

## **Democratic Policing (and the Policing Project)**

Professor Barry Friedman  
Maria Ponomarenko, Fellow  
Open to 2L and 3L Students

Offered Both Fall and Spring Semester  
Pre/Co-Requisite: Criminal Procedure  
(Survey, or 4th/5th Amendment)

### **Introduction**

In the Fall of 2015, the law school will launch a new course, entitled Democratic Policing, and a related Policing Project, in which students will have the opportunity to participate as externs. This memorandum describes the course, Democratic Policing, as well as the mission of the Policing Project. For the Academic Year 2015-16, students will have the choice of signing up for the Democratic Policing seminar in the Fall, the Democratic Policing seminar + externships in the Spring, or both. The Fall Semester will be run on a more typical seminar format; in the Spring, all students will both enroll in the seminar and work as externs.

### **The Concept**

The last few years have revealed deep difficulties with policing in the United States. There is, at the moment, surprising consensus on this issue, including some acknowledgement from law enforcement, and an unusual alliance between the political left and right. The problem with policing is evident in the events in Ferguson, Missouri; overly-aggressive use of stop-and-frisk by urban departments; widespread use (or abuse) of civil forfeiture laws; and concern about practices involving underage informants. The Snowden revelations brought public attention to bulk data collection by United States spy and law enforcement agencies, used ostensibly for counter-terrorism, but often employed for ordinary law enforcement purposes as well. There also is widespread public debate about the rules that should govern new policing technologies, from drones and Stingrays, to license plate readers and CCTV cameras.

We tend to look at all of these as separate issues, but the premise of the Democratic Policing seminar and the Policing Project is that what unites these issues is a failure of democratic processes and accountability.

The problem, as many are increasingly aware, is a deep and serious rift between police forces and the communities they police. There is a lack of trust on both sides. Contributing to this are a set of biases—implicit and conscious both—as well as a failure to always keep at the forefront the fact that policing agencies work for communities. They *serve* and protect.

Despite a longstanding consensus that policing should be subject to some degree of civilian oversight, there still are no good models for how best to promote systematic civilian oversight and community participation. The Interim Report of the President's Task Force on Twenty-First Policing emphasized the need for work in this area. There obviously are a number of devices currently in use, from Civilian Complaint Review Boards, to Inspectors General and court-appointed monitors. But these are patches, applying to concerns about police conduct that arise after things have gone wrong. They do not address the need for before-the-fact regulation.

The Policing Project is a not-for-profit endeavor, housed at NYU Law School, the mission of which is to facilitate the democratic accountability of policing. It is dedicated to ensuring that policing occurs consistent with democratic norms, thereby assuring policing is efficacious and minimally intrusive on civil rights and liberties. Much of the initial focus will be on practices that implicate Fourth Amendment rights: surveillance, seizure of persons or property, and use of force. Still, many of the initial aspects of the Project will apply to policing across the board. The Policing Project will partner with other organizations, be they NGOs, private law firms, or police agencies and organizations themselves, in order to pursue and effectuate change.

In pursuing its mission, the Policing Project will at times collaborate with policing agencies. This was a considered judgment made on the advice of very many people. Although it would be easy to take the position that there is a problem with policing, and try to force solutions—be it through litigation or otherwise—the consensus of many people (including long-time progressives) is that change will not truly occur unless this is a shared endeavor. And, to be fair, many in the policing world realize there is a problem and want to solve it. (In addition, there is a rich scholarly literature casting doubt on the ability of litigation alone to effect lasting societal change.)

There are four pillars to the mission of the Policing Project: (a) working to draft model rules for policing agencies; (b) working with accomplished social scientists to develop tools that allow for cost-benefit analysis of policing practices (which is necessary to formulating sound rules); (c) engaging in public education and other efforts to involve the public in policing governance; and (d) engaging in targeted litigation to enshrine in law the principle that policing should be governed by rules adopted in democratic ways. The Policing Project is already at work on a number of projects that pursue these goals.

The Democratic Policing Seminar will diagnose the causes of policing's woes, and explore methods for bringing sound democratic governance to policing. The Seminar will examine how best to assess the efficacy of police practices, evaluate models of police governance, formulate litigation strategies to ensure that law enforcement agencies are accountable to the public, work on drafting rules to govern policing, and consider how to accomplish this while acknowledging that many of policing's problems are grounded in implicit or unconscious biases. In addition, the Seminar will focus on the basics of social change, from building a successful social change organization, to choosing coalition partners and selecting cases for litigation.

### **Democratic Policing: Details on the Course**

The course, Democratic Policing, will be offered in both semesters. In its first year, students may enroll for one or both semesters, which will differ in substantial ways from one another.

In the Fall, Democratic Policing will take the form of a typical seminar. All students will receive seminar credit, and a few students will also have an opportunity to work for credit as externs to the Policing Project or one of its partner organizations. In the Spring, all students will participate in both the seminar and serve as an extern, and receive credit for both.

The Fall seminar will be partly substantive and partly will focus on building a set of skills necessary for lawyers engaged in social change advocacy. On the substantive side, we will cover basic aspects of the law governing policing—including selected issues in constitutional law and criminal procedure, racial justice, remedies, and administrative law. On the skills side, we will discuss everything from defining the mission of a social change organization, to finding coalition partners, adopting a communications strategy, and identifying and selecting cases to litigate.

For assessment, students in the Fall semester can draft typical seminar papers, but will have the option of several alternatives, like drafting rules governing various aspects of policing or model briefs to be used in litigation efforts. Students will also work on shorter assignments, which may include writing blog entries on policing issues—based on their work in the seminar—for the Policing Project website. Each student will be responsible for one longer and two short writing assignments. Students will present their work to one another, but also to outsiders who have a stake in these issues. Grades will be based 75% on written work and 25% on participation.

In the spring semester, all students in the Democratic Policing seminar will also work as externs on the Policing Project or with one of its partner organizations. Specific projects are detailed below. Students may sign up for 1 to 3 externship credits (with the general rule being that one credit equals 3-4 hours of field work per week). Assessment will be based on writing, performance on lawyering tasks, and group participation.

## **Course Admission Requirements**

All students wishing to take Democratic Policing must simultaneously enroll in (or have completed) either the Criminal Procedure Survey or Criminal Procedure: Fourth and Fifth Amendments. This requirement may be waived at instructor discretion. For the Spring Semester, preference will be given to those who will have taken Democratic Policing in the Fall.

In the Fall the course will be open to 25 students; in the Spring it will be open to 12.

Admission in the Spring 2015 seminar and externship is subject to professor pre-approval. In addition, there will be a few externship slots in the Fall of 2015, also subject to professor pre-approval. (Admission to the Fall 2015 seminar will be through the usual course registration procedures, and will not require professor approval.)

Students wishing to apply for pre-approval must complete the application form found **here**, and submit a resume and transcript. For the Spring Semester, preference may be given to those who have taken Democratic Policing in the Fall. The instructors may request an interview if there are questions to be addressed.

Deadlines: Students who are considering the externship in lieu of a clinic or other similar commitment should submit application materials by Friday, April 24, and will be notified whether they have been admitted to the course by Wednesday, May 6. There will be a second application period in August 2015 (deadlines TBA); space permitting, additional students may be accepted to the Spring externship on a rolling basis in the fall.

## Spring Semester Projects

As indicated above, the Policing Project will pursue four vehicles for change. Spring semester students should plan to be involved in some or all aspects of these, depending on their interest and role.

- **Model Rules:** Students will work on the new ALI project *Principles of Law: Police Investigations*, as well as other collaborations, to draft policies to govern various aspects of policing, including use of force, use of drones and other surveillance technology, deterrence-based policing practices, and the like.
- **Litigation:** The core focus of the Project's litigation efforts will be to establish the principle that policing must be governed by democratic accountability through public rules. Several states have made gestures in this direction, but in general this principle—common throughout the rest of executive and administrative government—is missing with regard to policing. Students will help select cases and commence litigation.
- **Cost-Benefit Analysis:** The idea here is to assess the rationality, and in particular the costs and benefits, of police rules. To a remarkable degree, policing practices are not assessed to ensure they maximize public safety while minimizing harm to individuals and potential infringement on civil liberties. This is something that increasingly concerns policing agencies themselves. Students will work with experts in order to develop models for the costs of certain kinds of policing (such as stop and frisk, consent searches, and SWAT) as well as the potential benefits from these tactics.
- **Public Advocacy:** A lot of what needs to be done, besides the substantive work, is seeing these ideas adopted. Some of that might occur through litigation, but one of the fundamental lessons here is that policing must be accountable to the public and their representatives, not only to courts and constitutional law. That means engaging with community organizations on the ground, legislative bodies and police agencies, as well as educating the public. Students will be involved in all aspects of this, from developing and maintaining a website, to preparing legislative testimony or information packets, to answering legislative inquiries.

## Faculty

The course will be taught by Professor Barry Friedman. He will be assisted by Maria Ponomarenko (who will be the first Policing Project Fellow).

Professor Friedman's biography is on the [Law School's website](#). In addition to what it says there, and relevant to this course: Professor Friedman is currently writing a book on policing and the Constitution, which will be published by Farrar Straus and Giroux. He also is the author of several articles on policing, and is the Reporter for the ALI's *Principles of Law: Police Investigations*. He has had a long involvement with social change issues, often from what are traditionally seen as competing sides of the "left-right" divide. He was, for example, the affiliate President and Legal Director of the ACLU of Tennessee, has worked on cases involving

abortion, free speech, the death penalty and prisoner claims, and co-authored and spearheaded the law professors' amicus brief on the Commerce Clause issues in the Affordable Care Act litigation. Yet, he also wrote amicus briefs for the State and Local Legal Center on the state side of federalism issues in cases like *United States v. Lopez* and *South Dakota v. Dole* (and was co-counsel for the National Governor's Association in the original action, *South Carolina v. Baker*).

Maria Ponomarenko is a recent graduate of NYU law, and is currently clerking for Judge Richard Posner on the Seventh Circuit. She will return to NYU in the Fall of 2015 as the first Policing Project Fellow. Prior to starting at NYU she completed a Ph.D. in History at Stanford University, where her research and teaching focused primarily on the history of crime and criminal justice policy. Her current research focuses on constitutional law and criminal procedure. She is writing an article on programmatic searches and seizures under the Fourth Amendment, and recently co-authored an article with Barry Friedman on governing policing.