

Lexipol: The Privatization of Police Policymaking

Ingrid V. Eagly & Joanna C. Schwartz*

This Article is the first to identify and analyze the growing practice of privatized police policymaking. In it, we present our findings from public records requests that reveal the central role played by a limited liability corporation—Lexipol LLC—in the creation of internal regulations for law enforcement agencies across the United States. Lexipol was founded in 2003 to provide standardized policies and training for law enforcement. Today, more than 3,000 public safety agencies in thirty-five states contract with Lexipol to author the policies that guide their officers on crucial topics such as when to use deadly force, how to avoid engaging in racial profiling, and whether to enforce federal immigration laws. In California, where Lexipol was founded, as many as 95% of law enforcement agencies now rely on Lexipol’s policy manual.

Lexipol offers a valuable service, particularly for smaller law enforcement agencies that are without the resources to draft and update policies on their own. However, reliance on this private entity to establish standards for public policing also raises several concerns arising from its for-profit business model, focus on liability risk management, and lack of transparency or democratic participation. We therefore offer several recommendations that address these concerns while also recognizing and building upon Lexipol’s successes.

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Introduction

The conduct of American police is never far from the front page of the news. A wide range of policing issues—such as use of force, racial profiling, stop and frisk, roadblocks, Tasers, body cameras, and immigration policing—have garnered significant attention from community members, courts, advocacy organizations, and law enforcement agencies. Much of the discussion about improving police practices has focused on how best to regulate police conduct.¹ Gaining increasing traction in this discussion is the view that comprehensive internal police policies can guide the opaque and largely discretionary conduct of the police.² Those engaged in these discussions appear to assume that police departments, local governments, and nonprofits will play leading roles in the creation of police policies. However, the most significant national player in policing policy today is a private limited liability corporation—Lexipol LLC—that has, to date, received almost no scholarly attention.³

1. See generally Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437 (describing various police reformers and their strengths and limitations).

2. See *infra* notes 175–177 and accompanying text (summarizing scholarship in this area).

3. To date, the only limited descriptions of Lexipol in academic scholarship occur in our own work and that of John Rappaport. See Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEXAS L. REV. 245, 256 (2016) (discussing the role of Lexipol, “a private service that writes and updates policies and procedures for public safety organizations, including police departments”); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV.

This Article is the first to examine Lexipol's role in police policymaking. Lexipol explains on its website that it "offers a customizable, reliable and regularly updated online policy manual service, daily training bulletins on your approved policies, and implementation and management services to allow us to manage the administrative side of your policy manual."⁴ And Lexipol contends that it is "America's leading provider of state-specific policy management resources for law enforcement organizations."⁵ But beyond the statements Lexipol posts about itself online, there is little publicly available information about Lexipol LLC's products, its relationships with local jurisdictions, or the values that its products promote. Accordingly, we submitted public records requests to the 200 largest law enforcement agencies in California, seeking copies of their policy manuals as well as any communications or agreements with Lexipol. In response, we received thousands of pages of Lexipol-authored policy manuals, contracts, promotional materials, and e-mails.⁶ We supplemented these public records responses with court records, newspaper stories, and other documentation of Lexipol's work in California and around the country.

We found that Lexipol has expanded like wildfire since its founding in 2003. In only fifteen years, Lexipol has grown from a small company servicing forty agencies in California to a leading national police policymaker, replacing the homegrown manuals of local police departments with off-the-shelf policies emblazoned with the Lexipol LLC copyright stamp. Company employees and executives promote the fact that 95% of California law enforcement agencies subscribe to Lexipol⁷—an assertion

1539, 1575 (2017) (noting that "some insurers fund or subsidize subscriptions to a turnkey policy-writing service from a company called Lexipol"); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1188 (2016) (explaining that some risk pools offer discounts on premiums to jurisdictions that subscribe to Lexipol).

4. *Lexipol Products & Services*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-products/> [https://perma.cc/TMH9-ZTZX].

5. *Id.*

6. We discuss our methodology in Part I, *infra*. Our focus in this Article is on the manuals created by Lexipol for police and sheriff's departments. We note, however, that Lexipol also provides policy manuals for fire departments.

7. *See, e.g.*, SBN Staff, *Dan Merkle, Chairman and CEO, Lexipol LLC*, SMART BUS. (July 1, 2012), <http://www.sbnonline.com/category/industry-topics/legal-industry-topics/page/2/> [https://perma.cc/27R9-G5GQ] ("Ninety-five percent of the police agencies in California now use Lexipol's online Knowledge Management System, which includes law enforcement standardization and training programs, and the company has exceeded 30 percent growth for each of the last five years, all without infusions of outside capital."); Report of Bruce D. Praet at 1, *Mitz v. City of Grand Rapids*, No. 1:09-cv-365, 2009 WL 6849914 (W.D. Mich. Oct. 21, 2009) ("Lexipol currently has 94% of all California law enforcement agencies subscribing to our policy and training systems."). California jurisdictions regularly use the 95% figure in their public communications, suggesting that that figure is used in Lexipol's marketing materials as well. *See, e.g.*, CITY OF LAGUNA BEACH: AGENDA BILL NO. 5, at 2 (Sept. 3, 2013), http://lagunabeachcity.granicus.com/MetaViewer.php?view_id=3&clip_id=314&meta_id=24551 [https://perma.cc/6FJS-5F6B] ("Lexipol dominates with over 95% of the cities [in California] using its services."); VALLEJO POLICE DEPARTMENT,

consistent with agencies' responses to our public records requests.⁸ Lexipol's rapid growth has allowed it not only to saturate the market in California but also to expand its reach to 3,000 public safety agencies in thirty-five states across the country.⁹ Although Lexipol is not the only private entity to sell policies to local police departments in the United States, it appears to sell policy manuals and trainings to far more local law enforcement agencies than its competitors.¹⁰ Indeed, law enforcement agencies in several states describe

2013: THE YEAR IN REVIEW 29 (2014), <http://www.ci.vallejo.ca.us/common/pages/DisplayFile.aspx?itemId=74914> [<https://perma.cc/Q3RY-F8UW>] ("More than 95 percent of California law enforcement agencies . . . now utilize Lexipol for their policies and procedures . . ."); Alex Emslie, *Vallejo City Manager Responds to Questions About Police Shootings*, KQED NEWS (May 20, 2014), <https://www.kqed.org/news/2014/05/20/vallejo-city-manager-responds-to-questions-about-police-shootings/> [<https://perma.cc/L6B3-MGGG>] ("More than 95 percent of California law enforcement agencies . . . subscribe to the Lexipol Policy system."). Lexipol executives reported to us that 94% of all California public safety agencies use Lexipol—a figure which reflects not only police departments and sheriff's departments, but also law enforcement for parks, college campuses, transit systems, and airports. E-mail from Tim Kensok, Vice President, Prod. Mgmt., Lexipol, to authors (Sept. 13, 2017, 4:07 PM) (on file with authors).

8. See *infra* Table 2; Appendix. Our public records requests revealed that 83% of California's 200 largest law enforcement agencies were Lexipol customers. Smaller agencies were especially likely to use Lexipol: 95% of responding agencies with fewer than 100 officers relied on Lexipol policies.

9. See *infra* Table 1. Lexipol executives assert that approximately 2,500 of those 3,000 public safety agencies are local police and sheriff's departments. See LEXIPOL: REVIEW OF LEXIPOL: THE PRIVATIZATION OF POLICE POLICYMAKING 4 (2017) (on file with authors) [hereinafter SECOND LEXIPOL POWERPOINT] (presenting company information in a PowerPoint given to authors by Lexipol LLC). The remainder are fire departments, probation departments, and other types of public safety agencies. Telephone Interview with Tim Kensok, Vice President, Lexipol, Gordon Graham, Vice President, Lexipol, Leslie Stevens, Vice President, Lexipol, Kevin Piper, Vice President, Lexipol, and Shannon Piper, Dir. of Mktg. & Comm'ns, Lexipol (Sept. 8, 2017) [hereinafter Lexipol September Conference Call].

10. Other private entities that provide similar services include: OSS Law Enforcement Advisors, <http://www.ossrisk.com/consultant/Law-Enforcement/page174.html> [<https://perma.cc/W54Z-P636>]; Daigle Law Grp., LLC, <http://daiglelawgroup.com> [<https://perma.cc/J36N-KFBA>]; Pub. Safety Specialist's Grp., <http://www.pssg.net/liability/liability.shtml> [<https://perma.cc/68LK-FPDA>]; Legal & Liability Risk Management Institute, <http://www.llrmi.com/index.shtml> [<https://perma.cc/8LTE-TWTX>]; The Thomas & Means Law Firm, <https://www.thomasandmeans.com/policy-manual-work> [<https://perma.cc/YDW3-UFLV>]; and Hillard Heintze, <http://www.hillardheintze.com/law-enforcement-consulting/police-department-assessment/> [<https://perma.cc/V8WS-QBA5>]. Most of these companies were reluctant to provide us with information about their law enforcement clients, but the information we have been able to collect suggests that these companies work with fewer law enforcement agencies than does Lexipol. See Telephone Interview by David Koller with Eric Daigle, Principal, Daigle Law Group, LLC (Aug. 28, 2017) (reporting that his company consults with approximately eighty law enforcement agencies, and confirming that Lexipol has only a couple of competitors—including The Daigle Group—because "Lexipol had the market cornered for so long"); Telephone Interview by David Koller with Dennis W. Bowman, President & Founder, Public Safety Specialist's Group (Aug. 31, 2017) (reporting that his company has worked with forty to fifty law enforcement agencies on their policy manuals since the company's formation in 2001); Telephone Interview by David Koller with David Lee Salmon II, Law Enforcement Advisor, OSS Law Enf't Advisors (Sept. 13, 2017) (reporting that OSS has "well over" 2,000 clients but explaining that that figure includes local law enforcement agencies,

it as the “sole source provider” of standardized, state-specific law enforcement policy manuals.¹¹

The key to Lexipol’s commercial success appears to be its claims to reduce legal liability in a cost-effective manner. Lexipol promotes itself as providing departments with a “policy that is always up to date” containing “legally defensible content” that will “protect your agency today.”¹² In fact, Lexipol’s promotional materials assert that departments using Lexipol have fewer lawsuits filed against them and pay less to resolve the suits that are filed.¹³ Lexipol also argues that its policy manuals are higher-quality, more user-friendly, and less expensive than manuals that local jurisdictions could create on their own. Lexipol claims its standardized policies reflect court opinions, legislation, and what it calls “best practices” in each state.¹⁴ Lexipol updates its policies, and local jurisdictions can incorporate those updates into their policy manuals with a click of a button. And Lexipol’s sliding-fee scale, which is based on the number of officers employed by the agency, makes this prepackaged deal particularly appealing for smaller departments that would not have the resources to develop and update policies on their own.¹⁵

Lexipol’s meteoric rise has significant implications for longstanding debates about the role policymaking might play in police reform. Beginning in the 1960s,¹⁶ Anthony Amsterdam, Kenneth Culp Davis, Herman Goldstein, and others argued that comprehensive police policies could guide police discretion, improve police decisionmaking, and increase transparency.¹⁷ These scholars advocated for a rulemaking procedure akin to

municipal groups, insurance companies, state agencies, state associations, and private employers). We repeatedly reached out to LLRMI, Thomas & Means, and Hillard Heintze, and did not get responses to our inquiries.

11. See *infra* notes 311–312 and accompanying text.

12. *About Lexipol*, LEXIPOL, <http://www.lexipol.com/about-us/> [<https://perma.cc/3W98-VXF5>] (click on video).

13. See *infra* notes 144–148 and accompanying text.

14. See *infra* Figure 1.

15. For example, the Calaveras County Sheriff’s Department, with fifty-nine officers, was charged less than \$9,000 for a one-year contract, while larger agencies were charged more. See *infra* notes 110–120 and accompanying text for a discussion of Lexipol’s cost structure.

16. For a history of administrative rulemaking in policing, see Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 14–17 (2003).

17. See, e.g., Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 146 (1963) (arguing that police should acknowledge the role of discretion in law enforcement); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 588–89 (1960) (suggesting that legislatures should create Policy Appraisal and Review Boards to review the nonenforcement decisions of police officers and make policy recommendations); Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 146 (1953) (advancing the idea that police methods and policies should “reflect democratic values”); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904 (1962) (asserting that “criminal law

that which exists for administrative agencies, whereby proposed policies would be subject to notice and comment by the public before promulgation, so as to invite “community reaction.”¹⁸ In recent years, Barry Friedman, Christopher Slobogin, Eric Miller, and others have renewed these earlier calls for policing policies created by an administrative rulemaking process.¹⁹ Yet Lexipol does not appear in these ongoing discussions about the types of police policies that will best guide police behavior, or the need for transparency and community engagement in the development of those policies.

As we reveal in this Article, Lexipol’s approach to police policymaking diverges in several significant ways from that long advocated by scholars and experts. Commentators have viewed police policies as a tool to constrain officer discretion and to improve officer decisionmaking. Lexipol, in contrast, promotes its policies as a risk management tool that can reduce legal liability. Commentators have long contended that the Supreme Court’s policing decisions are wholly inadequate to guide law enforcement discretion

enforcement can often be improved substantially by the imposition of legal procedures and standards upon the exercise of discretion”); Wayne R. LaFare, *The Police and Nonenforcement of the Law* (pt. 1), 1962 WIS. L. REV. 104, 104 (1962) (discussing the reasons why police discretion has rarely been recognized in the law); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 674 (1972) (highlighting the lack of actual police participation in the making of rules governing police). Note, however, that the earliest calls for administrative rulemaking for police occurred in the early 1900s. See Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 123 (2016) (citing BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903)).

18. Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROBS. 500, 509 (1971); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423 (1974) (“[I]nformed authorities today agree with rare unanimity upon the need to direct and confine police discretion by the same process of rulemaking that has worked excellently to hold various other forms of public agencies to accountability under standards of lawfulness, fairness and efficiency.”); Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEXAS L. REV. 703, 725 (1974) (“My central idea is that police practices should no longer be exempt from the kind of judicial review that is usual for other administrative agencies.”); see also REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 164–65 (1968) (arguing in favor of formal policymaking pursuant to an administrative-type procedure for police departments).

19. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1833 n.28 (2015) (observing that, in calling for administrative rulemaking in policing, they “stand on the shoulders of giants”); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 525 (2015) (proposing that police reformers “focus on the departmental level of police policymaking to give local communities and disadvantaged individuals a more meaningful voice in evaluating and checking local police policy”); Slobogin, *supra* note 17, at 91 (arguing that when police create “statute-like policies that are aimed at largely innocent categories of actors . . . they should have to engage in notice-and-comment rulemaking or a similar democratically oriented process and avoid arbitrary and capricious rules”); see also Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2050 (2016) (identifying a trend calling “for a pivot to law enforcement self-regulation as a primary means of constraining state power in the criminal justice arena”).

regarding racial profiling, stop and frisk, and other practices.²⁰ Yet Lexipol has resisted efforts to craft policies that go beyond the minimum requirements of court decisions because such policies might increase legal liability exposure.²¹

Moreover, the process by which Lexipol develops its policies is not consistent with the approach recommended by many policing experts who have emphasized the importance of transparent policymaking, with opportunities for public input.²² Lexipol does not disclose information about who is making Lexipol's policies and what interests are prioritized in their process. And although Lexipol informally receives feedback from subscribing jurisdictions about its policies, its policymaking process departs considerably from the transparent, quasi-administrative approach recommended by scholars and policing experts and adopted by some law enforcement agencies.²³ Also, Lexipol's profit-seeking motive influences its product design in concerning ways. For example, Lexipol's policies are copyrighted, and the company vigorously defends that copyright as a means of maintaining its profitability. Yet police policymaking has long been viewed as a collaborative enterprise. Departments across the country have traditionally shared their policies as a means of learning from each other and have borrowed liberally from each others' policies. Lexipol's business model impedes this generative process.²⁴

In this Article, we do not reach any conclusions about how Lexipol's policies compare to those adopted by law enforcement agencies that do not purchase Lexipol's products. Indeed, some of these same critiques have been made of local law enforcement agencies that draft their own policies.²⁵ Yet

20. See, e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 125 (2017) (criticizing Fourth Amendment law as in fact "legaliz[ing] racial profiling," resulting in ongoing police surveillance, social control, and the injury and death of African Americans); see also *infra* notes 189–192 and accompanying text.

21. See *infra* notes 180–194 and accompanying text for further discussion of these concerns.

22. See, e.g., Friedman & Ponomarenko, *supra* note 19, at 1827 (arguing that police practices should be legislatively authorized and "subject to public rulemaking").

23. See *infra* notes 213–226 and accompanying text for further discussion of these concerns.

24. See *infra* notes 241–253 and accompanying text for further discussion of these concerns.

25. For example, although we critique Lexipol's resistance to model use of force policies recommended by the International Association of Chiefs of Police and the Police Executive Research Forum, see *infra* notes 180–195 and accompanying text, we recognize that there have also been powerful critiques of use of force policies promulgated by departments that do not contract with Lexipol. See, e.g., Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 212 (2017) (arguing that use of force policies of the fifty largest policing agencies in the United States are insufficiently specific and lack guidance in key areas); see also POLICE USE OF FORCE PROJECT, <http://useofforceproject.org/#project> [https://perma.cc/57AN-GAWF] (reviewing police use of force policies in ninety-one of the one hundred largest law enforcement agencies and finding that policies frequently failed to include eight "common-sense limits on police use of force"). Critics have also argued that police departments should—but do not—view

because Lexipol appears to be the single most influential actor in police policymaking, its successes—and failures—have an outsized impact on American police policy. As Lexipol goes, so go thousands of law enforcement agencies across the country. And Lexipol’s for-profit status raises additional concerns that do not apply to government and nonprofit police policymakers.

By identifying Lexipol as a force to be reckoned with in American policing, this Article also begins an important conversation about the privatization of police policymaking. Privatization scholars tend, in varying degrees, to applaud privatization of government functions as cost-effective²⁶ or to despair that privatization impedes democratic values.²⁷ Our research regarding the privatization of police policymaking offers evidence to support both views. Lexipol appears to have solved a problem that has proven elusive to those advocating for police policymaking—how to promulgate police policies in the almost 18,000 highly localized law enforcement agencies across the country.²⁸ And agencies that contract with Lexipol may well have

policymaking as a quasi-administrative exercise. *See generally* Friedman & Ponomarenko, *supra* note 19, at 1833 (summarizing scholarly arguments for using administrative processes to govern policing policy). And critics have complained that police policies are often kept secret. *See, e.g.,* Garrett & Stoughton, *supra*, at 277 (finding that only seventeen of the fifty largest police departments published their policies and patrol manuals online).

26. *See, e.g.,* Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective* (arguing that privatization will often be the most efficient solution for government and that limitations on privatization can be counterproductive), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 153, 158–59 (Jody Freeman & Martha Minow eds., 2009); Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It* (arguing that private companies often have better resources and research capacity than government entities), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* at 192, 221–22; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285, 1296 (2003) (“From this pragmatic perspective, privatization is a means of improving productive efficiency: obtaining high-quality services at the lowest possible cost . . .”).

27. *See, e.g.,* JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* (2017) (describing how privatization threatens constitutional principles and threatens government health and stability); Sharon Dolovich, *How Privatization Thinks: The Case of Prisons* (arguing that operators of private prisons will promote efficiency over other important interests), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 26, at 128, 134; Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy* (describing concerns about the process by which contracts are awarded for government work and the difficulty of monitoring private employees), in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY*, *supra* note 26, at 110, 111; David A. Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165, 1277–78 (1999) (highlighting how the growing private security industry undermines the function of the criminal law).

28. As Monica Bell has noted, “the sheer volume of locally controlled police departments, all of which have slightly different policies and issues,” has impeded systemic police reform across these different localities. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2138 (2017); *see also* Friedman & Ponomarenko, *supra* note 19, at 1886 (arguing that “the real challenge” to applying rulemaking to policing “is identifying

a more complete and up-to-date policy manual than they would have developed on their own—Lexipol subscribers quoted on its website certainly make that claim.²⁹ But our research also raises serious questions about the values, process, and expertise called upon to create the Lexipol policies that regulate the public police.

Many believe—and we agree—that police departments need comprehensive and detailed policies to guide officer discretion and should engage with local communities in some manner when shaping those policies. We additionally believe that plans to improve law enforcement policymaking must recognize the prevalence of Lexipol and take account of the strengths and weaknesses of its approach. Accordingly, we recommend that Lexipol be more transparent about its policymaking process so that local governments can make more informed decisions about the policies that guide their law enforcement agencies; that local governments and courts take a more active role in police policymaking; and that nonprofits and scholars develop more easily accessible alternative model policies that are compatible with Lexipol’s user-friendly platform. We believe that these recommendations will encourage local jurisdictions to craft their own policies when possible and, when contracting with Lexipol, view the company as a first—but not final—step in the policymaking process.

I. The Rise of Lexipol

In this Part, we share our findings about Lexipol’s founders, its products, and its relationships with the local governments it serves. In conducting this research, we first gathered information from Lexipol’s website, financial filings, press releases, news sources, and court documents. We supplemented this research with public records requests to the 200 largest police and sheriffs’ departments in California, seeking each department’s policy manual and any dealings with Lexipol LLC—including contracts, payments, correspondence, and other memoranda.³⁰ We chose to conduct this research in California, where Lexipol was founded. Soon thereafter, we were contacted by a vice president at Lexipol who had learned about our public records requests from Lexipol subscribers. We had several conversations with this vice president and other Lexipol executives about the company’s business model and process for creating its policy manuals.

methods of public participation that can be scaled to communities and police forces of various sizes”).

29. See *infra* notes 152–158 and accompanying text.

30. To identify the 200 largest police and sheriff’s departments in California, we relied on a census of local law enforcement agencies conducted by the Bureau of Justice Statistics (BJS). See Appendix (describing our methodology).

In this Part, we provide a descriptive account of Lexipol's services, drawn from the information we gathered. We begin by introducing what we know about Lexipol's founders and employees. We then describe the company's products, cost structure, sales methods, and growth. Later, in Part II, we build on our findings to analyze Lexipol's model of police policymaking.

A. *People*

Lexipol LLC was founded in 2003 by Bruce Praet, Gordon Graham, and Dan Merkle.³¹ Praet, an attorney and former law enforcement officer, appears to have had the initial vision for the company. While working as a partner at the Southern California law firm of Ferguson, Praet and Sherman, Praet developed a specialty in “aggressively defending police civil matters such as shootings, dog bites and pursuits.”³² In the late 1990s, Praet's firm assisted the California agencies he represented to reduce liability exposure by recommending they adopt a policy he authored on vehicular pursuits.³³ A 1959 California law provided that agencies with a written policy for vehicular pursuits were immunized from certain forms of civil damages.³⁴ By drafting such a policy for his clients, Praet shielded them from civil liability for these types of claims.

Praet's experience developing a model policy for vehicle pursuits inspired him to create a more comprehensive set of policies that local law enforcement agencies could purchase. Working with Geoff Spalding, a Police Captain with the Fullerton Police Department, Praet created a model California law enforcement manual based on Fullerton's policies.³⁵ Praet used this model when the Escalon Police Department retained his firm to write its entire policy manual in 1999. By 2002, the firm maintained the policy manuals for about forty California-based law enforcement agencies.³⁶

31. Deposition of Bruce D. Praet at 7, *Schrock v. Taser Int'l, Inc.*, No. CIVDS-14-8556, 2016 WL 5656893 (Cal. Super. Ct. Mar. 25, 2016) (on file with authors) [hereinafter Praet Deposition].

32. Thadeus Greenon, *Arraignment Only the First Step in Moore Case*, EUREKA TIMES STANDARD (Dec. 12, 2007), <http://www.times-standard.com/general-news/20071212/arraignment-only-the-first-step-in-moore-case> [<https://perma.cc/46Q2-9SCR>] (quoting a description of Praet's firm from the Lexipol website); see also Mark I. Pinsky, *Former Officer Defends Police in Courtroom: Law: Bruce D. Praet Faces What May Be the Challenge of His Legal Career in the Newport Police Sexual Harassment Case*, L.A. TIMES (Dec. 28, 1992), http://articles.latimes.com/1992-12-28/local/me-2115_1_police-officers [<https://perma.cc/3GPQ-TAKR>] (chronicling Praet's career from police officer to lawyer).

33. LEXIPOL, LEXIPOL POLICY DEVELOPMENT—HOW WE DO WHAT WE DO 12 (Feb. 10, 2017) (on file with authors) [hereinafter FIRST LEXIPOL POWERPOINT] (presenting company information in a PowerPoint given to authors by Lexipol).

34. *Id.* (citing CAL. VEH. CODE § 17004.7 (West 2007)).

35. *Id.* at 13.

36. *Id.*

In 2003, Praet founded Lexipol with Gordon Graham and Dan Merkle, and transferred his policy development work from his law firm to the new company.³⁷ Graham, also a former law enforcement officer and law school graduate, additionally has a master's degree in Safety and Systems Management.³⁸ In the 1980s, while a sergeant in the California Highway Patrol, Gordon developed daily trainings for officers that he called the "SROVT program: Solid, Realistic, Ongoing, Verifiable, Training."³⁹ In the early 1990s, Graham began adapting his training programs for private sector and public safety organizations.⁴⁰ When Graham joined Lexipol as co-President, he drew on his expertise in public entity risk management to develop training materials to accompany the manuals.⁴¹

Dan Merkle served as Lexipol's first Chairman and CEO.⁴² Merkle has a background as a corporate executive⁴³ and was recruited to focus on building the company's infrastructure.⁴⁴ When Merkle left Lexipol in 2013 to join a media technology company,⁴⁵ Ron Wilkerson became the new CEO of Lexipol.⁴⁶ As the company has grown beyond its original founders, it has hired scores of attorneys, marketing specialists, and account managers.⁴⁷

Although Lexipol applauds the "all-star team of public safety veterans"⁴⁸ that drafts its polices and trainings, there is no publicly available

37. Letter from Lexipol to Pat Smith, Chief of Police, Beaumont Police Dep't (Sept. 4, 2003) (on file with authors) ("Lexipol has assumed all functions of the policy manual development work formerly performed by the law firm of Ferguson Praet and Sherman.").

38. *About GRC, Bio: Gordon Graham*, GRAHAM RES. CONSULTANTS, <http://www.gordongraham.com/about.html> [<https://perma.cc/9Z33-EAAE>].

39. *Id.*

40. *Id.*

41. See Letter from Lexipol to Pat Smith, *supra* note 37 ("Gordon is leading a group developing a training system based on the content of each agency's policy manual and his extraordinary knowledge base."); see also GRAHAM RES. CONSULTANTS, *supra* note 38 (recounting Graham's expertise in police training programs before establishing Lexipol).

42. SBN Staff, *supra* note 7.

43. Dan Merkle, LINKEDIN, <https://www.linkedin.com/in/dan-merkle/>.

44. See Letter from Lexipol to Pat Smith, *supra* note 37 ("Dan Merkle has been recruited to lead our investment in systems and resources to better serve our subscribing agencies.").

45. Merkle, *supra* note 43.

46. Ron Wilkerson, LINKEDIN, <https://www.linkedin.com/in/ron-wilkerson-8a075b8a>. In 2013, Praet and Graham sued Merkle for allegedly attempting to strip Praet of his ownership interest in Lexipol. See *Praet v. Merkle*, No. 30-2013-00622437 (Cal. Super. Ct. Jan. 4, 2013); see also *Veritone Appoints New President of Public Safety, Expanding Cognitive Media Platform to Law Enforcement*, CISION: PRWEB (Sept. 15, 2016), <http://www.prweb.com/releases/2016/09/prweb13690214.htm> [<https://perma.cc/9NZU-5EK6>] (announcing Dan Merkle as the new CEO of Veritone, Inc.).

47. See *Current Career Opportunities*, LEXIPOL, <http://www.lexipol.com/careers/> [<https://perma.cc/S9YF-KXP8>] (stating that Lexipol is currently hiring product managers, attorneys, and development representatives).

48. Letter from Lexipol to Roy Davenport, Assistant Chief Deputy, Denton Cty. (Dec. 3, 2012) (on file with authors).

information about who these public safety veterans are. We found information about Praet and Graham, but could find no information about the identities or credentials of their 120 employees.⁴⁹ Indeed, none of the marketing materials that we obtained from the California jurisdictions we surveyed included information on names or credentials of Lexipol's employees. When we spoke to company executives about this issue, they provided us with the photos, names, and titles of ten Lexipol executives, and one vice president told us that he would love to include photos and bios of staff on Lexipol's website, but that he had not yet had a chance to do so.⁵⁰ Another vice president observed that law enforcement agencies can always call Lexipol to learn more about the people who develop policies.⁵¹

Bruce Praet was equally unforthcoming about Lexipol's employees in a recent deposition taken after Lexipol was sued over its Taser policy.⁵² Praet testified that Lexipol identifies best practices by relying on their internal subject matter experts and feedback from their subscriber agencies.⁵³ Yet when Praet was directly asked whether Lexipol "employ[s] subject matter experts on different areas of law enforcement practices who determine what best practices are," he acknowledged that they did not.⁵⁴ He explained: "We don't have a specific subject matter expert on a specific topic, but a good number of our people are law enforcement background, so there's a wealth of information that we draw upon, depending on the subject."⁵⁵ Similarly, Praet could not (or would not) identify Lexipol employees who had particular expertise in Tasers.⁵⁶ Instead, he said, Lexipol "had a wealth of people who

49. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 13 (reporting a rapid growth from 61 employees in 2014 to 120 employees in 2016).

50. See Lexipol September Conference Call, *supra* note 9 (statement of Tim Kensok, Vice President, Prod. Mgmt., Lexipol); SECOND LEXIPOL POWERPOINT, *supra* note 9, at 8, 12 (responding to the authors' criticisms about a lack of transparency with pictures and brief descriptions of ten executives).

51. Lexipol September Conference Call, *supra* note 9 (statement of Leslie Stevens, Vice President, Legal Dep't, Lexipol).

52. In the deposition, Praet was repeatedly asked to identify employees involved in crafting Lexipol's 2008 Taser policy. After several nonresponsive answers, Praet was asked whether he could name a single person with whom he consulted about a Taser-related memo. Praet's response:

A: [T]he staffing at Lexipol has changed so many times over 15 years, I couldn't tell you. All I can tell you is that whoever was on staff in 2009 at the time of this I probably would have consulted with several people.

Q: Can you name any of those several people?

A: That's my problem. I don't have a roster of who was on staff in 2009 to give you names, and I don't want to give you somebody who came on in January of 2010 or somebody who may have left in 2008. So . . .

Praet Deposition, *supra* note 31, at 41. For additional details about the case, see *infra* note 237.

53. Praet Deposition, *supra* note 31, at 12.

54. *Id.*

55. *Id.* at 12–13.

56. *Id.* at 21.

have a significant amount of information about Tasers, but not one person who was the go-to person.”⁵⁷

B. Products

On its website and in its promotional materials sent to potential law enforcement customers, Lexipol markets three main products: (1) a policy manual, (2) Daily Training Bulletins, and (3) implementation services.⁵⁸ In this section, we share what we have learned about each product.

1. Policy Manual.—Lexipol’s signature product is its copyrighted policy manual.⁵⁹ Lexipol has a “global master” manual that is based on federal standards and best practices.⁶⁰ It has used this global master to create “state master” manuals that incorporate state-specific standards.⁶¹

There is limited public information available regarding how Lexipol goes about drafting the policies contained in its manuals. We know from speaking with executives at Lexipol that they work with a team of company attorneys and former law enforcement officials to review court decisions, legislation, and other materials applicable to a state.⁶² Lexipol also considers media reports, client feedback, trends in law enforcement, and reports by outside groups including the Department of Justice, the American Civil Liberties Union (ACLU), and the National Institute of Justice.⁶³ Anecdotal evidence also plays a significant role in Lexipol’s policy development

57. *Id.*

58. See *Lexipol Products & Services*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-products/> [<https://perma.cc/LDS6-JGRA>] (describing a “customizable, reliable and regularly updated online policy manual service, daily training bulletins on your approved policies, and implementation and management services to allow [Lexipol] to manage the administrative side of [an agency’s] policy manual”).

59. Lexipol vice presidents made clear that Lexipol offers a “policy manual,” not a “procedure manual.” Telephone Interview with Tim Kensok, Vice President, Lexipol, Leslie Stevens, Vice President, Lexipol, and Kevin Piper, Vice President, Lexipol (Feb. 10, 2017) [hereinafter Lexipol February Conference Call]. In Lexipol’s view, a policy manual “[a]nswers major organizational issues,” is “[u]sually expressed in broad terms,” has “[w]idespread application,” and “[c]hanges less frequently.” FIRST LEXIPOL POWERPOINT, *supra* note 33, at 16. In contrast, a procedure manual “[d]escribes a process,” is “[o]ften stated in detail,” is “[p]rone to change,” and has “[n]arrow application.” *Id.*

60. Lexipol February Conference Call, *supra* note 59.

61. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 15; see also Letter from John Fitisemanu, Client Servs. Representative, Lexipol, to Tammie Stilinovich, Officer, Long Beach Police Dep’t (Feb. 28, 2014) (on file with authors) (stating that “Lexipol provides . . . [c]ustomized content for the state of California”). For a copy of Lexipol’s California state master policy document, see LEXIPOL, CALIFORNIA STATE MASTER POLICE DEPARTMENT: POLICY MANUAL (n.d.), which the authors obtained through their public records request to the Irvine Police Department.

62. Lexipol February Conference Call, *supra* note 59.

63. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 19, 21; Lexipol September Conference Call, *supra* note 9.

process. As Bruce Praet explained in a deposition, “we’re constantly getting anecdotal information, and I can’t speak for everybody, but everybody on the Lexipol staff, when they become aware of something that may impact policy . . . they share that and then that is round-tabled, and if it has a policy impact, then that’s incorporated into our content.”⁶⁴

The Lexipol vice presidents we interviewed offered little guidance about how Lexipol ultimately weighs and balances these various sources of information. They simply reported that policies are designed by looking at all available evidence and having all relevant employees weigh in on how the policies should be crafted.⁶⁵ As Bruce Praet similarly reported in his deposition, “if an issue comes up, typically, among the attorneys and subject matter experts that we have, we would, for lack of a better term, turkey shoot or brainstorm the issue and see what we could come up with [as] an appropriate response.”⁶⁶ Once Lexipol decides to develop a policy, employees determine how the policy should be written. The vice presidents with whom we spoke described this process as “a challenge” that often results in disagreements between the legal team (which is focused on risk to its agency clients in the courtroom) and the content-development team (which is focused on risk to law enforcement officers on the street).⁶⁷ How these disagreements resolve “varies based on what the issue is and the timing.”⁶⁸ Lexipol does not make public the substance of its deliberative process or the justifications for its policy decisions. Indeed, Lexipol appears to keep no discoverable records of its decisionmaking process regarding policy content.⁶⁹

64. Praet Deposition, *supra* note 31, at 107.

65. Lexipol February Conference Call, *supra* note 59.

66. Praet Deposition, *supra* note 31, at 21.

67. Lexipol February Conference Call, *supra* note 59.

68. *Id.*

69. In a deposition about Lexipol’s Taser policy, Bruce Praet was asked about the process by which the company wrote the policy and an advisory memorandum to its subscribers. Praet answered:

I’m sure that I had communications with all of our people involved in the development of the policy, and we have a collaborative forum in which the attorneys and everybody on staff at Lexipol can brainstorm issues, so I’m sure there was a good deal of communication between myself as an attorney, other attorneys in the—on Lexipol’s staff and those who might have any subject matter interest or expertise.

Praet Deposition, *supra* note 31, at 27. The attorney then asked for documentation regarding these conversations:

Q: Do you know whether there are any e-mails regarding these communications?

A: I doubt it.

Q: Why is that? I mean, why would there not be?

A: Because we don’t communicate much by way of e-mail.

Q: How would those communications take place?

A: Um, I’d be guessing, and I don’t want to guess, but I would imagine there would have been phone calls.

Agencies that contract with Lexipol are provided a draft state-specific policy manual for review.⁷⁰ The draft manual is typically accompanied by a diagram (reproduced in Figure 1) that captures the framework that Lexipol uses for categorizing the policies included in its manuals. According to this typology, some policies are required by federal or state law, whereas others are considered “best practices” or “discretionary.” Lexipol’s draft policy manuals are coded to inform readers of the categorization of each proposed policy.⁷¹

Figure 1: The Components of a Lexipol Policy Manual⁷²



Jurisdictions can choose whether to adopt, reject, or modify each policy.⁷³ Lexipol advises its users to “fully understand the ramifications and

Id. at 27–28.

70. *See, e.g.*, LEXIPOL, LAW ENFORCEMENT POLICY MANUAL & DAILY TRAINING BULLETINS: PRESENTED TO COSTA MESA POLICE DEPARTMENT (2014) (on file with authors) (proposing a Law Enforcement Policy Manual to the Costa Mesa Police Department).

71. *See, e.g.*, Invoice from Lexipol to Alameda Police Dep’t (Sept. 26, 2007) (on file with authors) (referring to a “color coded draft”).

72. Figure 1 was obtained from the Long Beach Police Department in response to our public records request. LEXIPOL PROPOSAL PRESENTED TO LONG BEACH POLICE DEP’T, LAW ENFORCEMENT POLICY MANUAL & DAILY TRAINING BULLETINS (Feb. 28, 2014) (on file with authors) [hereinafter LONG BEACH PROPOSAL].

73. *See, e.g.*, E-mail from Chris Hofford, Lieutenant, Baldwin Park Police Dep’t, to authors (Nov. 7, 2016, 3:51 PM) (on file with authors) (“Policy changes proposed by Lexipol are addressed electronically in Lexipol’s online environment. Proposed changes that we accept in part or whole are incorporated into the next released edition of the Policy Manual. Proposed changes that we reject are not retained.”).

use caution before changing or removing” policies derived from federal and state law.⁷⁴ Policies characterized as “best practices” are reportedly “considered the currently accepted best practice in the public safety field,” and Lexipol advises adopters that “[t]his content may be changed if necessary, with caution.”⁷⁵ Discretionary policies are described as those “that may or may not be important for your agency” and “may be changed or removed as needed.”⁷⁶ Jurisdictions understand this message: as one agency representative told us in responding to our public records request, those Lexipol policies designated as “best practices” or “discretionary” are “optional,” but those that are the “law” are required.⁷⁷

In promotional materials, Lexipol describes its manual as “a complete regulatory and operational policy manual” that “may be accepted for use immediately.”⁷⁸ Nonetheless, Lexipol does take some steps that enable local jurisdictions to customize their manuals. When Lexipol first begins working with a department, it asks the department to fill out a questionnaire that is used by the company to ensure that the terminology used in the manual (such as “officers” or “deputies”) is consistent with that used by the particular agency.⁷⁹ Once Lexipol receives the questionnaire, its staff members spend

74. LEXIPOL, LEXIPOL CITATION FAQs: GUIDANCE FOR AGENCY ADMINISTRATORS ON THE USE OF CITATIONS AND EDIT LEVELS IN LEXIPOL POLICY MANUALS 4 (2015) (on file with authors) [hereinafter LEXIPOL CITATION FAQs].

75. DAN FISH, BILL MCAULIFFE & JEFF WITTENBERGER, SANTA CLARA POLICE DEPARTMENT PROJECT MANAGEMENT GUIDE AND POLICY IMPLEMENTATION PLAN 5 (2017) (on file with authors) [hereinafter SANTA CLARA POLICE DEPARTMENT POWERPOINT].

76. *Id.* Another Lexipol document describes discretionary content as:
not necessarily a best practice, doesn't have a direct impact on risk or may not apply to your agency. . . . For example, the Administrative Communications Policy outlines specifications for letterhead, memorandum style, fax cover sheets, etc. It is appropriately classified [as] Discretionary since it is agency-specific and does not have a direct risk management impact.

LEXIPOL CITATION FAQs, *supra* note 74, at 5.

77. *See, e.g.*, Telephone Interview by Ingrid Eagly with Joseph May, Deputy Chief, Simi Valley Police Dep't (Nov. 23, 2016) (explaining which policies are mandatory and which ones are merely optional).

78. Letter from Martha Bereczky, Mktg. Coordinator, Lexipol, to Cliff Baumer, San Joaquin Sheriff Office (Aug. 27, 2008) (on file with authors).

79. *See* LEXIPOL, LEXIPOL LLC DELAWARE POLICY GUIDE 1 (2016), <http://www.lexipol.com/wp-content/uploads/2016/10/DE-LE-Policy-Guide-Sheets-2016-10-10.pdf> [<https://perma.cc/ZMD2-9784>] (explaining that the “implementation process begins when you complete the agency Questionnaire” and that the responses will be used to replace certain bracketed terms “with terminology familiar to your agency”); *see also* E-mail from Nicole Falconer, Account Manager, Lexipol, to Tyson Pogue, Lieutenant, Madera Cty. Sheriff's Dep't (Jan. 28, 2016, 2:35 PM) (on file with authors) (instructing Lt. Pogue to complete and return a questionnaire that would assist Lexipol “to define key titles and terms specific to your agency's structure and operation so the manual is consistent with how you operate”); Letter from John Fitsemanu, Client Servs. Representative, Lexipol, to Tammie Stilinovich, Officer, Long Beach Police Dep't (Feb. 20, 2014) (on file with authors) (explaining that Lexipol's “proprietary software allows efficient and accurate generation of a draft version of the manual from an online questionnaire”); Letter from Bruce D. Praet, Attorney

an average of ten to fifteen hours “to further refine the manual to the specific needs of the agency.”⁸⁰ Agencies may also work with Lexipol to customize certain policies or supplement the manual with original policy content.⁸¹ For those agencies that wish to author some of their own policies, Lexipol issues a style guide in which it describes “house rules for spelling, punctuation, citations and other style issues.”⁸²

Lexipol executives informed us that they also make policy “guide sheets” available to their subscribers that offer additional information agencies can use when deciding whether to customize their manuals.⁸³ But when we requested a copy of this policy guide, Lexipol refused to provide us with a copy⁸⁴ and none of the California agencies we queried provided us with guide sheets or a policy guide in response to our public records requests.⁸⁵ Indeed, when we asked a detective at the Fontana Police Department—a Lexipol subscriber—about Lexipol’s policy guide, he said that they had never “heard of” or “seen” such a guide.⁸⁶ Lexipol executives conceded that the guide is a “well-kept secret” because it is difficult for subscribers to access online.⁸⁷ Lexipol marketing material that we obtained from the Santa Clara Police Department included a single sample “guide sheet” for a policy on Records Release and Security. The sample “guide sheet” stressed the necessity of adopting Lexipol’s policy with little or no modification: “This is a highly recommended policy that all agencies should have as part of their manual. . . . [W]e have provided you with a

at Law, to Pat Smith, Chief, Beaumont Police Dep’t (Jan. 30, 2002) (“If you subscribe, the first phase of the manual development requires that you (or your assigned staff member) [] simply complete the questionnaire and return it at your earliest convenience.”).

80. Letter from Dan Merkle, CEO, Lexipol, to Bob Gustafson, Captain, City of Orange Police Dep’t (Oct. 20, 2003) (on file with authors).

81. For example, an official from the Los Angeles Port Police Department explained in responding to our public records request that his agency modified the Lexipol policies before accepting them so that they would match the agency’s practices. Telephone Interview by Ingrid Eagly with Lt. Kevin McCousky, L.A. Port Police Dep’t (Dec. 1, 2016).

82. LEXIPOL, LEXIPOL STYLE GUIDE 3 (2015), http://www.lexipol.com/wp-content/uploads/2016/10/StyleGuide_2015.pdf [<https://perma.cc/H59U-W6D7>].

83. Lexipol September Conference Call, *supra* note 9.

84. E-mail from Tim Kensok, Vice President, Prod. Mgmt., Lexipol, to authors (Sept. 13, 2017, 7:27 AM) (on file with authors) (“We would not be able to give you a copy of the entire policy guide.”). Kensok did suggest that we could try to get a policy guide from one of Lexipol’s subscribers through our public records requests, but the company reported that it would not provide us with a copy of its copyrighted materials. *See id.*

85. After Lexipol informed us of the existence of a “policy guide,” we followed up with several California agencies to request a copy, but none were provided.

86. Telephone Interview by Joanna Schwartz with Matthew Roth, Detective, Custodian of Records, Fontana Police Dep’t (Oct. 2, 2017).

87. Lexipol September Conference Call, *supra* note 9. Lexipol executives told us that they are working to make it easier for customers to access the policy guide. *Id.*

comprehensive policy [I]t is unlikely that you will want to modify it to any great extent.”⁸⁸

The Lexipol-issued policy manuals we reviewed from California law enforcement agencies follow a nearly identical format.⁸⁹ After an initial page concerning the law enforcement code of ethics and a page for a mission statement, there is a table of contents that covers the role of law enforcement officers, the organizational structure of the department, general operations, patrol operations, traffic operations, investigation operations, equipment, support services, custody, and personnel.⁹⁰ Each section has several policies, and each policy has an identical numbering system and title. For example, Policy 310 concerns “Officer-Involved Shootings and Deaths”; Policy 402 concerns “Racial- or Bias-Based Profiling”; and Policy 1014 concerns “Sick Leave.”

2. *Daily Training Bulletins.*—Daily Training Bulletins (DTBs) are the second principal component of the Lexipol platform. The company describes DTBs as a system of short “training scenarios” that give departments and officers the ability to understand their policies and apply them in practice.⁹¹

The concept of short daily trainings is based on founder Gordon Graham’s philosophy that “every day is a training day.”⁹² The approach focuses on “high risk, low frequency events” that, according to Lexipol, “pose the greatest risk to agencies and their personnel.”⁹³ DTBs are made available to agency personnel via any web-enabled device, including a mobile phone, in-car computer, or desktop computer.⁹⁴ Company executives informed us that each DTB training is designed to be completed in only two

88. SANTA CLARA POLICE DEPARTMENT POWERPOINT, *supra* note 75, at 10.

89. In this project, we do not analyze the California departments’ policy manuals to assess the frequency or extent to which departments customize Lexipol’s California state master policies. Lexipol has informed us that its subscribers change, on average, 20% of the manual text, but the company has not assessed whether or to what extent those changes are substantive. *See infra* note 212 and accompanying text.

90. *See, e.g.*, BREA POLICE DEPARTMENT: POLICY MANUAL 3–6 (2016) (on file with authors).

91. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 29.

92. Rachel Cisto, *City Cleaning Up Tax Rules*, DAILY NEWS-RECORD (Mar. 7, 2016), http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=15B7618C0ED53208&p_docnum=129 [<https://perma.cc/C88G-CE6B>].

93. ROSEMARIE CURRAN, LEXIPOL OVERVIEW FOR BEVERLY HILLS POLICE DEPARTMENT: CALIFORNIA LAW ENFORCEMENT POLICY MANUAL AND DAILY TRAINING BULLETINS 9 (2016) (on file with authors); *see also* Agreement Between Lexipol and Reedley Police Dep’t for Use of Daily Training Bulletins (Aug. 18, 2014), http://www.reedley.com/departments/city_clerk/agreements_contracts_and_leases/PDFs/Lexipol%20Addendum%20to%20Online%20Subscription%20Agreement%20-%20August%202014.pdf [<https://perma.cc/3VZA-U3B8>] (offering a subscription to Lexipol’s DTB online training program and describing its design and features).

94. SECOND LEXIPOL POWERPOINT, *supra* note 9, at 4.

minutes.⁹⁵ They explained that this is because two minutes of daily training—which amounts to one hour per month and twelve hours per year—is sufficient to satisfy minimum police training requirements set by some states' Peace Officer Standards and Training (POST) organizations.⁹⁶

95. *Id.* (clarifying that two-minute trainings add up to an hour per month and twelve hours per year, the minimum that state-required police officer standards and trainings (POST) require).

96. *Id.*; see also Lexipol, *Four Ways to Integrate Policy into Police Training*, <http://www.lexipol.com/news/4-ways-to-integrate-policy-into-police-training/> [https://perma.cc/3X6J-LTJ2] (asserting that law enforcement agencies in Kansas and Utah have used Lexipol's DTBs to satisfy their states' POST requirements). California's POST requires that its law enforcement officers complete at least twenty-four hours of training every two years. See CAL. CODE REGS. tit. 11, § 1005 (2017) (requiring that "[e]very peace officer . . . satisfactorily complete the CPT requirement of 24 or more hours of POST-qualifying training during every two-year CPT cycle"). Yet, we learned through our public records requests that California's POST has twice declined to certify Lexipol as a provider of state-approved trainings for California law enforcement agencies. See *infra* notes 219–224 and accompanying text for further discussion of the reasons California's POST declined to certify Lexipol DTBs as sufficient to satisfy their training requirements.

Figure 2: A Lexipol Daily Training Bulletin⁹⁷

Daily Training Bulletin - Review Question
8 / 1 / 2007

Please answer the following question, and submit your response using the button at the bottom of the page.
You may change your answer at any time prior to submission.

DEADLY FORCE (Furtive Movements)

While patrolling late one night, you monitor a BOLO broadcast on a vehicle containing multiple armed robbery suspects. The suspects committed a robbery of a convenience store, killing the clerk with a shotgun. Several minutes later, you observe the suspect vehicle turn in front of you, in a remote part of the city. You begin following the vehicle and advise dispatch of its location. Before backup officers arrive, the vehicle abruptly stops at the right curb of the highway. You stop behind the vehicle, at which time the suspects begin looking in your direction and making numerous furtive movements within the vehicle.

ISSUE: An officer may use deadly force to protect him or herself or others from what they reasonably believe would be an immediate threat of death or serious bodily injury.

- True
 False

REFERENCE: 300 DEADLY FORCE APPLICATIONS

ANALYSIS:

Policy and law allow an officer to use deadly force to protect him or herself or others from what they reasonably believe would be an immediate threat of death or serious bodily injury. When determining whether or not to apply any level of force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration. In this worst-case scenario, you are suddenly confronted with a potential threat of death or serious bodily injury. Any evaluation of the use of deadly force must include whether or not the threat was immediate. Because you are outnumbered by armed suspects without backup officers present, you should take immediate steps, consistent with your training, to place yourself in a position of cover. Although the use of deadly force would not be immediately appropriate in this situation, the circumstances could rapidly change if the suspects were to exit their vehicle and/or display a weapon. Another tactical option to consider in this scenario would have been to continue driving past the suspect vehicle once it stopped at the right curb. Apprehension can then be accomplished after sufficient resources arrive on scene to better protect the safety of officers and citizens.

CONCLUSION:

This scenario represents a high-risk, low frequency event. It is recognized that officers are expected to make split-second decisions and that the amount of an officer's time available to evaluate and respond to changing circumstances may impact his/her decision. Constant training in tactics and policy is the key to ensuring a successful resolution.

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Figure 2 contains a sample DTB taken from Lexipol's promotional materials. According to Lexipol's founding CEO Dan Merkle, DTBs follow "the well-respected 'IRAC' (Issue, Rule, Analysis, Conclusion) method of

97. Figure 2 was obtained from the San Joaquin Sheriff's Office in response to our public records request.

training commonly used in law schools.”⁹⁸ Using this standardized IRAC format,⁹⁹ all DTBs begin with a three to four sentence scenario that could occur in the field.¹⁰⁰ Next, the DTB provides the number of the Lexipol policy that guides police decisionmaking in the scenario.¹⁰¹ The officer is asked to respond to a multiple choice or true/false question that highlights application of the policy to the scenario.¹⁰² Finally, the DTB provides a short analysis of why the policy applies and summarizes the learning objective for the training.¹⁰³

For those departments that choose to supplement their Lexipol policy manuals with DTBs, officers can receive one of these short trainings each day during roll call. As Deputy Chief of the Simi Valley Police Department explains in an advertisement on Lexipol’s web page: “It can be challenging for the supervisor to come up with relevant topics for roll call training, but having the DTBs gives us a pool of topics to choose from.”¹⁰⁴ Lexipol keeps a record of each officer’s participation in the training exercises.¹⁰⁵

3. *Implementation Services.*—In addition to the policy manual and DTBs, Lexipol offers departments a range of consulting services to assist in implementing and managing their Lexipol products.¹⁰⁶ For example, agencies

98. Letter from Dan Merkle, CEO, Lexipol, to Paul Cappitelli, Director, California Commission on Peace Officer Standards and Training (June 4, 2009) (on file with authors).

99. See LEXIPOL STYLE GUIDE, *supra* note 82, at 5–7 (describing the standard style format for Lexipol’s DTBs).

100. Letter from Martha Berezky, *supra* note 78.

101. *Id.*

102. *Id.*; see also MIKE DIMICELI & ALAN DEAL, CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, REPORT ON APPEAL OF LEXIPOL TO POST COMMISSION 9, JULY 7, 2009 (on file with authors) [hereinafter POST LEXIPOL REPORT] (noting that the Commission reviewed paper versions of the DTBs and all contained a “single true/false question at the end”).

103. Letter from Martha Berezky, *supra* note 78.

104. Shannon Pieper, *Simi Valley Police Department: Q&A with Deputy Chief John McGinty*, LEXIPOL (May 17, 2016), <http://www.lexipol.com/casestudycategory/law-enforcement/page/2/> [<https://perma.cc/WV2Z-QRVW>].

105. Lexipol February Conference Call, *supra* note 59; see also Letter from Dan Merkle, *supra* note 98, at 2 (explaining that “[a]ll DTBs and all training records are retrievable from Lexipol’s searchable database”).

106. *Implementation and Management Services*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-products/implementation-management-services/> [<https://perma.cc/RE9K-HWTY>]. In a call with company executives, they explained that implementation services have been offered since 2014 and that currently about half of their new customers purchase at least some implementation services. For example, for a few thousand dollars, Lexipol will provide the agency with a “cross-reference” guide that compares its current manual to the Lexipol guide. Full implementation services, which give the agency access to a “team of people over an 18-month period,” might cost as much as \$200,000. Lexipol executives did not provide us with information about the total number of law enforcement clients that have purchased these services. Lexipol September Conference Call, *supra* note 9.

can hire Lexipol to draft custom policies based on specific needs, as well as to ensure that departments' DTBs are consistent with any custom policies that the departments have modified.¹⁰⁷ Agencies can choose between a basic "silver plan" that provides a "quick start," or go with a "platinum" plan that will "help with implementation."¹⁰⁸ As a Lexipol executive told the Beverly Hills Police Department in 2016, departments can retain a "Project Manager" to "facilitate" the "entire project" and "do all the heavy lifting when it comes to edits, linking policy to procedure and anything else you would need."¹⁰⁹

4. *Cost.*—The cost of a Lexipol subscription varies significantly depending on the size of the agency and the services purchased. The initial start-up cost for the first year generally includes access to the policy manual, policy updates, and DTBs. The cost of a basic subscription to the Lexipol service depends upon the size of the agency. For example, Lexipol charged the Calaveras County Sheriff's Office, which has fifty deputies, \$8,600 for the first year of services;¹¹⁰ Lexipol's proposal to the Simi Valley Police Department for up to 150 full-time sworn officers priced the first year at \$15,150.¹¹¹ The larger Long Beach Police Department, which is no longer a Lexipol client,¹¹² was quoted \$24,950 for up to 820 full-time sworn officers.¹¹³

Once an agency adopts the Lexipol manual, it can choose to subscribe to Lexipol's updating service, as well as its Daily Training Bulletins, for an additional fee.¹¹⁴ Subscribers to the updating service will periodically receive revised policies from Lexipol.¹¹⁵ When departments accept these policy

107. See generally LEXIPOL, LEXIPOL DTB AND POLICY MANUAL UPDATE ADMINISTRATION SERVICES (2015) (on file with authors) (provided by the San Leandro Police Department).

108. E-mail from Bill McAuliffe, Operations Manager, Lexipol, to Tony Lee, Beverly Hills Police Dep't (Nov. 18, 2016, 1:41 PM) (on file with authors).

109. *Id.*

110. Agreement Between Lexipol and Calaveras Cty. Sheriff's Office for Use of Subscription Material (Aug. 1, 2015) (on file with authors).

111. LEXIPOL, LAW ENFORCEMENT POLICY MANUAL & DAILY TRAINING BULLETINS: PRESENTED TO SIMI VALLEY POLICE DEPARTMENT 7 (2014) (on file with authors).

112. E-mail from Tim Kensok, *supra* note 84 (advising authors that Long Beach Police Department is no longer a Lexipol client); Letter from Robert G. Luna, Chief, Long Beach Police Dep't, to Peter Roth, Chief Customer Officer, Lexipol (Jan. 12, 2016) (on file with authors) (cancelling Lexipol subscription).

113. LONG BEACH PROPOSAL, *supra* note 72, at 7.

114. Praet Deposition, *supra* note 31, at 10–11 (explaining that the "updating component" Lexipol offers "is something that most agencies don't have the resources for").

115. See, e.g., LEXIPOL, POLICY MANUAL UPDATE: RELEASE NOTES 1 (June 2013) (on file with authors) (provided by the Folsom Police Department) [hereinafter FOLSOM UPDATE] (describing "a list of recommended changes and updates to your manual"); see also Telephone Interview by Joanna Schwartz with Lon Milka, Captain, Rocklin Police Dep't (Nov. 8, 2016) (explaining that when Rocklin began working with Lexipol in 2004, Lexipol would send out an

revisions, they are incorporated automatically into the existing policy manual.¹¹⁶ Again, prices for these services vary based on the size of the department. For example, the Simi Valley Police Department (which has 127 sworn officers) was quoted \$13,250 for ongoing updates and DTBs,¹¹⁷ while the Long Beach Police Department (which has 968 sworn officers) was quoted \$64,500.¹¹⁸

Beyond these standardized services, jurisdictions can pay additional fees for consulting services. For example, the Baltimore (Maryland) Police Department paid Lexipol \$340,000 in 2013 for “overhauling the manual providing the basis for Standard Operating Procedures and providing professionally created training bulletins.”¹¹⁹ Similarly, the New Orleans Police Department (NOPD) paid Lexipol \$295,000 to help develop policies required by the Department of Justice following a civil rights investigation of the NOPD.¹²⁰

Sometimes the costs for Lexipol are partly or wholly covered by municipal insurers.¹²¹ More often, local jurisdictions pay for Lexipol’s

updated manual every six months, but now Lexipol uses software that sends out individual amended policies every few weeks to be accepted or rejected by the jurisdiction).

116. See FOLSOM UPDATE, *supra* note 115, at 1 (“Each time you accept an update the new content will automatically replace your current content for that section of your manual.”); Telephone Interview with Lon Milka, *supra* note 115.

117. LEXIPOL, TERMS AND CONDITIONS FOR USE OF SUBSCRIPTION MATERIALS (2014) (on file with authors) (provided by the Simi Valley Police Department).

118. E-mail from Tammie Stilinovich, Officer, Long Beach Police Dep’t to Randy Allan (Feb. 26, 2014, 10:06 AM) (on file with authors).

119. Justin Fenton & Doug Donovan, *Use of Local Foundation Allowed Baltimore Police Surveillance Project to Remain Secret*, BALT. SUN (Aug. 25, 2016), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-community-foundation-20160824-story.html> [<https://perma.cc/EY7J-YJZA>].

120. Charles Maldonado, *Paying for the Consent Decree*, GAMBIT (Aug. 14, 2012), <https://www.bestofneworleans.com/gambit/reform-at-a-cost/Content?oid=2057022> [<https://perma.cc/5VYT-V62X>].

121. See, e.g., E-mail from Cathie Bigger-Smith, Risk Control Consultant, to Steve Pangelinan, Commander, Milpitas Police Dep’t (Apr. 22, 2008, 7:12 AM) (on file with authors) (reporting that the municipal insurer—the Association of Bay Area Governments—would cover the cost of Lexipol for the Milpitas Police Department); Invoice from Lexipol to Porterville Police Dep’t (June 1, 2016) (on file with authors) (noting that the DTB subscription service and management service invoice was “Paid by CSJVRMA [the Central San Joaquin Valley Risk Management Authority]”); E-mail from Brenda Haggard, Assistant City Clerk, City of Elk Grove, to Ingrid Eagly (Feb. 13, 2017, 9:37 AM) (on file with authors) (“The City does not directly contract with Lexipol; rather, the City is a member of the Northern California Cities Self Insurance Fund (NCCSIF), who provides various services to the City, including on-line policy services via Lexipol.”); see also John Rappaport, *Cops Can Ignore Black Lives Matter Protestors. They Can’t Ignore Their Insurers*, WASH. POST (May 4, 2016), https://www.washingtonpost.com/opinions/cops-can-ignore-black-lives-matter-protesters-they-cant-ignore-their-insurers/2016/05/04/c823334a-01cb-11e6-9d36-33d198ea26c5_story.html?utm_term=.0d4b1e53381c [<https://perma.cc/BJ4K-VKQ9>] (“Insurers work closely with police departments on policies and training. . . . The companies sometimes bring in outside consultants—usually police veterans—to do this work or send departments off-the-shelf rules from policy-writing services such as Lexipol.”). For further discussion of the role insurance plays in police reform—and

products directly through their general city or county budgets,¹²² or through the law enforcement agency's budget.¹²³ One jurisdiction reported using forfeiture funds to pay Lexipol.¹²⁴

C. Sales Techniques

Lexipol LLC engages in an aggressive marketing campaign with its potential customers. The company hosts booths at government and law

in the proliferation of Lexipol policies—see *infra* notes 133–134, 149, 179, 266–269 and accompanying text.

122. See, e.g., Lexipol Bill to the City of San Leandro (June 30, 2011) (on file with authors) (reflecting that the cost of Lexipol's online policy manual should be billed to the finance department of the City of San Leandro and delivered to the San Leandro Police Department); Purchase Order from the City of Oxnard, to Lexipol (Jan. 19, 2016) (on file with authors) (billing the city for the police department's contract with Lexipol); Centralized Purchase Order from the Cty. of Ventura Gen. Servs. Agency, to Lexipol (Nov. 20, 2009) (on file with authors) (billing the county for Lexipol subscription materials to be shipped to the sheriff's department); Purchase Order from the City of Riverside, Fin. Dep't—Purchasing Div., to Lexipol (Mar. 16, 2011) (on file with authors) (billing the city for a Lexipol subscription service to update the police department manual); Purchase Order from the Cty. of San Joaquin, Purchasing & Support Servs., to Lexipol (Sept. 12, 2008) (on file with authors) (paying Lexipol invoice for the sheriff's department from the county budget); Purchase Order from the City of Corona, Purchasing Div., to Lexipol (July 1, 2006) (on file with authors) (billing the city for a Lexipol subscription for the police department); Purchase Order from the City of Richmond, Accounts Payable, Fin. Dep't, to Lexipol (Jan. 20, 2016) (on file with authors) (listing the City of Richmond as the "bill to" addressee for Lexipol's contract with the Richmond Police Department); Purchase Order from the City of El Monte to Lexipol (Mar. 14, 2007) (on file with authors) (billing the police department's Lexipol contract price to the City of El Monte); Check from the City of Newport Beach to Lexipol (June 22, 2007) (on file with authors) (paying \$4,950 out of city funds to Lexipol); Purchase Order from the City of Roseville, Purchasing Dep't, to Lexipol (Mar. 14, 2016) (on file with authors) (paying the Lexipol invoice on behalf of the city's police department); Check from the City of Rialto, to Lexipol (Aug. 25, 2006) (on file with authors) (making a payment of \$8,950 to Lexipol out of city funds).

123. See, e.g., Cty. of Madera Board Letter Approving Lexipol Contract (Feb. 23, 2016) (on file with authors) (seeking authorization to purchase Lexipol's service, with funds coming from the sheriff's department's budget); E-mail from Kristie Velasco, Fin. Office Prof'l, Santa Barbara Sheriff's Dep't, to Craig Bonner, Commander, N. Cty. Operations Div. (July 8, 2016, 11:38 AM) (on file with authors) (obtaining approval to have the sheriff's department pay the invoice for Lexipol); Purchase Order from the City of Glendale, to Lexipol (Sept. 5, 2007) (on file with authors) (billing the police department for Lexipol's policy service); E-mail from Suzanne Perez, City of Irvine, to Mike Hallinan, Commander, City of Irvine Police Dep't (Apr. 18, 2016, 12:19 PM) (on file with authors) (indicating that Irvine's "OPD will handle payment" and that police department funds have been used "in the past"); E-mail from Deirdre Rockefeller-Ramsey, Police Bus. Manager, Fremont Police Dep't, to John Harnett, Lieutenant, Fremont Police Dep't (Feb. 8, 2016, 2:17 PM) (on file with authors) (indicating that the police department will budget \$5,750 for Lexipol services).

124. See Memorandum from Lili Hadsell, Chief of Police, City of Baldwin Park, to the Mayor and Members of City Council, City of Baldwin Park (June 3, 2010) (on file with authors). "Forfeiture funds" are funds collected through civil forfeiture, which are sometimes used by law enforcement agencies for various needs. For further discussion of civil forfeiture, see generally Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 22 (2017).

enforcement conventions to promote its wares.¹²⁵ For example, in 2017, Lexipol representatives attended the Kansas Sheriff's Association Fall Conference, the New Jersey Association of Chiefs of Police Annual Mid-Year Meeting, and the Oregon State Sheriff's Association Annual Conference, among other conferences and events.¹²⁶ Lexipol clients who visited the Lexipol booth at the 2016 conference for the International Association of Chiefs of Police could "enter [its] drawing to win a free iPad air 2."¹²⁷

Lexipol also attracts clients by sponsoring free webinars on hot policing issues such as "Immigration Violations & Law Enforcement" or "How Not to Speak to the Media" that may encourage departments to purchase their services.¹²⁸ One e-mail sent to the Madera Police Department explained that state law "offers unprecedented protection from liability risks associated with police pursuits" but that "[m]any law enforcement agencies fall short in meeting these requirements and are exposing their cities and counties to much greater financial risk than necessary."¹²⁹ The e-mail then invited representatives of the department to attend a free thirty-minute educational webinar.¹³⁰

Some of the solicitation correspondence we collected reveals that Lexipol researches the target departments to learn about their particular law enforcement challenges. For example, in 2015 Lexipol approached the Chief of the San Francisco Police Department, writing: "I recognize the current challenges your department is facing. I reviewed your policies and they are severely outdated and insufficient. Case in point, you don't have a Department's Use of Social Media policy and your Use of Force policy hasn't been updated/revised since 1995."¹³¹ Lexipol provided the Chief with sample policies and a few ideas for improving his department's policies, and asked for a fifteen-minute call to discuss Lexipol's services. Similarly, a Lexipol

125. Public records from the San Francisco Sheriff proclaim that Lexipol will be at "booth 1024" at the 2016 National Sheriffs' Association Annual Conference and Exhibition. E-mail from marketing@lexipol.com, to Carl Koehler, S.F. Sheriff's Dep't (June 6, 2016, 12:01 PM) (on file with authors); *see also* E-mail from Nicole Falconer, Account Manager, Lexipol, to Christian Lemoss, Lieutenant, City of Santa Cruz Police Dep't (Oct. 13, 2016, 10:59 PM) (on file with authors) (inviting Lemoss to come by Lexipol's booth at the International Association of Chiefs of Police Convention in 2016).

126. *Event Calendar*, LEXIPOL, <http://www.lexipol.com/event-calendar/> [<https://perma.cc/4VZD-GBJZ>].

127. E-mail from Nicole Falconer, *supra* note 125.

128. *Lexipol Webinars: Timely, Free Education on Important Issues*, LEXIPOL, <http://www.lexipol.com/webinars/> [<https://perma.cc/HDU2-WRV5>].

129. E-mail from John Fitisemanu, Senior Account Exec., Lexipol, to undisclosed recipients (Oct. 5, 2015, 2:40 PM) (on file with authors) (provided by the Madera Police Department).

130. *Id.*

131. E-mail from John Fitisemanu, Senior Account Exec., Lexipol, to Greg Suhr, Chief of Police, S.F. Police Dep't (May 28, 2015, 5:03 PM) (on file with authors).

Client Services Representative reached out to the Chief of the Beverly Hills Police Department to complement him for “the amazing manner in which” his officers “presided over the Trayvon Martin protests recently,” before going on to warn that “with recent racial tensions rising, now would be the perfect opportunity to re-examine ways Lexipol can help ensure the safety of your officers to avoid any potential risks.”¹³²

Lexipol also appears to have directed its advertising to municipal liability insurers that provide liability insurance to small governments. Our research has revealed that insurance companies will sometimes reduce their annual premium for cities that contract with Lexipol, or even pay outright for their insureds’ Lexipol contracts.¹³³ In California, for example, more than 100 law enforcement agencies are given access to Lexipol as a benefit of their insurance agreement with one large insurer, the California Joint Powers Insurance Authority.¹³⁴

Lexipol has a standard sales pitch that was repeated in communications with multiple California jurisdictions. The message describes the high costs of “[o]utdated [p]olicy and [l]ack of [t]raining,” measured in “Increased Risk and Liability to Deputies, Department and Community,” “Damaged [sic] to Reputation, Negative news Headlines and/or Viral Footage,” “Lawsuits,” “Legal Fees,” “Settlements,” “Injury and/or Death,” and “Distrust with the Community.”¹³⁵ Lexipol’s solicitation e-mails to department officials include catchy taglines such as “Are Outdated Policies Putting Your Agency at Risk?,”¹³⁶ “Is Your Use of Force Policy Properly Protecting You?,”¹³⁷ and

132. E-mail from John Fitisemanu, Client Servs. Representative, Lexipol, to David L. Snowden, Chief of Police, Beverly Hills Police Dep’t (July 29, 2013, 2:09 PM) (on file with authors).

133. See, e.g., Pub. Agency Risk Sharing Auth. of Cal., *Training Resources*, PARSAC, <http://www.parsac.org/services/trainingresources/> [<https://perma.cc/F8VW-G64D>] (“[Public Agency Risk Sharing Authority of California] subsidizes each member’s subscription to Lexipol . . .”).

134. See Alex Mellor, *Legislative Update: Law Enforcement Must Report Details on Shootings and Uses of Force Under New California Law*, CAL. JPIA (Jan. 2016), <https://cjpia.org/news/newsletter/newsletter-article/2016/01/28/january-2016—issue-47#four> [<https://perma.cc/MP67-4QTL>] (reporting that in January 2009, Lexipol and CJPIA entered a “strategic business partnership . . . whereby the California JPIA funds the cost of a member’s participation in the Law Enforcement Policy Manual Update and Daily Training Bulletin subscriptions”); Cal. Joint Powers Ins. Auth., *Members*, CAL. JPIA, <https://www.cjpia.org/join/members> [<https://perma.cc/X5TD-JQ67>] (listing over 100 member agencies in California).

135. E-mail from James Quanico, S.F. Sheriff’s Dep’t, to Mark Nicco, S.F. Sheriff’s Dep’t (Nov. 21, 2016, 1:02 PM) (forwarding e-mail from Lexipol Senior Account Executive John Fitisemanu, with the subject line “The Cost of Policies?”); see also *About Lexipol*, LEXIPOL, <http://www.lexipol.com/about-us/> [<https://perma.cc/ALA5-L7WM>] (click on video) (promoting Lexipol’s service as allowing police, fire, and custody departments to have “up-to-date policies” that will “protect your agency today” by offering “legally defensible content”).

136. E-mail from marketing@lexipol.com, *supra* note 125.

137. *Id.*

“What is the Cost of Outdated Policy and Lack of Training?”¹³⁸ After attracting the attention of top officials, Lexipol makes a web-based or in-person presentation to the department that highlights the Lexipol approach and the benefits of entering into a contract with Lexipol.¹³⁹ Lexipol may also make presentations to city council or other government officials who make the ultimate decision about whether to purchase Lexipol’s services.

Although Lexipol describes many different types of risk in its marketing materials, liability risk plays the central role. As Lexipol’s CEO Dan Merkle stressed in a letter to Captain Bob Gustafson of the Orange Police Department, the value in Lexipol’s service is that it provides “[p]olicies that are court tested and successful in withstanding the numerous legal challenges prevalent today.”¹⁴⁰ Lexipol constantly warns its potential customers that without Lexipol they are at risk of having their outdated policies turn up “downstream in litigation” and make the day for “plaintiff’s lawyers.”¹⁴¹ In a document prepared for the Chula Vista Police Department, Lexipol summed up why its clients choose Lexipol this way: “Law Enforcement agencies by their nature are a high frequency target for litigation. It is the most compelling reason why our customers choose our services.”¹⁴²

Lexipol does not outline the precise ways in which updated policy manuals will reduce liability risk, but it does report that its products have in fact “helped public safety agencies across the country reduce risk and avoid litigation.”¹⁴³ In a PowerPoint presentation offered to several departments in our study, Lexipol included a slide (reproduced as Figure 3) claiming that adoption of Lexipol policies was associated with reduced litigation costs. According to the slide, Lexipol’s Oregon clients that “fully adopted” Lexipol reportedly had a 45% reduction in the “frequency of litigated claims” and a 48% reduction in the “severity of claims paid out,” as compared to nonparticipating agencies.¹⁴⁴

138. E-mail from John Fitisemanu, Senior Account Exec., Lexipol, to James Quanico, S.F. Sheriff’s Dep’t (Feb. 24, 2016, 4:28 PM) (on file with authors).

139. See, e.g., E-mail from Rosemarie Curran, Senior Account Exec., Lexipol, to Rob Ransweiler, Admin. Lieutenant, El Cajon Police Dep’t (Oct. 26, 2016, 10:05 AM) (on file with authors) (setting up a web-based “go to meeting” regarding Lexipol’s services as part of their marketing to the department).

140. Letter from Dan Merkle, CEO, Lexipol, to Bob Gustafson, Captain, City of Orange Police Dep’t (Oct. 20, 2003) (on file with authors).

141. GORDON GRAHAM, REAL RISK MANAGEMENT: AN EXCLUSIVE ARTICLE SERIES BROUGHT TO YOU BY LEXIPOL (pt. 2) 5 (2016), http://www.lexipol.com/wp-content/uploads/2016/06/Lexipol_Real_Risk_Management_Part_2.pdf [<https://perma.cc/FY3T-BJ88>].

142. LEXIPOL, INDEMNIFICATION RATIONALE (n.d.) (on file with authors) (provided by the Chula Vista Police Department).

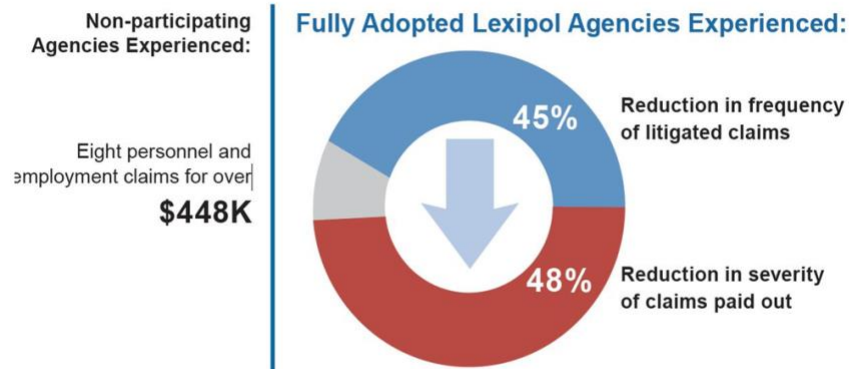
143. Donna Thompson, *Ilion Board OKs Policy Service for Police*, TIMES TELEGRAM (Dec. 22, 2015), <http://www.timestelegram.com/news/20151222/ilion-board-oks-policy-service-for-police> [<https://perma.cc/7AU3-WTLH>].

144. See CURRAN, *supra* note 93, at 13.

Figure 3: Lexipol Risk Management Analysis¹⁴⁵

LEXIPOL RISK MANAGEMENT ANALYSIS

5-years post-implementation (Oregon)



13

COMPREHENSIVE, DEFENSIBLE POLICY AND DAILY TRAINING

Lexipol
PREDICTABLE IS PREVENTABLE™

Other Lexipol promotional materials tout similar litigation-cost savings. Materials provided to the San Francisco Police Department in 2016 quoted one risk management association as saying this about Lexipol: “Two years post-Lexipol implementation, perhaps the most positive trend is that Lexipol users have 69% fewer litigated claims compared to pre-Lexipol implementation. And, the claims that are litigated have, on average, \$7k paid out instead of \$20k pre-Lexipol.”¹⁴⁶ A company press release from 2014 claimed that “a 10-year third-party study demonstrated a 54% decrease in litigated claims and a 46% reduction in liability for agencies that adopted Lexipol.”¹⁴⁷ Lexipol additionally provided us with marketing materials that tout “37% fewer claims,” “45% reduced frequency of litigated claims,” “48% reduction in severity of claims,” and “67% lower incurred costs.”¹⁴⁸ Lexipol’s

145. Figure 3 was obtained from the Beverly Hills Police Department in response to our public records request. *Id.*

146. LEXIPOL, THE LEXIPOL ADVANTAGE: LAW ENFORCEMENT 2 (n.d.) (emphasis omitted) (on file with authors) (provided by the San Francisco Police Department).

147. Chris Witkowsky, *Riverside Company Acquires Lexipol*, PE HUB NETWORK (Aug. 22, 2014), <https://www.pehub.com/2014/08/riverside-company-acquires-lexipol/> [<https://perma.cc/4JXW-42AP>].

148. E-mail from Tim Kensok, *supra* note 84 (attaching a slide reportedly used by Lexipol’s marketing staff titled “Proven Customer Results”).

promotional materials identify insurance company claims data as the source for these findings, but Lexipol provided us with no dataset, study, or other evidence to support these assertions by the company.¹⁴⁹

Lexipol's marketing materials also contain detailed testimonials of jurisdictions explaining why they chose to adopt Lexipol. The justifications offered repeatedly echo Lexipol's claims that its products insulate jurisdictions from liability. For example, Sheriff Blaine Breshears of the Morgan County Sheriff's Office in Utah explains in an advertisement on Lexipol's website that after attending "a class taught by Lexipol co-founder and risk management expert Gordon Graham," he became concerned that his outdated policy manual "could actually be a serious liability."¹⁵⁰ After adopting Lexipol, however, Sheriff Breshears successfully defended his agency against a use of force lawsuit: "[A]s soon as the attorneys discovered that we have Lexipol, they said, 'We won't have an issue there.' Our policies were never in question."¹⁵¹

In the records we obtained from 200 California jurisdictions, we found that several departments justified the cost of Lexipol's products with claims that Lexipol's policies would protect them from possible lawsuits. The Chief of Police of the City of Baldwin Park explained in a memo to the Mayor and City Council that "[n]ot having an updated policy manual [from Lexipol] could result in litigation against the city."¹⁵² The Riverside Police Department similarly told the City's Purchasing Division that without Lexipol it risked "continuing to fall behind as court decisions, laws, and law enforcement practices change. This deficiency can potentially expose the City, Department, and Officers to unnecessary liability and harm."¹⁵³ And the City of South San Francisco's Chief of Police told the Mayor and City Council that Lexipol would "assist in mitigating any litigation that is related to the policies of the Police Department."¹⁵⁴

In addition to litigation-risk reduction, Lexipol promotes its products as cost effective by saving jurisdictions the time and money of developing their own policies. Lexipol repeatedly noted in its promotional materials that

149. Indeed, it is unclear whether any of these data are available. A Lexipol executive reported that he "plan[s] to do some additional work with our [Risk Management Association] partners to drive toward a more statistically defensible correlation of claims to excellence in policy management and training on policy." *Id.*

150. *Morgan County (UT) Sheriff's Office*, LEXIPOL, <http://www.lexipol.com/casestudytype/morgan-county-ut-sheriffs-office/> [<https://perma.cc/MP3V-CLXK>].

151. *Id.*

152. Memorandum from Lill Hadsell, Chief of Police, City of Baldwin Park, to the Mayor and Members of City Council, City of Baldwin Park (June 3, 2010) (on file with authors).

153. CITY OF RIVERSIDE, JUSTIFICATION OF SOLE SOURCE/SOLE BRAND REQUEST 2 (n.d.) (on file with authors) [hereinafter RIVERSIDE PD SOLE SOURCE JUSTIFICATION].

154. Staff Report from Mark Raffaelli, Chief of Police, City of S. S.F., to the Mayor and City Council, City of S. S.F. 2 (Feb. 28, 2007) (on file with authors).

agencies would spend far more than Lexipol's modest subscription cost to write and update policing policies on their own.¹⁵⁵ As Lexipol warned the Long Beach Police Department during contract negotiations: "A fully burdened officer can cost an agency upward of \$100K in salary and benefits. Most small to mid-sized agencies assign one officer to update and maintain their policy manual, which can consume 50% to 80% of the officer's time."¹⁵⁶ In case studies on Lexipol's website, chiefs of small agencies explain that they did not have the capacity to create and maintain policies on their own and applaud Lexipol for providing up-to-date policies in a cost-effective manner.¹⁵⁷ Several California departments in our study justified their adoption of the Lexipol service in similar terms. For instance, the Riverside Police Department told city officials charged with approving the Lexipol contract that "the salary savings realized over having Department personnel research the constantly changing legal requirements and make the needed policy changes, would likely far exceed the cost of this service."¹⁵⁸

D. Growth

Lexipol does not publish a list of its clients and refused to provide us with a list of its clients.¹⁵⁹ However, the company regularly makes public statements about the number of law enforcement and other public safety agencies that use Lexipol policies and boasts of the growing number of states that the company now services. In order to chart the company's growth, we

155. Lexipol describes the high cost to a department to develop a "Legal[], Defensible Policy Manual and an Online Training Program," and asserts that "Lexipol's services are offered at a fraction of the cost, by way of an annual subscription fee, thus allowing us to pass along savings to departments." E-mail from John Fitisemanu, *supra* note 138.

156. LONG BEACH PROPOSAL, *supra* note 72, at 4.

157. For example, the Police Chief from Midland, Michigan, says:

It just makes good sense to me to have experts overseeing our policy manual as opposed to relying on myself to track the case law and the legislation. This will make the maintenance part very easy. What I see happening in most departments is that the manual gets done but then it doesn't get updated for 10 years. Here, if something changes, we get notified, and then we review the updates and add them. And that frees up my time.

Midland (MI) Police Department, LEXIPOL, <http://www.lexipol.com/casestudytype/midland-mi-police-department/> [<https://perma.cc/2B67-TRNE>]. Similarly, a Lieutenant from Bonners Ferry, Idaho observes:

Small departments like mine don't have . . . a legal team or a policy/procedure division. We have only ourselves—seven people who are responsible for the department. With Lexipol, we have a resource we can go to if we have questions, and we know our policies stay current. It's an easy decision to make as far as cost.

Bonners Ferry (ID) Police Department, LEXIPOL, <http://www.lexipol.com/casestudytype/bonners-ferry-id-police-department/> [<https://perma.cc/DM5Z-GWP9>].

158. RIVERSIDE PD SOLE SOURCE JUSTIFICATION, *supra* note 153, at 3.

159. See E-mail from Tim Kensok, *supra* note 84 (refusing to provide a list of clients in California).

collected the company's own statements from press releases, the company's web page, news articles, and marketing materials provided by Lexipol clients in response to our public records requests.

Our research reveals that the company has grown from forty California-based agencies in 2003 to 3,000 public safety agencies across thirty-five states in 2017.¹⁶⁰ This astronomical growth has been mainly focused on police and sheriff's departments, but also includes fire departments and other public safety agencies.¹⁶¹ Table 1 reports these data in two-year increments.

Table 1: Lexipol's Growth, by Agencies and States (2003–2017)¹⁶²

<i>Year</i>	<i>Agencies</i>	<i>States</i>
2003	40	1
2005	200	2
2007	500	4
2009	1,000	10
2011	1,100	12
2013	1,500	15
2015	2,000	25
2017	3,000	35

160. According to information we obtained from Lexipol, the only states in which its product is not yet active are Alaska, Arkansas, Connecticut, Hawaii, Kentucky, Maine, Mississippi, Nebraska, New Hampshire, New Mexico, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. LEXIPOL, LEXIPOL LIVE DATES (Sept. 13, 2017) (on file with authors); *see also* FIRST LEXIPOL POWERPOINT, *supra* note 33, at 13 (stating that in 2003, Lexipol had about forty agency clients).

161. Lexipol executives informed us that 2,500 of its current 3,000 clients are police departments and sheriff's departments. Lexipol September Conference Call, *supra* note 9.

162. The following sources were relied on to compile Table 1: FIRST LEXIPOL POWERPOINT, *supra* note 33, at 13 (stating that in 2003, when Lexipol was founded, it was only in California and had about forty agency clients); *Lexipol (from Latin: Law Enforcement Policy)*, LEXIPOL, <http://plan.abag.ca.gov/rmm/rmm/pobp/Police%20-%20Lexipol%20Service.pdf> [<https://perma.cc/5BER-BMMY>] ("Over two hundred law enforcement agencies operate from our policy manual system . . ."); Press Release, Lexipol, Lexipol Launches Custody Policy Manual and Daily Training Bulletin Service in Idaho (July 15, 2011), <https://globenewswire.com/news-release/2011/07/15/451250/226510/en/Lexipol-Launches-Custody-Policy-Manual-and-Daily-Training-Bulletin-Service-in-Idaho.html> [<https://perma.cc/FRX8-QKXZ>] (explaining that in 2005, Lexipol expanded into Idaho); *id.* (noting that in 2011, Lexipol served more than 1,100 law enforcement agencies in twelve states); Memorandum, Lexipol, Lexipol's Position on Contractual Indemnification (Jan. 2008) (on file with authors) (provided by Rohnert Park Police Department) [hereinafter Lexipol's Position on Contractual Indemnification] (reporting that Lexipol then had over 500 clients in four states); Report of Bruce D. Praet at 1, *Mitz v. City of Grand Rapids*, No. 1:09-cv-365, 2009 WL 6849914 (W.D. Mich. Oct. 21, 2009) (reporting that by 2009, Lexipol was used by almost 1,000 agencies in ten states); Letter from Paul Workman, Chief of Police, City of Laguna Beach, to the Honorable Thomas J. Borris, Presiding Judge, Orange Cty. Super. Ct. (Sept. 3,

Not surprisingly, Lexipol enjoys a strong market presence in California, where the company began. Lexipol executives claim that as many as 95% of California law enforcement agencies now have their policies written by Lexipol.¹⁶³ Our public records requests to the 200 largest police and sheriff's agencies in California reveal that only twenty-six agencies (13%) are independent, meaning that they create their own policy manuals and have no relationship with Lexipol. The 174 remaining departments—or 87% of our sample—purchase Lexipol's services or receive them through their insurer. Of these 174 agencies, all but eight have adopted a copyrighted Lexipol policy manual for their police or sheriff's department.¹⁶⁴

We also find that the smaller agencies are especially likely to use Lexipol's products. Among agencies with 1,000 or more officers, only 20% subscribe to Lexipol. In contrast, among agencies with fewer than 100 officers, 95% subscribe to Lexipol. The complete results of this size-based analysis are displayed in Table 2.

Table 2: Lexipol Subscriptions Among the 200 Largest Police and Sheriff's Departments in California, by Agency Size (2017)¹⁶⁵

<i>Agency Size</i>	<i>Number of Agencies</i>	<i>Lexipol Subscribers</i>
1,000+	10	2 (20%)
500–999	10	5 (50%)
200–499	27	23 (85%)
100–199	57	53 (93%)
71–99	49	46 (94%)
48–70	47	45 (96%)

2013), http://www.ocgrandjury.org/pdfs/2012_2013_reports/Laguna%20Beach%20Police%20Department090313.pdf [https://perma.cc/ZEL3-WZGS] (“Lexipol provides a comprehensive policy program for . . . more than 1,500 law enforcement agencies throughout 15 states.”); Praet Deposition, *supra* note 31, at 7–10 (testifying that in 2015, Lexipol was used by approximately 2,000 agencies across twenty-five states); *Proud Partner of the Louisiana Fire Chiefs Association*, LEXIPOL, <http://info.lexipol.com/louisiana-fire-chiefs> [https://perma.cc/VWJ2-DPTK] (claiming that Lexipol is “[t]rusted by more than 3,000 public safety agencies in 35 states”).

163. See *supra* note 7 (collecting sources).

164. As we develop further, these eight departments have a hybrid arrangement with Lexipol, whereby they produce their own manual with no Lexipol copyright stamp but have an agreement to consult with Lexipol on policy development. See *infra* note 253 and accompanying text.

165. In Table 2, “Agency Size” measures the number of sworn officers in the department. We include in Table 2 the eight “hybrid” jurisdictions that subscribe to Lexipol but produce a manual without a Lexipol copyright stamp. Additional information about the California law enforcement agencies that have adopted Lexipol is provided in the Appendix.

In 2010, Lexipol was ranked the twenty-fourth fastest-growing private company in Orange County, California.¹⁶⁶ In 2012, Lexipol was ranked 387 on Deloitte's Technology Fast 500, "a ranking of the 500 fastest growing technology, media, telecommunications, life sciences and clean technology companies in North America."¹⁶⁷ Lexipol was purchased by The Riverside Company in 2014.¹⁶⁸ The Riverside Company describes Lexipol as a company with "tremendous opportunity for growth due to a largely untapped market."¹⁶⁹ Riverside plans to help Lexipol expand into new states and offer clients additional risk management services.¹⁷⁰

II. The Significance of Lexipol

Although there are other private, nonprofit, and government entities that draft police policies, Lexipol is now a dominant force in police policymaking across the country. Lexipol has saturated the market in California and provides its services to more than 3,000 public safety agencies in thirty-five states across the country. There is every reason to expect that Lexipol will play a controlling role in police policymaking in more states in the future.

Lexipol has achieved a goal that has proven elusive—disseminating and updating police policies for thousands of law enforcement agencies. Lexipol's business model appears to be the key to its growth. Lexipol has successfully marketed its policy and training products as risk management tools that can insulate police and sheriff's departments from liability. The company has also promoted its policies and trainings as being of higher quality than local jurisdictions could create on their own—the products are available online, are state-specific, are updated to reflect changes in governing law and best practices, and allow jurisdictions to track when their employees have viewed policies and completed trainings. Lexipol's products are therefore viewed as money-savers twice over—they reduce the cost of creating comparable policies and trainings, and those policies and trainings reduce the cost of litigation. Lexipol's service has been particularly popular

166. Michael Lyster, *Fast-Growing Privates: \$12B in Sales, Growth of 23%*, ORANGE COUNTY BUS. J., Oct. 25, 2010, at 12.

167. Press Release, Lexipol, Lexipol Is Proud to Be Selected as a Deloitte Technology Fast 500(TM) Award Winner for 2012 (Nov. 14, 2012), <https://globenewswire.com/news-release/2012/11/14/505171/10012576/en/Lexipol-is-Proud-to-Be-Selected-as-a-Deloitte-Technology-Fast-500-TM-Award-Winner-for-2012.html> [<https://perma.cc/ZPE6-23C6>].

168. Witkowsky, *supra* note 147. See generally *About*, RIVERSIDE, <https://www.riversidecompany.com/About.aspx> [<https://perma.cc/T3HV-AS78>] ("The Riverside Company is a global private equity firm focused on making control and non-control investments in growing businesses valued at up to \$400 million.")

169. Press Release, Riverside Co., Riverside Trains Its Eyes on Lexipol (Aug. 22, 2014), <http://www.riversideeurope.com/es/News%20and%20Media/Press%20Releases/Lexipol%20-%20Acquisition%20News%20Release> [<https://perma.cc/CF6Y-ZFUK>].

170. *Id.*

with smaller jurisdictions that lack the personnel or resources to create and update their own policies and trainings. Mayors, city councils, and insurers have been willing to pay Lexipol's fees, apparently convinced that they more than pay for themselves given the litigation and risk management savings associated with Lexipol's products.

Yet Lexipol's approach appears to run contrary to the purposes, values, and processes recommended by two generations of advocates for police policymaking. In this Part, we consider three main areas of divergence: Lexipol's unwavering focus on liability risk management, its lack of transparency, and its privatization of the policymaking role.

A. *Liability Risk Management*

Police policies have long been viewed as a means of regulating officers' vast discretion. When President Lyndon B. Johnson's National Crime Commission studied policing practices in 1967, it found that police did have some internal rules.¹⁷¹ However, the few rules that existed were "mostly of a housekeeping character—how to wear the uniform, how to carry the gun, whether to scribble a report in triplicate or in quadruplicate, and what to do with the copies."¹⁷² Police manuals did not address "the hard choices policemen must make every day."¹⁷³ That is, they did not resolve how officers should exercise discretion in high-frequency scenarios, such as "whether or not to break up a sidewalk gathering, whether or not to intervene in a domestic dispute, whether or not to silence a street-corner speaker, whether or not to stop and frisk, whether or not to arrest."¹⁷⁴ The end result was that police engaged in policymaking in an ad hoc way as they went about their work, rather than answering to a centralized set of rules when making the important discretionary decisions inherent to policing.

Scholars and policing experts in the 1950s and 1960s hoped that comprehensive police policies would give an officer "more detailed guidance to help him decide upon the action he ought to take in dealing with the wide range of situations which he confronts and in exercising the broad authority

171. THE PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 103 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/J2QE-626K>] [hereinafter CRIME IN A FREE SOCIETY] ("Many police departments have published 'general order' or 'duty' or 'rules, regulations, and procedures' manuals running to several hundred pages.").

172. Davis, *supra* note 18, at 712.

173. CRIME IN A FREE SOCIETY, *supra* note 171, at 103.

174. *Id.* As Kenneth Culp Davis famously explained in his classic text on the topic: "The police . . . make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second." KENNETH CULP DAVIS, POLICE DISCRETION 222 (1975).

with which he is invested.”¹⁷⁵ Internal policies could also help to achieve “uniformity” in police conduct within an agency, including by ensuring that when “individual police officers confront similar situations, they will handle them in a similar manner.”¹⁷⁶ Today, scholars and experts echo concerns from half a century ago about the need to guide police discretion and the potential for comprehensive police policies to serve that role.¹⁷⁷

Lexipol has a different set of goals and values that guide its approach to police policymaking. While scholars and experts have long viewed police policies as a means of limiting officer discretion, Lexipol appears to view its products primarily as a means of reducing legal liability. Lexipol relentlessly markets its products to jurisdictions by arguing that it will decrease the number of claims brought against police departments and the amount that jurisdictions pay in settlements and judgments in cases that are filed. We do not condemn Lexipol for focusing on limiting liability risk—its claim that Lexipol policies reduce financial liability appears to be a powerful selling point for local jurisdictions and insurers that purchase its services.¹⁷⁸ We also recognize that efforts to reduce liability risk will sometimes lead to the same policy prescriptions as efforts to constrain officer discretion.¹⁷⁹ But Lexipol’s focus on reducing liability risk is sometimes in tension with longstanding efforts to guide and restrict officer discretion through police policies.

175. Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1128 (1967).

176. Gerald F. Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 4 (1973); see also Caplan, *supra* note 18, at 504 (“At the very least, the promulgation of policy will serve to reduce the uneven enforcement that now characterizes so much of street policing.”).

177. See *supra* note 19 (collecting citations).

178. For example, the City of Fresno includes the claim that Lexipol’s policies reduce legal liability in its signed agreement with Lexipol. See Agreement Between City of Fresno and Lexipol for Consultant Services 1–2 (Dec. 1, 2005) (on file with authors) (agreeing that the policies that Lexipol will create for the city “are court tested and successful in withstanding legal challenges”); see also *supra* notes 140–148, and accompanying text (describing claims of liability risk reduction made in promotional materials to several agencies).

179. Research by John Rappaport and Joanna Schwartz underscores that municipal liability insurers’ financial incentives to reduce legal liability can sometimes lead them to demand policing improvements aimed at reducing misconduct. See Rappaport, *supra* note 3, at 1543–44 (“[A]n insurer writing police liability insurance may profit by reducing police misconduct. Its contractual relationship with the municipality gives it the means and influence necessary to do so—to ‘regulate’ the municipality it insures.”); Schwartz, *supra* note 3, at 1207 (“[O]utside insurers have a uniquely powerful position from which they can demand improvements in policing.”). Indeed, municipal liability insurers’ financial incentives may make them better situated than self-insured municipalities to push for these types of policing reforms. See *id.* at 1203–04 (finding that the costs of lawsuits have no financial consequences for the majority of law enforcement agencies in self-insured jurisdictions); *id.* at 1205–06 (“Contrary to the assumption that insurance creates moral hazard, public entity risk pools may take greater efforts than self-insured jurisdictions to reduce liability risk. . . . [P]ublic entity risk pools can place financial pressures on law enforcement agencies that self-insured governments may be unwilling or unable to replicate.”).

This tension can be seen in recent debates about use of force policies. Over the past few years, several groups—including the Fraternal Order of Police, the International Association of Chiefs of Police, the Police Executive Research Forum (PERF), academics, and nonprofit advocacy organizations—have recommended new policing policies to reduce unnecessary and excessive use of force.¹⁸⁰ Included in this approach are policies requiring that police use de-escalation techniques with suspects, refrain from shooting into moving vehicles, and intervene if another officer might use excessive force.¹⁸¹ Although Lexipol’s California state master policy manual contains some of these concepts,¹⁸² Lexipol has issued a series of public statements critical of these recently issued model use of force policies because language in these policies restricts officers’ discretion in ways that could expose them to legal liability.

Soon after several prominent law enforcement groups issued a National Consensus Policy on Use of Force, Lexipol’s founding partner, Bruce Praet, posted an article to Lexipol’s website titled *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*.¹⁸³ Praet cautioned law enforcement agencies against adopting several of the model policies because they used the word “shall.” Although the model policies’ use of “shall” was presumably geared to constrain officer discretion, Praet discouraged agencies from adopting that language because plaintiffs’ attorneys would “highlight” that type of language as a way of showing that officers had violated policy.¹⁸⁴ According to Praet, the need to shield officers from liability is “why Lexipol policy clearly defines the difference between

180. See *infra* note 181. For other efforts by academics and nonprofits to draft model rules, see *infra* notes 305–309 and accompanying text.

181. See, e.g., NATIONAL CONSENSUS POLICY ON USE OF FORCE 3–4 (2017), http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf [<https://perma.cc/SS9A-QFE3>] [hereinafter NATIONAL CONSENSUS] (requiring that officers use de-escalation when possible, prevent other officers’ use of excessive force, and refrain from shooting at moving vehicles); POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 40–41, 44, 74–75 (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> [<https://perma.cc/RH4L-D8Y3>] [hereinafter PERF GUIDING PRINCIPLES] (same); *Limit Use of Force*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/force/> [<https://perma.cc/6G82-29JA>] (advocating for police policies that would ban shooting at moving vehicles and require de-escalation before use of force).

182. See, e.g., CALIFORNIA STATE MASTER POLICE DEPARTMENT: POLICY MANUAL, *supra* note 61, at 44, 48 (Policy 300.2.1 “Duty to Intercede,” Policy 300.4.1 “Shooting at or From Moving Vehicles”). Lexipol does not appear to include a policy of de-escalation, though it alludes to the concept in its policy manual as a benefit of kinetic energy projectiles, see *id.* at 61, and one of the skills of a Crisis Negotiation Team, see *id.* at 279.

183. Bruce D. Praet, *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*, LEXIPOL (Jan. 25, 2017), <http://www.lexipol.com/news/use-caution-when-changing-use-of-force-policy-language/> [<https://perma.cc/UR2T-DUH2>].

184. *Id.*

‘shall’ and ‘should’ and cautions against the unnecessary use of ‘shall.’”¹⁸⁵ Lexipol posted an article by a police chief offering a similar admonition against adopting a model use of force policy recommended by PERF that prohibited shooting at moving vehicles. His argument against the model policy was also based on limiting legal liability: “Policy language that definitively prohibits an action will inevitably result in a situation where an officer violates the policy under reasonable circumstances, which in turn can create issues that must be dealt with if litigation results.”¹⁸⁶

Bruce Praet has additionally criticized PERF for recommending that use of force policies “go beyond the legal standard of ‘objective reasonableness’ outlined in the 1989 United States Supreme Court decision *Graham v. Connor*.”¹⁸⁷ PERF’s recommendation was motivated by an interest in limiting officers’ discretion to use lethal force. As PERF explained:

[The *Graham*] decision should be seen as “necessary but not sufficient,” because it does not provide police with sufficient guidance on use of force. . . . Agencies should adopt policies and training to hold themselves to a higher standard, based on sound tactics, consideration of whether the use of force was proportional to the threat, and the sanctity of human life.¹⁸⁸

PERF’s position is consistent with decades of scholarship about the limitations of court opinions as a guide for police policymaking. Those who advocate for improved police policies are generally skeptical of the ability of courts to provide needed guidance to agencies creating police policies.¹⁸⁹ Judicial decisions do play a critically important role in police policies, as they create a floor that cannot be violated.¹⁹⁰ Because courts are focused on the

185. *Id.*

186. Michael D. Ranalli, *Counsel’s Corner: Adding Perspective to the PERF Guiding Principles on Use of Force: What Police Administrators Should Consider*, N.Y. ST. CHIEF’S CHRON., June 2016, at 7, 11, as reprinted in Michael Ranalli, *Why PERF’s Prohibition on Shooting at Vehicles Sells Agencies Short*, LEXIPOL (Dec. 7, 2016), <http://www.lexipol.com/news/why-perfs-prohibition-on-shooting-at-vehicles-sells-agencies-short> [https://perma.cc/AZQ8-V6U2] [hereinafter Ranalli, *Shooting at Vehicles*].

187. Praet, *supra* note 183; see POLICE EXEC. RESEARCH FORUM, 30 GUIDING PRINCIPLES 1 (2016), <http://www.policeforum.org/assets/30guidingprinciples.pdf> [https://perma.cc/3ZD2-UNCQ] (discussing *Graham v. Connor*, 490 U.S. 386 (1989), a seminal Supreme Court opinion that defines what force is unreasonable and in violation of the Fourth Amendment).

188. POLICE EXEC. RESEARCH FORUM, *supra* note 187, at 1.

189. See, e.g., Friedman & Ponomarenko, *supra* note 19, at 1832, 1865 (describing courts as “completely inadequate” for the task of regulating police behavior). An insightful recent article by Anna Lvovsky provides additional historical context for the inadequacies of courts in this arena: the longstanding deference to “police expertise” that has made courts presume that police decisions are necessarily based on reliable “expert” knowledge. See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

190. For example, the Warren Court’s criminal procedure decisions, such as *Mapp* and *Miranda*, arguably “initiated” police rulemaking by addressing “previously unregulated aspects of routine police procedures” related to searches and interrogations. Walker, *supra* note 16, at 12, 15.

constitutionality of officer behavior, their decisions will, by definition, articulate the bare minimum that officers must do to avoid violating the Constitution.¹⁹¹ However, due to their “case-by-case and relatively intuition-laden” approach, courts are not necessarily well-situated to articulate best practices.¹⁹² As a result, most experts agree that police policymaking should draw from multiple sources, including input from local community members regarding their experiences with police, best practices recommended by policing experts, research about the impact of various policies, and analyses of the costs and benefits of different approaches.¹⁹³

In contrast to decades of scholarship on the subject, Praet has criticized the notion that police use of force policies should “go beyond” the requirements announced by the Supreme Court in *Graham*. He writes:

Several years ago, our forefathers decided that there would be nine of the finest legal minds in the country who would interpret the law of the land. For almost 30 years, law enforcement has learned to function under the guidance of the Supreme Court’s “objective reasonableness” standard. What would happen if each of the 18,000+ law enforcement agencies in the United States formulated their own standard “beyond” *Graham*?¹⁹⁴

To be sure, Lexipol’s policies are not solely guided by court decisions. Lexipol makes clear in its promotional materials that some of its policies are inspired by what it calls “best practices” that are not mandated by statutes or court decisions.¹⁹⁵ But use of force policies raise a different question for policymakers: When there is a court decision or statute that prohibits certain officer behavior, and expert opinion that recommends additional restrictions on officer behavior, should the policy conform to the court decision or to the higher standard recommended by experts? Statements by Praet and other

191. As administrative law scholar Kenneth Culp Davis asked decades ago: “If the Supreme Court has stated the minimum requirements of the Constitution, how can the police change anything unless they are willing to go above the minimum?” Davis, *supra* note 18, at 712.

192. Slobogin, *supra* note 17, at 117.

193. Barry Friedman and Maria Ponomarenko describe the need for additional information to supplement judicial decisions in this way:

[F]ew believe it makes sense for courts to be the primary supervisors of police agencies, particularly because judicial review is almost exclusively about constitutionality. Governing policing involves a host of prior questions: Are policing policies and procedures properly vetted? Are they efficacious? What harms do they impose? Do they make sense from a cost-benefit perspective? In short, largely neglected by courts and constitutional law are the very questions that concern us most with regard to the work of other agencies.

Friedman & Ponomarenko, *supra* note 19, at 1832.

194. Praet, *supra* note 183.

195. See, e.g., *Law Enforcement: Custom Policy Content*, LEXIPOL, <http://www.lexipol.com/law-enforcement> [<https://perma.cc/GQ83-EEAH>] (describing Lexipol’s policy content as “based on federal and state statutes, case law and law enforcement best practices”).

Lexipol spokespeople about use of force suggest that Lexipol's focus on liability risk management may cause it to draft policies that maximize officer discretion and hew closely to court decisions when such decisions exist—and that those inclinations may conflict with experts' views on best practices.

Lexipol's focus on liability risk management may influence its product design in other ways. For example, Lexipol promotes its officer DTB training program as focused on “high-risk, low-frequency behaviors” including use of force, use of electronic control devices, vehicle and foot pursuits, and crisis intervention incidents.¹⁹⁶ According to Lexipol, its DTB trainings are designed to be “a cost effective training delivery method that serves as a substantial safety net” against lawsuits.¹⁹⁷ Yet, although low-risk, high-frequency events—such as traffic stops and searches—are less likely to result in litigation,¹⁹⁸ such events threaten other risks, including risks to community safety and trust in the police. As John Rappaport has observed, a focus on reducing liability risk may shortchange other important areas of police activity.¹⁹⁹

Lexipol's focus on liability risk management may also cause it to design products that reduce the frequency with which plaintiffs sue or the amount they recover without reducing the occurrence of the underlying harms. For example, Lexipol has designed its policy and training software so that officers can “acknowledge” that they received updated policies and participated in Lexipol's trainings.²⁰⁰ According to the company, this acknowledgement protocol can help in litigation, as it provides evidence that

196. See, e.g., Ranalli, *Shooting at Vehicles*, *supra* note 186; see also Letter from Dan Merkle, *supra* note 98, at 2 (“The primary focus of the DTBs are those high/risk, low/frequency events that can get an agency and/or an officer into trouble.”).

197. Dan Merkle, CEO, Lexipol Daily Training Bulletins (DTBs): Request for California POST Certification 2 (undated) (on file with authors).

198. In one important exception, the Center for Constitutional Rights brought a federal class action lawsuit against the City of New York challenging the New York Police Department's stop-and-frisk practices as unconstitutionally relying on racial profiling. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). For additional background on the *Floyd* litigation, see Sunita Patel, *Policing the Police: The Potential of Public Law Injunctions* (manuscript on file with authors).

199. See John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369, 375–83, 399–404 (2016) (describing how financial risk prompts municipal liability insurers to focus on reducing “high-dollar, short-tail” claims, like excessive force, while overlooking “low-dollar” claims—like investigatory stops and racial profiling claims—and “long-tail” claims—like wrongful convictions).

200. See, e.g., *How It Works*, LEXIPOL, <http://www.lexipol.com/how-it-works/> [<https://perma.cc/X6KY-6K5L>] (“Lexipol's Knowledge Management System (KMS) is easy to use and allows your agency to customize policy content to fit your needs. Features include easy editing of policies, electronic policy acknowledgement, and reports that quickly enable you to document whether officers have completed training and reviewed new or updated policies.”).

officers were informed and trained on the policies.²⁰¹ Yet we found no corresponding marketing materials suggesting that Lexipol designs its trainings to improve officer understanding of harmful practices by drilling down on these challenging topics, or that the two-minute training format is well-suited to achieve these goals.

Finally, Lexipol's focus on risk management appears to influence the ways in which the company evaluates the efficacy of its policies. Lexipol consistently promotes its policies as reducing the frequency of lawsuits and the cost of settlements and judgments. The marketing materials we obtained make specific claims about the reduction in such costs enjoyed by subscribers.²⁰² But Lexipol does not make any claims about whether its products advance other important policing goals, such as enhanced trust within communities or fewer deaths of persons stopped by the police.²⁰³ Also notably absent is any claim about whether Lexipol's products reduce the frequency with which police officers engage in unconstitutional conduct that does not frequently result in litigation.²⁰⁴ Lexipol's decision to focus on liability risk management makes sense; it certainly has been an effective marketing strategy with local governments. Nevertheless, this focus threatens to crowd out other values that can be advanced through police policies.

Because Lexipol does not publicly disclose information about its drafting process, it is impossible to know the extent to which liability risk management interests have influenced drafting choices for individual policies, decisions about which trainings to develop, or assessments of policy efficacy. Nonetheless, the evidence we have collected suggests that Lexipol's policies and trainings may differ in meaningful ways from those proposed by policing experts and researchers and that Lexipol's focus on liability risk management may explain at least some of those differences.

B. *Secret Policymaking*

Proponents of police reform have long recommended that police policies be created through a transparent, quasi-administrative process.

201. See, e.g., *FAQs*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-faqs/> [<https://perma.cc/APU7-KE7D>] ("Lexipol recommends that all personnel take every DTB, as it links to the policy manual, encourages continuous training and serves as a record of training for potential litigation."); see also Letter from John Fitisemanu, Client Servs. Representative, Lexipol, to Tammie Stilinovich, Officer, Long Beach Police Dep't (Feb. 28, 2014) (noting that DTB reports are archived and that these records can be used for litigation).

202. See, e.g., *supra* Figure 3; see also *supra* notes 144-148 and accompanying text.

203. For New York City's efforts to measure community trust in its police department, see Al Baker, *Updated N.Y.P.D. Anti-Crime System to Ask: 'How We Doing?'*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/nyregion/nypd-compstat-crime-mapping.html> [<https://perma.cc/36XR-2MBS>].

204. See Rappaport, *supra* note 199, at 385-91 (observing that insurers can help improve policing but will be focused only on those types of behaviors deemed liability risks).

Beginning in the 1950s and 1960s, commentators advocated for an administrative rulemaking process whereby proposed policies would be subject to notice and comment by the public.²⁰⁵ As President Johnson's 1967 Commission explained, "the people who will be affected by these decisions—the public—have a right to be apprised in advance, rather than ex post facto, what police policy is."²⁰⁶ Ideally, policies would also be evaluated after enactment by law enforcement officials, researchers, and the public.²⁰⁷

Today, scholars are again calling for an administrative rulemaking process that encourages police to develop detailed policies that are subject to notice and comment and some manner of judicial review.²⁰⁸ Contemporary commentators have also emphasized—perhaps even more forcefully than their predecessors—that any administrative police rulemaking process should directly engage community members and that policies should be tailored to the particular circumstances and interests of the community.²⁰⁹

205. See, e.g., Caplan, *supra* note 18, at 509 (supporting "openness" and "public examination" of proposed police department policies which "invites publicity and community reaction and insures that policy can be easily challenged in the courts," which will "promote the production of sophisticated, balanced policy positions"); see also *supra* note 18 and sources cited therein.

206. CRIME IN A FREE SOCIETY, *supra* note 171, at 104–05.

207. *Id.*; Amsterdam, *supra* note 18, at 423, 427; Caplan, *supra* note 18, at 509; Davis, *supra* note 18, at 717.

208. See *supra* note 19 and sources cited therein.

209. See, e.g., PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 20 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/BC9G-P4VA>] (recommending that law enforcement agencies "should collaborate with community members to develop policies and strategies in communities and neighborhoods disproportionately affected by crime" and emphasizing that community members need to be included in these discussions because "what works in one neighborhood might not be equally successful in every other one"); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 2 (2009) (contending that when departments provide "inadequate training and policy guidance to officers" and fail to incorporate "public feedback," they facilitate or encourage misconduct); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000) ("Empowering citizens through access to government information and by giving them a voice in the decisionmaking process is not only more democratic, but has the potential to establish a basis for trust in otherwise distrusting communities."); Miller, *supra* note 19, at 525 (promoting giving "local communities and disadvantaged individuals a more meaningful voice in evaluating and checking local police policy"); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 794, 796, 802 (2016) (highlighting the benefits of community engagement in police policymaking as a reform strategy); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 409 (2010) (explaining that community engagement in police policymaking on the front end "may create not only better substantive reforms, but may also increase the legitimacy of the ultimate police reforms implemented in a particular jurisdiction"); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407 (2016) (revealing how copwatching is a form of civic engagement in which "groups of lay people come together to contest police practices through observation, recording, and dialogue"); cf. Bell, *supra* note 28, at 2144 (arguing that administrative rulemaking procedures will not on their own "unsettle legal estrangement in the communities that are most affected" by police abuse and

Advocates for these more democratic processes contend that they can lead to more effective policies and enhance the perceived legitimacy of policing.²¹⁰ Increasingly, police departments are incorporating these democratic ideals into their policymaking processes: In 2015, several law enforcement leaders signed on to a Statement of Democratic Principles, organized by New York University (NYU) School of Law's Policing Project, which included a commitment to a rulemaking process that incorporates robust community engagement.²¹¹

Lexipol's policymaking process departs considerably from the transparent, quasi-administrative policymaking processes recommended by scholars and policing experts and adopted by some law enforcement agencies. Instead of policies crafted locally and with community input, policies created by Lexipol are based on a uniform state template. Lexipol's standardization of policymaking is one of the reasons that the private service has been so commercially successful. But its approach runs contrary to that recommended by experts and embraced by some law enforcement agencies.

Lexipol does not preclude local jurisdictions from seeking out the types of community engagement and deliberation that scholars and experts recommend, or tailoring Lexipol policies to reflect local values and interests. In this Article, we have not examined the extent to which local jurisdictions modify Lexipol's standard policies to reflect local values and interests, or whether jurisdictions are engaging community members in the customization process.²¹² But several aspects of Lexipol's structure make us wary of simply assuming that jurisdictions will seek public input or modify policies based on their own needs once they have made the decision to give the policymaking job to Lexipol. First, Lexipol provides local jurisdictions with little information about the reasons for its policy choices, which makes it difficult for subscribers to make informed decisions about whether to adopt Lexipol's policies. Lexipol's statewide master manual does identify whether a policy is required by law, a best practice, or discretionary.²¹³ But the manual contains no explanation of what evidence Lexipol considers when designing its

that such processes should therefore be combined “with other democracy-enhancing reforms” such as providing more transparency on police practices).

210. See sources cited *supra* note 209.

211. POLICING PROJECT: NYU SCH. OF LAW, STATEMENT OF PRINCIPLES ON DEMOCRATIC POLICING 3 (2015), <https://policingproject.org/wp-content/uploads/2016/05/Policing-Principles.pdf> [<https://perma.cc/YLC8-PJ58>].

212. Lexipol executives provided us with data suggesting that approximately 60% of customers change less than 20% of their Lexipol policy manuals. SECOND LEXIPOL POWERPOINT, *supra* note 9, at 16. The remaining 40% of customers change 20% or more of Lexipol's manuals. *Id.* But Lexipol has not examined the extent to which its customers' modifications are cosmetic—changing the name of the law enforcement agency, for example—or more substantive.

213. See *supra* Figure 1 and accompanying text.

policies, why Lexipol makes particular drafting decisions, or whether there are other plausible alternative policies.

The other materials Lexipol provides to its customers are similarly unilluminating. We used the Public Records Act to request all information that the California agencies had regarding their relationship with Lexipol. What we typically obtained was Lexipol's standard police manual, a contract, and evidence of payment. Many jurisdictions also had marketing information that they received from Lexipol, e-mail exchanges, and PowerPoint presentations from Lexipol executives. Some had internal memoranda justifying local jurisdictions' decisions to purchase Lexipol's service rather than continue to write their own policy manuals. Some had materials from Lexipol that described amended policies and the rationale for the amendments (generally a change in the law). But none of the departments produced materials from Lexipol that described the evidentiary basis for policies, drafting decisions by the company, or the existence of alternative approaches.

The Lexipol executives with whom we spoke reported that, since 2008, jurisdictions have also had access to policy guides that offer general background information about policies. Yet the fact that no jurisdictions provided us with such guides—and a detective from one jurisdiction, when asked about the policy guide, said he had never seen or heard of it—confirms one Lexipol vice president's view that these guides are “well-kept secrets” and difficult for departments to access online.²¹⁴ Moreover, we are skeptical that these guides—even if widely available—would provide much information to agencies about Lexipol's policy decisions. Lexipol declined to provide us with a copy of its policy guide, but it did provide us with a single page of the guide regarding body camera video, and that page provided little basis by which a Lexipol customer could assess the sensibility of Lexipol's policy choices in this area.²¹⁵

Even when local jurisdictions seek out information from Lexipol about the bases for its policy-drafting decisions, Lexipol reveals scant information about its choices. For example, a sergeant at the Irvine Police Department e-mailed Lexipol, seeking information about several aspects of Lexipol's use of force policy, including:

1. Where did the definition of Force come from? Has it changed over time? I know there is not one agreed upon definition as it applies to UoF policy, but was wondering where your definition came from.

214. *See supra* notes 86–87.

215. *See infra* notes 259–261 and accompanying text (describing the substance of the page we received).

2. Is the lethal force policy verbiage based on federal standards? It varies slightly from ours, primarily because it includes the word imminent. The definition of imminent is broadly defined to include preventing a crime. Was the Lexipol wording derived from case law that includes “imminent” as it is defined in your policy?²¹⁶

The sergeant explained in his message that the Irvine Police Department has its own policy manual but uses Lexipol to “augment” its policies, and that he was reviewing Lexipol’s policies to see whether and how they should adjust their own manual.²¹⁷ The Lexipol representative responded quickly to the sergeant’s questions but offered no specifics about its use of force policy choices, writing only: “The force definitions are based on federal guidelines as well as the deadly force section. This policy has changed over time with the changes in laws and case decisions. The ‘imminent’ wording again is based on the federal guidelines.”²¹⁸ Although the sergeant took this laudable step to discover additional information about Lexipol’s standardized policy, the company offered him minimal guidance.

Our research uncovered similar concerns regarding the claims that Lexipol makes about its DTB trainings. Although Lexipol promises that its two-minute trainings and “every day is training day” philosophy will save subscribers money and reduce exposure to lawsuits, we found no empirical support for these claims. Indeed, citing a litany of concerns, California’s Commission on Peace Officer Standards and Training (POST) twice declined to certify Lexipol’s DTBs as sufficient to satisfy their minimum standards for state law enforcement training.²¹⁹ Among other concerns, the Commission cited a “[l]ack of evidence or feedback to indicate the information [in Lexipol’s DTBs] is understood or can be applied.”²²⁰ According to the Commission staff, the true/false format of the extremely brief DTBs provides no “proof of learning” or “degree of assurance that the information would be applied in a unique situation, i.e., beyond the single scenario included in the

216. E-mail from Barry Miller, Sergeant, Irvine Police Dep’t, to Greg Maciha, Lexipol (Aug. 4, 2015, 11:22 AM) (on file with authors).

217. *Id.*

218. E-mail from Greg Maciha, Lexipol, to Barry Miller, Sergeant, Irvine Police Dep’t (Aug. 4, 2015, 1:41 PM) (on file with authors).

219. POST LEXIPOL REPORT, *supra* note 102, at 2–3 (reviewing the history of Lexipol’s unsuccessful attempts to gain state certification from the Commission for its DTBs, beginning informally in 2004, and later resulting in two formal denials in 2006 and 2009). Lexipol appealed this decision pursuant to Commission Regulation 1058 but lost the appeal. *See* Letter from Paul A. Cappitelli, Executive Director, Commission on Peace Officer Standards and Training, to Dan Merkle, CEO, Lexipol (July 27, 2009) (on file with authors) (“It is the decision of the Commission to deny your appeal and affirm the actions of POST staff and the Executive Director to deny certification of the Daily Training Bulletin.”).

220. POST LEXIPOL REPORT, *supra* note 102, at 3.

DTB.”²²¹ Moreover, the DTBs do not include clear “learning objectives,” do not ensure that students will actually read the information contained in the DTBs, are entirely “stand-alone trainings” not supported by “the assistance or guidance of an instructor,” and fail to provide opportunities for “practice or feedback.”²²² The fact that the DTBs are “part of a wholly proprietary subscription service” and distributed by a “private, for-profit company” also weighed heavily in the Commission’s decision to decline certification of the trainings.²²³ In particular, the Commission found it troubling that it would have no “oversight” over Lexipol’s privatized “content, instructional methodology, instructor competence, or effectiveness” and that non-subscribing agencies would not have access to the proprietary, fee-based trainings.²²⁴

In sum, based on the information we have been able to collect, we do not believe that Lexipol provides subscribing agencies with sufficient information for them to be able to understand what evidence Lexipol has consulted when crafting its policies and trainings, the rationale for its drafting decisions, or whether there are diverging opinions about best practices in a given area. Even if a jurisdiction tries to deviate from the standard-issue Lexipol policies or trainings, it must address structural aspects of Lexipol’s products that make it burdensome to customize. For example, Lexipol’s update service automatically overrides client customization. The Lexipol policy manual updates repeatedly caution subscribers that “[e]ach time you accept an update the new content will automatically replace your current content for that section/subsection of your manual,” meaning that “if you have customized the section/subsection being updated you will lose your

221. Letter from Paul A. Cappitelli, Executive Director, Commission on Peace Officer Standards and Training, to Steve Peeler, Training Director (Apr. 20, 2009) (on file with authors); *see also* POST LEXIPOL REPORT, *supra* note 102, at 9 (“The single true/false question at the end of each DTB assesses only whether the student is able to read the questions but does not, by itself, assess whether the concept is understood or can be applied. Whether or not the student has read the DTB, the chance of selecting the correct answer is 50/50. If the incorrect answer is selected online, no corrective feedback or remediation is necessary because the correct answer is obvious. True/false questions are widely determined to be inherently unsound as a stand-alone assessment.”).

222. POST LEXIPOL REPORT, *supra* note 102, at 2–3, 7–9.

223. Letter from Paul A. Cappitelli, *supra* note 221.

224. Letter from Michael C. DiMiceli, Assistant Exec. Dir., Cal. Comm’n on Peace Officer Standards and Training, to Steve Foster, Lexipol LLC (May 2006) (on file with authors); POST LEXIPOL REPORT, *supra* note 102, at 10 (“[T]he DTB program is a wholly proprietary, fee-based subscription service of Lexipol. It is directly connected to their foundational policy manual service. Certification of the DTB limits training credit solely to Lexipol customers and, if certified, the training would not be available to non-subscribing officers and agencies. Limiting training and credit to subscribers of a proprietary service is a significant departure from long-standing Commission policy.”).

specific changes.”²²⁵ The fact that Lexipol’s DTB trainings are all based on the standard policies is another impediment to customization. Jurisdictions wishing to deviate from Lexipol’s standard trainings would need to invest in creating their own training programs.

Finally, Lexipol’s subscribers purchase Lexipol’s products in part because they do not have the money or time to engage in their own rulemaking processes. Lexipol markets its service as a cost-saving tool, emphasizing that it costs less to adopt the Lexipol manual than to pay internal staff to research and develop policies on their own. And Lexipol subscribers applaud the service because it eliminates the need for police chiefs and other government officials to develop policies themselves.²²⁶ If a subscriber wanted to modify Lexipol’s standard policies, it would need to identify alternative policy language, consider the strengths and limitations of that alternative, and seek community input. Most jurisdictions that contract with Lexipol are unlikely to dedicate the time and money necessary to this project, particularly given Lexipol’s assurances that its policies reduce litigation and litigation costs so dramatically.

In this Article, we do not examine the substance of Lexipol’s policies or compare its policies to those created through the transparent, quasi-administrative processes recommended by scholars and experts and adopted by some progressive agencies. But we defer to their view that there are

225. LEXIPOL, CALIFORNIA LE POLICY MANUAL UPDATES 2 (Nov. 2016) (provided by the Modesto Police Department) (on file with authors). These update instructions also inform clients that:

If you wish to preserve your custom content, you should select “Edit ←” to manually merge the new content with your modified content. If you select “Reject Update” your customized content will not be changed. If the update is to delete an entire section/subsection and you choose “Reject Delete” the content will no longer be supported by Lexipol and the section/subsection will be shown as agency-authored content.

Id.; see also LEXIPOL, LEXIPOL POLICY MANUAL UPDATE, RELEASE NOTES 1 (June 2013) (provided by the Folsom Police Department) (on file with authors) (“**Important:** Each time you accept an update the new content will automatically replace your current content for that section of your manual.”) (emphasis in original).

226. See, e.g., Press Release, Lexipol, Lexipol Launches LE Policy Manual & Daily Training Bulletin Service in Missouri (Nov. 28, 2011), reprinted in *Lexipol Launches LE Policy Manual & Daily Training Bulletin Service in Missouri*, LAW OFFICER (Dec. 1, 2011), <http://lawofficer.com/archive/lexipol-launches-le-policy-manual-daily-training-bulletin-service-in-missouri/> [https://perma.cc/5PRE-QM8A]. Gregory Mills, Police Chief in Riverside, Missouri, explains Lexipol’s benefits:

Like most chiefs, I do not have the luxury of having a staff that can research policy issues from the legal and best practices perspectives and then translate the information into an understandable written policy But with Lexipol I don’t need to, because they do it all. Lexipol’s policy manual is complete and its updates are timely. There are many things in police management to worry about. Fortunately for me, not having up-to-date policies is no longer one of those.

Id.

democratic and perhaps substantive benefits to customization and community engagement in police policymaking. We are concerned that Lexipol's lack of transparency about its policy decisions, the difficulty of modifying Lexipol's manual, and the financial pressures faced by agencies that decide to purchase Lexipol's services discourage local agencies from evaluating the sensibility of Lexipol's policy choices, seeking community input, or modifying policies to reflect local priorities.

C. *Policymaking for Profit*

Those who have promoted police policymaking over the past several decades never considered the possibility that a private, for-profit enterprise might play such a dominant role in the creation and dissemination of police policies. Yet perhaps the rise of Lexipol should come as no surprise. Private entities have long engaged in police functions.²²⁷ Private companies have also drafted government policies, standards, and regulations.²²⁸ And more generally, private–public partnerships and hybrids have become the rule, rather than the exception.²²⁹ The growth of Lexipol and other private agencies involved in police policymaking is consistent with the privatization of law enforcement functions and the increasing privatization of government policies, standards, and regulation more generally.

Privatization scholars tend, in varying degrees, to applaud privatization as more effective and efficient than government action and to despair that privatization compromises democratic principles.²³⁰ Our study of Lexipol offers evidence to support both views. In this Article, we have not compared Lexipol's policies with those drafted by agencies and so cannot reach any firm conclusions about whether Lexipol's policies are more “effective”—by

227. See generally Sklansky, *supra* note 27. For a discussion of the ways in which private business is playing a role in policing technologies, see Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 101 (2017). Joh's examination of private surveillance technologies raises similar concerns to those we have raised here, including the dominance of one company's policy choices and secrecy about technology decisions.

228. See, e.g., Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 292–93 (2005) (describing copyrighted standards that are incorporated into substantive law); Nina A. Mendelson, *Taking Public Access to the Law Seriously: The Problem of Private Control over the Availability of Federal Standards*, 45 ENVTL. L. REP. 10776, 10776 (2015) (reporting that federal agencies have incorporated privately drafted standards into federal regulations); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995) (describing the work of ALI and other private entities that create restatements); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 502 (2013) (describing standards created by private standard-setting organizations that are incorporated into public laws).

229. See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

230. See *supra* notes 26–27 and accompanying text.

whatever metric one might use—than policies drafted by local agencies. But Lexipol subscribers quoted on Lexipol’s website appear to believe that the company’s policies are of higher quality than they could create on their own.²³¹ Lexipol’s dramatic expansion over the past fifteen years suggests a widespread belief that the company is better situated than local law enforcement agencies to perform the police policymaking function and can do so at reduced cost.

Yet our study of Lexipol also offers anecdotal support for common criticisms of privatization. As we have argued, Lexipol appears to prioritize liability risk management over other interests, and the secrecy with which it drafts its policies makes it difficult for law enforcement to understand the bases for Lexipol’s policy decisions. These observations echo concerns by privatization scholars that private companies overvalue efficiency interests and lack transparency.²³² In addition, Lexipol’s interest in making a profit creates unorthodox relationships between the policymaking company and the public police agencies that subscribe to its services.

For example, Lexipol’s standard contract with subscribers contains an indemnification clause providing that the company “shall have no responsibility or liability” to any subscriber for its products.²³³ According to Lexipol, an indemnification term is necessitated by its business model: As Lexipol explained in a memorandum to customers, removing the indemnification clause would mean that subscription prices would increase “dramatically” to account for the possibility of litigation.²³⁴ Nevertheless, Lexipol has also assured its subscribers that “Lexipol’s content has been published for agency use for over 10 years,” and “[w]e are unaware of any

231. See *supra* note 157 and accompanying text.

232. See *supra* note 27.

233. See, e.g., Lexipol, Contract with the Long Beach Police Dep’t (2013) (on file with authors); Lexipol, Contract with the City of Orange Police Dep’t (Feb. 21, 2004) (on file with authors); Lexipol, Contract with the Walnut Creek Police Dep’t (Apr. 12, 2011) (on file with authors); Lexipol, Contract with the San Ramon Police Dep’t (Aug. 13, 2006) (on file with authors); Lexipol, Contract with the Cty. of Napa (approved by Board of Supervisors Apr. 12, 2005) (on file with authors). Similarly, Lexipol has required jurisdictions to waive standard provisions in their contracts requiring vendors to pay any settlements and judgments arising out of their contract performance. See, e.g., Agreement between Lexipol and the City of Chula Vista for Use of Subscription Material (July 1, 2015) (on file with authors) (waiving the standard provision in a vendor contract for Lexipol, which requires city vendors to indemnify and hold harmless the city). Other localities similarly had to request waivers of their normal indemnification terms in order to accommodate Lexipol’s refusal to agree to this term. Agenda Item, Office of the Sheriff–Coroner, Cty. of Tulare, Approve Agreement Between the County of Tulare and Lexipol (Aug. 23, 2006) (on file with authors) (requesting that the Board approve an agreement between the County of Tulare and Lexipol, “which includes payment in advance and waiver of [the county’s] indemnification provisions”).

234. Lexipol’s Position on Contractual Indemnification, *supra* note 162.

case in which Lexipol provided content was found faulty by a court. . . . Consider that track record against any alternative.”²³⁵

Although Lexipol’s indemnification clause may make business sense for the company and for its subscribers, it creates the potential for a liability shell game when policies are faulty. A plaintiff can sue a city or county if she suffered a constitutional harm that resulted from official police policy.²³⁶ Presumably as a means of avoiding liability under this legal theory, Lexipol has repeatedly made clear that “Lexipol will never assume the position as any agency’s ‘policy-maker.’”²³⁷ In negotiations with one jurisdiction over the indemnification issue, Lexipol offered the curious rationale that it only “suggests” content and does not actually “control” the policies adopted by the agency:

We only suggest content. The agency has total control of their actual policies. The Chief will adopt the Policy Manual before it is deployed and certify that he is the Policy Maker as defined by federal requirements. Certainly the agency would not ask us to indemnify what we do not control.²³⁸

In addition, when Lexipol issues a policy update, it cautions its subscribers “to carefully review all content and updates for applicability to your agency, and check with your agency’s legal advisor for appropriate legal review before changing or adopting any policy.”²³⁹ These disclaimers about Lexipol’s policymaking role sit in stark contrast with the broader messaging by Lexipol to jurisdictions—that its policies are “legally defensible” and designed to help jurisdictions avoid litigation that will result from out-of-date

235. *Id.*

236. *See generally* *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658 (1978) (allowing municipal liability for an unconstitutional policy that causes harm).

237. Lexipol’s Position on Contractual Indemnification, *supra* note 162; *see also* Second Addendum to Agreement Between City of Fresno and Lexipol, LLC (July 23, 2015) (on file with authors) (containing an acknowledgment by the city that “neither Lexipol nor any of its agents, employees or representatives shall be considered ‘policy makers’ in any legal or other sense and that the chief executive of City will, for all purposes, be considered the ‘policy maker’ with regard to each and every such policy and Daily Training Bulletin”).

We could find only one case in which Lexipol was named as a defendant in a civil rights suit against a law enforcement agency or officer. That case alleged that Thomas Schrock died after Ontario Police, following a Lexipol policy, shot him twice with a Taser. *Schrock v. Taser Int’l, Inc.*, No. ED CV 14–02142–AB (DTBx), 2014 WL 7332112 (C.D. Cal. Dec. 19, 2014). Lexipol was voluntarily dismissed from the case after moving for summary judgment. *See* Defendant, Lexipol, LLC’s Ex Parte Application to Dismiss Lexipol, LLC and for Entry of Judgment at 3, *Schrock v. Taser Int’l, Inc.*, No. CIVDS 1408556 (Cal. Super. Ct. Apr. 28, 2016) (Bloomberg, Litigation & Dockets) (requesting Lexipol be dismissed from the case because it was not named in plaintiffs’ amended complaint). In this Article we have repeatedly relied on Bruce Praet’s deposition in that case. *See supra* note 31.

238. INDEMNIFICATION RATIONALE, *supra* note 142.

239. LEXIPOL, POLICY MANUAL UPDATE: RELEASE NOTES 1 (Dec. 2013) (provided by Cathedral City) (on file with authors).

policies. Indeed Lexipol markets its policies as a cost-savings because agencies can adopt them without modification.²⁴⁰

Lexipol, LLC's vigorous use of copyright law to protect its business interests is another troubling outgrowth of its for-profit status. Under a standard term found in all Lexipol contracts, Lexipol, rather than the contracting agency, holds the copyright to all policies.²⁴¹ Even when a law enforcement agency that contracts with Lexipol amends Lexipol's model policies, Lexipol regards the resulting amended policy as covered by Lexipol's copyright.²⁴² The manuals used by Lexipol subscribers have the Lexipol copyright on each page, even when the subscriber has added original content to the page.²⁴³

Lexipol has a sensible business argument for copyrighting its policies and preventing its policies from being adopted by other agencies without paying Lexipol. As Lexipol's CEO explained in correspondence to a customer in our study, "if we do not correct/defend any and all known violations we risk losing the copyright and by extension we risk our ability to do business."²⁴⁴ Yet this copyright position may inhibit improvements to Lexipol's policies and stunt development of policies and best practices more generally.

Police policymaking is often viewed as a collective enterprise among advocacy groups, community leaders, and other experts. For example, the Immigrant Legal Resource Center (ILRC), a nonprofit organization that advocates for the rights of immigrants, has published a guide featuring policies from several jurisdictions that protect immigrants from federal immigration enforcement.²⁴⁵ As part of this project, ILRC also publishes an

240. See *supra* note 78 and accompanying text.

241. See, e.g., Lexipol, Contract with the Long Beach Police Dep't (2013) (on file with authors). The contract provides that:

Agency further agrees that any content within an Agency Policy Manual prepared by Agency, based in whole or in part on content created by Lexipol, or based on any Supplemental Policy Publications and/or Procedure Manuals, and Daily Training Bulletins copyrighted by Lexipol shall be derivative works subject to the copyright of Lexipol.

Id.

242. See, e.g., E-mail from Ron Wilkerson, CEO, Lexipol, to Scott Jordan, Chief, Tustin Police Dep't (Apr. 1, 2013, 9:32 AM) ("Lexipol copyright needs to be added to any content authored by Lexipol whether in total or a derivative of content authored by Lexipol.").

243. We did find eight jurisdictions that consulted with Lexipol but did not officially adopt Lexipol's policies. Their manuals did not have Lexipol's copyright stamp on their policies. See *infra* note 253 and accompanying text.

244. E-mail from Ron Wilkerson, *supra* note 242.

245. LENA GRABER, ANGIE JUNCK & NIKKI MARQUEZ, LOCAL OPTIONS FOR PROTECTING IMMIGRANTS: A COLLECTION OF CITY & COUNTY POLICIES TO PROTECT IMMIGRANTS FROM DISCRIMINATION AND DEPORTATION (2016), https://www.ilrc.org/sites/default/files/resources/local_options_final.pdf [<https://perma.cc/W9KP-GFG3>].

interactive national map that includes links to local policing policies that disentangle local law enforcement from federal deportation efforts.²⁴⁶ Campaign Zero, a nonprofit organization dedicated to ending police-caused deaths, has crafted a model use of force policy from components of policies adopted by departments in a number of jurisdictions including Philadelphia, Denver, Seattle, Cleveland, New York City, Los Angeles, Las Vegas, and Milwaukee, all of which are made available to the public on Campaign Zero's web page.²⁴⁷

The basic idea behind these efforts is that sharing, evaluating, and modifying policies from different jurisdictions will improve police policies overall. Groups like ILRC and Campaign Zero can identify the strengths and weaknesses of policies from different jurisdictions and analyze the ways in which these policies impact discretionary decisionmaking. This information can then be used by other jurisdictions to make informed decisions about which policies to adopt.

Lexipol's copyrighted policies can only play a limited role in this evaluative process. Lexipol subscribers can make their policies public and sometimes post their policies online.²⁴⁸ But Lexipol's copyright stamp must be included on each page of those policies. And it is Lexipol's position that other jurisdictions cannot adopt language from Lexipol policies—even policies that have been modified by their subscribers—without first paying Lexipol. When Lexipol learned that the Tustin Police Department—a Lexipol subscriber—did not have a Lexipol copyright stamp on its policy manual's pages and had distributed its manual online and shared portions of its manual with other agencies, then-CEO Ron Wilkerson contacted the Tustin Police Chief with the company's copyright concerns. Wilkerson explained to the chief that “if your manual is posted on any web site or forum such as the [International Association of Chiefs of Police] site and others use that content not knowing it is copyrighted material a much more serious problem takes shape.”²⁴⁹ Wilkerson also asked that the chief identify any agencies that might be using the policies so that he could “work to correct the problem.”²⁵⁰

246. *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RESOURCE CTR. (Dec. 19, 2016), <https://www.ilrc.org/local-enforcement-map> [<https://perma.cc/F9PW-KBFN>].

247. *Limit Use of Force*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/force/> [<https://perma.cc/U4RZ-DQQ7>].

248. For examples of agencies posting their Lexipol-authored policy manuals online see AUSTIN POLICE DEP'T, POLICY MANUAL (2015), <https://www.documentcloud.org/documents/2661319-Austin-Police-Department-Policy-Manual-2015.html> [<https://perma.cc/RAQ3-QR5N>]; PALO ALTO POLICE DEP'T, POLICY MANUAL (2013), <https://www.cityofpaloalto.org/civicax/filebank/documents/38381> [<https://perma.cc/Z2VR-VY2L>]; RIVERSIDE POLICE DEP'T, RIVERSIDE P.D. POLICY MANUAL (2017), <https://riversideca.gov/rpd/ChiefOfc/manual.pdf> [<https://perma.cc/B36R-FW25>].

249. E-mail from Ron Wilkerson, *supra* note 242.

250. *Id.*

Lexipol's approach allows the company to preserve its copyright and the associated financial benefits but is contrary to a collaborative policymaking approach.

One jurisdiction in our study—the City and County of San Francisco Sheriff's Department—concluded that Lexipol's insistence on a copyright provision was a deal breaker. The sheriff had retained Lexipol to consult with them on developing a new use of force policy. But Lexipol insisted that the resulting policy would belong to Lexipol, not the sheriff. As the San Francisco City Attorney's Office advised Lexipol in a memorandum terminating the relationship, “Lexipol's ownership of copyrighted material and related derivative works language was unacceptable.”²⁵¹ Other jurisdictions have also struggled with the copyright issue. For example, the City of Orange raised the copyright issue with us in response to our public records request, lamenting that although they “have revised many of [their] policies without Lexipol input” since the time of their initial Lexipol contract in 2004, “[t]he policies maintain the Lexipol trademark stamp as we did not wish to fight with them about whether they were still their intellectual property.”²⁵²

Eight of the departments in our study have what we call hybrid contractual arrangements, whereby they subscribe to Lexipol's manual service to stay updated on policy development but do not adopt the Lexipol manual for their department.²⁵³ Instead, they have continued using their own manual, which carries no Lexipol copyright stamp.

251. Memorandum from Michael Renoux, Dir. Contracts, Lexipol, to Carl Fabbri, Lieutenant, S.F. Police Dep't (Jan. 25, 2016) (on file with authors).

252. E-mail from Denah Hoard, City of Orange, to Ingrid Eagly (Dec. 14, 2016, 7:43 AM) (on file with authors).

253. The eight hybrid departments are the Oceanside Police Department, the Solano County Sheriff's Office, the Kern County Sheriff's Office, the Davis Police Department, the Riverside County Sheriff's Department, the Irvine Police Department, the Burbank Police Department, and the Butte County Sheriff's Office. *See* E-mail from Patti Czaiko, Admin. Sec'y, City of Oceanside, to Ingrid Eagly (Sept. 20, 2017, 7:37 AM) (“I confirmed with Oceanside Police Department that the Lexipol website is utilized for research when developing language for the OPD internal manual. They are not using Lexipol as the Policy and Procedure Manual, it is simply a resource.”); E-mail from Kimberley G. Glover, Solano Cty. Counsel, to Ingrid Eagly (Sept. 16, 2017, 4:02 PM) (on file with authors) (“[A]lthough the Sheriff's Office does have a Lexipol contract, I have been advised that they do not use it very often and have not adopted the Lexipol 'policy manual.'”); E-mail from Jennifer Moran, Police Records Manager, Burbank Police Dep't, to Ingrid Eagly (May 11, 2017, 3:24 PM) (on file with authors) (“We use the Lexipol policies as a reference. We read the policies and edit them to fit our needs. Some polic[i]es require very little changes and others are heavily edited. We customize the policies so they are in line with the BPD[']s business practices and with our existing procedures. Lexipol assists with the legal mandate verbiage. Once we make the edits, the policy becomes ours and it is not a Lexipol policy.”); Letter from Virginia L. Gingery, Deputy Cty. Counsel, Butte Cty., Cal., to authors (Dec. 6, 2016) (on file with authors) (“I am informed that the Department does not use Lexipol's policies and procedures verbatim, but rather, uses Lexipol as a resource when developing its own policies and departmental orders. The contractual relationship with Lexipol is in the form of a yearly subscription.”); Letter from Donny

In this Article, we have not examined the practices of all private companies engaged in police policymaking. It is certainly possible that the practices of other private policymaking groups would not prompt the same concerns that we have observed about Lexipol. Yet Lexipol is—and is well-positioned to remain—the dominant private actor in the police policymaking market, and we find that Lexipol’s privatized approach raises significant substance and process concerns. More fundamentally, our study raises questions as to what role Lexipol can and should play in efforts to improve police policymaking more generally. This is the topic to which we turn in Part III.

III. Moving Forward

In this Part, we offer several recommendations about how to move forward. Our goal with these recommendations is to enable local governments to be more fully engaged in the creation of their policies and trainings, while recognizing the financial and time constraints that have made it difficult for local governments to craft comprehensive policy manuals and trainings on their own. First, we recommend that Lexipol be more transparent about its policymaking process so that adopting jurisdictions can more easily make informed decisions about whether to modify or adopt wholesale Lexipol’s proposed policies. Second, we encourage states and local jurisdictions to promulgate model policies and foster independent policymaking processes. Third, we urge nonprofits and scholars interested in improving police policies to take steps to more effectively compete in the increasingly privatized police policymaking space and view Lexipol as a critically important audience.

A. *Understanding Lexipol*

Lexipol should be more transparent about its policymaking process. Currently, Lexipol provides no information to its subscribers about the identity of experts who draft their model policies, the evidence upon which it relies when crafting policies and trainings, the policy interests that animate

Youngblood, Sheriff–Coroner, Kern Cty., Cal., to Ingrid Eagly (Dec. 2, 2016) (on file with authors) (“The Commander in charge of the Human Resources unit believes that the Sheriff’s office has been using Lexipol for years but has never used or adopted Lexipol information to formulate any policy or procedures. The Commander periodically receives e-mails from Lexipol LLC with the latest updates in case law [a]ffecting law enforcement which coincides with notifications received from other services about the same issues.”); Letter from David Delaini, Deputy Police Chief, Davis Police Dep’t, to authors (Nov. 14, 2016) (reporting that the Davis Police Department is a member of the Yolo County Public Agency Risk Management Insurance Company (YCPARMIA), that the Department has access to Lexipol’s policies as part of its contract with YCPARMIA, and that, “[w]hile the Department has used the Lexipol policies as a guide, the Department has not adopted the Lexipol policy manual as its own and does not communicate with Lexipol regarding the Department’s policy manual.”); *see also* Appendix.

its drafting choices, the availability of alternative policy formulations, or the impact of its policies on local jurisdictions' practices.

Lexipol's lack of transparency about its employees and policymaking process threatens local governments' policymaking efforts in two ways. First, local jurisdictions deciding whether to purchase Lexipol's services have little information with which to assess the quality of Lexipol's products or the ways in which those products might influence police practices. Second, Lexipol's lack of transparency makes it difficult for subscribers to decide which of Lexipol's proposed policies to adopt. Lexipol customers are faced with an uncomfortable choice—adopt each of Lexipol's model policies on the untested assumption that the policies are sound or spend scarce time and money to independently evaluate those policies.

Lexipol could make this choice less stark by providing its customers with additional information about the rationale for its policy choices and available policy alternatives. Armed with more knowledge about the considerations relevant to Lexipol's policy rationales, subscribers could make better informed decisions about whether and how to modify Lexipol's standard policy language.

Body camera policies are just one arena in which more transparency by Lexipol would benefit its customers. There is a great deal of disagreement about whether police officers should be able to review body camera video before writing up reports about use of force incidents.²⁵⁴ The United States Department of Justice's Community Oriented Policing Services and the Police Executive Research Forum recommend allowing officers to review video footage before making a statement about an incident because “[r]eviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events” and “[r]eal-time recording of the event is considered best evidence.”²⁵⁵ In contrast, the ACLU opposes policies that allow officers to review video before writing up reports, arguing that the practice enables lying, undermines the legitimacy of investigations, and allows for cross-contamination of evidence.²⁵⁶ Several police departments, including Atlanta, Oakland, San Francisco, San Jose, and

254. N.Y.C. POLICE DEP'T, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 16–17 (2017), https://policingproject.org/wp-content/uploads/2017/04/NYPD_BWC-Response-to-Officer-and-Public-Input.pdf [<https://perma.cc/TDM9-XG7D>] [hereinafter NYPD BODY CAMERA REPORT].

255. U.S. DEP'T OF JUSTICE CMTY. ORIENTED POLICING SERVS. & POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 45 (2014), <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<https://perma.cc/799X-RM29>].

256. See Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports> [<https://perma.cc/8FWS-DKBG>].

Washington, D.C., prohibit their officers from viewing video footage prior to making a statement.²⁵⁷

Lexipol adopted a model policy that allows officers to review body camera footage before making a statement to investigators.²⁵⁸ But Lexipol's policy manual includes no guidance about the rationale supporting its policy decision, alternative policies adopted by other jurisdictions, or the reasons it rejected those alternative approaches. Lexipol was willing to share with us their policy "guide sheet" for this policy,²⁵⁹ but it contained nothing by way of guidance for agencies other than to note that the issue is "hotly debated . . . when it comes to officer-involved shootings."²⁶⁰ Moreover, the guide "recommends" that agencies adopt the Lexipol policy language without providing additional information with which agencies can make their own assessment.²⁶¹ Finally, Lexipol executives who read a draft of this Article pointed us to a webinar available on its website about the decision to allow officers to view video footage before offering a statement.²⁶² We do not know how many agencies review this and other webinars produced by Lexipol, but note that the webinar did not include information about alternative policy approaches adopted by other agencies or supported by those groups advocating for restrictions on video review by officers.²⁶³

Lexipol's presentation of its body camera policy stands in contrast to that of the New York City Police Department, which similarly allows officers to review body camera footage before making a statement. When New York

257. NYPD BODY CAMERA REPORT, *supra* note 254, at 16. A recent report by the Stanford Criminal Justice Center (SCJC) recommends that law enforcement agencies should not investigate their own cases involving officer shootings. Such an approach, according to SCJC, would help to minimize conflicts of interest and enhance the accountability of police. AMARI L. HAMMONDS ET AL., STANFORD CRIMINAL JUSTICE CTR., AT ARM'S LENGTH: IMPROVING CRIMINAL INVESTIGATIONS OF POLICE SHOOTINGS 16 (2016), <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf> [<https://perma.cc/JSC6-L22J>].

258. See, e.g., ELK GROVE POLICE DEP'T, POLICY MANUAL (2017) (adopting Lexipol Policy 310.8, Audio and Video Recordings, which explains that "[a]ny officer involved in a shooting or death may be permitted to review available Mobile Audio/Video (MAV), body-worn video, or other video or audio recordings prior to providing a recorded statement or completing reports").

259. For a description of policy guide sheets, see *supra* notes 83–88 and accompanying text. As we have discussed, these policy guide sheets do not appear to be used by many Lexipol customers. See *supra* notes 214–215 and accompanying text.

260. SECOND LEXIPOL POWERPOINT, *supra* note 9, at 17 (presenting a sample Lexipol policy guide sheet for officer-involved shootings in California).

261. *Id.*

262. See Grant Fredericks, Laura Scarry & Ken Wallentine, *Point/Counterpoint: The Debate over Officer Viewing of BWC Video Footage*, LEXIPOL (Dec. 12, 2016), <https://register.gotowebinar.com/register/277667746234235396> [<https://perma.cc/M9M6-SHCA>] (Lexipol webinar).

263. The three participants in the video are two Lexipol employees and an instructor at the FBI National Academy who is a forensic video analyst. *Id.* The webinar identified arguments for and against allowing officers to review video before making a statement but ultimately recommended that officers be allowed to view video before making a statement.

City adopted this policy, it issued a lengthy report describing public and police views about various policy options and the rationale supporting its decision.²⁶⁴ Were Lexipol to provide agencies with more information about the rationale underlying its policy decisions regarding body camera footage and other areas of debate and disagreement, subscribing jurisdictions would be able to make independent, informed decisions about whether to adopt or modify Lexipol's standard policies.

Assuming that Lexipol stands by its process and content, it should welcome additional transparency. Lexipol makes clear that it should not be viewed as police departments' policymaker and that local jurisdictions should assess proposed policies and decide on their own whether to adopt them. According to the fine print in Lexipol contracts, the local jurisdictions (not Lexipol LLC) are the policymakers, and local law enforcement (not Lexipol LLC) will be held liable if those policies are found to be constitutionally unsound. It is, therefore, consistent with Lexipol's proclaimed advisory role to provide agencies with background information about Lexipol's policy decisions so that they can be more engaged in the creation of their policies.

B. Regulating Lexipol

Our second recommendation is that governments become more actively engaged with police policymaking as a mechanism to narrow the gap between policymaking ideals and current practices. Lexipol's influence could be subject to greater public oversight if states and cities were to take a greater interest in both the process by which important policing policies are created and the content of the resulting policies. In addition, courts could play a role by requiring local governments to engage in transparent policymaking.

First, state and local policing agencies that subscribe to Lexipol should customize Lexipol's model policies to reflect their particular needs and community values.²⁶⁵ When making the decision to purchase a Lexipol contract, localities should account for the agency time that is necessary to review and customize the policies. Indeed, the agency does remain the

264. See generally NYPD BODY CAMERA REPORT, *supra* note 254. In another example that deviates from the Lexipol model, the City Council in Berkeley, California, recently worked with the SCJC to provide detailed advice in a published report regarding the benefits and drawbacks of arming the Berkeley Police Department with Electronic Control Weapons. See generally JENA NEUSCHELER & AKIVA FREIDLIN, STANFORD CRIMINAL JUSTICE CTR., REPORT ON ELECTRONIC CONTROL WEAPONS (ECWs) SUBMITTED TO THE CITY OF BERKELEY (2015), <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/ECW-Final-Draft-2.pdf> [<https://perma.cc/2VCD-6CVD>].

265. While determining the extent to which jurisdictions customize their manuals is beyond the scope of this project, the manuals that we did receive in public records requests appear highly standardized. See *supra* notes 89–90 and accompanying text.

“policymaker” under the standard Lexipol contract and must take this obligation seriously.

This is precisely how a major California municipal insurer hopes its subscribers will use Lexipol. California Joint Powers Insurance Authority (CJPIA), a municipal self-insurance pool with more than 100 members, provides Lexipol subscriptions to its insureds.²⁶⁶ However, in a recent newsletter, CJPIA encouraged its members to view sample policies from Lexipol and other sources as “a [s]tarting [p]oint; [n]ot an [e]nding [p]oint.”²⁶⁷ Acknowledging that “[s]uch policies are often well-researched, well-written, and legally compliant” and “can provide an excellent starting point for drafting,” CJPIA warned readers that “all too often, the drafter simply takes the policy, changes the names and titles and voilà—a policy has been born! Yet, using another’s policy can be a trap for the unwary.”²⁶⁸ Among the concerns identified by the CJPIA are that the model policy “does not alleviate the agency of the responsibility for the content of the policy” and that different public agencies may have different needs and practices.²⁶⁹ Although this type of localization will take some time and money, it will be far less expensive than creating entirely new policies and trainings. And if Lexipol is more transparent about its policymaking process, it will be less burdensome for local jurisdictions to benefit from—without overly relying upon—Lexipol.

Second, local governments should be encouraged to write their own policies, and develop procedures for implementing them, without subscribing to Lexipol. At the local level, some jurisdictions have taken steps to create their own formalized system for police rulemaking, akin to what has been advocated by scholars. The Los Angeles Board of Police Commissioners is one such example. This five-member civilian body functions “like a corporate board of directors” for the Los Angeles Police Department,²⁷⁰ taking on roles that include developing and analyzing police policies and

266. Mellor, *supra* note 134 (reporting that in January 2009, Lexipol and CJPIA entered a “strategic business partnership . . . whereby the California JPIA funds the cost of a member’s participation in the Law Enforcement Policy Manual Update and Daily Training Bulletin subscriptions”).

267. Kelly A. Trainer, *Risk Solutions: One Size Rarely Fits All: Proper Use of Sample Policies*, CAL. JPIA, Dec. 2016, <https://cjpia.org/news/newsletter/newsletter-article/2016/12/15/december-2016—issue-58#seven> [<https://perma.cc/TAK4-TC9E>].

268. *Id.*

269. *Id.*

270. *Police Commission*, L.A. POLICE DEP’T, http://www.lapdonline.org/police_commission [<https://perma.cc/C7EZ-WPTE>]. The Board’s five civilian members are appointed by the Mayor and confirmed by the Los Angeles City Council. *The Function and Role of the Board of Police Commissioners*, L.A. POLICE DEP’T, http://www.lapdonline.org/police_commission/content_basic_view/900 [<https://perma.cc/BP23-3PPJ>].

monitoring policy implementation.²⁷¹ Importantly, all of its meetings are open to the public and the group provides opportunities for public comment.²⁷²

The Chief of the Washington, D.C. Metropolitan Police Department is responsible for policymaking,²⁷³ with internal institutional support and input from outside constituencies. The Chief has a dedicated Policy and Standards Branch, which develops and publishes department policy and directives.²⁷⁴ The Chief also consults with the Citizens Advisory Council, a group of community members that provide community feedback on policy issues.²⁷⁵ To further increase transparency, the D.C. Official Code requires all written policy directives to be available to the public online.²⁷⁶

Other jurisdictions have involved community members in piloting new policy initiatives. The Camden County Police Department partnered with NYU School of Law's Policing Project to seek community input on their department's body-worn-camera policy.²⁷⁷ The department posted a draft policy on its website and sought feedback through an online questionnaire, in two community forums, and from focus groups made up of Camden police officers who had been using body cameras as part of a pilot project.²⁷⁸ In

271. *The Function and Role of the Board of Police Commissioners*, L.A. POLICE DEP'T, http://www.lapdonline.org/police_commission/content_basic_view/900 [https://perma.cc/BP23-3PPJ] (including a detailed description of the various arms of the Commission, including the policy group that "assists the Board in developing and analyzing policy, monitoring the progress of policy implementation, and reviewing proposed Department actions" and "also provides overall research and analytical support to the Commission, and facilitates the transfer and coordination of information").

272. *Id.* Other major cities have also adopted a Police Commission model similar to that of Los Angeles. See, e.g., *Police Commission*, S.F. POLICE, <http://sanfranciscopolice.org/police-commission> [https://perma.cc/9AVN-EKPR]; *About the Fire and Police Commission*, CITY.MILWAUKEE.GOV, <http://city.milwaukee.gov/fpc/About#.WXaL39Pytn5> [https://perma.cc/36XN-XUPH]; *Police Commissioners History*, DETROITMI.GOV, <http://www.detroitmi.gov/How-Do-I-Find-Detroit-Archives/Police-Commissioners-History> [https://perma.cc/Q8A6-VNUL]; *Community Police Commission: About Us*, SEATTLE.GOV, <https://www.seattle.gov/community-police-commission/about-us> [https://perma.cc/8BM6-QRTJ]; *Board of Police Commissioners: St. Louis County Police Department*, STLOUISCO.COM, <http://www.stlouisco.com/LawandPublicSafety/PoliceDepartment/AboutUs/BoardofPoliceCommissioners> [https://perma.cc/CUA9-EK7P].

273. METROPOLITAN POLICE DEP'T, D.C., GO-OMA-101.00, DIRECTIVES SYSTEM 1 (June 3, 2016), https://go.mpdconline.com/GO/GO_101_00.pdf [https://perma.cc/V2Z3-K9YL] ("The Chief of Police makes 'orders, rules, and regulations governing conduct and controlling police activity.'").

274. *Policy and Standards Branch*, METROPOLITAN POLICE DEP'T, D.C., <https://mpdc.dc.gov/page/policy-and-standards-branch> [https://perma.cc/LQL6-MZTP].

275. *Citizens Advisory Councils*, METROPOLITAN POLICE DEP'T, D.C., <https://mpdc.dc.gov/page/citizens-advisory-councils-cac> [https://perma.cc/8UGE-4KBT].

276. D.C. CODE § 2-536 (2012).

277. *Camden, POLICING PROJECT: N.Y.U. SCH. L.*, <https://policingproject.org/our-work/developing-accountability/camden/> [https://perma.cc/T8BP-7S32].

278. *Id.*

response to this feedback, the department made several adjustments to its draft policy and published a report describing the community feedback the department received and the changes to the draft policy inspired by that feedback.²⁷⁹

While not all jurisdictions will have the resources to support a full commission process like that in operation in Los Angeles, most larger departments could follow Camden's example and involve community members in the ongoing development and revision of police policies. Moreover, jurisdictions that create their own policies could do more to disseminate their resulting policies to the public free of cost so that other agencies, particularly smaller ones, can adopt them. Local engagement in the development and revision of police policies is particularly important in jurisdictions that have been investigated or sued for civil rights abuses. Public rulemaking processes and advisory councils like that adopted in Washington, D.C., can be used to address the unique problems faced by departments and can strengthen community trust damaged as a result of those problems. Instead, several departments in our study appear to have adopted Lexipol policies after facing these types of suits and investigations without public engagement or input about the content of those policies.²⁸⁰

Third, state legislatures could more actively shape the content of the Lexipol policies that their law enforcement departments adopt. It was, after all, a 1959 California law designed to encourage police departments to adopt policies governing police pursuits that provided the foundation for starting Lexipol.²⁸¹ Since then, additional state reforms have further shaped the

279. *Id.*

280. For example, when the Oakland City Council approved a settlement of a multitude of constitutional violations by police officers, the court monitor approved a Lexipol contract rather than requiring the city to revise its own policies in collaboration with community members. See Oakland City Council, Resolution No. 85356 (Dec. 4, 2014) (on file with authors) (indicating that Lexipol was the sole respondent to a request for proposals from outside vendors); E-mail from Kristin Burgess to Danielle Cortijo (Mar. 26, 2015, 2:37 PM) (on file with authors) (indicating that approval for Lexipol was obtained from the monitor). Similarly, the Bakersfield Police Department became a Lexipol subscriber immediately after the Department of Justice recommended a series of reforms to their department's written police policies. Joe Mullins, Sergeant, Bakersfield Police Dep't, Approval of Lexipol's Subscription Agreement (July 6, 2006) (on file with authors) (laying out the terms and conditions of the subscription agreement); Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep't of Justice, to Virginia Gennaro, City Attorney, City of Bakersfield (Apr. 12, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/bakersfield_ta_letter.pdf [<https://perma.cc/GG2S-R39E>] (recommending a series of reforms to the department's written policies at a preliminary stage of investigation). The Inglewood Police Department also adopted Lexipol policies after public outcry over repeated shootings of unarmed suspects by the department's officers. See Jack Leonard & Victoria Kim, *Inglewood Police Have Repeatedly Resorted to Deadly Force*, L.A. TIMES (Dec. 28, 2008), <http://www.latimes.com/local/la-me-inglewood28-2008dec28-story.html> [<https://perma.cc/H2KU-DLDD>] (detailing the Inglewood Police Department's pattern of using unnecessary force against suspects).

281. CAL. VEH. CODE § 17004.7 (West 2007) (benefitting jurisdictions that adopt a "written policy" on police pursuits that meets a number of "minimum standards" and requires that "all peace

content of police pursuit policy in California. For example, in 1993, the state required the Commission on Peace Officer Standards and Training to establish further guidelines and training on vehicle pursuits, involving more than 120 law enforcement agencies, legal advisors, and public representatives in the development of the guidelines.²⁸² Other states around the country have similarly passed laws that require departments to adopt policy content. For example, a number of states require that police administer lineups with safeguards that research has shown reduce the possibility of misidentification.²⁸³ Wisconsin's state law on eyewitness identification procedures specifically requires that law enforcement agencies "adopt written policies" that are "designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases."²⁸⁴ Moreover, the law requires that agencies "consider model policies and policies adopted by other jurisdictions" when developing and revising their own eyewitness identification policies.²⁸⁵

States could do more to regulate the content of police policies of public import—they could require Lexipol and its law enforcement agency clients to be more transparent about their policy choices. States could also require that Lexipol and its subscribers seek community input about proposed policies. The California legislature recently passed the TRUTH Act, which requires law enforcement agencies to hold community forums before allowing officials from Immigration and Customs Enforcement (ICE) to interview detainees.²⁸⁶ This legislation requires all jurisdictions that cooperate with ICE in the state to solicit community input. Perhaps a similar requirement could be legislated for agencies that subscribe to Lexipol or other private policymaking entities, requiring them to seek public comment on their police policies.

States and localities could also facilitate public rulemaking by establishing a rulemaking body for the police. Since 1953, California's Ralph

officers of the public agency certify in writing that they have received, read, and understand the policy"); *see also supra* notes 31–34 and accompanying text (discussing the founding of Lexipol).

282. S.B. 601, 1993–1994 Leg. Sess. (Cal. 1993). This law and other subsequent legal amendments are codified in § 13519.8 of California's Penal Code. CAL. PENAL CODE § 13519.8 (West 2012); *see generally* CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, CALIFORNIA LAW ENFORCEMENT VEHICLE PURSUIT GUIDELINES 2006 (rev. ed. 2007), http://lib.post.ca.gov/Publications/vp_guidelines.pdf [<https://perma.cc/MP62-XXMQ>].

283. Mark Hansen, *Show Me Your ID: Cops, Courts Re-evaluate Their Use of Eyewitnesses*, ABA J. (May 2012), http://www.abajournal.com/magazine/article/show_me_your_id_cops_courts_re-evaluate_their_use_of_eyewitnesses/ [<https://perma.cc/B46G-M33S>].

284. WIS. STAT. § 175.50(2) (2017).

285. *Id.* § 175.50(4).

286. *See* Assemb. B 2792, 2015–2016 Leg., Reg. Sess. (Cal. 2016). *See generally* Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017) (discussing California's adoption of new laws designed to disentangle state law enforcement from federal deportation efforts).

M. Brown Act (Brown Act) has required that all meetings by the governing body of a local agency be open to the public and allow for public participation.²⁸⁷ The Brown Act provides a ready-made framework to facilitate public participation in police policymaking.²⁸⁸ As far as we are aware, California jurisdictions using Lexipol have not followed the Brown Act provisions.²⁸⁹ However, they could start doing so by requiring that a governmental committee or commission approve local police policies, including those written by Lexipol, thereby bringing the process of reviewing and customizing Lexipol policies squarely into the purview of the state's open-meeting requirements.²⁹⁰ A simple additional improvement would be to require that police departments make copies of their policy manuals and training materials available to the public on the Internet. This would be a first, modest step toward improving transparency and facilitating public engagement on policymaking.

Finally, courts could assume a more active role in the substance and process of police policymaking. Courts will always serve an important function in identifying the baseline—a constitutional floor under which police conduct may not pass. That alone will continue to inform police policy, particularly the type of “legally defensible” policies that Lexipol promotes. But courts have often proven themselves ill-suited or unwilling to articulate the detailed and comprehensive rules necessary to guide police discretion.²⁹¹ Andrew Manuel Crespo has argued that if courts took better advantage of the voluminous facts at their disposal about the criminal justice system, they would gain a greater “institutional awareness of the criminal justice systems

287. Ralph M. Brown Act, CAL. GOV'T CODE §§ 54950–63 (West 2017) (providing that meetings of public bodies in California must be “open and public” and that action taken in violation of open-meetings laws may be voided). The Act provides details regarding which entities are covered and how to properly run public meetings (including requirements for when and how agendas are posted, how to broadcast meetings, and how to track the minutes of the meetings). *Id.*; see also Int'l Longshoremen's & Warehousemen's Union v. L.A. Exp. Terminal, Inc., 69 Cal. App. 4th 287, 293 (1999) (noting that the Brown Act “serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies”).

288. Several local jurisdictions in California—including San Francisco, Contra Costa County, and Oakland—require even greater public transparency through local “Sunshine” ordinances. *E.g.*, S.F., CAL., S.F. ADMIN. CODE § 67.1 (1999), <http://sfgov.org/sunshine/provisions-sunshine-ordinance-section-67> [<https://perma.cc/9MYN-E2MB>]; CONTRA COSTA CTY., CAL., ORDINANCE CODE tit. 2 div. 25 (1995); OAKLAND, CAL., CODE OF ORDINANCE tit. 2 ch. 2.20 (1997).

289. Our research did reveal one unsuccessful suit challenging a Lexipol police policy that alleged that meetings between the police chief, his lieutenant, and officials from Lexipol concerning proposed police policies were subject to the Brown Act. *Jiaqing v. City of Albany*, No. RG06254229, 2008 WL 7864330 (Cal. Super. Ct. Sept. 29, 2008).

290. Under the Brown Act, “legislative body” includes any “commission, committee, board, or other body of a local agency,” including one “that governs a private corporation.” CAL. GOV'T CODE § 54952 (West 2003).

291. See *supra* notes 189–192 and accompanying text (describing these critiques).

over which they preside.”²⁹² Doing so, according to Crespo, could bring the institutional advantages of courts—including their ability to “safeguard minority interests that may be ignored or abused in the political process”—to bear on the substance of police policy.²⁹³ Courts could also, as Barry Friedman and Maria Ponomarenko advocate, require localities to adopt democratic processes for police policymaking. Courts could require that local governments create police policies through an administrative rulemaking process and “refuse to defer to policing actions that lack a sufficient democratic pedigree.”²⁹⁴

Indeed, courts have already played an important role in helping to get major United States cities to democratize their policymaking process. For example, in 2001, the United States Department of Justice entered into a civil rights consent decree with the Los Angeles Police Department following a corruption scandal in the 1990s.²⁹⁵ The court-enforced consent decree, which was ended by the federal court in 2013,²⁹⁶ provided guidelines for creating new policies and procedures designed to remedy past abuses²⁹⁷ and, among other reforms, resulted in the creation of an Office of Constitutional Policing to address issues of police policy.²⁹⁸ These kinds of court-ordered remedies through consent decrees are, however, labor intensive and therefore have tended to focus on the largest police departments.²⁹⁹

292. Crespo, *supra* note 19, at 2065.

293. *Id.* at 2063.

294. Friedman & Ponomarenko, *supra* note 19, at 1836; see also BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 113 (2017) (suggesting that courts could refuse “to allow the police to act without [democratic] authorization” or “reward the police for obtaining public approval” for their policing rules before they are adopted).

295. For background on the Rampart corruption scandal, see Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG. (Oct. 1, 2000), <http://www.nytimes.com/2000/10/01/magazine/one-bad-cop.html>, and Anne-Marie O’Connor, *Rampart Set Up Latinos to Be Deported, INS Says*, L.A. TIMES (Feb. 24, 2000), <http://articles.latimes.com/2000/feb/24/news/mn-2075> [<https://perma.cc/98TP-MFFR>].

296. Joel Rubin, *Federal Judge Lifts LAPD Consent Decree*, L.A. TIMES (May 16, 2013), <http://articles.latimes.com/2013/may/16/local/la-me-lapd-consent-decree-20130517> [<https://perma.cc/3PSG-JYG2>].

297. See generally *Quarterly Reports of the Independent Monitor*, L.A. POLICE DEP’T, http://www.lapdonline.org/office_of_constitutional_policing_and_policy/content_basic_view/9010 [<https://perma.cc/97TX-9848>] (containing reports from the Independent Monitor hired to ensure effective and timely implementation of the LAPD consent decree).

298. *Office of Constitutional Policing and Policy*, L.A. POLICE DEP’T, www.lapdonline.org/office_of_constitutional_policing_and_policy [<https://perma.cc/3SPQ-FPJR>]. See generally ALEXANDER A. BUSTAMANTE, OFFICE OF THE INSPECTOR GEN., L.A. POLICE COMM’N, REVIEW OF NATIONAL BEST PRACTICES (2017), http://www.lapdpolicy.com.lacity.org/050217/BPC_17-0169.pdf [<https://perma.cc/PX8E-DAEM>] (analyzing the Los Angeles Police Department’s implementation of national best practice recommendations).

299. See generally Bell, *supra* note 28, at 2130 (arguing that litigation reform strategies risk allowing abuses to continue undetected, especially since litigation “is rarely initiated before tragedy occurs”); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 44 (2012) (explaining that “the Department of Justice cannot achieve national

Finally, we believe that judges could take a more active role in understanding and overseeing Lexipol's products and people when they appear in court. Lexipol employees regularly serve as defense experts in constitutional litigation against law enforcement agencies and rely on their association with Lexipol as a credential when establishing their expertise.³⁰⁰ At least one expert has relied on the fact that a policy was written by Lexipol as proof that it was constitutionally sound.³⁰¹ Courts assessing police policies have also taken notice when policies are created by Lexipol.³⁰² And when the Department of Justice entered into a court-monitored consent decree with the New Orleans Police Department, New Orleans and Lexipol entered into a

reform by suing every department with a pattern of widespread constitutional violations"); Patel, *supra* note 209, at 812–14 (describing the “increasing strength” of the DOJ’s use of consent decrees under recent administrations and citing the perceived positive outcomes in three major police departments but noting the “vulnerab[ility] to bias and political maneuvering” of consent decrees). The viability of the Department of Justice in this role is also dependent on the priorities of the president. See David A. Graham, *Can Trump’s Justice Department Undo Police Reform?*, ATLANTIC (Apr. 4, 2017) (describing efforts by Attorney General Jeff Sessions to reverse police reform advances made by the Department of Justice under President Obama).

300. See, e.g., Rebuttal by James Sida to Jeffrey A. Schwartz at 6, *Parenti v. County of Monterey*, No. 14-CV-05481, 2017 WL 2958801 (N.D. Cal. Jan. 17, 2017) (“I have written jail policies as a practitioner and division commander of a large jail system. In addition, I was the lead consultant in the development of a jail policy manual for Lexipol, Inc., a risk management firm, that provides a jail manual throughout the United States.”); Expert Opinion of Use of Force of Robert Glen Carpenter, *Durden-Bosley v. Shepherd*, No. 2:15-CV-00798MJP, 2016 WL 9281044 (W.D. Wash. Feb. 23, 2016) (“I was the Use of Force subject matter expert (SME) used to develop and implement the present Lexipol policy manual currently used by my department.”); Report of Kenneth R. Wallentine at 8, 12, *Christiansen v. West Valley City*, No. 2:14cv00025, 2015 WL 11439375 (D. Utah July 15, 2015) (“My qualifications as an expert in this subject matter include the following: . . . I am Vice-President and Senior Legal Advisor for Lexipol, Inc., the nation[s] [sic] largest provider of policy formulation and revision for public safety agencies and policy-based training, responsible for reviewing and editing the work of legal staff in creation of policy manuals for law enforcement agencies.”); Interim Report of Expert Witness Jeffrey A. Martin at 1, *Jaramillo v. City of San Mateo*, 76 F. Supp. 3d 905 (N.D. Cal. 2015) (No. C 13-00441 NC), 2015 WL 11253330 (“I also worked as an author of ‘Daily Training Bulletins’ for Lexipol, LLC, regarding various practices including the use of force, search and seizure, and other police practices.”); Defendant’s Expert Witness Report - R. Scot Haug, *Towry v. Bonner Cty.*, No. 10-CV-292, 2011 WL 11733377 (D. Idaho June 14, 2011) (“I was selected to serve as a representative of the Statewide Lexipol Model Policy Board where I assisted ICRMP and Lexipol in developing a statewide model policy for the State of Idaho.”); Report of Bruce D. Praet at 1, *Mitz v. City of Grand Rapids*, No. 1:09-cv-365, 2009 WL 6849914 (W.D. Mich. Oct. 21, 2009) (describing his role in the formation of Lexipol as among his expert qualifications).

301. See, e.g., Interim Report of Expert Witness Jeffrey A. Martin at 1, *Jaramillo v. City of San Mateo*, 76 F. Supp. 3d 905 (N.D. Cal. 2015) (No. C 13-00441 NC), 2015 WL 11253330, at *1 (“The San Mateo Police Department’s policy manual is provided by Lexipol, LLC, a private company. Lexipol provides standardized policy manuals for well over 500 law enforcement agencies in California and reflects current statutory authorizations and constitutional limitations on the use of force by peace officers. This makes the policy very sound.”).

302. See, e.g., *Kong Meng Xiong v. City of Merced*, Nos. 1:13-cv-00083-SKO, 1:13-cv-00111-SKO2015, WL 4598861, at *5 (E.D. Cal. July 29, 2015) (noting that “[a]t the time of the incident, MPD used policies developed by Lexipol”).

\$295,000 contract to develop those policies.³⁰³ Although we do not know how courts evaluate experts associated with Lexipol, or policies produced by Lexipol, the repeated invocation of the Lexipol brand suggests it may be treated as a signal of excellence. Yet, as we have shown, very little is actually known about the expertise of Lexipol's employees or the constitutionality or effectiveness of its products. We encourage courts to more rigorously evaluate the credentials of Lexipol experts and the constitutionality of Lexipol policies and trainings without being influenced by its untested marketing claims or its market dominance. The fact that virtually every California law enforcement agency has the same use of force policy should not be viewed as evidence that that policy language is reasonable—it is merely evidence that 95% of California law enforcement agencies subscribe to Lexipol.

C. *Competing with Lexipol*

Our third recommendation is that nongovernmental groups interested in making their own police policy recommendations adjust their approaches in light of Lexipol's commercial success. Specifically, groups developing model policies should make it easier for jurisdictions to adopt those policies. And groups advocating for policy changes should view Lexipol as a critically important audience.

Several nonprofits and government groups have developed model police policies in recent years.³⁰⁴ For example, NYU School of Law's Policing Project solicits public involvement when crafting policing policies and also invites social scientists and other experts to weigh in on best practices.³⁰⁵ The American Law Institute's project on police investigations has drafted template policies with detailed commentary that can be considered and adopted by law enforcement agencies.³⁰⁶ The Municipal Research and Services Center, a nonprofit organization that focuses on helping local

303. Charles Maldonado, *Paying for the Consent Decree*, GAMBIT (Aug. 14, 2012), <https://www.bestofneworleans.com/gambit/reform-at-a-cost/Content?oid=2057022> [<https://perma.cc/KUU2-2KRP>].

304. These initiatives are similar to policy drafting initiatives undertaken in the 1960s. See Kenneth Culp Davis, *Police Rulemaking on Selective Enforcement: A Reply*, 125 U. PA. L. REV. 1167, 1170 (1977) (describing rulemaking initiatives in the 1960s by the International Association of Chiefs of Police and the National Advisory Commission on Criminal Justice Standards and Goals).

305. See generally *Our Mission*, POLICING PROJECT: N.Y.U. SCH. L., <https://policingproject.org/about-us/our-mission/> [<https://perma.cc/WC4V-X8MC>].

306. See Am. Law Inst., *Principles of the Law: Policing*, ALI ADVISOR, <http://www.thealiadviser.org/policing/> [<https://perma.cc/V2U5-AG72>] (proposing policies related to—among other things—search and seizure, the use of force, and evidence gathering); *Model Rules and Policies*, POLICING PROJECT: N.Y.U. SCH. L., <https://policingproject.org/our-work/writing-rules/> [<https://perma.cc/UN4D-ZXWD>] (stating that the American Law Institute's draft policies “can serve as a template for legislative bodies, communities, and courts”).

governments in Washington State with policy issues, publishes information about how local jurisdictions should develop their policy manuals and provides access to the full policy manuals of four major police departments in the state.³⁰⁷ In a similar vein, the ACLU has launched a “Freedom Cities” campaign to promote nine model state and local law enforcement policies that protect immigrants from the Trump Administration’s deportation agenda.³⁰⁸ And the International Association of Chiefs of Police’s Policy Center publishes model policies with accompanying explanations for its drafting choices, including related studies and other information.³⁰⁹

Each of these groups makes policies available to the public without copyright restrictions—and many are free. Yet our research suggests that Lexipol’s model policies are adopted by more jurisdictions than the model policies developed by these groups. Lexipol provides policies for almost every police department and sheriff’s department in California. Beyond the small handful of jurisdictions that choose to create their policies themselves, Lexipol is practically the only game in town.

Why has Lexipol dominated the markets in California and other states despite the fact that its policies cost more than those made available by nonprofits? We think that part of the answer is that Lexipol has created products that allow departments—particularly smaller departments—to develop and update police policies and trainings quickly and affordably. Lexipol delivers policies and trainings online and makes it easy for jurisdictions to update their policies to reflect changes in the law. Lexipol also allows its subscribers to track which employees have reviewed manual updates and completed trainings. And as Lexipol emphasizes in its marketing materials, it charges far less than it would cost local police departments to replicate these services on their own.

Moving forward, advocacy groups and think tanks need to recognize Lexipol’s role as their most successful competitor in the marketplace of policymaking ideas. Nonprofit groups hoping to convince law enforcement

307. *Police and Law Enforcement Services Policy and Procedure Manuals*, MUN. RES. & SERVS. CTR., <http://mrsc.org/Home/Explore-Topics/Public-Safety/Law-Enforcement/Police-and-Law-Enforcement-Services-Policy-and-Pro.aspx> [<https://perma.cc/V97Y-KBVS>].

308. See ACLU, *Freedom Cities*, PEOPLE POWER, <https://peoplepower.org/freedom-cities.html> [<https://perma.cc/U4XX-QZKH>] (describing the ACLU’s “Freedom Cities” campaign); see also Faiz Shakir & Ronald Newman, *How People Power Activists Are Driving Change*, ACLU (July 19, 2017), <https://www.aclu.org/blog/how-people-power-activists-are-driving-change> [<https://perma.cc/8YCE-2NUP>] (summarizing the efforts of People Power Activists to encourage municipalities to adopt the ACLU’s nine model policies).

309. For example, the International Association of Chiefs of Police includes on its web page a model body-worn cameras policy as well as a “concepts and issues” paper, videos of presentations and workshops related to best practices, and a list of general principles to guide departments in developing effective policies regarding use of technology. *Body-Worn Cameras*, INT’L ASS’N CHIEFS POLICE (Apr. 2014), <http://www.theiacp.org/MPBodyWornCameras>.

to favor their policies over Lexipol's could take steps to make their proposed policies easier to integrate into existing policy manuals of both Lexipol and independent jurisdictions. In working with Lexipol clients, advocacy organizations could stress why Lexipol's existing master policy on a given topic is inadequate and propose alternative policy language that follows Lexipol's basic style guide. Nonprofit competitors could also do more to compete with Lexipol by offering policy updates to reflect changes in the law and best practices, thereby reassuring jurisdictions that these alternative policies would, to borrow Lexipol's language, remain "up-to-date" and "defensible."³¹⁰

Another possible reason that Lexipol has dominated the market, despite the availability of free or less expensive alternatives, is that Lexipol makes such powerful claims about the excellence of its policies and the ability of its services to reduce liability risk. Competitors in the private marketplace often question the merits of their rivals' claims about their products. Groups drafting alternative model police policies could similarly examine the bases for Lexipol's claims about its products.

Our recommendations that other organizations more effectively compete with Lexipol's policymaking approach are not offered solely for these organizations' benefit. Instead, it is our view that Lexipol's growing dominance in the policymaking market has serious drawbacks. With more and more departments adopting Lexipol's policies, there is mass standardization of police policies across jurisdictions and less opportunity to assess the efficacy of different approaches. Lexipol's domination of the market may also inhibit transparency. Lexipol promotes itself as "the sole source provider" of its risk management tools.³¹¹ Jurisdictions that agree and designate Lexipol as the sole source provider may forego the formal bidding process generally associated with city contracts. As a result, Lexipol does not have to compete for contracts or explain why its products are better than those offered by its competitors.³¹² One way to counteract this standardization and secrecy is by nurturing policymaking competition.

310. *Why Partner With Lexipol?*, LEXIPOL, <http://www.lexipol.com/law-enforcement/law-enforcement-why-lexipol/> [<https://perma.cc/2A2B-A7HK>].

311. *See* Lexipol, Contract with the City of Austin (Aug. 23, 2012), <http://www.austintexas.gov/edims/document.cfm?id=179747> [<https://perma.cc/72NB-BQLL>] (Lexipol explains the following in Exhibit A of the contract: "The comprehensive Lexipol service is not available through any other public or private resources or organizations. There is no other system that offers the following integration into one package; therefore we are the sole source provider of the following package . . .").

312. *See, e.g.*, City of Fremont, Sole Source Justification (undated) (on file with authors) ("This is the only known entity providing this service on the west coast. . . . Since there are no other services of this type available they are the sole source for this type of resource."); Memorandum from Lili Hadsell, Chief of Police, City of Baldwin Park, to the Mayor and Members of the City Council, City of Baldwin Park (June 3, 2010) (on file with authors) ("Lexipol LLC is a sole source

We additionally recommend that groups engaged in advocacy on police policymaking focus their efforts more directly on Lexipol. The company's policy decisions have an oversized influence on American policing. As a result, changing Lexipol's policies can influence the practices of thousands of law enforcement agencies at once. Lexipol reports that it reviews publications from government and nonprofit organizations—including the

vender, as they are the only company that authors a policy manual specific to the agency, but also updates and maintains the policy manual as case law or interpretations change.”); Memorandum from Greg Hebert, Commander, Oxnard Police Dep’t, to Irma Coughlin, Purchasing, Oxnard Police Dep’t (Oct. 3, 2016) (on file with authors) (“LEXIPOL LLC is the only known provider of these online policy services and is led by industry leaders in risk management and policy development for law enforcement.”); Irvine Police Dep’t, Sole Source Request: Lexipol (undated) (on file with authors) (seeking approval of a “sole source request with Lexipol” to maintain the department’s policy manual and noting that “Public Safety staff conducted a web-based search and could not identify another firm that provides the breadth and expertise of services offered by Lexipol”); Interoffice Memorandum from Raymond W. King, Police Captain, San Bernardino Police Dep’t, to Deborah Morrow, Purchasing Manager, San Bernardino Police Dep’t (Feb. 28, 2012) (on file with authors) (“The service that Lexipol LLC provides is unique and is not available through any other public or private resources or organizations.”); City of Long Beach, Purchasing Div., Informal Bid Quote Form (Mar. 19, 2014) (on file with authors) (noting that Lexipol’s service is “not available through any other public or private resources or organizations”); Memorandum from Margaret Mims, Sheriff–Coroner, Cty. of Fresno to Bd. of Supervisors, Cty. of Fresno (Feb. 24, 2015) (on file with authors) (“The Department requests your Board waive the competitive bidding process . . . [because] Lexipol is the only vendor uniquely qualified to provide these services.”); City of Modesto, Justification for Sole Source/Sole Brand (Sept. 26, 2013) (on file with authors) (“Sole Source: Item is available from only one vendor.”); Oakland City Council, Resolution No. 85356 (Jan. 6, 2015) (on file with authors) (referring to Lexipol as “the sole respondent to a competitive solicitation process (Request for Proposals/Qualifications)”); Sole Source Request from the City Manager, City of Richmond (Mar. 6, 2015) (on file with authors) (“There are competing vendors that provide policy manual management services but Lexipol LLC is the sole vendor that will update the existing manual.”). We also found sole source purchase requests online from other states. *See, e.g.*, Memorandum from Jason Batalden, Internal Servs. Adm’r, to Richard A. Nahrstadt, Vill. Manager, Vill. of Northbrook, Ill. (Aug. 8, 2017), northbrookil.iqm2.com/Citizens/FileOpen.aspx?Type=30&ID=8325 [<https://perma.cc/23ZX-CDXE>] (recommending renewal of the sole source contract with Lexipol LLC); Executive/Council Approval Form from Snohomish Cty., Wash., Sheriff, to Council Chairperson, Snohomish Cty. Council (Apr. 29, 2008), http://snohomish.granicus.com/MetaViewer.php?view_id=2&clip_id=270&meta_id=22726 [<https://perma.cc/JMB9-M3CV>] (requesting permission to award “a sole source purchase order to Lexipol, LLC for the purchase of Policy Manual Services”); Nathan L., *County to Appoint Members to Mental Health Committee*, BAKER CITY HERALD (Nov. 25, 2008), <http://www.bakercityherald.com/localnews/4132524-151/county-to-appoint-members-to-mental-health-committee> [<https://perma.cc/Q395-BUB8>] (describing a request for a sole source contract between Lexipol and Baker County, Oregon); Letter from Jimmy Liles, Nixa, Mo., Police Dep’t, to Cindy Robbins, City Council, Nixa, Mo., Brian Bingle, City Council, Nixa, Mo., and Mayor Steel, Nixa, Mo. (July 16, 2015), <http://nixa.com/home/showdocument?id=4429> [<https://perma.cc/4HKE-MWKD>] (requesting funds for a subscription agreement with Lexipol and describing Lexipol as a sole source provider); Minutes of the Regular Meeting of the Moore, Okla., City Council (July 18, 2016) (requesting sole source approval of Lexipol’s products based on the City Attorney’s determination that “it qualified as a sole source purchase due to the unique services offered by Lexipol”).

Department of Justice and the ACLU—when crafting its model policies.³¹³ But these groups should also take their message directly to Lexipol.

There are some recent examples of advocacy groups doing just this: engaging Lexipol about its policies. For example, a coalition of community advocacy groups in California discovered that police departments in a number of cities had adopted “ready-made policies” from Lexipol on immigration enforcement that, in their view, are “unconstitutional and otherwise illegal, and can lead to improper detentions and erroneous arrests.”³¹⁴ The group shared the policies at issue with the press and sent a letter to Lexipol “demanding that it eliminate illegal and unclear directives that can lead to racial profiling and harassment of immigrants.”³¹⁵ Ken Wallentine, a senior legal advisor for Lexipol, told the *Los Angeles Times* that departments adopting its policies “should consider their local demographics and circumstances before turning those [model Lexipol] policies into practice.”³¹⁶ Nonetheless, he maintained that the Lexipol immigration-enforcement policy that came under fire—which allows officers to consider a “lack of English proficiency” as a criteria in making a police stop—was legally defensible.³¹⁷ In a private letter sent to attorneys at the ACLU, Bruce Praet was even more defensive: “Falsely publicizing that our policies are ‘illegal’ and ‘unconstitutional’ appears intended to interfere with our ability to conduct business and to generate media attention. . . . Lexipol policies are legally sound and do not advocate any illegal or unconstitutional conduct by law enforcement officers.”³¹⁸ However, we have since learned that after the public advocacy around the policy, at least one California department repealed the problematic Lexipol policy.³¹⁹ Following this example, groups focused on changing policies on use of force, racial

313. Lexipol February Conference Call, *supra* note 59.

314. *ACLU Demands Change to Unlawful Pre-Packaged Police Policies*, ACLU N. CAL. (Apr. 12, 2017), <https://www.aclunc.org/news/aclu-demands-change-unlawful-pre-packaged-police-policies>.

315. *Id.*; see also Letter from Representatives of the ACLU, Nat’l Day Laborer Org. Network, All. San Diego, Advancing Justice—Asian Law Caucus, Cal. Immigrant Policy Ctr., and Immigrant Legal Res. Ctr. to Bruce Praet, Chairman, Lexipol (Apr. 12, 2017) (on file with authors) (“We strongly urge you to revise the Policy so that it comports with current law, and to promptly rescind and replace the products you have already provided to law enforcement agencies in this state.”).

316. James Queally, *Police Departments Say They Don’t Enforce Immigration Laws. But Their Manuals Say Something Different*, L.A. TIMES (Apr. 12, 2017), <http://www.latimes.com/local/lanow/la-me-ln-california-police-immigration-enforcement-20170412-story.html> (quoting Lexipol senior legal advisor Ken Wallentine).

317. *Id.*

318. Letter from Bruce D. Praet, Attorney at Law, to Adrienna Wong, Attorney at Law, ACLU, and Jennie Pasquarella, Attorney at Law, ACLU (Apr. 13, 2017) (on file with authors).

319. Letter from Pamela Healy, Records Manager, Dep’t of Pub. Safety, City of Sunnyvale, to authors (July 11, 2017) (on file with authors) (noting that Policy Section 415 on “Immigration Violations” was redacted from their policy manual “as the policy is currently under revision and the available material no longer reflective of current practice”).

profiling, body cameras, and other aspects of law enforcement practice should view Lexipol, as well as Lexipol's clients, as a crucial audience.

Each of these suggestions is aimed at encouraging local jurisdictions to play a greater role in deciding what policies should guide their law enforcement agencies. Standardized policies, like those offered by Lexipol, are one possible source of information for jurisdictions creating or updating their police policies. Yet Lexipol needs to provide its subscribers with more information about its policymaking process so that governments can make more informed decisions about whether to subscribe to the service and, if they do, whether to customize Lexipol's policy language. Moreover, Lexipol should not be the only resource consulted during local governments' police policy development. Local governments should also seek out sources that are not as focused on liability risk reduction, tailor policies to fit the particular needs of their jurisdictions, and engage community members about their policies. State governments, advocacy groups, courts, and policing organizations also have important roles to play in drafting and regulating policing policy.

Conclusion

This Article is the first to identify and analyze the significance of Lexipol to American policing. We have documented the quiet emergence of Lexipol as a corporate answer to the challenge of creating internal police policies that guide officer discretion. Surprisingly, this growing practice of privatizing the police policymaking function has gone unnoticed in the academic literature.

As we have shown, Lexipol's policies are reshaping both the process by which police policies are created and the content of the resulting policies. This, in turn, has enormous impact on the institution of policing, particularly in a state like California where nearly every law enforcement agency has adopted Lexipol's policies.

Our goal in this project is to begin an important conversation about some of the concerns raised by this new era of reliance on a corporate legal entity to establish national standards for local policing. These concerns include a focus on liability risk management as the baseline standard for law enforcement behavior, a rulemaking process that proceeds in private with no public participation, and a profit-making model that reduces accountability and disrupts norms of sharing across agencies. We have also begun to sketch a way forward—a path that recognizes possible causes for the increasing privatization of police policymaking while encouraging greater transparency, oversight, and competition.

Appendix

This Appendix describes our methodology for collecting public records of police and sheriff policymaking practices in California. In October and November of 2016, we submitted public records requests to the 200 largest police and sheriff's departments in California, requesting their policy manuals as well as any records reflecting their negotiations and contractual relationships with Lexipol LLC. We completed our collection of records from all 200 departments in October of 2017.

We identified the 200 largest police and sheriff's departments in California by consulting a census of law enforcement agencies published by the Bureau of Justice Statistics (BJS).³²⁰ The BJS census reports on the number of sworn officers in state and local law enforcement agencies as of 2008. Because our focus is on police and sheriff policies, we first removed state law enforcement agencies, university- and school-based law enforcement agencies, and airport, public transportation, and park police from the list of California agencies. In total, the BJS data included 406 police and sheriff's departments in California. Of these, we selected the 200 agencies with the most full-time sworn officers for our public records requests. Our study therefore captures the policymaking practices of almost half of police and sheriff's departments in the state.

The table that follows summarizes the agencies we surveyed and their policy type. It contains the name of the department (column two), the number of sworn officers employed in the department, as reported by the BJS (column three), the city and county in which the department is located (columns four and five), and the policy type, as revealed by their responses to our public records requests (column six). If a jurisdiction authored its own policy manual and had no current relationship with Lexipol, we designated the policy type as "independent." If a jurisdiction adopted the Lexipol policy manual, we designated the policy type as "Lexipol." Finally, if a jurisdiction subscribed to the Lexipol service but continued to publish its own policy manual (without a Lexipol copyright stamp), we designated the department's policy type as "hybrid." Overall, we found that 26 agencies were independent, 166 adopted Lexipol, and 8 had hybrid policy manuals.

320. Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT'L ARCHIVE CRIM. JUST. DATA (2008), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681> [<http://perma.cc/2XJZ-M92U>].

	Agency	Sworn Officers	City	County	Policy Type
1	Los Angeles Police Department	9,727	Los Angeles	Los Angeles	Independent
2	Los Angeles County Sheriff's Office	9,461	Los Angeles	Los Angeles	Independent
3	Riverside County Sheriff's Office	2,147	Riverside	Riverside	Hybrid
4	San Diego Police Department	1,951	San Diego	San Diego	Independent
5	San Francisco Police Department	1,940	San Francisco	San Francisco	Independent
6	San Bernardino County Sheriff's Office	1,797	San Bernardino	San Bernardino	Independent
7	Orange County Sheriff-Coroner Department	1,794	Santa Ana	Orange	Lexipol
8	Sacramento County Sheriff's Office	1,409	Sacramento	Sacramento	Independent
9	San Jose Police Department	1,382	San Jose	Santa Clara	Independent
10	San Diego County Sheriff's Office	1,322	San Diego	San Diego	Independent
11	Long Beach Police Department	968	Long Beach	Los Angeles	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
12	Alameda County Sheriff's Office	928	Oakland	Alameda	Independent
13	San Francisco Sheriff's Department	838	San Francisco	San Francisco	Independent
14	Fresno Police Department	828	Fresno	Fresno	Lexipol
15	Oakland Police Department	773	Oakland	Alameda	Lexipol
16	Ventura County Sheriff's Office	755	Ventura	Ventura	Lexipol
17	Sacramento Police Department	701	Sacramento	Sacramento	Independent
18	Contra Costa County Sheriff's Office	679	Martinez	Contra Costa	Independent
19	Tulare County Sheriff's Office	513	Visalia	Tulare	Lexipol
20	Kern County Sheriff's Office	512	Bakersfield	Kern	Hybrid
21	Fresno County Sheriff's Office	461	Fresno	Fresno	Hybrid
22	Santa Clara County Sheriff's Office	450	San Jose	Santa Clara	Independent
23	Stockton Police Department	415	Stockton	San Joaquin	Independent

	Agency	Sworn Officers	City	County	Policy Type
24	Anaheim Police Department	398	Anaheim	Orange	Lexipol
25	Riverside Police Department	385	Riverside	Riverside	Lexipol
26	Santa Ana Police Department	369	Santa Ana	Orange	Lexipol
27	Bakersfield Police Department	348	Bakersfield	Kern	Lexipol
28	San Bernardino Police Department	345	San Bernardino	San Bernardino	Lexipol
29	San Mateo County Sheriff's Office	334	Redwood City	San Mateo	Lexipol
30	Monterey County Sheriff's Office	315	Salinas	Monterey	Lexipol
31	Santa Barbara County Sheriff's Office	294	Santa Barbara	Santa Barbara	Lexipol
32	San Joaquin County Sheriff's Office	280	French Camp	San Joaquin	Lexipol
33	Glendale Police Department	264	Glendale	Los Angeles	Lexipol
34	Modesto Police Department	262	Modesto	Stanislaus	Lexipol
35	Sonoma County Sheriff's Office	251	Santa Rosa	Sonoma	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
36	Pasadena Police Department	246	Pasadena	Los Angeles	Lexipol
37	Chula Vista Police Department	244	Chula Vista	San Diego	Lexipol
38	Torrance Police Department	235	Torrance	Los Angeles	Independent
39	Stanislaus County Sheriff's Office	230	Modesto	Stanislaus	Lexipol
40	Ontario Police Department	230	Ontario	San Bernardino	Lexipol
41	Oxnard Police Department	228	Oxnard	Ventura	Lexipol
42	Placer County Sheriff's Office	228	Auburn	Placer	Independent
43	Huntington Beach Police Department	223	Huntington Beach	Orange	Lexipol
44	Sunnyvale Department of Public Safety	210	Sunnyvale	Santa Clara	Lexipol
45	Oceanside Police Department	210	Oceanside	San Diego	Hybrid
46	Santa Monica Police Department	205	Santa Monica	Los Angeles	Lexipol
47	Marin County Sheriff's Office	202	San Rafael	Marin	Independent
48	Irvine Police Department	197	Irvine	Orange	Hybrid

	Agency	Sworn Officers	City	County	Policy Type
49	Inglewood Police Department	187	Inglewood	Los Angeles	Lexipol ³²¹
50	Berkeley Police Department	186	Berkeley	Alameda	Lexipol
51	Hayward Police Department	185	Hayward	Alameda	Lexipol
52	Fontana Police Department	184	Fontana	San Bernardino	Lexipol
53	Pomona Police Department	182	Pomona	Los Angeles	Lexipol
54	Fremont Police Department	182	Fremont	Alameda	Lexipol
55	El Dorado County Sheriff's Office	179	Placerville	El Dorado	Lexipol
56	Corona Police Department	179	Corona	Riverside	Lexipol
57	Santa Rosa Police Department	179	Santa Rosa	Sonoma	Lexipol
58	Salinas Police Department	177	Salinas	Monterey	Lexipol
59	Orange Police Department	167	Orange	Orange	Lexipol
60	Garden Grove Police Department	166	Garden Grove	Orange	Independent
61	Richmond Police Department	165	Richmond	Contra Costa	Lexipol

321. The Inglewood Police Department never responded to our public records request. However, officials at Lexipol informed us that Inglewood is one of their clients. Email from Tim Kensok to Ingrid Eagly & Joanna Schwartz (Sept. 13, 2013) (on file with authors).

	Agency	Sworn Officers	City	County	Policy Type
62	Burbank Police Department	164	Burbank	Los Angeles	Hybrid
63	Escondido Police Department	163	Escondido	San Diego	Independent
64	Concord Police Department	161	Concord	Contra Costa	Independent
65	Fullerton Police Department	159	Fullerton	Orange	Lexipol
66	Costa Mesa Police Department	158	Costa Mesa	Orange	Lexipol
67	San Luis Obispo County Sheriff's Office	156	San Luis Obispo	San Luis Obispo	Lexipol
68	Shasta County Sheriff's Office	154	Redding	Shasta	Lexipol
69	Santa Cruz County Sheriff's Office	149	Santa Cruz	Santa Cruz	Lexipol
70	El Monte Police Department	145	El Monte	Los Angeles	Lexipol
71	Santa Clara Police Department	141	Santa Clara	Santa Clara	Independent
72	Newport Beach Police Department	140	Newport Beach	Orange	Lexipol
73	San Diego Harbor Police	139	San Diego	San Diego	Lexipol
74	Beverly Hills Police Department	137	Beverly Hills	Los Angeles	Independent

	Agency	Sworn Officers	City	County	Policy Type
75	Visalia Department of Public Safety	136	Visalia	Tulare	Lexipol
76	Santa Barbara Police Department	136	Santa Barbara	Santa Barbara	Lexipol
77	Ventura Police Department	134	Ventura	Ventura	Lexipol
78	Port of Los Angeles Police	133	San Pedro	Los Angeles	Lexipol
79	Whittier Police Department	127	Whittier	Los Angeles	Lexipol
80	Simi Valley Police Department	127	Simi Valley	Ventura	Lexipol
81	Roseville Police Department	126	Roseville	Placer	Lexipol
82	Elk Grove Police Department	126	Elk Grove	Sacramento	Lexipol
83	Fairfield Police Department	124	Fairfield	Solano	Lexipol
84	El Cajon Police Department	120	El Cajon	San Diego	Independent
85	Antioch Police Department	120	Antioch	Contra Costa	Lexipol
86	West Covina Police Department	119	West Covina	Los Angeles	Lexipol
87	Vallejo Police Department	116	Vallejo	Solano	Lexipol
88	Carlsbad Police Department	114	Carlsbad	San Diego	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
89	Solano County Sheriff's Office	113	Fairfield	Solano	Hybrid
90	Daly City Police Department	113	Daly City	San Mateo	Lexipol
91	Merced County Sheriff's Office	112	Merced	Merced	Lexipol
92	Vacaville Police Department	111	Vacaville	Solano	Lexipol
93	Butte County Sheriff's Office	110	Oroville	Butte	Hybrid
94	Rialto Police Department	109	Rialto	San Bernardino	Lexipol
95	Downey Police Department	109	Downey	Los Angeles	Lexipol
96	Imperial County Sheriff's Office	109	El Centro	Imperial	Lexipol
97	Santa Maria Police Department	108	Santa Maria	Santa Barbara	Lexipol
98	San Mateo Police Department	108	San Mateo	San Mateo	Lexipol
99	Culver City Police Department	106	Culver City	Los Angeles	Lexipol
100	Sutter County Sheriff's Office	105	Yuba City	Sutter	Independent
101	Merced Police Department	105	Merced	Merced	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
102	Clovis Police Department	105	Clovis	Fresno	Lexipol
103	Brea Police Department	103	Brea	Orange	Lexipol
104	Westminster Police Department	100	Westminster	Orange	Lexipol
105	South Gate Police Department	99	South Gate	Los Angeles	Lexipol
106	Redondo Beach Police Department	99	Redondo Beach	Los Angeles	Lexipol
107	Napa County Sheriff's Office	98	Napa	Napa	Lexipol
108	Mountain View Police Department	97	Mountain View	Santa Clara	Lexipol
109	Redwood City Police Department	96	Redwood City	San Mateo	Lexipol
110	Hawthorne Police Department	96	Hawthorne	Los Angeles	Lexipol
111	Chino Police Department	96	Chino	San Bernardino	Lexipol
112	San Leandro Police Department	95	San Leandro	Alameda	Lexipol
113	Santa Cruz Police Department	95	Santa Cruz	Santa Cruz	Lexipol
114	Tustin Police Department	95	Tustin	Orange	Lexipol
115	Alameda Police Department	94	Alameda	Alameda	Lexipol
116	Buena Park Police Department	94	Buena Park	Orange	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
117	Livermore Police Department	94	Livermore	Alameda	Lexipol
118	Palm Springs Police Department	93	Palm Springs	Riverside	Lexipol
119	Palo Alto Police Department	93	Palo Alto	Santa Clara	Lexipol
120	Gardena Police Department	91	Gardena	Los Angeles	Lexipol
121	Humboldt County Sheriff's Office	91	Eureka	Humboldt	Lexipol
122	Tracy Police Department	90	Tracy	San Joaquin	Lexipol
123	National City Police Department	90	National City	San Diego	Lexipol
124	Murrieta Police Department	90	Murrieta	Riverside	Lexipol
125	Chico Police Department	88	Chico	Butte	Lexipol
126	Folsom Police Department	88	Folsom	Sacramento	Lexipol
127	Milpitas Police Department	86	Milpitas	Santa Clara	Lexipol
128	Pleasanton Police Department	85	Pleasanton	Alameda	Lexipol
129	Redlands Police Department	84	Redlands	San Bernardino	Lexipol
130	Citrus Heights Police Department	83	Citrus Heights	Sacramento	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
131	Alhambra Police Department	83	Alhambra	Los Angeles	Lexipol
132	Yolo County Sheriff's Office	82	Woodland	Yolo	Lexipol
133	Hemet Police Department	82	Hemet	Riverside	Lexipol
134	Upland Police Department	81	Upland	San Bernardino	Independent
135	Union City Police Department	81	Union City	Alameda	Lexipol
136	Montebello Police Department	81	Montebello	Los Angeles	Lexipol
137	Turlock Police Department	80	Turlock	Stanislaus	Lexipol
138	Kings County Sheriff's Office	79	Hanford	Kings	Independent
139	South San Francisco Police Department	79	San Francisco	San Francisco	Lexipol
140	Rohnert Park Department of Public Safety	78	Rohnert Park	Sonoma	Lexipol
141	Madera County Sheriff's Office	78	Madera	Madera	Lexipol
142	Mendocino County Sheriff's Office	77	Ukiah	Mendocino	Lexipol
143	Lodi Police Department	76	Lodi	San Joaquin	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
144	Manteca Police Department	76	Manteca	San Joaquin	Lexipol
145	Pittsburg Police Department	76	Pittsburg	Contra Costa	Lexipol
146	Monterey Park Police Department	75	Monterey Park	Los Angeles	Lexipol
147	Nevada County Sheriff's Office	74	Nevada City	Nevada	Lexipol
148	San Rafael Police Department	74	San Rafael	Marin	Lexipol
149	Walnut Creek Police Department	73	Walnut Creek	Contra Costa	Lexipol
150	Indio Police Department	73	Indio	Riverside	Independent
151	Napa Police Department	72	Napa	Napa	Lexipol
152	Tulare Police Department	71	Tulare	Tulare	Lexipol
153	Colton Police Department	71	Colton	San Bernardino	Lexipol
154	West Sacramento Police Department	70	West Sacramento	Yolo	Lexipol
155	Baldwin Park Police Department	69	Baldwin Park	Los Angeles	Lexipol
156	Petaluma Police Department	68	Petaluma	Sonoma	Lexipol
157	El Segundo Police Department	68	El Segundo	Los Angeles	Independent

	Agency	Sworn Officers	City	County	Policy Type
158	Huntington Park Police Department	68	Huntington Park	Los Angeles	Lexipol
159	La Habra Police Department	68	La Habra	Orange	Lexipol
160	Yuba County Sheriff's Office	66	Marysville	Yuba	Lexipol
161	Yuba City Police Department	65	Yuba City	Sutter	Lexipol
162	Woodland Police Department	65	Woodland	Yolo	Lexipol
163	Arcadia Police Department	65	Arcadia	Los Angeles	Lexipol
164	San Luis Obispo Police Department	64	San Luis Obispo	San Luis Obispo	Lexipol
165	Watsonville Police Department	64	Watsonville	Santa Cruz	Lexipol
166	Manhattan Beach Police Department	64	Manhattan Beach	Los Angeles	Lexipol
167	Azusa Police Department	63	Azusa	Los Angeles	Lexipol
168	La Mesa Police Department	63	La Mesa	San Diego	Independent
169	Siskiyou County Sheriff's Office	62	Yreka	Siskiyou	Lexipol
170	Tuolumne County Sheriff's Office	61	Sonora	Tuolumne	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
171	Fountain Valley Police Department	61	Fountain Valley	Orange	Lexipol
172	Lake County Sheriff's Office	61	Lakeport	Lake	Lexipol
173	Porterville Police Department	60	Porterville	Tulare	Lexipol
174	Covina Police Department	60	Covina	Los Angeles	Lexipol
175	Madera Police Department	60	Madera	Madera	Lexipol
176	Brentwood Police Department	60	Brentwood	Contra Costa	Lexipol
177	Gilroy Police Department	60	Gilroy	Santa Clara	Lexipol
178	Calaveras County Sheriff's Office	59	San Andreas	Calaveras	Lexipol
179	Novato Police Department	59	Novato	Marin	Lexipol
180	Davis Police Department	59	Davis	Yolo	Hybrid
181	Montclair Police Department	58	Montclair	San Bernardino	Lexipol
182	San Pablo Police Department	57	San Pablo	Contra Costa	Lexipol
183	Cypress Police Department	56	Cypress	Orange	Lexipol
184	Cathedral City Police Department	56	Cathedral City	Riverside	Lexipol
185	San Ramon Police Department	56	San Ramon	Contra Costa	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
186	Monrovia Police Department	55	Monrovia	Los Angeles	Lexipol
187	Monterey Police Department	54	Monterey	Monterey	Lexipol
188	Rocklin Police Department	54	Rocklin	Placer	Lexipol
189	El Centro Police Department	54	El Centro	Imperial	Lexipol
190	Beaumont Police Department	54	Beaumont	Riverside	Lexipol
191	San Gabriel Police Department	54	San Gabriel	Los Angeles	Lexipol
192	Newark Police Department	54	Newark	Alameda	Lexipol
193	Glendora Police Department	53	Glendora	Los Angeles	Lexipol
194	Vernon Police Department	53	Vernon	Los Angeles	Lexipol
195	Bell Gardens Police Department	51	Bell Gardens	Los Angeles	Lexipol
196	Menlo Park Police Department	50	Menlo Park	San Mateo	Lexipol
197	Hanford Police Department	50	Hanford	Kings	Lexipol
198	Lompoc Police Department	49	Lompoc	Santa Barbara	Lexipol
199	Seaside Police Department	48	Seaside	Monterey	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
200	Los Banos Police Department	48	Los Banos	Merced	Lexipol