervene as of right into the DOJ pattern and

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[265] *See* Consent Decree Regarding the New Orleans Police Department, *supra* note 96 at 61.

[266] *Id.* at 108.

[267] *See id.*

practice suit in Portland, Oregon in January 2013.[268] The Coalition began ten years prior after the shooting of Kendra James, a Black woman, by the Portland Police during a traffic stop.[269] The Albina Ministerial Alliance was comprised of 125 Portland-area religious congregations.[270] Those groups had been working in the area of social justice for more than four decades and were founding members of the AMA Coalition.[271]

AMA made several solicited recommendations regarding the draft terms of a proposed settlement agreement.[272] Those recommendations were not solely limited to aspects of traditional community engagement. The organization raised concerns and declared interests regarding data tracking, the use of intermediary weapons, and the expansion of police accountability through community oversight.[273] AMA argued that the finalized agreement failed to address the organization's interests on those issues and others.[274]

AMA also squarely addressed its assertion that the DOJ would not adequately represent its interests in two ways. First, the organization stated its concern about the failure of DOJ to address the racially discriminatory practices of the Portland Police Bureau.[275] Community organization leaders provided data analysis on the disparate use of force based on race.[276] The DOJ, despite a purported recognition of the disparity, failed to ensure that the settlement terms were designed to remedy the issue.[277] Second, the organization argued that the DOJ would not adequately represent its

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[268] *See* Memorandum of Law in Support of AMA Coalition's Motion to Intervene at 1, United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 WL 12309780 (D. Or. Feb. 19, 2013), ECF No. 20.

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *See id.* at 6–7.

[273] *See id*. at 8.

[274] *See id.*

[275] *See id.* at 13–14.

[276] *Id.* at 14.

[277] *Id.* at 14.

interests because it had rejected recommendations on accountability, use of force, data tracking, and ongoing community input or court oversight of outcomes.[278]

The DOJ argued that that it adequately represented any interests AMA had in the current litigation. It addressed two presumptions of adequate representation that it argued AMA failed to rebut: the presumption that arises when the intervenor has the same "ultimate objective" of one of the parties, and the presumption that the government adequately represents the interests of its constituency.[279]

The district court agreed with the DOJ.[280] This determination was made after the court detailed in the opinion how an interest is not protectable if it is "undifferentiated, generalized" or if it is "comparable to a substantial portion of the population."[281] This analysis failed to address the racially disparate policing present in American cities.[282] People of color, especially Black people, experience disproportionately high rates of interactions with police—from traffic stops to physical violence.[283] The concerns of individuals and communities directly impacted by those disparities are distinctly different from those of the majority. The characterization of AMA's interests as "undifferentiated" and "generalized" ignored that reality and allowed the court to end its analysis without addressing the issue of adequate representation.[284] Consequently, the finding by the court that

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[278] *Id.* at 15.

[279] Memorandum in Opposition to Proposed Intervenor-Defendant Portland Police Association and Proposed Intervenor-Plaintiff AMA Coalition's FRCP 24 Motions to Intervene at 19, United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 WL 12309780 (D. Or. Feb. 19, 2013), ECF No. 25.

[280] *See* United States v. City of Portland, No. 3:12-CV-02265, 2013 WL 12309780, at *6 (D. Or. Feb. 19, 2013).

[281] *Id.* at *5.

[282] *See* Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff, & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 739–41 (2020).

[283] *See*, Sarah DeGue, Katherine A. Fowler, Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 Amer. Journal of Prev. Med. S173, S176 (2016) (finding that Blacks were over-represented-victims of police violence).

[284] *See City of Portland*, 2013 WL 12309780, at *6.

AMA had no protectable interest created the space for it to avoid addressing the issue of adequate representation.[285]

Nevertheless, the court provided its analysis of the adequate representation factor. It found that AMA could not overcome the presumption that the government adequately represents its constituents.[286] Embedded in the analysis is the court's assumption that the federal government was generally interested in remedying unconstitutional policing and therefore would adequately represent the interests of AMA. For reasons more fully discussed in Part IV, this finding fails on at least two fronts. First, the court failed to acknowledge that a proponent for a general resolution is quite different than an advocate for specified interests. Second, the finding negated the value and insight that those closely connected to the relevant police misconduct could add to inform the reform process.

5. Albuquerque

Formal intervention was sought in the Albuquerque federal consent decree on two separate occasions. The first attempt involved motions of nine unrepresented individuals filed prior to the fairness hearing held by the court to assess the appropriateness of the proposed decree.[287] The court observed that the motions expressed a general interest in remedying "lawlessness" within the Albuquerque Police Department.[288] The court found that the interest was shared and adequately represented by the

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[285] The court granted AMA Coalition what it referred to as "enhanced *Amicus Curiae*" status. *Id.* at *8. That status certainly provides the appearance that AMA has a literal seat at the table by ordering that they be permitted to: (1) provide briefs on any issues before the court in the same manner as the parties; (2) participate in any oral arguments; (3) have a place at counsel's table; and (4) be referred to as a party in the litigation, among other concessions. *Id.* This begs the question of why the court would make these concessions for an entity with no protectable interest that is being adequately represented by an existing party.

[286] *Id.* at *7.

[287] United States v. City of Albuquerque, No. 1:14-cv-01025-RB-SMV, 2015 WL 13747185, at *6 (D.N.M. Feb. 19, 2015). The court referenced the main motion to intervene filed by Antoine Pirard. *Id.* Most of the contents of that motion failed to articulate its basis. The remaining eight individually filed "identical forms with spaces where proposed intervenors can insert their name and contact information." *Id.* Those eight "appear[ed] to support the original filings of Mr. Antoine Pirard" and "include[d] no argument of their own." *Id.*

[288] *See id.*

DOJ.[289] The first attempt at intervention by individuals within the Albuquerque community was consequently denied.[290]

The second attempt at intervention involved three community groups representing the homeless, disabled, and Native American communities within Albuquerque.[291] Their joint motion was filed approximately one month after the court denied the first set of intervention motions.[292] The three organizations had a longstanding history of representing and advocating for the rights and interests of the identified communities.[293] The motion also provided some background on each organization's prior involvement in the reform efforts.[294] Both the federal government and the City of Albuquerque opposed intervention by the organizations.[295]

The procedural mechanism used by the organizations in Albuquerque was different from that used in similar cases. They sought permissive intervention under Rule 24(b) instead of intervention as a matter of right under Rule 24(a).[296] The filing indicates that the parties chose this path to intervention to avoid deficiencies in standing.[297] The motion for permissive

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[289] *See id.*

[290] *See id.*

[291] *See* United States v. City of Albuquerque, No. 1:14-CV-01025-RB-SMV, 2015 WL 13747189, at *2 (D.N.M. June 2, 2015).

[292] *See id.* at *2. The delay in filing the motion weighed against the three organizations. The court pointed to, among other things, the fact that the parties had spent months negotiating the terms of the proposed Settlement Agreement prior to filing the Complaint. *See id.* at 3–4. This fact presents an interesting quandary for interested parties: how does one determine whether there is a need to intervene during that considerable time span of closed negotiations to which the interested party is not privy?

[293] Corrected Motion to Intervene on Behalf of People Who Have Mental Disabilities, Who Experience Homelessness and Who Are Native American, Who Have Encounters with the Albuquerque Police Department at 3–4, United States v. City of Albuquerque, No. 1:14-CV-01025- RB-SMV, 2015 WL 13747189 (D.N.M. June 2, 2015), ECF No. 107.

[294] *See id.* at 4.

[295] *City of Albuquerque*, 2015 WL 13747189, at *1.

[296] *Id.*

[297] Corrected Motion to Intervene on Behalf of People Who Have Mental Disabilities, Who Experience Homelessness and Who Are Native American, Who Have Encounters with the Albuquerque Police Department, *supra* note 293, at 4. The doctrine of standing is often

intervention[298] identified three ways that the DOJ failed to adequately represent the interests of the organizations' members. First, Native Americans and homeless individuals who had been victimized were too afraid of and distrusting of law enforcement to speak directly to law enforcement officers.[299] Second, the United States government failed to address the disparate impact that some sections of the consent decree, which likely would increase interactions between police officers those with mental, developmental, or other disabilities, would have on those populations.[300] Finally, the DOJ representatives did not have the federally recognized expertise in issues related to mental health that one of the proposed intervenors possessed.[301] The motion identified specific portions of the government's proposed consent decree that would have a detrimental impact on persons living with disabilities, if adopted.[302]

The court decided that the concerns of the community organizations were adequately represented by the parties.[303] It pointed to the fact that one of the organizations was a participant in the Mental Health Response Advisory Committee designed and implemented under the Settlement Agreement.[304] And it characterized the dispute over the adequacy of

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discussed in cases involving Federal Rule 24. It often goes unmentioned in court opinions deciding whether to allow a moving party to intervene in federally initiated police reform litigation. For that reason, a detailed explanation of how standing can impact the success of motions to intervene is beyond the scope of this Article.

[298] Federal Civil Rule 24(b) allows a movant party to be permissively granted intervention in existing litigation. The rule allows the court to grant intervention, at its discretion, if the movant meets three requirements: (1) files a timely motion; (2) that asserts a claim or defense that is in common with a question of law in the underlying suit; and (3) will not result in undue prejudice or delay to the existing parties. FED. R. CIV. P. 24(b).

[299] Corrected Motion to Intervene on Behalf of People Who Have Mental Disabilities, Who Experience Homelessness and Who Are Native American, Who Have Encounters with the Albuquerque Police Department, *supra* note 293, at 9.

[300] *Id.* at 11.

[301] *Id* at 10.

[302] *Id*. at 11 ("If implemented, this section would increase the number of encounters between the City's police officers and people with mental, developmental or other disabilities, likely increasing uses-of-force incidents against them by City police officers and likely increasing the arrests and incarceration of such people.").

[303] *See* United States v. City of Albuquerque, No. 1:14-CV-01025-RB-SMV, 2015 WL 13747189, at *3 (D.N.M. June 2, 2015).

[304] *See id.*

representation as an issue of "different policy approaches."[305] Finally, the court found that the three issues raised by the organizations to support their argument of inadequate representation were new claims that went "beyond the scope" of the existing litigation.[306] The disparate impact argument presented by the community organizations actually led to their undoing. It led the court to express concern that the discovery required to determine the merit of the claims would cause undue delays in the existing case.[307] The concern raised by the court here is not unlike those related to general case management concerns for large, structural-reform litigation. Part V will explore the tensions related to this concern and incorporate a proposed viable solution.

6. Seattle

The Seattle CPC also sought to permissively intervene in that city's pattern or practice litigation more than one year after the court approved the consent decree.[308] Unlike the community organizations that had sought intervention in the prior cases, the CPC was created by the City of Seattle under the terms of the decree. Its membership included ten individuals chosen to represent some of the diverse communities within Seattle as well

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[305] *Id.*

[306] *Id.*

[307] *See id.* at *4. The federal government raised an important issue as to the disparate impact allegation for which there is no simple answer. They argued that a potential delay in the current reform efforts would place other communities at risk of experiencing continued unconstitutional policing while the court and the parties spent time working through the merits of the movant-interveners on behalf of Native Americans and the homeless. *Id.*

[308] Community Police Commission's Motion to Intervene for Purpose of Proposing Modifications to Deadlines at 1, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 90 [hereinafter *CPC Motion to Intervene*]. A pro se litigant and the *Seattle Times* each also sought to intervene in the case. The pro se filing does not provide much insight into the purpose of the filer's motion beyond his stated intention to "[i]ntervene as a friend [o]f the court on behalf of the City of Seattle." Motion to Enter the Policy of the Department of Justice and the Question of the Participation of the Washington State Bar Association as an Expert Witness at 1, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 34. The Federal Rule 24(b) motion by the *Seattle Times* centered around the interest of the press to gain information received by the parties regarding Independent Monitor applications. *See* Third Party Seattle Times Company's Motion for Relief from Provisional Protective Order and Motion to Intervene at 1–2, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 16. The parties previously sought to limit access to that information. *Id.* at 1. Both motions are outside the scope of this Article and have not been included in the overall analysis.

as three appointed police union members.[309] There was no category specifically reserved for those impacted by Seattle Police Department misconduct. The CPC was the first of its kind in DOJ-initiated police reform litigation. The parties agreed that there was "significant community interest" in the litigation and that "[t]he community is a critical resource."[310]

The CPC's and the parties' filings on the issue reveal the motive of the CPC in seeking intervention as well as the parties' objections to the intervention sought. CPC intervention was driven by a desire to seek additional time to provide input and recommendations on policy revisions.[311] The organization specifically sought judicial relief from the deadlines established under the First Year Monitoring Plan.[312] This process-oriented intervention is unlike the other remedial interventions attempted by community organizations in other jurisdictions. This filing exchange could, in some ways, be explained away as a procedural misunderstanding. The CPC argued that it believed the court required a motion to intervene in order to consider its deadline extension request.[313] The opposition articulated by the federal government potentially provides insight on how the DOJ views the role of community organizations in DOJ-initiated litigation.

DOJ lawyers preemptively argued that the interests of the CPC were "adequately protected" under the current composition of parties and

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[309] Settlement Agreement and Stipulated [Proposed] Order of Resolution at 2, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 3-1 (the decree focused on creating the CPC to "ensure that [its] membership is representative of the many diverse communities" based on residential geography, occupation as law enforcement, religious faith, and those designated as "minority or ethnic" with no specific seat on the Commission for those individuals impacted by police violence.

[310] Settlement Agreement and Stipulated [Proposed] Order of Resolution at 2, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 3-1.

[311] Community Police Commission's Motion to Intervene for Purpose of Proposing Modifications to Deadlines, *supra* note 308, at 2.

[312] *Id.* at 1.

[313] Reply Memorandum in Support of Community Police Commission's Motion to Intervene for Purpose of Proposing Modification to Deadlines at 1, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 104 [*hereinafter* Memo in Support of CPC Motion to Intervene].

contents of the consent decree.[314] The DOJ conceded that the CPC had a significant protectable interest in the litigation but asserted that this interest was "shared by both current parties."[315] The DOJ went on to include the federal judge assigned to the litigation as responsible for adequately representing the interests of the community.[316] The identification of the protectable interest and assertion of adequate representation proffered by the federal government were made without any such initial assertion by the CPC. The CPC argued in reply that its independent role as the voice of the community made it distinctly different from being an entity within city government.[317]

This distinction is an important one worth highlighting. The possibility exists that similarly situated community-based organizations would not agree with city government. For example, if the City and CPC were to take opposing positions on the use of body-worn cameras by officers, there would be no possibility that the City lawyers would advance and represent the interests of the CPC. Concerns have been expressed about the expanding surveillance of marginalized communities.[318] The CPC also distinguished the engagement required of it under the consent decree from its shared "ultimate objective [of] constitutional and effective policing" with

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[314] United States' Combined Response to the CPC's Motion to Partially Intervene and to the City and the CPC's Motions to Extend Certain Deadlines at 3, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 96.

[315] *Id.* at 9.

[316] *Id.* at 10.

[317] Reply Memorandum in Support of Community Police Commission's Motion to Intervene for Purpose of Proposing Modification to Deadlines at 4–5, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 104.

[318] *See* Melissa Hellmann, *Seattle's Oversight of Surveillance Technology is Moving Forward Slowly*, SEATTLE TIMES (June 5, 2019, 5:11 PM), https://www.seattletimes.com/business/technology/seattles-oversight-of-surveillance-technology-is-moving-forward-slowly/ (detailing the community privacy concerns regarding previously undisclosed governmental use of surveillance technology that led to legislative reforms in Seattle); *see also* Friedman and Ponomarenko, *supra* note 39, at 1829–30 (discussing community privacy concerns related to use of drones by the government in Compton, California).

the federal government.[319] The CPC's motion to intervene was ultimately denied by the court, which instead granted the commission only amici status.[320]

The Seattle CPC has faced challenges and organizational questions around its authority and impact.[321] Though Seattle's CPC was granted amici status,[322] it still encountered difficulty establishing a "durable collaborative partnerships" with police leadership.[323] Party status would make it harder for law enforcement to disregard community input and needs as mere recommendations. As of now, the success of community organization efforts to be meaningfully engaged in reform litigation is determined by the extent of its political connections.[324] This crucial working relationship should not be left to the chance that police brass will embrace community engagement and input or that the marginalized will find some way to leverage political capital necessary to gain the attention and support of elected officials. This is especially true considering the fact that a

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[319] Reply Memorandum in Support of Community Police Commission's Motion to Intervene for Purpose of Proposing Modification to Deadlines at 5, United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209 (W.D. Wash. Nov. 26, 2013), ECF No. 104.

[320] United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209, at *6–7 (W.D. Wash. Nov. 26, 2013).

The estate of Charleena Lyles also attempted to intervene after she was killed in an officer-involved shooting in 2017. *See* The Estate of Charleena Lyles' Emergency Motion to Motion to Intervene for the Purposes of Providing Additional Critical Information to the Court, United States v. Seattle, No. 2:12-cv-1282-JLR (W.D. Wash. Dec. 5, 2017), ECF No. 427. Unlike the other intervention attempts discussed in this article, Ms. Lyles' Estate sought to intervene in its individual capacity. The Lyles intervention was sought approximately four years after the Seattle Settlement Agreement has been adopted by the court as a consent decree. *See id.* It was precipitated by the killing of Charleena Lyles during a mental health crisis call for service. *See id.* at 1. The estate sought to provide information to the court regarding concerns about officer training, competence, and decision making after Ms. Lyles was fatally shot by officers. *Id.* at 2–3, 5.

[321] Graef, *supra* note 170, at 35–36.

[322] *See* United States v. City of Seattle, No. 2:12-cv-01282-JLR, 2013 BL 434209, at *6–7 (W.D. Wash. Nov. 26, 2013). The Seattle CPC later became a permanent city organization after the City Council passed the requisite legislation. *See* SEATTLE MUNICIPAL CODE § 3.29.310 (2017).

[323] Graef, *supra* note 170, at 34.

[324] *See id.* at 35.

breakdown in community-police relations has been identified by scholars and experts as a contributing source to patterns and practices of unconstitutional policing.[325]

There is an inherent tension, despite DOJ efforts, present in its response to community motions to intervene. As discussed above, the DOJ has engaged the community in real-time, on-the-ground discussions about ways to improve policing in subject jurisdictions. These efforts have included seeking community input during the investigation phase.[326] But that engagement virtually disappears once a decision has been made to move forward with filing suit. In essence, one might observe the DOJ metaphorically saying to interested community leaders and organizations, "Thanks for your help. We'll take it from here." This position is evidenced by DOJ opposition to motions to intervene filed by those organizations.[327]

7. Baltimore

The 2016 election and subsequent inauguration of Donald Trump presented unique challenges for the consent decree process in Baltimore. The settlement agreement was filed with the court on January 12, 2017.[328] In April 2017, lawyers for the Department of Justice informed the court of Attorney General Sessions' "grave concerns" about the proposed decree.[329] A motion to intervene was filed by community members in Baltimore on that same day.

Community Churches for Community Development, Inc. and Ralph Moore, Jr. in his individual capacity filed a joint Motion to Intervene in the

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[325] *See, e.g.*, Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 616 (2016).

[326] *See* Memorandum of Law in Support of AMA Coalition's Motion to Intervene at 4–5, United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 WL 12309780 (D. Or. Feb. 19, 2013), ECF No. 20.

[327] *See, e.g.*, United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 WL 12309780, at *1 (D. Or. Feb. 19, 2013).

[328] Consent Decree, United States v. Balt. Police Dep't, 249 F. Supp. 3d 814 (D. Md. 2017) (1:17-cv-00099-JKB).

[329] Laura Jarrett & David Shortell, *DOJ Has 'Grave Concerns' over Baltimore Police Reform Plan*, CNN (Apr. 6, 2017, 5:31 PM ET), https://www.cnn.com/2017/04/06/us/baltimore-consent-decree-public-hearing/index.html [https://perma.cc/KXU2-VUN5].

Baltimore consent decree process.[330] The putative intervenors requested intervention as a matter of right under Federal Civil Rule 24(a) or, in the alternative, permissively under subpart (b).[331] The Community group was made up of 6 churches, 5 of which were located in Black neighborhoods.[332] The organization identified their "strong interest in ending unlawful and discriminatory police practices that have harmed them in the past" along with their desire to see the proposed Consent Decree fully enforced.[333] Mr. Moore was identified as a community leader, social worker and lifelong Baltimore resident.[334] The filing asserts that he individually, and the communities he serves, will likely be "harmed again" by BDP if the proposed consent decree was not fully enforced.[335] The complaint in intervention filed by the movants included information about the organizations longstanding efforts and resources to build and strengthen community-police relationships in Baltimore.[336]

The putative intervenors also asserted a "public interest" as a basis for intervention since they live in Baltimore and would be harmed if reforms were not made.[337] Additionally, they highlighted "recent alarming and recalcitrant behavior" of the federal government.[338] The motion to

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[330] Proposed Intervenors' Community Churches for Community Development, Inc., and Ralph E. Moore, Jr.'s Motion to Intervene at 1, United States v. Balt. Police Dep't, 249 F. Supp. 3d 814 (D. Md. 2017) (1:17-cv-00099-JKB).

[331] *Id.*

[332] *Id.* at 2.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] Memorandum of Law in Support of Proposed Intervenors Community Churches for Community Development, Inc. and Ralph E. Moore Jr.'s Amended Motion to Intervene as Plaintiffs at 13–14, United States v. Balt. Police Dep't, 249 F. Supp. 3d 814 (D. Md. 2017) (1:17-cv-00099-JKB).

[337] Proposed Intervenors' Community Churches for Community Development, Inc., and Ralph E. Moore, Jr.'s Motion to Intervene at 4, United States v. Balt. Police Dep't, 249 F. Supp. 3d 814 (D. Md. 2017) (1:17-cv-00099-JKB).

[338] *Id.*

intervene included a proposed complaint that expounded upon the actions of the federal government under the new administration.[339]

This background framed the putative intervenors' argument that representation by the federal government would prove inadequate. The motion discussed the Trump Administration's "new and different institutional priorities and constraints."[340] It went on to discuss how the new administration's announced position on the issue is "inconsistent with, and adverse to, the continued federal oversight" needed in Baltimore.[341] The argument made in support of intervention failed to explicitly address the presumption of adequate representation when the government is a party.

The court denied the motion to intervene just one day after it was filed.[342] It summarized the purpose of the motion to intervene in 2 parts: (1) to seek redress for violations, and (2) to ensure enforcement of the decree.[343] The court found the motion to intervene for the purpose of redressing constitutional violations moot in light of the fact that the consent decree had been ordered by the court earlier that day.[344] The opinion goes on to find concerns about enforcement of the decree to not yet be ripe because the government had yet to do anything to indicate that it would refuse to comply with the decree.[345]

Several takeaways are important to highlight. The majority of organizations seeking intervention are recognized by the courts for their local and longstanding commitment to reform police in their communities.[346] In all instances, the DOJ opposed intervention efforts.[347] The courts generally

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[339] *Id.* Exhibit 2 at 5.

[340] *Id.*

[341] *Id.* at 6.

[342] *See* United States v. Balt. Police Dep't, 249 F. Supp. 3d 814, 815 (D. Md. 2017).

[343] *See id.*

[344] *See id.*

[345] *See id.*

[346] *See infra* Sections III.B.1–7.

[347] *See* United States' Response to The Detroit Coalition Against Police Brutality's Motion For Intervention As of Right, United States v. Detroit, No. 03-72258-AC-DRG (E.D. Mich.

recognized the liberal intervention standard set out by Federal Rule 24(a).[348] Nevertheless, the application of the presumption of government adequate representation serves as a virtual bar to intervention for community organizations seeking intervention. The following Part interrogates the judicial authority cited to support the assertion of presumptive adequate representation.

IV. How Courts Have Missed the Mark and A Path Forward

The court decisions detailed above create what may be perceived as an impenetrable barrier between the reform process and the communities whose lives and rights the reforms are created to protect. Courts must consider several factors when analyzing motions under Rule 24. It cannot be ignored that courts must also balance practical concerns regarding the scope and size of the litigation under its purview. While those considerations and responsibilities should not be understated or overlooked, a more complete analysis of the adequate representation factor and its related presumption is in order. The following Part discusses case law relied upon by courts in determining whether impacted communities are adequately represented by the DOJ. It also seeks to illustrate how the denial of intervention to impacted communities misses the mark. The case law that the denials rely on either plainly supports intervention, cites precedential authority misaligned to issues relevant to DOJ-initiated police consent decrees, or ignores the broader applicability of concerns presented by established precedent.

A. Controlling Case Law Supports Intervention

Some courts deciding whether to grant intervention in DOJ-initiated consent decrees cite cases that support finding in favor of the putative intervenors. Two of those cited cases that follow the liberal standard for intervention contemplated by Rule 24(a)'s amendment are discussed below.

Trbovich v. United Mine Workers,[349] the seminal Supreme Court case on intervention, is aligned with the standard set out in Rule 24(a). *Trbovich*

Aug. 26, 2003), ECF No. 14; Memorandum in Opposition to Proposed Intervenor-Defendant Portland Police Association and Proposed Intervenor-Plaintiff AMA Coalition's FRCP 24 Motions to Intervene, United States v. Portland, No. 3:12-CV-02265-SI (D. Or. Jan 22, 2013), ECF No.25;

[348] Let's All Join In, supra note __ at 350 (discussing the purpose of the amended rule to, in part, liberally permit intervention to protect asserted interests and avoid barring litigants on the grounds of *res judicata*.

[349] 404 U.S. 528 (1972)

involved the efforts of a union member to intervene in a lawsuit brought by the U.S. Secretary of Labor.[350] The Secretary sought the removal of elected union officials for alleged violations under the Labor-Management Reporting and Disclosure Act.[351] Movant-intervenors are generally required to only show that the representation by the original parties "may be" inadequate to serve their interests.[352] Some of the factors courts have analyzed when determining if interests are adequately represented include: (1) whether the arguments made by an original party to advance their interests would undoubtedly be the same as the movant's interest arguments; (2) if the original party is both capable and willing to make those same arguments; and (3) if the movant offers a necessary element to the proceedings that the original party will neglect.[353]

This "relatively low"[354] bar encounters enhanced scrutiny when the putative representative party is the government. Several circuits have established a rebuttable presumption of adequate representation when the government is a party.[355] The Third and Fourth Circuits requires the movant to make a

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[350] *Id.* at 529.

[351] *Id*.

[352] *Id.* at 538 n.10.

[353] Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996).

[354] Gregory R. Manring, *It's Time for an Intervention!: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 FORDHAM L. REV. 2525, 2531 (2017).

[355] *See, e.g.*, Ruthardt v. United States, 303 F.3d 375 (1st Cir. 2002) ("Adequacy is presumed, although rebuttably so, where a government agency is the representative party."); Maine v. Norton, 203 F.R.D. 22 (D. Me. 2001) (government, in defending the validity of statute, is presumed, for purposes of motion for intervention of right, to be representing adequately the interests of all citizens who support the statute); Commonwealth v. United States Department of Health and Human Services, 289 F. Supp. 3d 259, 99 Fed. R. Serv. 3d 999 (D. Mass. 2018) (where the representative named party in the litigation is a government entity, the burden of persuasion for showing inadequate representation to support a motion to intervene as of right is ratcheted upward); United States v. Virgin Islands, 748 F.3d 514, 520 (3rd Cir. 2014) ("[W]e presume that the United States adequately represents the interests of those prisoners."); Benjamin v. Department of Public Welfare of Cmwlth., 267 F.R.D. 456 (M.D. Pa. 2010) (There is well-settled presumption that when representative party is government body charged with representing interests of proposed interveners as of right it will do so adequately unless there is showing of gross negligence); United States v. City of Los Angeles, 288 F.3d 391, (9th Cir. 2002) ("Normally, 'a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.'").

compelling, or strong, showing" that the representation is inadequate.[356] In the Seventh Circuit, movants must make a showing of gross negligence or bad faith on the part of the government.[357]

Courts considering whether impacted communities have successfully rebutted the presumption of adequate governmental representation also routinely cite *Forest Conservation Council v. U.S. Forest Service*[358] despite the fact that the opinion in that case support the opposite conclusion. The Ninth Circuit granted intervention to the State of Arizona and Apache County, Arizona after finding that the federal government did not adequately represent those intervenors.[359] The decision pointed to the fact that the federal government had a responsibility to "present the broad public interest."[360] Moreover, the court reasoned that inadequate representation is "most likely to be found when the applicant asserts a personal interest that does not belong to the general public."[361] The reasoning asserted by the court here is applicable to police reform cases. The federal government has acknowledged its responsibility to represent the varied and diverse viewpoints of those who live and work in American cities.[362] Moreover, police reform cases considering motions to intervene have failed to acknowledge that the interests of disproportionately impacted communities are different from those of the general public.[363]

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[356] *Commonwealth of Pa. v. President of United States of America*, 888 F. 3d 52, 60 (3rd Cir. 2018) (holding that there was a compelling showing for a religion non-profit to intervene where Pennsylvania was suing the U.S. government for allowing an exemption for religious business to pay for contraceptive coverage); *Stuart v. Huff*, 706 F.3d 345,352 (4th Cir. 2013) (holding that abortion providers could not intervene in defending a constitutional challenge to abortion laws). .

[357] *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (holding that the state legislature could not intervene to defend a challenge against Wisconsin's new abortion laws because they could not show the Attorney General would not provide adequate representation.)

[358] 66 F.3d 1489 (9th Cir. 1995).

[359] *Id.* at 1499.

[360] *Id.*

[361] *Id.*

[362] *See* PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 18.

[363] *See* Pierson, et al., *supra* note 282 (describing the process through which researches "compiled and analysed a dataset detailing nearly 100 million traffic stops" conducted in

Instead, they have exacerbated what Sunita Patel calls a formal structure by which the " minority or marginalized voices are . . . silenced in liberal democratic processes."[364]

B. Why the Presumption Should be Rebutted

The Oregon District Court denied community organization intervention in the Portland consent decree.[365] The court cited *Arakaki v. Cayetano* to support the denial based on adequate representation.[366] It is from *Arakaki* that a commonly used test for adequate representation is derived. The following subsection argues that the issues unique to DOJ-initiated police reform efforts deserve closer examination by the courts.

1. Shared General Interest in Consent Decree is Not Enough—Adequate Representation of Impacted Community Interests Should Require More

The democratic and representational responsibilities owed by the federal government to all Americans expose the fallacy of presumptive adequate representation, especially in police reform litigation initiated by the DOJ. Thus far, the representation analysis employed by courts in the police reform context is limited and fails to consider some key distinctions between the interests and roles of the federal government and community organizations seeking intervention. Lawyers for both the federal government and subject local jurisdictions highlight the various community interests they must weigh throughout the implementation phase of consent decrees. The current analysis has been distilled to whether the putative intervenor and the federal government share a specific mutual interest. Courts have employed a simplistic approach to determining this mutual interest: whether they both desire the remedial efforts of the consent decree

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dozens of jurisdictions across the country, concluding that "police stops and search decisions suffer from persistent racial bias"); John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RESEARCH CTR. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/ [https://perma.cc/4RJQ-WM25] ("Blacks are also more likely than whites to have specific criticisms about the way officers do their jobs, particularly when it comes to police interactions with their community.").

[364] Patel, *supra* note 38, at 806.

[365] *See* United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 WL 12309780, at *2 (D. Or. Feb. 19, 2013).

[366] *See id.* at *6 (citing Arakaki v. Cayetano, 324 F.3d 1078 (9th Cir. 2003)).

to be successful.[367] In short, the court simply asks whether they both seek to remedy unconstitutional policing. Allowing a blanket interest in constitutional policing to serve as a major factor in the intervention analysis undermines that very goal. An analysis that fails to take into account the particularized interest of communities impacted by police violence could benefit from an enhanced understanding of the limited role the federal government serves in the litigation.

A desire to bring about change is not a magic wand. The process of implementing police consent decrees takes place across a variety of substantive areas in law enforcement. It is unlike traditional litigation in which one party pursues an action against another to recover damages as a result of a single incident or situation. Pattern or practice litigation involves, instead, detailed policy revisions and training on use of force, search and seizure, use of body-worn cameras, community policing plans, and various ways to ensure accountability within departments.[368] The intricate nature of the work requires more than the perspectives of law enforcement and local and federal governments. The voice and insight of impacted communities are essential to the implementation phase. Indeed, current consent decree processes have increased their outreach to community members. That outreach, described above, has largely been a one-sided arrangement with community members being surveyed and informed but never being recognized or respected as an essential party at all stages of the process. Party status for organizations representing the interests of impacted communities would provide space and opportunity for meaningful engagement in every aspect of the reform process, not merely those on which the DOJ seeks input.

The stability and continuity to be gained by granting impacted communities party status has also been ignored. The implementation of police reform consent decrees takes place over the span of a number of years.[369] The consent decree involving reforms within the Pittsburgh Police Department lasted more than eight years.[370] The decree in Detroit stretched

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[367] *See, e.g.*, United States v. City of Albuquerque, No. 1:14-cv-01025-RB-SMV, 2015 WL 13747185, at *6 (D.N.M. Feb. 19, 2015); *City of Portland*, 2013 WL 12309780, at *7.

[368] *See* PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74, at 10.

[369] *Id.*

[370] Order granting Joint Motion to Terminate Consent Decree and Dismiss Case United States of America v. City of Pittsburgh, et al., 2:97-CV-00354-RJC (Apr. 7, 2005).

out for nearly thirteen years.[371] In many instances, elected officials on both the federal and local levels change.[372] Changes have also occurred in the court-appointed independent monitor selected to work with the parties and the court toward implementation.[373] During this time the parties discuss and decide *how* the reform mandates will be carried out to serve the communities impacted by the pattern or practice of unconstitutional policing. The parties may also jointly decide to revise a term or set of terms in the original agreement. Party status for impacted community organizations would provide a role and opportunity for them to formally participate in the implementation decision-making.

It could also potentially provide a stable source of continuing local expertise, especially in the instance where the putative intervenor has a longstanding history of working to reform police practices. Intervention by impacted community organizations in reform litigation should also address any concerns that private plaintiffs would simply use the process for their own financial gain.[374] The reform processes under § 12601 do not presently allow for monetary damages.[375] In sum, the decision-making processes involved require more than a stated commitment to the decree or the ability to strategize.

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[371] Tresa Baldas, *Detroit Police Finally Rid of Federal Oversight*, DETROIT FREE PRESS (Mar. 31, 2016, 8:35 PM), https://www.freep.com/story/news/local/michigan/detroit/2016/03/31/detroit-police-finally-rid-federal-oversight/82491776/ [https://perma.cc/223A-54BH].

[372] *See* Daniel Beekman & Susan Kelleher, *Jenny Durkan: Former U.S. Attorney Brings Experience, High-Powered Allies, but also Draws Scrutiny*, SEATTLE TIMES (Oct. 15, 2017, 6:00 AM), https://www.seattletimes.com/seattle-news/politics/former-u-s-attorney-brings-experience-high-powered-allies-but-also-draws-scrutiny/.

[373] *E.g.*, Order, United States v. City of Detroit, 2:03-cv-72258-JAC (July 24, 2009), ECF No. 401 (removing court-appointed federal monitor from the case).

[374] *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 58 (2009).

[375] An amendment to § 14141 was introduced in Congress in 1999 and 2000. The amendment would have provided for a private right of action for pattern or practice violations, among other things. *See*, Law Enforcement Trust and Integrity Act of 1999, H.R. 2656, 106th Cong. § 501 (1999); Law Enforcement Trust and Integrity Act of 2000, H.R. 3927, 106th Cong. § 502 (2000). The proposed LETIA amendment never made it out of committee.

2. The Federal Government is Unlikely to Make the Arguments of Impacted Communities

The federal government, as discussed above, has recently demonstrated that there are some arguments it is unwilling to make on behalf of impacted communities. It is also important to explore how federalism concerns have impacted the depth and breadth of federal intervention. As expounded upon by Burke Marshall, the federal government is constrained by issues of comity and federalism that are unique to the American system of government.[376] Though some scholars have rightfully challenged Marshall's view of federalism,[377] the federal government has cited it as a reason for making certain litigation choices.

Whether the litigation strategy is rooted in federalism concerns or simply diverging opinions on the best way to achieve lasting reforms, it is illogical to presume that the federal government will provide adequate representation on behalf of impacted communities. As a practical matter, the role and perspective of the DOJ are distinctly different from that of impacted communities. The federal government plays the crucial role of initiating an investigation and then pursuing reforms where unconstitutional patterns or practices of policing have been discovered. The importance of that role cannot be overstated. Federal authority to specifically address police brutality had been long overdue.[378] The DOJ must fulfill its primary obligation and responsibility to enforce the laws of the United States. The federal government will have greater insight into law enforcement national trends and best practices. It also has access to experts and resources. The essential arguments made by federal government will be informed by that insight.

That does not negate the essential role and perspective that impacted communities could bring to the litigation process. Just as the ability of the federal government to make arguments from the national perspective is invaluable to the process, the local perspective of impacted communities

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[376] *See generally* BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS, 40 (1964).

[377] *E.g.*, Michal R. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960's*, 33 EMORY L. J. 93, 101 (1984) (recounting critics, including law professors, of Burke Marshall's approach to addressing violence against Blacks in the South).

[378] Hardaway, *supra* note 48 at 145–53 (discussing the persistent problem of police violence in America).

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should not be overlooked. Arguments related to the impact and effectiveness of local police practices are best made by the communities affected by those practices. Many community organizations that previously sought intervention in DOJ pattern and practice suits have demonstrated longstanding engagement in police reform efforts.[379] The historical knowledge and experience that comes from that engagement could enable the organizations to make specific arguments on how best to design and implement key policy revisions. Arguments made on behalf of local communities could add a necessary layer to newly developed policies related to civilian oversight, accountability, and community policing.

More specifically, there is no indication that the DOJ has previously engaged impacted communities on what arguments should be made on their behalf. Instead, the details from prior intervention attempts highlight instances when the DOJ has refused to do just that. As discussed above, the community intervention efforts in Portland were made largely because the federal government backed away from race-based reform efforts. Separate and apart from previous interventions, community organizations have historically made concerted efforts to establish or expand the effectiveness of civilian oversight as well as additional mechanisms to increase police accountability.[380] Arguments made by impacted communities, but not espoused by DOJ, can also be found in amici filings.[381]

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[379] Sections II(B)(1), II(B)(2), and II(B)(4), *supra.*

[380] ANTI POLICE-TERROR PROJECT, *Oakland Should Lead the Way: Proposal for Effective Police Oversight*, (Sept. 2019), https://www.antipoliceterrorproject.org/oakland-should-lead-the-way-proposal-for-effective-police-oversight [https://perma.cc/343S-BEDB]; Justice Coalition of Vallejo found at https://justicecoalitionofvallejo.com; Assata's Daughters MARCH FOR ALTON, PHILANDO, AND ALL BLACK LIVES: ABOLITION NOW! (Jul. 14, 2016) (calling for a number of justice reforms including police accountability) found at: https://www.assatasdaughters.org/statements#march-for-alton-philando-and-all-black-lives-abolition-now.

[381] *E.g.*, Amicus Curiae Summary, United States v. City of Los Angeles, No. 2:00-cv-11769-GAF-RC (C.D. Cal. June 19, 2009), ECF No. 403 (including intervenors Southern Christian Leadership Conference of Los Angeles, ACLU of Southern California, Homeboy Industries, Asian Pacific American Legal Center, and Radio Sin Fronteras); Amicus Curiae Memorandum of Community United for Change in Opposition to Motion to Vacate Consent Decree, United States v. City of New Orleans, No. 2:12-CV-01924-SM-JCW (E.D. La. Feb. 20, 2013), ECF No.197; Amicus Curiae Brief of APD Forward Regarding Court Approval of the Settlement Agreement Between the City of Albuquerque and the United States Department of Justice, United States v. Albuquerque, No. 1:14-CV-01025-RB-SMV (D.N.M., Jan. 14, 2015), ECF No. 56.

3. History Demonstrates the Federal Government's Neglect of Impacted Communities and their Experiences

During the first 150 years of American history—what legal scholar Stephen Rushin refers to as the "Hands-Off Era"—the federal government made the deliberate choice to ignore police misconduct on the state level.[382] This "hands-off" approach was not the due to ignorance. The Wickersham Commission Report on Lawlessness in Law Enforcement released in the early 1930s provided official notice to the federal government that local police departments across the country were employing brutality to extract coerced confessions.[383] Nevertheless, the federal government remained largely silent for nearly six more decades.

Rushin categorizes this timeframe as the "Build-Up Era," and he generously gives the federal government and judiciary credit for taking some steps to make the cost of police misconduct too great for departments, whether that be financially or legally through the loss of improperly obtained evidence.[384] This position fails to acknowledge the minuscule impact those efforts had on police departments. The heightened burden of proving misconduct on a civil or criminal level was often too great for already marginalized and presumed guilty individuals to overcome. Local governments won far more cases than they lost.[385] And the losses they incurred rarely prompted them to incorporate the concerns of impacted communities into the way localities policed those communities.

During the 1960s, President Lyndon Johnson's Law Enforcement Assistant Act was an explicit declaration of the federal government's position on police brutality.[386] It came about after uprisings in Harlem after 15-year-old

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[382] STEPHEN RUSHIN, FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS 8 (2017).

[383] Records of the Wickersham Commission on Law Observance and Enforcement, Part 1: Records of the Committee on Official Lawlessness, available at: http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf (describing the rampant use of police torture, referred to as the "third degree," to obtain coerced confessions).

[384] Rushin, *supra* note 382 at 10-12.

[385] Harmon, *supra* note 374, at 9 (describing the inadequate and ineffective nature of criminal and civil remedies available to redress and deter police abuses).

[386] The Law Enforcement Assistant Act was a part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 34 U.S.C. § 10101. At the signing of the bill,

James Powell was shot in the street by a police officer.[387] Prior to that time, the federal government had enacted legislation aimed at addressing purported civilian terrorism against Blacks. Johnson and Congress viewed the anger of the impacted communities of color with disdain. The legislation left no doubt that the interests of the federal government and local law enforcement authorities (and likely the municipalities themselves) were aligned. Johnson was of the position, as he stated in a speech following the uprisings in Detroit, that federal intervention in local police matters was appropriate only when state and local police could not "end disorder."[388] For Johnson, intervention was necessary on behalf of law enforcement to maintain "law and order," not to protect those in impacted communities.[389] The passage of the law signaled a wholesale rejection of any argument that the federal government was interested in protecting the constitutional rights of impacted communities of color in the context of policing. Johnson's Act did not just send troops into cities to restore order. He also gave financial support to enlarge local police agencies.[390] Johnson also illegally authorized surveillance of Black liberationist and civil rights organizations.[391] These legislative actions were designed to snuff out civil unrest without addressing or acknowledging the injustices, specifically police brutality, that prompted the uprisings.

The Johnson Administration is highlighted here to illustrate how the federal government has aligned itself with local government and law

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Lyndon Johnson declared his commitment to law and order through the provision of aid to local governments in their charge to "promote the rule of law." *See Statement by the President Following the Signing of Law Enforcement Assistance Bills* (Sept. 22, 1965), https://www.presidency.ucsb.edu/documents/statement-the-president-following-the-signing-law-enforcement-assistance-bills [https://perma.cc/KJE7-DTKE].

[387] *See* Martin Arnold, *Police Board Absolves Gilligan in Slaying of Negro Teen-Ager; No Violation of Rules Found—Shooting Led to Riots in Harlem and Brooklyn*, N.Y. TIMES, Nov. 7, 1964, at 1.

[388] Lyndon B. Johnson, President of the United States, Speech to the Nation on Civil Disorders (July 27, 1967).

[389] Lyndon B. Johnson, President of the United States, Statement by the President Following the Signing of Law Enforcement Assistance Bills (Sept. 22, 1965).

[390] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, (discussing the Johnson's Administration's provision of money to municipal law enforcement agencies for the hiring of more officers, to "professionalize" the agencies, as well as the provision of military-grade equipment).

[391] Adam Janos, *Nixon and Johnson Pushed the CIA to Spy on U.S. Citizens, Declassified Documents Show*, HISTORY.COM (Sep. 3, 2018), https://www.history.com/news/cia-surveillance-operation-chaos-60s-protest [https://perma.cc/2TJV-4QTW].

enforcement. Reticence of certain political officials and parties to intervene in local police matters tells a story of unreliable and sporadic efforts by the federal government, at best. In fact, most of history shows that the federal government has failed to successfully intervene to defend the constitutional rights of local citizens.[392]

C. The Framework for a Path Forward

Courts' analysis of the adequate representation factor under Rule 24 has failed to fully assess the interests of impacted communities. Moreover, the analysis has also failed to give full consideration to the ways in which the interests of the federal government are not fully aligned with those impacted by police violence. The DOJ model of community engagement and consultation does not enable the federal government to adequately represent the interests of communities impacted by police violence. Federal courts that presume the federal government adequately represents those interests have sorely missed the mark of remedying unconstitutional police practices. Expanding the analysis beyond the limited focus of whether the federal government has an interest in a successfully implemented consent decree is worth consideration.

Texas v. United States provides an intervention framework useful in the context of marginalized communities and the federal government.[393] The Fifth Circuit in that case found that the presumption of adequate representation is successfully rebutted when a movant identifies an adversity of interests between itself and the government representative.[394] An adversity of interests can be demonstrated by showing the government has interests related to its relationship with the other existing party ***and*** the courts with jurisdiction.[395] The court stated that "[t]he lack of unity in all objectives, combined with real and legitimate additional or contrary arguments, is sufficient to demonstrate that the representation *may* be

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[392] Rushin, *supra* note 382 at 3–8 (discussing how for 150 years of American history the federal government has, on the whole, failed to consistently intervene to enforce the rights of local community members while deliberately choosing to ignore police abuses).

[393] 805 F.3d 653 (5th Cir. 2015). In Texas v. United States, non-citizens were permitted to intervene in an action regarding Homeland Security's Deferred Action program after successfully rebutting the presumption of adequate representation by the federal government. *Id.* at 663. Intervenors pointed to the governmental interests in expansive interpretation of government authority, enforcing immigration laws, and maintaining a working relationship with the states to demonstrate divergent interests. *Id.* at 663.

[394] *Id.* at 661–62.

[395] *Id.*

inadequate."[396] Movants are required to make a connection between the claimed divergent interests and how they affect the litigation.[397]

As in *Texas v. United States*, the federal government's interests in DOJ-initiated police consent decrees are distinctly different from the interests of impacted communities. The Attorney General has made the current administration's desire to have a good working relationship with local law enforcement widely known.[398] Considerable financial resources have been provided from the federal government to municipalities and their police departments.[399] These resources include grants from Homeland Security and the DOJ, as well as Military Surplus equipment.[400] The DOJ has also failed to include community interests and perspectives beyond the investigation phase of its police reform efforts. Court filings indicate that they desire to have sole control over the implementation of the reform mandates.[401] Finally, the DOJ readily admits they have a responsibility to represent the interests of all citizens.[402]

This lack of unity in objectives between the DOJ and impacted communities has manifested itself in ways that undoubtedly have concrete effects on the litigation. The DOJ has emphasized strong relationships with law enforcement over consent decrees.[403] That prioritization led to the DOJ's failure to honor its agreement in principle with the City of Chicago.[404] In Baltimore, the DOJ officially attempted to delay, and

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[396] *Id.* (citing Brumfield v. Dodd, 749 F.3d 339, 346 (5th Cir. 2014)).

[397] *See id.*

[398] *See* OFFICE OF THE ATT'Y GEN., *supra* note 5.

[399] *See* Alicia Parlapiano, *The Flow of Money and Equipment to Local Police*, N.Y. TIMES (Dec. 1, 2014) https://www.nytimes.com/interactive/2014/08/23/us/flow-of-money-and-equipment-to-local-police.html.

[400] *Id.*

[401] *Supra* note 1.

[402] PATTERN AND PRACTICE POLICE REFORM WORK, *supra* note 74 at 13.

[403] OFFICE OF THE ATTORNEY GENERAL, *supra* note 5.

[404] *See* United States' Statement of Interest Opposing Proposed Consent Decree, Illinois v. City of Chicago, No. 1:17-cv-6260 (N.D. Ill. Oct. 12, 2018).

perhaps attempted to abandon, reform efforts.[405] This coupled with the federal government's supply of military grade weapons and other technologies to local law enforcement efforts indicates that its diverging interests impacts the litigation.

The current top-down model that excludes community insight from the consent decree process prioritizes efficiency over the need to enable impacted communities to build positive working relationships with their local law enforcement agency. As it currently stands, litigation reform efforts serve only to reinforce the authoritative and hierarchical frameworks that divide community and law enforcement by relegating impacted communities to non-party status.

Courts inclined to recognize that the federal government does not adequately represent the significant interests of impacted communities will have legitimate, practical concerns over the size and scope of the litigation. It is the courts' responsibility to ensure that reform efforts do not become unduly burdened by divergent viewpoints and agendas that may prevent the court from maintaining order. There is a balance to be struck between those practical concerns and the courts' responsibility to ensure that interested parties are not excluded from litigation.

The following discussion outlines the framework for establishing the outer edges for evaluating motions filed by community organizations under Federal Rule 24.

1. Significant Interest Demonstrated by Community Engagement and Efforts to Reform Questionable Police Practices

Some will undoubtedly be concerned that favorable rulings for community organizations seeking intervention may open the floodgates for intervenors with varying perspectives and motives to unduly burden the reform process. Insight and guidance from those impacted by police misconduct are integral components to a healthy and accountable law enforcement agency. They are also essential to the implementation of successful reform processes. Courts seeking to ensure that the insight and expertise of impacted communities are being utilized in a meaningful way should examine the historical engagement efforts of the putative intervenor. As seen in previous motions to intervene, community organizations in certain jurisdictions have worked for a number of years to bring policing concerns to the attention of local elected and selected officials. This community

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[405] *See* Motion for Continuance of Initial Hearing, United States of America v. Police Department of Baltimore City, et al., No. 1:17-cv-00099-JKB (D. MD. Jan. 20, 2017)

perspective should be buttressed by the organization's knowledge of both current and historical community-police relations, local police department practices and policies, and community concerns about the police services received. While several of the organizations highlighted in this research had long tenures within their respective communities, length of engagement around reform efforts should not be dispositive. It could, however, be used as a factor to demonstrate how a comparatively short DOJ investigation should not be presumed to usurp the need for direct community representation in police structural reform litigation.

2. Specious Intervention Attempts by Anti-Reformists Do Not Meet the Intervention Standard

The legislative intent and purpose of Section 12601 is to provide injunctive relief to those impacted by unconstitutional policing. Structural police reform litigation under Section 12601 is not the appropriate vehicle or mechanism for anti-reform sentiment or advocacy. Federal Rule 24, while liberal, does contain essential requirements.

Of most relevance here is the requirement that a movant possess an interest that is likely to be impaired by the litigation. By the time that the parties have entered into a consent decree, the DOJ has made a finding—and the local government has agreed—that the federal government has enough evidence to support a finding of pervasive unconstitutional policing. An outside party asserting an interest against the decree would essentially be advocating for the continuation of unconstitutional practices by law enforcement for which there can be no cognizable interest. To that end, intervention by organizations should be limited to community organizations that represent the interest of marginalized communities impacted by the pattern or practice of unconstitutional policing. To date, the only intervention attempts conceivably against reform efforts have come from police unions.[406]

Impacted community organizations granted intervention during the remedial phase of reform litigation can serve to benefit the implementation process. As discussed above, the historical perspective and on-the-ground insight to be gleaned from marginalized communities are essential components to the reform process. Giving equal party-status to impacted

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[406] Hardaway, *supra* note 48, 193-198 (arguing that police union assertions of collective bargaining interests in police reform litigation should not satisfy Federal Rule 24(a) because those rights (limited to wages, hours, and other conditions of employment) are outside the scope of the managerial policy revisions covered by law enforcement consent decrees).

communities and local law enforcement also serves to provide a foundation for positive community-police relations beyond the reform process. To that end, providing impacted communities a seat at the table is aligned with the statutory aims of Section 12601. The same cannot be said of community and civic organizations whose primary interest lies in supporting local law enforcement *from* federal reforms. Any such specious claims are tangential to reform litigation and do not meet the requirements of Federal Rule 24(a). It would be appropriate to rebuff attempts to intervene by those not impacted by police violence or with the purpose of thwarting reform efforts.

3. Collaboration and Joint Legal Representation of Community Organizations

Limiting the number of attorneys of record is another way to prevent structural reform litigation from becoming unnecessarily unwieldy. In many instances, there have been several community organizations working to support those impacted by police violence and misconduct. As discussed above, some of these organizations have worked to remedy police misconduct in a number of different ways, over the course of several years. Many of those efforts began before the DOJ initiated their investigations. Indeed, many community organizations have been instrumental in gaining the attention of the DOJ and assisting them in their investigations.

While those efforts are invaluable, it is important to avoid situations where there are a number of lawyers representing each distinct and marginalized community. For instance, it is conceivable that the LGBTQ, homeless, and Black communities impacted by police violence have been supported by different community organizations. It is impractical to expect, however, that each of those organizations be represented by separate and distinct legal counsel. Instead, it should be required that the community organizations representing impacted communities agree on the selection of a trial counsel team to represent the collective interests of each marginalized community. In order to streamline that representation, the organizations should be expected to independently reach a formalized agreement on their objectives, priorities, and means for resolving differences. The court should not be required to address or manage those issues.

CONCLUSION

Organizations seeking intervention in other contexts have successfully rebutted the presumption of adequate representation.[407] However, federal courts presiding over DOJ-initiated police reform cases have without exception found that community organizations have failed to rebut the presumption of adequate representation.[408] The decision in *United States v. City of Los Angeles* is often cited to support the denial of motions to intervene as a matter of right filed on behalf of community organizations.[409] But the court's analysis of community efforts to intervene is inherently deficient to identify and address the interests of impacted communities. The current top-down model being used to reform local departments has historically excluded impacted communities despite recognition that input and engagement from those stakeholders are key components to reform efforts.

Not only is it factually inaccurate to assert that the federal government adequately represents the interests of communities impacted by police violence, but court decisions denying community organizations the right to intervene in police reform litigation run counter to the purpose and intent of Rule 24. The language and comments of the amended rule fail to support the current judicial findings that intervention hinges on adequate or satisfactory representation of interests.[410] Thus, a cursory or perfunctory analysis of the adequacy of representation by courts in a manner that stifles the options of putative intervenors circumvents or ignores the purpose and intent of the drafters' amended rule.

Party-status for community organizations representative of those impacted by police violence could be beneficial in a number of ways. The aim of this Article has been to recognize the invaluable and irreplaceable insight to be gained by impacted communities and to provide a framework in the reform process for community organizations to have a long-sought place at the litigation table. The willingness of a court to formally recognize the importance of impacted communities to the process also has reparative benefits. It could serve to address concerns of distrust and misgivings by granting marginalized communities full access to the aspects of the process

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[407] *E.g.*, Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489 (9th Cir. 1995); Sagebrush Rebellion Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983); Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980).

[408] *See, e.g.*, United States v. Los Angeles, 288 F.3d 391 (9th Cir. 2002).

[409] *Id.*

[410] Kaplan, *supra* note 134, at 401–02.

from which they have long been excluded. Of equal importance, it would provide the opportunity to ensure that needed conversations and understanding occur between community and police around challenges of policing in contemporary American cities as the parties brainstorm solutions and policies.