

Internal and External Police Oversight in the United States by Merrick Bobb¹

This paper discusses police oversight in the United States. After presenting historical background, I discuss external oversight provided by citizen review boards, police commissions, investigatory agencies, and monitors. As of 2000, over 100 municipalities in the United States, it is estimated, had some form of external oversight of the police, usually in the form of a civilian review board. Today, there are substantially more cities considering or implementing new models of civilian oversight. Next I discuss internal oversight by police departments themselves, concentrating on Internal Affairs bureaus and Use of Force Boards. Finally, I discuss oversight provided by the print media. Oversight of the police in all three of these areas—external, internal, and journalistic—is growing, and its development is robust.

Unlike the pattern in many places in the world where law enforcement is exclusively a state or national function, policing in the United States is predominantly a matter for local, municipal government. Although there are federal police such as the Federal Bureau of Investigation (FBI), the Border Patrol, and the Drug Enforcement Administration (DEA), their jurisdiction is limited to defined federal crimes. Individual states within the United States do have statewide police forces, such as the California Highway Patrol or the New York State Troopers, but their jurisdiction generally extends only to patrolling the roads and highways in the state. Overwhelmingly, municipal street patrol and other basic police services are provided by local authorities, including both police and local sheriff's departments.

There are far more individual law enforcement agencies in the United States than one might expect. As of June 2000, according to the U.S. Justice Department's Bureau of Justice Statistics², there were 15,736 local law enforcement agencies in the United

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² Reaves, Brian A. and Hickman, Matthew J. "Census of State and Local Law Enforcement Agencies, 2000." Bureau of Justice Statistics, U.S. Department of Justice. October 2002. The report can be found online at www.ojp.usdoj.gov/bjs/abstract/csllea00.htm. The report can be directly accessed in PDF format at www.ojp.usdoj.gov/bjs/pub/pdf/csllea00.pdf.

States. Of this total, 12,666 were local police departments (which includes municipal, county, tribal, and regional general purpose local policing agencies); the remaining 3,070 were sheriff's departments. There were 440,920 full-time, sworn police officers in these 12,666 police departments, and 164,711 full-time, sworn employees in the sheriff's departments. Of the 440,920 full-time police officers, slightly more than one-third (34.2%) worked in an agency having 1,000 or more officers, even though these agencies accounted for only 0.4% of the total number of police departments. While departments with 100 or more full-time police officers accounted for only 4.5% of the total number of police departments, they employed three-fifths (61%) of the full-time officers. There were only 1,323 police departments, about 10%, with 50 or more full-time police officers. The great majority of the police departments, about 78% (9,864), had less than 25 full-time police officers, while about 56% had fewer than 10 full-time officers. There were 1,366 police departments, or 10.8%, that employed one full-time officer and 199 departments (1.6%) that used solely part-time officers.

I. External Oversight

A. The Foundation of Modern Policing

To understand American police oversight, it is helpful to know how modern policing began. The role and function of a contemporary American police department are largely the result of developments in 19th-century London where, in 1829, Sir Robert Peel first recognized the need for a modern police force as English cities grew larger and crime and disorder increased. Previously, police functions had been performed by part-time village constables, private guards and night watchmen, or, in the case of riots and major disorder, by the militia or the military. Peel believed that a standing permanent police force was necessary.

The creation of a professional police was not without controversy. The idea of a highly visible, distinctive, uniformed, full-time, paid police force organized on quasi-military lines was a matter of concern to those who feared that omnipresent police would curtail civil liberties and privacy. At the time, people were concerned that the police might usurp the role of judge and jury by deciding guilt and meting out punishment.

Finally, there was concern that the police might overstep boundaries and use force excessively.

Thus, legislation was introduced by Peel in 1829 to strictly separate the job of the police from that of the judiciary and narrow the role of the police largely to the prevention and detection of crime. Peel's formulation became the foundation for English policing and, in 1844 – when the New York Police Department (NYPD) was formed – American policing.³

B. The Development of American Police Oversight

From the beginning of American policing, there has been debate about who should oversee the police and enforce Peel's principles. The question of who is best suited to police the police has been answered in different ways depending upon the problems in any given era.

In the early years of the NYPD and other police departments, the police were overseen by local political bosses. Ward heelers treated a job in the police department as political patronage, and the police quickly became corrupt and beholden to the local political bosses and their appointees and favorites. In response, in connection with a

³ Peel's principles state that the role of the police is:

1. To prevent crime and disorder.
2. To recognize the power of the police to fulfill their functions and duties is dependent on public approval of their existence, actions and behavior, and on their ability to secure and maintain public respect.
3. To recognize that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing the observance of laws.
4. To recognize the extent to which the co-operation of the public can be secured diminishes proportionately with the necessity of the use of physical force compulsion for all achieving police objectives.
5. To seek and to preserve public favor, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of law and without regard to the justice or injustices of the substance of individual laws; by ready offering of individual service and friendship to all members of the public without him.
6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order; and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police; the police being members of the public who are paid to give full time attention to duties which are incumbent on every citizen, in the interests of the community welfare and existence.
8. To recognize always the need for strict adherence to police executive functions, and to refrain from seeming to usurp the power of the judiciary or avenging individuals or the state, and of authoritatively judging guilt and punishing the guilty.
9. To recognize always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.

wave of reform to weaken local ward heelers, the first Boards of Police or Police Commissions were formed. In New York, for example, the Mayor, the Chief of Police (renamed Commissioner), and a City Judge constituted the members of the first New York City Police Commission.

Until the 20th century, mayors, acting alone or in conjunction with commissioners, constituted civilian oversight. A mayor's principal power was to hire and fire the Chief of Police. Not unlike the ward heelers before them, some mayors treated the police as political patronage and actually required the police in turn to raise money for their next political campaigns and provide protection to the mayor's longtime close friends.

These growing corrupt practices led to the next wave of police reform and a new model for police oversight. The Progressive movement in the United States in the first quarter of the 20th century was deeply distrustful of politicians, viewing them as hopelessly corrupt. Instead, the Progressives argued, power over the police should rest in the hands of good citizens (bankers, established merchants, civic-minded lawyers and other professionals) who would serve on a part-time basis, usually without pay, to oversee the police on a nonpartisan, politically independent basis.

In order to take policing out of politics, the power to hire and fire the Chief was given in whole or in part to the group of good citizens serving on police commissions. The Progressives saw these commissions as a buffer, shielding the police from the mayor and partisan politics. The police commission model never quite performed as the Progressives had hoped. Because the police commissioners were appointed by mayors or the city council, and served at their pleasure, partisan political considerations were never eliminated. The good citizens who were appointed to these commissions generally lacked expertise in police affairs and, as part-timers, did not have the time to acquire it. As a result, police commissions were overly deferential to the Chief of Police and, over time, became essentially negligible.

The independence of the Chief of Police and the department from these weak commissions led in turn to police departments that became a power in their own right—insulated and aloof. They ceased being accountable to all, except perhaps to the wealthy

and vocal. This diminished accountability led to abuse of power, particularly with respect to the policing of racial and ethnic minorities, poor people, and others without an effective voice. Large portions of communities of color came to see the police as unwilling to protect and serve them, vulnerable as they were to crime, leading to major city riots in the 1960s. Most, if not all, of the riots were triggered by an officer-involved shooting or an ugly excessive force incident. The 1960s gave rise to urgent, if not strident, calls for empowerment of communities of color by placing the police under scrutiny by civilian review boards with substantial membership by persons from racial and ethnic minorities.

C. Contemporary Issues

Over the last 30 years, a consensus has formed that law enforcement agencies rarely, if ever, confront problems of excessive force, or undertake substantial internal reform on their own. An outside, civilian organization with significant or exclusive responsibility for the investigation of an alleged misuse of force became popular. Yet, there remains genuine disagreement among advocates for police reform about the wisdom of a wholesale displacement of law enforcement's internal investigative apparatus in favor of outside review panels of lay persons, particularly where the power to adjudicate and impose discipline is taken away from the department, whether in whole or in part.

Those who advocate in favor of such displacement argue that self-policing will necessarily and unavoidably produce a biased result; that even reasonable, honest, and well-intentioned police investigators simply cannot overcome the pressures from all sides that come to bear on internal investigations of an officer-involved shootings, a death in the jail, or a serious use of force on the street. The pressure can come from many sources. It may come from superiors within the police organization who do not want an embarrassing incident publicly exposed, or who fear the credibility and authority of the police will be undermined if a use of force is held to be against policy. Pressure may come from the police union, which may be inclined to vigorously defend even bad officers. A mayor or city council may not want to hear bad news about the police department, and may encourage suppression of unfavorable incidents. Finally, fellow officers may not want to see one of their peers held up to withering scrutiny.

Complicating the issue is the tendency of police officers to become uncooperative when faced with an investigation, creating what has been called the “blue wall” to enforce a code of silence by intimidating any officer who shows any willingness to cooperate with investigators or point the finger at a fellow officer. Thus, many police reform advocates conclude that police organizations are insular, self-referential, and mistrustful of outsiders. Accordingly, these reformers argue, the power of law enforcement to investigate and self-police must be taken away and given to a review board.

On the other hand, there are other reform advocates who argue that the power to adjudicate wrongdoing and impose discipline belongs, at least presumptively, to the law enforcement agency in question. Without responsibility to adjudicate wrongdoing and impose discipline, these reformers argue, senior executives in the law enforcement agency cannot be held personally accountable for dealing with police misconduct, and will simply blame the civilian review board for its decisions. Their argument continues by stating that unless the police are held strictly accountable up and down the chain of command for actively managing the risk of police misconduct, the self-protective habits of the police will never change. It is one thing to achieve a fair result in a given investigation; it is far more powerful, these reformers contend, to change police culture in general by requiring strict accountability.

Most police reformers contend that self-policing is not an inalienable right. Rather, they argue that the ability to self police is a rare privilege afforded only to certain, highly trained and disciplined professionals—such as university faculty, lawyers, or doctors. The privilege comes with heavy obligations to demonstrate upon demand, in any individual case or in general that the results reached by self-policing are fair, reasonable, and based on thorough and dispassionate investigation. If that burden cannot be met, then the privilege is no longer merited, and should be taken away; or, at least, the power to investigate must be shared with civilian overseers.

There is increasingly broad agreement that whether or not the police retain the power to investigate themselves, law enforcement’s business, in general, is the public’s business, and therefore, must be open and transparent. In some instances, law enforcement agencies voluntarily agree to allow monitors unprecedented access to

internal records. As a result, for example, detailed information about the use of force, which heretofore had never seen the light of day, is being made public.

In jurisdictions where the police have been more amenable to voluntary reform efforts, the wholesale displacement of investigatory and disciplinary authority may be avoidable. Everywhere, however, the privilege of the police to self-regulate comes with an obligation to fully open the agency's records to responsible public representatives. If this obligation is not met, the privilege is no longer merited. The remainder of this article will describe some of the various options currently in use to place police agencies under heightened civilian oversight and control.

D. Civilian Review Boards

I. General Description

Civilian review boards typically go to work only after the law enforcement agency itself has completed an internal investigation of a citizen's complaint. Usually, these boards can only review the completed file and cannot conduct independent investigations or hearings, or subpoena witnesses or documents. Nor can they adjudicate complaints or mete out discipline to errant officers. The power of such boards is limited to giving the Chief of Police recommendations whether: (a) the results of the completed internal investigation should be sustained or reversed, or (b) further investigation or reinvestigation should take place. Generally, no portion of the review process is public. These review bodies often have no stand-alone budget. Most civilian review boards deal exclusively with citizens' complaints on an individual basis. They do not, as a rule, look at the department as a whole or search for patterns and practices of police misconduct. Generally, they cannot make policy recommendations based on their review of completed internal investigations.

Civilian review boards may or may not have full-time staff. Their budgets are small. They generally cannot receive complaints and only become aware of complaints or investigations when notified by Internal Affairs (IA). Additionally, Internal Affairs is generally not required to notify these bodies of filed complaints. These review bodies most often report to the Chief of Police and have little access to elected officials. St. Paul,

Minnesota's Police-Civilian Internal Affairs Review Commission (Review Commission) is a good example of the civilian review board model.

II. St. Paul, Minnesota

St. Paul has a population of approximately 300,000 with a police department of 555 sworn officers. The Review Commission, which has a staff of one and an annual budget of \$37,160, consists of seven members, two of whom are St. Paul Police Department officers. Members are jointly appointed by the Mayor and Chief of Police. The Commission has a civilian coordinator employed by the Police Department who processes complaints from the public, but the Internal Affairs unit of the St. Paul Police Department handles the investigations. The Review Commission has subpoena power.

Once an Internal Affairs investigation is complete, it is sent to the Commission for review. The Commission reviews all IA investigations alleging excessive force, use of firearms, discrimination, poor public relations, and other complaints at the Chief's discretion. The commissioners, after being presented information about the case from an IA investigator, vote on the outcome.

If a majority of the commissioners vote to sustain a complaint they must also agree on a recommendation for discipline. The commissioners may also determine that further investigation is needed either by IA or an independent investigator. The IA and Commission findings are forwarded to the Chief along with the Commission's disciplinary recommendations if the complaint is sustained. The Chief has the final word on both disposition and discipline, if any.

III. Strengths and Weaknesses

Civilian review boards have the strengths of opening internal police investigations to scrutiny by outsiders and often providing for participation by multiple community members on a board, thereby allowing various groups in the community to perceive that their perspectives are represented. However, such models are quite limited in the scope of their powers. They rarely are authorized to do more than find that a specific case was not competently or fairly handled and to request that the identified problem be corrected. Rarely do civilian review boards have the power to make policy recommendations or to address problems other than those found within the specific investigatory file they are reviewing. The lack of expertise in police tactics, strategy, and policy has prevented

many review boards from effectively overseeing the police, and has often resulted in boards agreeing with the police department 90 percent or more of the time. Additionally, many review boards have been starved for resources and lacked adequate staff, leading to a large backlog of unresolved cases. As a result, many review boards have had difficulty providing meaningful insight or oversight.

E. Investigative and Quality Assurance Models

Some jurisdictions have experiments afoot in which civilians from outside the law enforcement agency are empowered to oversee and direct police internal affairs investigations.

I. Seattle, Washington

In Seattle, a civilian lawyer has been placed in charge of Internal Affairs within the Seattle Police Department. Seattle has a population of approximately 560,000 and the Police Department has 1,240 sworn officers. In contrast to San Francisco, for example, which assigns the investigations of citizen complaints to an independent entity, Seattle has chosen to bring a civilian lawyer from outside the Department to head the Internal Affairs unit, called the Office of Professional Accountability (OPA), with the title of Director. A captain, a lieutenant, and six sergeants report to the Director. In turn, the Director reports to the Chief of Police.

The civilian OPA Director is appointed by the Mayor and confirmed by the City Council. The more serious complaints are investigated by the sergeants assigned to OPA. Completed investigations are forwarded to the Director who may agree with the findings, order further investigation, or recommend different findings. Except in the case of sustained complaints, the decision of the Director is final. Sustained complaints go to the Chief of Police for final decision and the imposition of discipline, if warranted.

The responsibilities of the OPA also include regularly advising the Chief of Police, the Mayor, and City Council on all matters involving the police department's investigatory and disciplinary functions, as well as recommending policy on issues relating to the professional standards of the police department. The OPA also evaluates the internal investigation process, and makes recommendations on strategies and policies to improve complaint gathering and investigative procedures.

II. Los Angeles County

As another example, the Board of Supervisors of Los Angeles County created the Office of Independent Review (OIR) in 2001. This group of six lawyers with significant civil rights experience has been empowered to direct and shape internal affairs investigations in the Los Angeles County Sheriff's Department (LASD). No investigation can be closed unless the OIR certifies that it was full, fair, and thorough. The OIR has the power to participate as necessary and appropriate in ongoing investigations by internal affairs, including interviewing witnesses, responding to crime scenes, and reviewing tangible evidence and relevant documentation. The OIR monitors all ongoing, internal investigations, and reviews all completed investigations to ensure that the content, disposition, and recommended discipline are appropriate. Additionally, the OIR is empowered to make recommendations of disposition and discipline on all investigations within its purview. It comments on policy and suggests needed reform.

III. City of Los Angeles

With respect to the Los Angeles Police Department (LAPD), the power to investigate and adjudicate misconduct is shared by LAPD's Internal Affairs, a Police Commission, and an Inspector General. The Commission, appointed by the mayor of Los Angeles and comprised of five civilians from outside of law enforcement, decides whether officer-involved shootings and other serious uses of force are proper or improper in light of LAPD policies and standards.

If the Commission decides a use of force is improper, the responsible police officer is subject to discipline or retraining. The Inspector General has independent investigatory authority, and also is required to provide independent opinions to the Commission on the propriety of LAPD shootings and serious uses of force. The Inspector General may also issue reports to the public on the overall integrity of the LAPD's disciplinary system.

IV. San Francisco

The Office of Citizen Complaints (OCC) in San Francisco is an example where investigatory power regarding complaints by civilians is taken away from the Police Department entirely. San Francisco has a population just under 800,000 and a Police

Department (SFPD) with 2,200 sworn members. The staff of the OCC consists of a director, chief investigator, three senior investigators, 16 line investigators, two attorneys, a policy specialist, and eight administrative positions.

The OCC reports to a Police Commission comprised of five members appointed by the Mayor and confirmed by the Board of Supervisors. The Commission is the principal disciplinary authority for the SFPD in all cases where discipline exceeds ten days of unpaid leave. The OCC issues special policy recommendation reports and has subpoena power.

The OCC has exclusive jurisdiction over civilian-initiated complaints of misconduct. Once a complaint has been filed with the OCC, an investigator interviews the complainant, officers, and witnesses, and reviews reports and other evidence. The OCC then formulates its preliminary findings which, if the allegations are found to be sustained, are then presented at a disciplinary hearing. Police Commission hearings are formal administrative hearings at which an OCC trial attorney prosecutes and a union or private attorney defends. The purpose of the administrative hearing is to review the OCC findings, establish the facts, and to impose discipline for sustained allegations.

V. Strengths and Weaknesses

These different investigative models of police oversight are premised on the view that unregulated internal police investigations of citizen complaints are often biased or otherwise not trustworthy. Accordingly, these models attempt to displace, in whole or in part, internal police investigations. Some, like San Francisco, in essence remove to investigatory and disciplinary powers from the Police Department and place them in the San Francisco Police Commission and the OCC. This model is thought by some to be less effective because it allows the Police Department to evade responsibility and to blame the OCC if it does not like the outcome. Others such as the OIR have shared responsibility for investigations with Internal Affairs. In the case of Seattle, the Internal Affairs unit continues to investigate, but under the direction and supervision of an externally appointed lawyer. These latter two models work well.

What unites each of these models is that their core responsibility is to assure the quality and integrity of individual investigations of citizen complaints. A principal strength of these models is that they should achieve complete, fair, and analytical

investigations of the allegations and facts relating to a complaint of police misconduct. On the other hand, investigative and quality assurance models more often than not are restricted to oversight only of specific cases where complaints have been filed. Even where such bodies have the power to address broader policy issues, they typically underutilize this power, in part because their resources are more geared to investigating specific cases than researching and writing about policy.

F. Monitors and Evaluative and Performance-Based Models

Some police reformers have taken the position that systemic failures will not be identified and solved when one proceeds on a case-by-case basis. Until systemic problems of police culture and procedure are solved, they argue, police departments will continue to produce flawed and biased investigations. They further argue that the displacement of investigatory authority lets the police department avoid criticism and does little to inculcate internal accountability. They favor independent monitors.

Although voluntary, independent monitoring exists in only a few jurisdictions, mostly in California, it can be a powerful and useful device. Monitoring enables persons from outside of law enforcement to conduct an agency review, and then frankly report to the public about the fairness, thoroughness, and integrity of internal police processes for self-examination, self-investigation, and self-regulation. Monitors can be used by themselves or in conjunction with independent investigators.

I. Los Angeles County

Los Angeles County uses an evaluative performance-based model with a monitor given the title of Special Counsel.⁴ The Los Angeles County Sheriff's Department serves a population of 3 million with approximately 8100 sworn officers. Special Counsel is appointed by the Board of Supervisors of Los Angeles and serves at the pleasure of the Board. The Los Angeles County has retained Special Counsel in his capacity as a lawyer, allowing confidential communications between Special Counsel and the Board to be protected from disclosure by the attorney-client privilege. Special Counsel is guaranteed unfettered access to all persons, documents, and records that are relevant to

⁴ The author of this paper has served as Special Counsel since the inception of that position in 1992.

his investigations. Special Counsel can request subpoena power from the Board if needed.

Special Counsel reports to the Board and issues public reports concerning the progress of the Sheriff's Department in managing the risk of police misconduct. In the early years, Special Counsel worked with the Sheriff's Department to develop data to serve as a baseline for measuring progress. Thus, Special Counsel had substantial input in the creation of an early warning and tracking system that captures data on officer performance across a broad spectrum, including use of force, shootings, generating litigation, and disciplinary decisions. Systems were also set up to track judgments and settlements against the Los Angeles County due to police misconduct.

Special Counsel's public monitoring reports, which address excessive force and integrity issues in policing, are calculated to foster a constructive, problem-solving dialog, stripped of ideology and rhetoric. A primary goal is to assist the department in devising ways to eliminate excessive or unnecessary lethal or non-lethal force. Another goal is for law enforcement to learn to handle situations that legitimately call for the use of force in a way that produces an acceptable result for the police while providing a reduced risk of injury to both the officer and the suspect. Approaching the reports with these goals in mind sharpens the strategic and tactical analysis, and it makes for a wider and more free-ranging inquiry into alternative solutions to the control of excessive force. By stripping the discussion of blame and ideology, everyone involved is freer to focus on the problem rather than worrying about mistrustful suspicions, personal motivations, and political agendas. In addition to the hope of providing both better and safer policing, it is hoped that the risk of legal liability for the law enforcement agency will be significantly reduced.

II. Strengths and Weaknesses.

Monitors are accountable to different constituencies. First, each is accountable to civic leaders to provide reports focusing on police decision-making, policy formulation, and efforts to responsibly anticipate and manage liability risk. More importantly, a monitor is accountable to the public at large to provide a thorough and fair appraisal of law enforcement, and to make the heretofore mystery-shrouded, internal processes of the police more transparent and comprehensible.

To fulfill these responsibilities, a monitor must speak candidly about weaknesses in internal police mechanisms for accountability and responsibility. The monitor must scour and test the law enforcement agency's policies, procedures, and practices to determine whether they are, in fact, up to the job of preventing misconduct. The monitor should propose new policies and practices where the old ones have failed. Additionally, an independent monitor ought to consider how the agency he or she is monitoring compares to other police departments with respect to the use of lethal and non-lethal force. After such comparison, the monitor should suggest the implementation of best practices from other law enforcement agencies.

Monitors look at the overall integrity and fairness of the disciplinary system and, in the course of such examination, review how citizen complaints are investigated and resolved. Unlike police oversight systems that focus solely on the resolution of citizen complaints, Special Counsel reviews and analyzes all manner of internal investigations, including, for example, the Sheriff's Department's internal review and appraisal of officer-involved shootings. This model of oversight compares the performance of the Department over time and against other similarly situated law enforcement agencies.

This oversight model is evaluative in the sense that the goal is to look at a police department in its entirety to make judgments over time regarding how well it minimizes the risk of police misconduct, identifies and corrects patterns and practices of unconstitutional and illegal behavior, and finds solutions to systemic failures. This oversight model is performance-based because it examines how individual officers perform, how supervisors and executives respond, and how the institution as a whole manages the risk that its employees engage in unconstitutional or illegal behavior.

A principal strength of evaluative and performance-based models is the ability of the entity exercising this authority — most typically, a monitor — to address systemic issues and to seek to create accountability within the police department for eliminating problems and abuses. As opposed to the other two types of models, monitors are more focused on systemic change than on resolution of specific cases. Because a monitor does not bring the same broad community involvement to the process as a multi-member board does, some see it as a possible problem that the oversight is not sufficiently connected to community interests and concerns.

G. Compulsory Monitoring and Reform

Where a law enforcement agency refuses voluntarily to give access to monitors, resists a civilian review board or other outside investigatory body, and persists in using excessive force, there are federal statutory remedies that can be applied to a recalcitrant department in order to bring about the necessary reform.

For example, in the wake of the Rodney King incident in Los Angeles, the Congress of the United States passed legislation enabling the Civil Rights Division of the Department of Justice to commence investigations of state and local police alleged to be engaging in an unconstitutional pattern or practice of excessive force or other serious misconduct. If the federal investigation shows that allegations are true, a federal court is empowered to compel police reform by issuing an injunction. During the Clinton administration, the Justice Department was active in forcing police departments to be more open and to undertake significant reform. In most instances, the local jurisdiction entered into a settlement agreement before the federal court issued an injunction. In part, the intent of these federal investigations and decrees was to make closed and mysterious internal police processes open and transparent so that police officials could be held publicly responsible and accountable for the thoroughness, correctness, reasonableness, and fairness of their decisions.

These federal remedies have been employed in several jurisdictions. Among them all are: Pittsburgh, Pennsylvania; Steubenville, Ohio; the State of New Jersey; Montgomery County, Maryland; Highland Park, Illinois; Washington, DC; Los Angeles, California; Cincinnati, Ohio; Detroit, Michigan; Portland, Maine; and Prince George's County, Maryland.

The consent decree (the Degree) recognizing the agreement reached between the federal government and the City of Los Angeles concerning reform of the LAPD is a representative example.⁵ The Decree details the degree to which the federal government

⁵ Consent Decree, *United States v. Los Angeles*, No. 00-11769 (C.D. Cal. approved June 15, 2001), <http://www.usdoj.gov/crt/split/documents/laconsent.htm>. A consent decree is in agreement between the Justice Department and the city in question that he is filed in federal court, signed by a federal judge, and can be enforced by all the powers

is requiring the LAPD to undergo reform and curtail excessive force. The federal order has numerous requirements. The LAPD must collect detailed information about the use of force, and make it available to the public. The Decree orders the LAPD to build a computerized relational database of information on use of force, shootings, administrative and criminal investigations, racial profiling, and a number of other subjects bearing upon risk of police misconduct. It also mandates the Police Commission, the Inspector General, and an appointed monitor to review and report on the LAPD's implementation of the federal government's order, including reports to the court if the monitor believes that the LAPD is not complying with the Decree in good faith. During President Clinton's years in office, the Justice Department actively pursued patterns of misconduct. President Bush's administration, most would argue, has not.

H. Lawsuits

Traditionally, lawsuits are not thought of as mechanisms for civilian oversight, although they often play this function in the United States. Private individuals who are harmed by police misconduct may bring lawsuits to recover monetary damages and to seek injunctive relief in a civil court. Injunctive decrees mandating compulsory change in police practices can result from such lawsuits. The decrees are supervised by a judge who may hold the city and the police department in contempt of court and to pay fines if they are not complying in a timely manner and in good faith. A judge can appoint a monitor to track the progress is being made. Accordingly, in the United States, both private citizens and the state and federal government are able to bring about oversight and reform.

I. Summary

Contemporary civilian oversight of police agencies in the United States may be viewed as a spectrum or continuum. If law enforcement agencies are willing to undertake reform voluntarily and to open their records to public scrutiny — allowing for the transparency of internal processes, including internal investigations— then initiation

granted to federal judges, including contempt, which allow judges as a last resort to imprison one or more individuals until they agree to comply.

of independent, civilian monitoring through a review board, the least intrusive means of oversight, may be adequate to assure the integrity of a self-regulating police agency.

The introduction of independent civilians with real power to oversee and structure the course of internal affairs investigations, rather than simply to review them afterwards, is a further step that may be necessary when a civilian review board does not succeed in curbing police misconduct. In some instances, where the law enforcement agency in question is resistant to greater accountability, and cannot, or will not, reduce the use of excessive force, then more radical steps may be in order, including complete displacement of investigatory authority, as exemplified by the San Francisco model discussed above. The most extreme intervention may occur if it can be demonstrated that, over time, an agency has tolerated a pattern or practice of the use of excessive force. In this case, federal intervention, and compulsory reform, including independent monitoring may be called for.

It is not that each alternative should be exhausted before the next is attempted. Rather, it is meant to suggest that for any particular situation, all the alternatives should be considered. The response to a law enforcement agency's resistance to accountability and responsibility should be carefully measured and overcome by the least intrusive option that ensures compliance.

II. Internal Oversight

A. Background

Law enforcement agencies in the United States enjoy a high degree of autonomy in deciding how to self-police. The typical pattern in the early years of American policing reposed the power to investigate and discipline police officers in the Chief of Police as the chief executive officer of the organization. The Chief of Police, in turn, was accountable to the mayor for how he exercised that power. As American law enforcement became better organized and more professional in the 1920s and 1930s, and as law enforcement moved into more complex responsibilities during and after the Prohibition era,⁶ and as efforts to control police graft and corruption increased, the job of

⁶ The Prohibition era refers to the 1920s and early 30s when the sale and consumption of alcohol was banned in the United States.

investigating police misconduct required a full-time professional staff. Hence the birth of Internal Affairs units charged with the responsibility to investigate allegations of misconduct by police officers persisted.

For most of the 20th century, there was a strict division of responsibility between Internal Affairs and the Chief of Police. The Chief alone decided whether the Internal Affairs investigation proved misconduct and, if so, what the appropriate discipline should be. IA was to investigate the facts, interview the witnesses, take statements from witnesses and officers, and present summaries without recommendations to the Chief. Internal Affairs would be seen as overstepping its bounds if it went so far as to make a recommendation on disposition or discipline of officers. In recent years, in a few departments, IA units have been more able to recommend a legal disposition and appropriate discipline, particularly in those departments where Internal Affairs is overseen by civilians, as in the discussion of the OIR in Los Angeles County and the OPA in Seattle.

The unbounded discretion of the chief of police regarding disposition and discipline has been circumscribed in other ways. For example, police unions have used their bargaining power to extract significant concessions from management concerning the imposition of discipline. In some cities, an officer may compel the department to submit proposed discipline to binding arbitration. Elsewhere, an officer can appeal the disposition and discipline of an officer to a civil service board and then to a court of law. In Los Angeles, an aggrieved officer can appeal to a Board of Rights composed of two police managers and a civilian. The decision of the Board is binding on the chief of police, although he can lower the amount of discipline imposed but not raise it. In some places, disciplinary guidelines set minimum and maximum amounts of discipline that the chief can impose.

B. Internal Oversight Today

1. Internal Criminal Misconduct

Most urban police departments in the United States have Internal Affairs units. Often, the job of IA is to focus on criminal misconduct by police officers. IA receives tips from within the police department about corruption, graft, sexual misconduct, and

abuse of authority. Internal Affairs also receives complaints from citizens about alleged police misconduct. On occasion, IA will receive information from another police departments or from state and federal authorities about possible criminal misconduct. IA is staffed with detectives, sergeants, and other trained investigators. Usually, those investigating have a higher rank than those they are investigating. Because rank-and-file police officers generate the most complaints, they are most often investigated by sergeants and detectives.

At the conclusion of the criminal investigation, when there is probable cause to believe that a crime has occurred, IA will refer the matter to a prosecutor, generally the local District Attorney (DA), who will decide whether to bring criminal charges against the officer in question. If the DA prosecutes, there will be a trial of the officer unless the officer avoids trial by pleading guilty to the charge or a lesser included charge. This is known in the U. S. as a plea bargain.⁷ After a conviction or a plea bargain, the case will be returned to Internal Affairs to determine whether the officer should be terminated, demoted, or given administrative discipline, usually in the form of mandatory unpaid leave.⁸

To investigate criminal misconduct by police officers, IA investigators are to use all the tools and techniques available that they would employ in any other criminal investigation. In addition, a few police departments will run integrity tests on stings of police officers. Stings are either target or random. When IA receives credible information about a specific officer's involvement in criminal misconduct, and an undercover operation is feasible, a targeted sting operation may occur. As an example of a targeted sting, if there is credible evidence that a particular officer steals cash when he finds a vehicle containing drug money, Internal Affairs will use hidden cameras to record on tape what the officer does when he finds a car planted with a large amount of cash in the trunk. The results of the sting operation will either exonerate or implicate the accused officer. In contrast, a random sting tests the integrity of police officers in general:

⁷ For example, an incident of excessive force could be pled down from a felony to a misdemeanor.

⁸ In some states, such as Florida, the name of the officer and the discipline imposed is a matter of public record and can be reported by the media, thereby increasing accountability. In many other states, however, police unions have convinced the Legislature to pass laws keeping confidential the officer's name in the discipline imposed. One such state is California.

Several officers selected at random will be confronted with cars full of cash to see if any one is tempted to steal.⁹

Up to quite recently, there was one large exception to the kinds of criminal cases against officers that IA could investigate—officer-involved shootings. When an American police officer shoots a citizen, fatally or not, the matter is investigated to determine whether the shooting was a criminal act, usually homicide or manslaughter. These investigations were assigned to the department's homicide bureau instead of IA on the theory that homicide investigators were best equipped to do the criminal investigation. These investigations are stressful, highly publicized, and anxiety producing. The public looks to the investigation to define the facts and question any allegations. It is rare that a department will find that an officer acted criminally when shooting—indeed, the law sets a high bar, and the officer will not be prosecuted or convicted if he had an objectively reasonable belief that his life, or the life of his partner, or of third parties were in imminent danger. Nonetheless, homicide investigations of police officers have been subject to widespread criticism that they are biased, lack objectivity, and are shaped to exonerate the officer. Additionally, homicide detectives tend to focus narrowly on whether the shooting violated the criminal law to the exclusion of a wider inquiry into the policy, strategic, and tactical questions involved. Because of these concerns and problems, progressive police departments are considering shifting responsibility for investigating officer involved shootings from homicide detectives to a specialized squad trained to produce fair and objective investigations across a wider spectrum of issues. The Metropolitan Police Department in Washington, DC and the LAPD have created those specialized squads.

2. Internal Administrative Investigations

It is a fact of American life that both local and federal prosecutors rarely bring criminal charges against police officers in officer- involved shooting cases. In some cities, prosecutors decline to accept most of the criminal cases proffered by Internal Affairs. In Los Angeles, for example, the District Attorney declines about 80 percent of

⁹ In this example, this sting is legal because there is no "entrapment." Entrapment implies that an individual is encouraging or pressuring another to commit an illegal act.

the cases sent by the LAPD and the Los Angeles County Sheriff's Department. Prosecutors understand that jurors, in general, have a reluctance to convict police officers and give them the benefit of the doubt. Hence, prosecutors do not want to squander limited staff and resources on cases that are the hardest to win. On occasion, public pressure on the prosecutor, after a highly publicized shooting or use of force, is great enough to force a prosecutor to bring the case to trial. Even those cases, however, tend to result in deadlocked juries or outright acquittals.

Accordingly, some law enforcement agencies are investing relatively fewer resources in ferreting out criminal misconduct and are emphasizing administrative remedies. Ever since the Christopher Commission Report on the LAPD in the wake of the Rodney King beating in 1991,¹⁰ police reformers have emphasized the importance of risk management in policing. That Report demonstrated that the LAPD had inadequate systems to identify officers who routinely used excessive force or were involved in a large numbers of shootings. Nor did the LAPD track those officers whose misconduct generated large verdicts or settlements. Neither was the LAPD trying to identify potentially problem officers for retraining or greater attention from supervisors. As result of blue-ribbon reports such as the Christopher Commission's, computerized systems to track officer performance were introduced. The data generated by these tracking systems forced police supervisors to pay attention to problem officers and to identify wider patterns in the use of force. The data gave monitors what they needed to evaluate how well the police department was managing the risk of police misconduct and resulting liability.

Regarding officer-involved shootings and critical force incidents, police reformers took note that many unnecessary and avoidable events involved defective use of force policies, inadequate training, and tactical and strategic errors. In response, several police departments created Use of Force Review Boards, comprised of senior police executives, to consider whether a given shooting or other serious use of force merited a full-blown IA investigation across a broad spectrum. Monitors reported on the internal disciplinary

¹⁰ Rodney King was an African-American motorist severely beaten by the LAPD after a police chase. The incident was caught on videotape and, when shown on television, evoked a strongly negative public reaction, including condemnation by then-President Bush. The mayor of Los Angeles appointed a panel of independent distinguished citizens (in American parlance, a "blue ribbon" commission) under the direction of former Secretary of State, Warren Christopher, to conduct an investigation which became known as the Christopher Commission.

system and whether it was doing an adequate job in punishing officers who violated policy or failed to perform as they had been trained or exercised substandard judgment.

An officer-involved shooting or a serious use of force may generate a criminal referral to the prosecutor or a lawsuit by the injured party or both. Monitors found that police departments did little to follow up on cases once they had been declined for prosecution or resulted in a significant judgment or settlement. Monitors' reports to that effect pressured the agencies to do a better job investigating. Here, external oversight resulted in improved internal oversight. Likewise, monitors expose the weakness and inadequacy of many IA investigations, leading to higher standards for investigation and questioning of officers and greater professionalism in IA.

Importantly, blue-ribbon commissions and monitors exposed serious problems in the way law enforcement agencies treated complainants and investigated citizen's complaints. In some instances, the police treated complainants rudely or intimidated or threatened them with retaliation. Not infrequently, the complaint would wind up in the wastebasket and never be investigated. The complaints themselves would be given short shrift and be decided in the officer's favor with little investigation. In most American police departments, citizen's complaints were investigated at the station level by the given officer's immediate supervisors who knew the officer personally and were loathe to question the officer's word or find him at fault. In the wake of these findings, monitors advocated reallocations of responsibility for investigation of citizen's complaints.

Fair treatment of citizen's complaints is crucial to the community's perception of the police. If there is no recourse for an individual to complain about an officer's discourtesy or rudeness, much less unnecessary or excessive force, the individual is left to harbor resentments and ill will against cops. If perceived mistreatment is widespread, community confidence and willingness to cooperate with the police erodes, leading ultimately to a perpetually tense, powder keg relationship between that community and the police. Often, the aggrieved communities are those of color, and the atmosphere is further poisoned by assumptions about racism, discrimination, and the disproportional impact of the criminal justice system on persons of color.

Accordingly, monitors recommended that all but the most trivial complaints be investigated centrally by IA rather than at the officer's station. Also, monitors have

advocated mediation of discourtesy and rudeness complaints between citizens and police using outside, neutral facilitators to foster greater mutual understanding and a resolution of complaints short of full investigation. The two Southern California cities of San Diego and Pasadena are examples.

In sum, monitors and police reformers have used Internal Affairs as the engine for inculcating professionalism, competence, integrity, transparency, and accountability in a police department's internal oversight. In many cases, monitors had to force police departments to collect data so that individual managers had the information they needed to manage the risk of police misconduct. In addition, this helped monitors, the press, and elected officials obtain what they needed to evaluate the performance of the chief and the police department as a whole.

Public monitoring reports make internal police procedure and its failings more transparent to the general public, thereby generating public pressure for reform. Reports by monitors are widely reported in the press and generate editorials, opinion pieces, and letters to the editor. Newspapers of record, such as the *Los Angeles Times*, will follow up to see if the monitor's recommendations are implemented. In so doing, elected officials feel pressure to respond. In one recent incident, a monitor's report linked a series of inmate-upon-inmate homicides to understaffing in the jails. Press reports generated pressure on politicians to increase the budget for staff in the jails.

Over the past 15 years, there has been a healthy widening of the police perspective on police misconduct and accountability. In some progressive departments, such as the Los Angeles County Sheriff's Department, more rigorous internal accountability and meaningful internal oversight have taken seed. The challenge over the next 10 years is to spread the lessons learned across the nearly 16,000 individual law enforcement agencies in the United States.

III. The Role of the Media

A free press with an insatiable appetite to hold elected and appointed officials accountable is indispensable in a properly functioning democracy. The American press has a well-deserved reputation for its investigative journalism, skepticism, doggedness, and boldness in the face of intimidation. The press has brought down Presidents through

exposure of scandal. For example, President Nixon ultimately resigned after the *Washington Post* had exposed Watergate. Similarly, the press has served to hold the police accountable and to provide external oversight. Press coverage of police misconduct has generated prosecutions and investigations of individual police officers and police departments as a whole.

The *Washington Post* did extensive work exposing misuse of force in the Washington, DC and Prince George's County police departments, leading to federal investigations and settlements that put those departments under the supervision of a federal judge and monitor. The *Los Angeles Times* similarly brought the Rampart corruption and excessive force scandal in the LAPD to light, leading also to a federal investigation and consent decree.¹¹ Additionally, the *Houston Chronicle* did a hard-hitting series on officer involved shootings. *The New York Times* has exposed scandals and corruption in the NYPD.

While the major metropolitan newspapers have done a good job covering police issues, the same cannot be said for the hundreds of other newspapers in the United States, much less for electronic media. Monitors have taken responsibility for teaching and training journalists how to cover police departments and investigate misconduct, incompetence, dishonesty, lack of integrity, and inadequate internal oversight mechanisms. The average American newspaper does an adequate job covering crime; few cover the police as a public institution and as part of the exercise of executive power in American government. The press is willing to take on the role of watchdog, but it must learn better how to do so.

Conclusion

The last 15 years have witnessed a proliferation of new models for police external oversight in the United States. Police commissions and civilian review boards have been joined by external investigators, monitors, and civilian outsiders. While only a small handful of American cities are utilizing these new models, the benefits of civilian

¹¹ Rampart is a part of Los Angeles populated largely by Latino immigrants, many of whom entered the United States illegally. The neighborhoods were drug-ridden and gang-infested. LAPD gang units planted drugs, conducted unconstitutional searches and seizures, routinely used excessive force, and stole money. The resulting scandal became known as the Rampart Scandal.

oversight are reaching a wider audience and increasing numbers of communities are considering initiating some form of external oversight. In some municipalities, more than one external oversight mechanism is being employed: In Los Angeles County, for example, there is both a monitor and the OIR.

The wave of reform sweeping American policing since the Rodney King incident in 1991 has not yet crested. Monitoring has proved to be a particularly potent form of oversight, bringing about substantial systemic and cultural change. So too has been the introduction of civilians into Internal Affairs Units. In addition, the press has played an indispensable role by investigating and publicizing police misconduct and police scandals. As a result, the combination of the press, monitoring reports, and federal investigations has brought about greater rigor and stricter accountability within some of the largest American police departments. American policing continues to be extremely fractured with 16,000 or more law enforcement agencies. It is a challenge to reach and raise the bar for all communities. To do so is the task facing police reformers across America for many years to come.

