AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

Police Reform: A Job Half Done

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I. INTRODUCTION

Each year, there is a high profile news event that puts policing in the spotlight – usually in a very negative way. In 1991, it was the beating of Rodney King in Los Angeles; in 1999, it was the shooting of Amadou Diallo and the brutal assault against Abner Louima in New York City; in 2001, it was the fatal shooting of Timothy Thomas, a black teenager in Cincinnati, Ohio. Last year, it was the on-camera beating by New Orleans police officers of an African American retired school teacher, Robert Davis, who had come back to New Orleans after Hurricane Katrina to look at his property. These incidents generate anger and frustration in black communities and elsewhere, and bring calls for greater police accountability and reform. Part of the police reform effort focuses on what the federal government can and should be doing to address police misconduct.

The fifteen years since Rodney King have seen important developments in police reform. The 1994 Crime Act created a civil action against police departments where there is a "pattern or practice" of police misconduct, and Attorney General Janet Reno established a program in the Civil Rights Division to investigate and prosecute those cases. The 1994 Crime Act also created the COPS Office and established funds for police agencies not only to hire more officers, but to shift agency strategy to community policing. In 1999, President Bill Clinton and Attorney General Reno brought together police executives, union representatives, academic experts, civil rights and community leaders, to examine police use of force, racial profiling, and ways to improve police-community relations. In January 2001, the Attorney General issued general principles for advancing the civil rights integrity of law enforcement agencies, in a publication titled "Principles for Promoting Police Integrity."

The attention paid to problems in policing, and ways to fix them – by the federal government, community and civil rights groups, the media, and by police organizations themselves – have had an important impact on moving the profession forward. This article describes some of those advances. But the reform effort is nowhere near complete. Distrust of the police, particularly in minority communities, continues at unhealthy levels. If we look the other way and ignore continued problems, we will be back where we started. There is not enough being done now to protect the civil rights of minority communities and others against police abuse. And the federal government is abdicating its leadership role in making police accountable. Sadly, there are still elements in the police world who have not gotten religion on use-of-force and accountability issues. It is time for the federal government, and the public, to take up this vital issue again.

II. ELEMENTS OF POLICE REFORM

Police reform has three interrelated components, each of which must be sustained. The first is police accountability and integrity – reducing misconduct and improving police professionalism. This requires progressive policies and practices within the law enforcement agency, such as new policies on police use of force, tracking and investigations of use of force incidents, and improvements in police training, hiring and supervision. There also have been significant changes in police equipment in the past decade, including in-car cameras and new less-lethal weapons, such as Tasers and chemical sprays (oleoresin capsicum/OC or pepper spray). Police accountability also requires internal systems for holding officers accountable when they engage in misconduct, including better systems for investigating citizen complaints, and risk management systems for identifying officers who have engaged in "at risk" behavior. For accountability to take hold, these police "best practices" need to be adopted by the agency, reviewed by appropriate oversight entities, and embraced by both police leaders and the political leadership of the jurisdiction. Where these elements are not evident, that is where the need for federal enforcement is greatest.

Second, police departments and local government need much greater efforts at community engagement and dialogue, especially in the area of race and policing. This includes addressing racial profiling and police bias. Perceptions of police bias are still strong in minority communities, and officers need to know that racial profiling is not an effective law enforcement tool. But dealing with race and policing means more than just disciplining officers who engage in intentional discrimination. Police departments must also examine how their police strategies in minority neighborhoods affect law abiding residents. For example, urban neighborhoods with higher crime rates are often predominantly minority. That can mean that black and Hispanic residents experience a different policing than white residents, especially if officers are told to engage in "aggressive policing" in high crime neighborhoods: those residents will see more invasive traffic stops and individuals being stopped and patted down on the street corner. This in turn will impact their views of the police and their willingness to partner with the police.

This leads to a third element of police reform: police management and the development of policing strategies - in crime prevention, the use and deployment of police resources, and police training - that puts policing squarely in its central role in our democratic society. The right police strategy is the one that is effective in reducing crime and fear of crime, <u>and</u> that reduces perceptions of police unfairness and bias. Federal dollars and research should be focused on new initiatives of community policing and problem-oriented policing. Traditional policing is reactive – officers are dispatched to locations on radio runs, mostly in response to calls for service. Between these runs, officers conduct random patrols in their cars. National research has shown that the effectiveness of this standard reactive model of policing is weak. It also leaves individual officers to make discretionary judgments virtually without direct supervision. Added to this, some agencies have adopted a misguided set of incentives rewarding the greater number of arrests, without really looking at whether the enforcement actions that are

being taken are making a difference in crime and disorder. Distrust and racial tension are likely outcomes.

There are answers to make policing more professional and more effective, and to build trust and confidence among the communities it serves. Police will be more effective in controlling crime and disorder if their efforts are more tailored to the problems they seek to address (problem-oriented policing). And community distrust and tensions will decrease where police leaders are truly willing to collaborate with the community in developing policies, strategies and programs.

Police reform efforts are needed today so that we don't lose the progress we have made. Organizational and cultural change, especially in insular organizations such as police departments, takes time and it takes leadership. Without continued effort on police reform, our nation's recent advances may be short-lived.

III. FEDERAL ENFORCEMENT EFFORTS

There are approximately 800,000 law enforcement officers in this country. The vast majority of them are honest, hardworking and law abiding. They uphold their oaths to protect and serve. But agencies must take decisive action against those officers who cross the line and abuse their power by violating the constitutional rights of individuals. Police misconduct such as improper searches and seizures, abuse of authority, excessive force, and discrimination undermine the effectiveness of the police mission.

The Department of Justice has long had the authority to bring criminal prosecutions against officers who intentionally violate an individual's civil rights. These provisions, 42 U.S.C. Section 241 and 242, have a very high standard of proof, however, and there are only a limited number of cases that are brought by the Attorney General each year. The prosecution must show that the officer knew that his actions were wrong (e.g., that the force used was excessive) and that he acted intentionally to deprive the victim of his or her constitutional rights. These prosecutions are also difficult to win. In addition to what has been called the "blue wall of silence" – the difficulty of getting other officers to testify against a fellow officer – jurors are often reluctant to send cops to jail, especially when the victims are not stellar citizens either. While it is crucial to ensure that the Justice Department brings these kinds of prosecutions, they are not enough to bring about change in a police department. Prosecutions under Sections 241 and 242 address only the misconduct of the individual officers prosecuted, and do not address systemic agency problems.

For this reason, and in response to the 1991 Rodney King incident and the Los Angeles riots that followed, as part of the 1994 Crime Act, Congress authorized the Attorney General to bring civil actions against state and local law enforcement agencies for a "pattern or practice" of police misconduct. This provision, 28 USC Section 14141, has now been in place for ten years.[1]

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[1] Section 14141 states as follows: (a) Unlawful conduct. It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a

In implementing the "pattern or practice" program, the Justice Department investigates whether there is a general pattern of misconduct on the part of the agency, rather than a single incident by an individual officer or officers. The types of conduct investigated include excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests. These investigations also focus on whether the agency has failed to put in place accountability systems that address misconduct: ineffective or nonexistent policies; lack of supervision and management of patrol officers; failure to have an internal administrative system that fairly and thoroughly investigates misconduct and citizen complaints, and then imposes appropriate administrative discipline and corrective action.[2]

Eleven Justice Department investigations have been resolved through agreement. Six have resulted in consent decrees, where a Justice Department complaint has been settled in court under the supervision of a federal judge. Five others have been settled with a Memorandum of Agreement (MOA), which is a contractual settlement agreement and is not entered in federal court.[3] While each of these settlements is tailored to the kinds of misconduct allegations raised in the jurisdiction, there are basic remedial provisions that are common to all of them. The settlements have required the law enforcement agency to implement better policies for use of force, improved training, risk management systems, and procedures for better investigations of citizen complaints of police misconduct and of use of force incidents. These provisions, if implemented, should result in more accountable and more professional police agencies.[4]

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pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
(b) Civil action by Attorney General. Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

[2] The Justice Department has issued a brochure and a Questions and Answers document on its pattern or practice program at http://www.usdoj.gov/crt/split/faq.htm#pppmp.htm and http://www.usdoj.gov/crt/split/documents/polmis.htm.

[3] The following agreed settlements and consent decrees can be found at http://www.usdoj.gov/crt/split/findsettle.htm: Consent decrees – Pittsburgh (1/17/1997), Steubenville, OH (9/3/1997), New Jersey (12/30/1999), Los Angeles, CA (signed by the parties on 11/2/200 and entered by the federal court on 6/15/2001), Detroit, MI (6/12/2002)(two consent decrees), Prince Georges County, MD (1/22/2004)(consent decree and MOA); Memorandum of Agreements – Washington, DC (6/13/01), Cincinnati, OH (4/12/02), Buffalo, NY (9/19/02), Village of Mt. Prospect, IL (01/22/03), Villa Rica, GA (12/23/03). Also, in 1999 the Justice Department reached a settlement agreement with Montgomery County, MD, under Title VI and the Safe Streets Act of 1968 resolving claims of racial discrimination in traffic stops.

[4] See *Turning Necessity Into Virtue: Pittsburgh's Experience with a Federal Consent Decree*, Robert C. Davis, Christopher W. Ortiz, Nicole J. Henderson, Joel Miller, and Michelle K. Massie, Vera Institute of Justice, 2002, http://www.vera.org/publication_pdf/180_326.pdf; *Can Federal Intervention Bring Lasting Improvement in Local Policing: the Pittsburgh Consent Decree*, Robert C. Davis, Christopher W. Ortiz, Nicole J. Henderson, Vera Institute of Justice, April 2005, http://www.vera.org/publication_pdf/277_530.pdf; see also reports of the Independent Monitors in Cincinnati, OH (www.cincinnatimonitor.org), Washington, DC (www.policemonitor.org), Los Angeles,

Following other pattern or practice investigations, the Justice Department closed its investigation without a formal agreement with the jurisdiction. In cases in Columbus and Cleveland, Ohio, the reasons for closing the investigation were detailed in an exchange of letters with the jurisdiction, and the Department stated that revisions to police policies and practices were sufficient to address the misconduct allegations. It is hard to determine, however, whether these reforms have been implemented successfully, and there continue to be police incidents in Cleveland and Columbus that lead to calls for further reforms from community leaders. Other cases have been closed without a public statement from the Department explaining its rationale for closure. In some cases, it may be that the Department's investigation did not find sufficient evidence of a pattern or practice of police misconduct; in others, it may be a determination that the jurisdiction implemented reforms that addressed the Justice Department's concerns. A third category may be situations where a new police chief or mayor has come in and the Justice Department determined that the new leadership should have an opportunity to implement reforms.

The Justice Department has begun to send "technical assistance" letters to jurisdictions laying out the findings of the investigation and recommending revisions to agency policies and accountability systems.[5] It is not clear whether the technical assistance letters are now the final action that the Justice Department will take, or whether the Department will follow up with enforceable legal agreements.

From the beginning of the "pattern or practice" program, the Department of Justice understood that its enforcement efforts could only be brought in a small number of localities.[6] The Department's view has been that the program's real impact would be its influence on the larger profession. It can be a beachhead for reform, moving the profession forward. Law enforcement agencies were concerned that their department would be next in line for a Justice Department investigation. The existence of the Justice Department's potential "hammer" prompted many police departments to review their policies and procedures and implement additional systems for accountability, in order to avoid a Justice Department investigation. Agencies have also looked to the measures that were incorporated into the Justice Department agreements as progressive and necessary accountability practices. These measures (e.g., use of force policies, use of force reporting and investigation, risk management, improved supervision, citizen complaint systems) are now considered "best practices" in the police profession. Many of them have made their way into the model policies of the International Association of Chiefs of Police (IACP) and the standards of the Commission on Accreditation of Law Enforcement Agencies (CALEA). In 2001, the Department of Justice published a

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CA (http://www.krollworldwide.com/about/library/lapd/), and Detroit, MI (http://www.krollworldwide.com/about/library/detroit/).

[5] Bakersfield, CA, Miami, FL, Schenectady, NY, Portland, ME, Alabaster, AL, Beacon, NY, and the Virgin Islands have been sent technical assistance letters regarding their law enforcement agencies. See http://www.usdoj.gov/crt/split/index.html.

[6] These are complex cases involving significant investigative work (indeed, no case has ever been brought to trial), and the Special Litigation of the Civil Rights Division has a limited number of attorneys. There are 17,000 police departments.

document entitled "Principles for Promoting Police Integrity," discussed below, which highlighted police practices that enhance police accountability, reduce police misconduct and build trust in their communities.

These past efforts did make a difference. But it is now an open question whether the "pattern or practice" program is still a Justice Department priority, given the low number of cases that have been opened and resolved by the Department in the last several years. In 2005, the only new actions listed on the Department's website were the technical assistance letters sent to the Virgin Islands and two small police departments (Beacon, NY, Police Department and Alabaster, AL, Police Department). If any new investigations were opened in 2005, they have not been made public. Another telling sign is that the number of lawyers assigned to the Justice Department's Civil Rights Division section bringing these cases has dropped dramatically since the beginning of 2005.

At a national conference in February 2005 to examine the ten years of the Justice Department "pattern or practice" program, several participants made suggestions for how new settlements and consent decrees addressing police misconduct could be broadened and strengthened. A more pertinent question is whether there will be any new settlements or consent decrees coming from the Justice Department investigations, and if so, how much narrower will the new remedies be than the earlier ones.[7] The Justice Department's technical assistance letters sent to the investigated jurisdictions may be the Department's final action in these cases. While these technical assistance letters can be helpful in pushing reform, without a mechanism for enforcement and follow-up, there is no guarantee that the reforms presented will be implemented. Moreover, without the Justice Department opening new investigations, there is much less impetus for other police departments to be introspective and examine their conduct.

Has the pattern or practice program met the expectations of the communities that sought its help, particularly minority communities? Some of those expectations have been met. Where Justice Department agreements have been enforced, police departments have more progressive policies and training, and have implemented new procedures to hold officers accountable. But a Justice Department investigation, even where there is a subsequent agreement on police reform, will not solve all of a police department's problems, particularly the problems of community distrust. The Justice Department's jurisdiction is limited to examining constitutional violations, and its focus tends to be on accountability systems and police procedures, rather than on police-community relations. To more fully address community expectations, police reform efforts, including the Justice Department's "pattern or practice" program, must examine how officers interact

[7] For example, one change in the agreements reached by the current Administration is the change in the time period of the agreements. Early agreements had a termination provision to end the consent decree or Memorandum or Agreement (MOA) in five years, but only if the agency was in substantial compliance with the agreement's provisions for at least two years. This was changed in later agreements to a definite five year term, with early termination if there was substantial compliance for two years. The most recent agreements were entered with the Prince Georges, MD, Police Department, where both a consent decree and a separate MOA terminate after only three years, with no requirement that substantial compliance be reached.

with citizens in their daily encounters. We must also call upon police departments and their leaders to reach out to members of the community and involve them in the process of setting police standards. It may not be enough to promote accountability provisions, without also requiring the police to engage in community dialogue. There is no doubt, however, that without a further push by the Justice Department, we will squander the advances in accountability that have been made.

IV. RACE AND POLICING

Race and policing is a central point of friction in civil rights today, as it has been for decades, and part of the context of all of the Justice Department's investigations. Even where the bases for the investigations are the lack of appropriate policies, or inadequate training or supervision, what brought the police misconduct to the fore was the level of community unrest and dissatisfaction with the police.

Policing is at the front end of the criminal justice system and any racial disparities in how policing is enforced affect the rest of the system. Racial profiling continues to be a spark for debate between the police and the community. Concerns about potential bias in policing arise not just in traffic stops, but also in pedestrian stops, use of force, and urban policing strategies.

A. Racial Profiling

The sentiment against racial profiling is universal, but there is little consensus on its definition. Many police agencies at the start of the racial profiling debate defined racial profiling as an officer taking a police action "solely" on the basis of race. This definition, however, misses the point. No officer, even the most biased, uses race as the only basis for his or her action. At the other end of the spectrum, a definition that says that any use of race, in any context, is racial profiling is too broad. For example, it is not racial profiling (or racial discrimination) when an officer uses race, ethnicity or national origin as a factor in his actions, based on a victim's or a witness's description of a specific suspect or individual.

The principle lesson is that officers cannot use a person's race, ethnicity, or national origin as a shortcut for suspecting them of criminal activity. Race can be a 'descriptor' but not a 'predictor.' A person's race or ethnicity by itself should not be a reason that officers heighten their suspicion of that person. Instead, the officer's actions must be based on the behavior of the individual, or on reliable information that leads the officer to believe that the person he is encountering has committed, or is in the process of committing, a crime. An important question for the officer to ask is: "Would I be stopping this person, if he or she were white?" This is the "but for" test for assessing bias-free policing.

"Profiling" is normal human behavior. Advertising is based largely on the fact that humans judge books by their covers. We can admit that those in law enforcement, just as others in every other sector in society, bring stereotypes and generalizations to

their job. What we must do, however, is overcome the psychological tendency of officers to make assumptions based on people's appearance, and ensure that official decisions are made on objective, factual criteria that meet the tests of procedural law.

Police agencies must deal – harshly – with those officers who are intentionally discriminatory. More often, however, it is unconscious bias and institutional pressures that influence police actions. Take, for example, an officer's assessment of the dangerousness of the persons he or she encounters. Is that officer likely to think that minorities are more dangerous? If their fear level is higher, they will resort to force more quickly. The police are often dealing with the worst type of people, in the worst type of neighborhoods; they cannot, however, assume the worst when dealing with others.

It is also true that blacks and whites in urban areas experience different kinds of policing, and these differences may stem as much from the police strategies and approaches adopted by the police agency as from the biased attitudes of individual officers. Black and Hispanic residents are more likely than whites to live in neighborhoods characterized by crime and disorder. Residents in high-crime neighborhoods are more likely to see, and experience, "aggressive policing," such as more invasive traffic stops, and individuals being stopped and patted down on the street corner. While neighborhood crime rates rather than race may be the rationale for these actions, if the message from police leadership to the street cop is simply to make more stops in high crime neighborhoods, and those neighborhoods are predominantly black or Hispanic, law abiding black and Hispanic residents will bear a heavier burden. Pressing aggressive enforcement can also give officers cover to rely on their "hunches" or even their biases.

Concerns about racial profiling involve not only why the stop was made, but also the officer's actions after the stop. Discretionary decisions on who gets asked for consent to search, who gets searched, who gets asked to exit the car, or whether canines are brought to the scene cannot be based on the race of the motorists. Again, however, even if the individual officer's actions are not based on racial bias, but instead on where the stop is made (e.g., in higher crime neighborhoods), minority residents will likely be treated more intrusively.

Are we asking cops to ignore their experience and intuition? Isn't that what police officers are taught to do? We are asking officers to base their actions on behavior. Because of the costs of race-based actions, officers can't "play the odds" with race or ethnicity, by assuming, for example, that a young black man might not belong in a particular neighborhood. Our intuition can be wrong. Constitutional guarantees require attention to facts, not intuition. In some cases, officers need to "unlearn" past practices — sometimes past training. There was a time when stopping a person simply because they "didn't fit the area" was considered good police work. Times change, as does the law.

B. Remedies for Racial Profiling

There are a number of efforts that agencies need to take to address concerns about racial profiling. First, agencies should have a clear and widely disseminated policy prohibiting law enforcement officers from discriminating on the basis of race, ethnicity, national origin, religion, gender, disability, or sexual orientation in performing their law enforcement duties. Second, agencies need to incorporate bias-free policing in their training efforts, for academy, in-service and management training. Third, agencies should put in place methods of monitoring and assessing the conduct of officers on traffic stops. These methods include data collection, citizen satisfaction surveys, the use of in-car video systems, an effective citizen complaint system, and supervisory oversight.

Many jurisdictions have begun the data collection process with high expectations that it will answer "bottom line" questions regarding the existence, or not, of officer bias and racial profiling. Collecting data on the race of persons stopped by the police is not a panacea, however, and these expectations are often disappointed. Communities around the country have found that the analysis of traffic stop and pedestrian stop data is more complicated and ambiguous than they anticipated.

The results can be helpful, but they are never definitive. The general experience in many jurisdictions is that there have been racial disparities in stops, with blacks and Hispanics stopped at a higher percentage than whites, compared to their population percentage.[8] Some of this disparity can be explained by non-racial factors. For example, high crime neighborhoods are generally correlated with poverty, and correlated with minority populations. If there are more police deployed in minority neighborhoods, the police will be stopping more minorities. In addition to examining stops, data collection efforts have also reviewed what happened after the stop – which motorists get searched, or are asked for consent to search, which are cited, what was the duration of stop, and what was the result of the stop (e.g., citation, arrest, or warning). Here too, many jurisdictions have identified racial disparities in police action.

A significant benefit of data collection is that it leads to a larger public discussion about how policing should be conducted in the jurisdiction. The issues of community distrust and concerns over biased policing go well beyond just traffic stops. These concerns extend to arrests, use of force, who goes to jail, and disproportion in the criminal justice system as a whole. In this light, it is necessary for us to examine what we are asking our police to do.

C. Police-Community Dialogue

Police departments in our nation's urban settings are faced with conflicting expectations. On the one hand, residents of high crime neighborhoods express concerns about the lack of police visibility and demand more police services and protections. We

[8] One of the difficulties in traffic stop analysis is determining what the appropriate benchmark is against which the racial percentage of traffic stops should be compared. Different studies have used Census data, traffic observation surveys, accident data and other measures, each of which has significant limitations.

respond to these concerns by increasing police deployment in these neighborhoods. Emphasis on crime "hot spots" and other efforts to target criminal activity have similar effects. This can lead to even greater disproportionality in stops. Police departments need to openly discuss their deployment decisions and strategies so that their actions do not lead to increased complaints about police activity from the very same communities that are seeking greater police presence. Are traffic stops being used in the inner city as a crime suppression tool? Are pedestrian and traffic stops being done at officers' discretion for legal, but often pretextual reasons, to dampen crime in high crime neighborhoods? If so, how well are they working? Are there modifications that should be made to an agency's search policies or practices? In part because of concerns over biased policing, the California State Highway Patrol eliminated its use of consent searches, as has the New Jersey State Police. Police departments cannot successfully address racial profiling and community distrust of police unless they forthrightly engage the community and examine how their police strategies impact community members, particularly persons of color.

This leads to the third aspect of police reform, the development of effective police strategies for addressing crime and disorder.

V. NEW DEVELOPMENTS IN POLICE REFORM

The standard model of policing today is a reactive one: officers are dispatched to locations on radio runs, mostly in response to calls for service. Between these runs, patrol officers randomly patrol in their districts or precincts, mostly in police vehicles. Over the last 10-15 years, new styles and strategies of policing and police leadership have developed that lead to better policing and foster police reform efforts.

One development has been the advancement of community policing, where a strong relationship is established between officers and neighborhoods. In community policing, officers are specifically assigned to a geographic neighborhood, and work with neighborhood groups, business and community organizations and leaders. Foot and bicycle patrols often take the place of some patrolling in cars. Community members also are brought into the police station to help define crime fighting priorities (surprisingly, these may be dealing with abandoned vehicles and condemned buildings, or noisy stereos, and not just violent felonies). The community policing philosophy also incorporates reducing fear of crime and improved quality of life in neighborhoods into the police function, along with crime prevention. Police are there not only to respond to crime and make arrests, but to intervene earlier in efforts to eliminate opportunities for crime, and address problems of disorder and neglect.

A second, related development has been the emphasis on "problem-oriented policing" and problem solving. In problem-oriented policing, the police department and the community focus on individual localized problems; in particular, patterns of repeat offenders, victims or problem locations. Initiatives to address crime and disorder are preceded by careful problem definition, analysis and an examination of a broad range of

solutions.[9] It is an information intensive strategy that places a premium on data, intelligence, community input, and analysis. In addition, the results of the problem solving efforts are measured to assess whether they were successful in solving the problem or reducing the harm from the problem. If not, the problem solving effort is begun again. Crime mapping, environmental and situational crime prevention, and the establishment of the professional field of "crime analyst," are each significant aspects of problem-oriented policing. In addition, other social and governmental agencies are often brought in to help address the problem, so that police enforcement and arrests may be only one part of the solution.

Some jurisdictions have combined these two police innovations into one approach that they have called Community Problem Oriented Policing (CPOP). The cities of Charlotte Mecklenburg, NC and Cincinnati, OH are examples. In Cincinnati, CPOP is the central theme of the class action settlement that arose from the 2001 civil unrest and allegations of racial profiling. As part of that settlement, known as the Collaborative Agreement, the City of Cincinnati and the parties to the settlement "adopt problem solving as the principal strategy for addressing crime and disorder problems."

One pioneering aspect of Cincinnati's CPOP effort is creation of the Police Community Partnering Center, a non-profit, privately funded organization that helps train and work with residents in the community on crime-related problem solving. The Partnering Center and the Cincinnati Police Department create neighborhood CPOP teams (residents, officers and Partnering Center staff) to identify individual crime and disorder problems in the neighborhood, analyze them and tailor solutions. While traditional enforcement efforts may sometimes be part of the response, the Partnering Center helps the neighborhood CPOP teams consider alternative strategies that often can be more effective (e.g., environmental changes, changing the actions of potential crime victims, or even offenders, and getting other city and county agencies involved). Part of the cultural change being implemented by the Partnering Center is that the City and its residents should not look solely to the police as the only entity responsible for preventing and addressing crime. Police officers and community members must become proactive partners in community problem solving.

A third policing style is what some might call "proactive policing" or "aggressive policing." This strategy is most often associated with the "broken windows" theory and the efforts of former New York City mayor Rudolph Giuliani and the NYPD. It has also been described as "zero tolerance" policing. The aim is to make officers a presence on the street, and have police enforce laws and ordinances against minor offenses and public disorder. Combined with this approach has often been intensive enforcement efforts such as police sweeps and crackdowns - police action to seek out and arrest large numbers of

[9] The key method of problem solving in policing is known as SARA - Scanning, Analysis, Response, and Assessment. In the scanning stage, residents and officers identify and define a problem; in the analysis stage, information and data is collected to learn about the nature and causes of the problem. In the response stage, options are identified that might address the problem and then responses are selected; and in the assessment stage, the impact of problem solving effort is measured to assess whether it was effective in either solving the problem or reducing its harm.

offenders. Police crackdowns take different forms and can range from highly planned, coordinated and focused efforts in which the officers know the geographic target and operational objectives, to loosely planned initiatives where officers are told little more than "go out and make your presence felt."

The research and evidence on whether the broken windows approach is effective is open to question.[10] There is no question that we do want law enforcement agencies to identify "hot spots" and use intelligence and data-driven policing in their planning. However, we probably do not want the response only to be more arrests and enforcement. Police crackdowns can have benefits in the short term, but unless there are other efforts to address underlying problems, their longer term benefits are limited and their costs in terms of community trust and confidence in the police are high.[11]

Finally, in addition to adopting new strategies to advance police reform, we also need to examine how we measure police performance and measure whether those strategies are working. Traditional policing has emphasized statistics such as the number of arrests made and the quantity of contraband seized. With the development of more recent policing strategies, there has also been a shift in measures of police effectiveness from the "means" of policing, to its "ends" - has there been a reduction in crime, disorder, and fear of crime, and has there been an increase in residents' views of the quality of police services. Added to these standards of police effectiveness and efficiency should also be measures of police fairness, accountability and community trust.

In addition to addressing performance measures of the police agencies, we also need to address performance measures and the incentive structures for individual officers. In problem-oriented policing and community policing, employees should be measured on their contribution to the welfare of the neighborhood, not just on the number of arrests they have made. Concerns have been raised for years (particularly from police unions) about "arrest quotas" imposed on officers by their supervisors. Similarly, it is not at all uncommon to hear of monthly expectations for "movers" (speeding tickets) and "parkers" (parking tickets). There is no question that police management must review and evaluate a police officer's level of activity. But if we are only measuring (and thus rewarding) officers for their arrests, then the department's incentive structure will just lead to more arrests and potential increased distrust. It also makes it difficult for officers to be preventive rather than reactive, and to take time and effort to focus on problem solving and analysis. The measurement and evaluation of both employee performance and agency performance should relate to the new direction and mission of the agency.

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[10] See *Fairness and Effectiveness in Policing: The Evidence*, supra, at 228-230; Harcourt, Bernard E. and Ludwig, Jens, "Broken Windows: New Evidence from New York City and a Five-City Social Experiment." University of Chicago Law Review, Vol. 73, 2006, http://www.law.uchicago.edu/academics/publiclaw/93-beh-jl-windows.pdf.

[11] See Michael Scott, *The Benefits and Consequences of Police Crackdown*, 2003, U.S. Department of Justice COPS Office.

VI. THE CONTENT OF POLICE ACCOUNTABILITY

In June 1999, Attorney General Janet Reno and President Clinton brought together police executives, union representatives, academic experts, civil rights and community leaders, for a conference "Strengthening Police-Community Relationships." That conference and several follow-up meetings over the next 18 months highlighted the need to identify police practices that enhance police accountability and reduce police misconduct.

In January 2001, the Attorney General issued "Principles for Promoting Police Integrity."[12] Its goal was to more clearly state what communities can expect of law enforcement agencies. The document did not prescribe rigid standards for law enforcement agencies, but it did set out general principles to help agencies assess whether their practices advanced civil rights integrity. These principles grew out of the discussions from the 1999 conference, from the provisions of the pattern or practice consent decrees and settlements, from a review of promising practices around the country, and from the input of police organizations such as the IACP and the Police Executive Research Forum (PERF), as well as the views of community and civil rights organizations. Since 2001, there have been a number of additional publications that have laid out a progressive ideal of policing.[13] In addition, a new organization, the Police Assessment Resource Center (PARC), was created to assist police monitors, auditors, and civilian review entities, as well as police executives, in the crucial functions of oversight and risk management.[14] The knowledge and expertise to further police reform is available; what is needed is reinvigorated momentum to ensure that the work is done.

Use of Force. Police officers are there to protect the public. But in the course of those duties, they have the power and the legal authority to use force. It is when officers use force, particularly with deadly consequences, that community anxiety and at times outrage is at its highest. Police shootings are just one type of force that needs to be addressed in police accountability. Several of the Justice Department's investigations have been based on allegations of improper force at lower levels. Police misconduct can involve aggressive policing and use of force in situations where force would not have been required had the officers used appropriate tactics, de-escalation and communications. It can also involve the use of more serious types of force where less serious alternatives would have been effective.

Use of Force Policy. At the very minimum, an agency's use of force policies must require officers to meet constitutional requirements. Under *Graham v. Connor*, 490 U.S. 386 (1989), an officer's use of force must be objectively reasonable in light of the facts and circumstances of the encounter. Policing requires that at times an officer must

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[12] http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf

[13] These have included *Good Cops, The Case for Preventive Policing* by David Harris (The New Press, 2004), *Fairness and Effectiveness in Policing: The Evidence*, National Research Council of the National Academies, Wesley Skogan and Kathleen Frydl, eds., (National Academy Press, Washington, DC, 2004), and *The New World of Police Accountability* by Sam Walker (Sage Publications, 2005).

[14] Information about PARC can be found at www.PARC.info.

exercise control of a violent or resisting individual to make an arrest, or to protect the officer or others from a risk of harm. Police officers should use only an amount of force that is reasonably necessary to effectively bring an incident under control, while protecting the lives of the officers and others. Deadly force should be used only when necessary to protect the officer or others from an imminent danger of death or serious physical injury. If non-deadly force reasonably appears to be sufficient to accomplish the law enforcement purpose, deadly force is not necessary.

While this is the policy floor, police departments can make a significant impact in reducing incidents where force legally could have been used, but wasn't. Several agencies have use of force policies stating that deadly force techniques are "a last resort" and that all practical methods available to the officer to avoid the use of deadly force should be exhausted before deadly force is used.[15] These include verbal commands, a lower level of force, establishing a perimeter, or disengagement.

A specific example of a use of force policy that reduces incidents of deadly force is to prohibit officers from shooting into cars (except if the subject is using deadly force against the officer using something other than the car). Shooting at moving vehicles is highly dangerous and has proved to be ineffective. There have been too many incidents where the subject driving the car, a passenger, or a bystander has been shot and killed, even as the car is going past the officer. Officers should not put themselves in the path of the vehicle and should move out of the way. The NYPD has had a policy prohibiting shooting at cars for many years, and the police departments in Chicago, Los Angeles and Miami, among others, now also have adopted these policies.

Mentally Ill Persons. Interactions between law enforcement officers and persons with mental illness have been at the center of many high-profile use-of-force incidents around the country. As a result, many police departments have developed specialized training and procedures to address these interactions. Officers are provided needed background on mental health issues and the options available beyond arrest, and are given additional training in de-escalation. These officers then provide immediate response to and management of calls for service involving individuals with mental illness who are in crisis. The Memphis, TN Police Department's Crisis Intervention Team (CIT), developed in 1988, was among the first such program, and has served as a model for countless other efforts.[16]

Training. Police recruits spend a great deal of time in the Academy learning *how* to use force. They do not spend enough time learning *when* to use force – and, just as important, *when not* to use force. With respect to firearms training, most larger departments now use sophisticated simulation technology with "shoot/don't shoot"

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[15] Both the Miami and Philadelphia Police Departments include this language in their policies.

[16] For example, there are 16 Ohio county law enforcement agencies that currently have CIT programs, and 18 more are in the planning stage for implementing CIT. In Florida, 12 counties have CIT programs, with four more developing them. Other prominent CIT programs are operating in the police departments of Cincinnati, OH, Albuquerque, NM, Montgomery County, MD, and Athens-Clarke County, GA. Information about CIT programs and other efforts to improve police response to mentally ill individuals can be found at www.consensusproject.org.

scenarios, where officers shoot weapons with light or laser beams at a screen showing an unfolding scenario. This technology originally was developed for target practice, and if the scenarios shown to recruits are mostly of the "shoot" variety, police departments are simply training officers to shoot more quickly. Police academies must incorporate ethics and critical decision-making in their use of force training.

Critical decision-making is just as important in training on less-lethal force. Almost all police departments train their officers to use a "continuum of force" or a use of force model where the officer's force options depend on the subject's actions and level of resistance. A police officer should use only the level of force that is necessary to gain compliance and make an arrest. The officer's level of force can escalate depending on the threat posed by the suspect and the suspect's level of resistance. But officers need to be trained to de-escalate the situation as well, so that they go down the use of force continuum when a subject lessens his or her resistance.

The initial interaction between the officer and citizen is crucial in setting the stage for the unfolding encounter. While an officer must always keep safety in mind, better communication and respect for the citizen will keep many incidents from escalating out of hand. Too often, officers believe they have to "assert control" of the situation to maintain their authority, and end up making matters worse. Respectful policing is effective, even when officers are making an arrest. Officers also need to be equipped to deal with abusive citizens without being abusive in turn.

Use of Force Reporting and Investigations. Proper management of a police agency involves the documentation, review and investigation of use of force incidents, to ensure that officers are using force appropriately. Use of force reporting systems track when officers use force, which officers use force, and against whom force is being used. The purpose of the evaluation is first to assess the individual officer's action, and determine whether the use of force was justified. Second, did the incident suggest a need for new training or tactics for the officer, or general retraining or changes in policy and tactics for the law enforcement agency. Are canine deployments going up? As pepper spray or Tasers are being used more, are shootings going down? How often do officers use force when making an arrest, and are there units that use force less often than others when making arrests? Answers to questions such as these can be used by police leadership in reducing officer use of force.

Supervision. Police chiefs and rank and file officers all acknowledge that it is first-line supervisors – the sergeants – who have the greatest influence over how officers act on the street. Sergeants need to be accountable for the behavior of the officers they supervise. To do this, they need to be out on the street, responding to calls, and questioning and guiding the actions of the officers they supervise. This means that supervisors will be there for back up, will know what is happening in the field, and can correct questionable practices quickly. Moving up the chain of command, lieutenants should be responsible for what happens below them, and so on.

Weapons. There have been significant advances in the weaponry of policing over the past decade, particularly with respect to less-lethal weapons. Having options other than deadly force reduces its occurrence. In the early 1980's and 1990's, most police agencies began equipping officers with chemical spray such as pepper spray (oleoresin capsicum or OC). Agencies also equip their officers with beanbag shotguns, collapsible batons known as asps, and most recently with newer versions of the Taser, an electronic control device.[17]

Over the past several years, over 7000 agencies have introduced Tasers as less-lethal use of force weapons.[18] These weapons shoot two barbs connected to wires, that when they connect with the subject or the subject's clothing, delivers an electrical current and causes the subject's muscles to involuntarily contract and the subject to fall down. Tasers also can be used in a "drive stun" mode, where the Taser cartridge is placed against the body of the subject, and the electrical charge serves as a "pain compliance" technique. The advantage of the Taser is that, if it is effective, it eliminates the need for the officer to close distance on the subject and engage in a physical confrontation. In this way, it can substitute for other uses of force, such as strikes or impact weapons, which may have an increased risk of officer or citizen injury. Tasers have also been used in situations where deadly force might have been used had the Taser not been available, especially in situations involving mentally ill persons and attempts at "suicide by cop."

The use of the Taser is not completely without risk, however. First, there can be injuries from Taser use, including from the subject's fall. Second, there has been significant debate about the Taser's role in a number of in-custody deaths of persons whose arrest involved a Taser deployment. While some medical studies have found the Taser to be safe, these have mostly involved persons with healthy medical histories. What is less certain is the effect that Tasers may have on individuals with heart conditions or who are on drugs or alcohol.

While most law enforcement officials point to great benefits from the development of the Taser (and it does appear that injuries to officers and subjects do decrease when Tasers are deployed), it hasn't meant that the number of use of force incidents has gone down when police departments implement Tasers. While Tasers may substitute for other types of force, it appears that at least in the first year or so that Tasers are distributed to patrol officers, the total number of force incidents often goes up, suggesting that Tasers can become the "option of first resort" in encounters. Tasers certainly should not be used in situations that could have been resolved using means other than force. If providing officers with Tasers results in decreasing their use of communication skills to resolve incidents, the community will be ill-served.

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[17] The Taser is a brand name for a particular weapon manufactured by Taser International; other terms for these types of weapons are Conducted Energy Devices (CED) and Elector-Muscular Disruption technology.

[18] Taser Weapons, Use of Tasers by Selected Law Enforcement Agencies, USGAO Report, May 2005, http://www.gao.gov/new.items/d05464.pdf.

Plainly, agencies that deploy Tasers must make serious efforts to monitor and evaluate their use. Specific training and use of force policies for the Taser need to be developed, including the decision where to place the Taser on the use of force continuum. Even among law enforcement agencies, there is debate as to whether Tasers should only be used against subjects who are engaged in "active resistance," and not against subjects who are not complying with the officer's directions, but are only engaged in "passive resistance." The Police Executive Research Forum (PERF) recently issued guidelines for use of conducted energy devices such as Tasers, and recommended that they only be used against persons who are actively resisting or exhibiting active aggression. Taser policies should also have limitations on the use of the weapon against vulnerable populations, such as pregnant persons, children and the elderly, and against subjects who are on elevated surfaces, where Taser use will risk greater injury from the fall. Also, Tasers should be deployed in a standard five-second cycle. Longer deployments certainly induce more pain than necessary, and may have potential health risks. Similarly, a recent Taser training bulletin noted that repeated deployments of the Taser against an individual may impair breathing. If the first few activations of the Taser are not successful, officers should be trained not to continue firing the Taser and to use other options.

Risk Management. Another area of police reform is the effort by police agencies to engage in risk management. Use of force data should be combined with information on citizen complaints, vehicle accidents and pursuits, lawsuits and various other data in what are known as "early identification" systems. Departments using these systems can identify which officers have repeat complaints or use of force incidents, and how an officer's activities compare with the activities of other officers. The time to find out that an officer has been involved in four previous force incidents is not when the fifth one occurs. The same goes for citizen complaints or lawsuits. In fact, identifying at-risk officer behavior early helps the officers as well as the community. With responses such as coaching, retraining, and additional supervision, it can put the officer on the straight and narrow and save a job, as well as prevent the next incident of brutality.

Citizen Complaints. To ensure that police agency procedures and actions are reasonable and effective, agencies should provide a readily accessible complaint process so that community and agency members have confidence that complaints will be given prompt and fair attention. Thorough and impartial investigations not only provide for corrective action where appropriate, but also protect against unwarranted criticisms when officers' actions and procedures are proper. These systems should be designed to open up the complaint process and provide an avenue for citizens to bring allegations to the jurisdiction without fear of retaliation.

In establishing a citizen complaint process, agencies need to ensure that access to the process is open, and officers do not discourage complaints. Complaints should be able to be filed by mail, fax, phone or in person, and many agencies now allow complaints to be made over the internet. Complaint forms should be readily available from officers, at police stations, city agencies, and other locations such as the local library. Where there is a significant population of limited-English speakers, the

complaint forms and brochures also should be available in other languages. Anonymous and third party complaints should also be accepted, and investigated to the extent possible. Many jurisdictions have a separate entity, created in an effort to provide an alternative forum and investigation, to bolster the confidence of the public that allegations of misconduct will be fairly and objectively investigated and adjudicated.[19]

Discipline. Misconduct happens. Sometimes it is caught on tape. Other times, it may be difficult to prove, especially because there are situations where officers legitimately need to use force, even deadly force. But when excessive force or other misconduct is alleged, there needs to be a prompt and fair investigation. Indeed, even when there is no complaint from a citizen, police use of force incidents need to be thoroughly investigated to determine if the officer's actions were appropriate and within policy. When it is determined that misconduct did occur, officers need to be disciplined appropriately. This can range from counseling, retraining, reprimands and suspensions, to termination. The penalty will depend on the circumstances of the incident and the disciplinary history of officer. Where the conduct rises to the criminal level, there must be criminal prosecutions and punishment.

Police Monitors and Oversight/Civilian Review. Another area of police reform has been the effort to implement mechanisms for police oversight, particularly through independent civilian entities. The challenges facing citizen oversight entities are great. It is difficult for them to be effective in reviewing and prompting change in a law enforcement agency, when those agencies are traditionally insular and suspicious of outsiders, jealous of their own authority to manage and discipline their members, and where those members have legitimate, but often times overwhelming, procedural rights and protections for their actions. Oversight entities have to maintain credibility with groups in the community that have widely different, and sometimes polar opposite, views of the police, and still retain the support of the agency's appointing authority. They also must make appropriate and difficult determinations relating to individual citizen complaints where the facts are in dispute and where there is often little independent evidence. And they often have to do it on a shoestring budget (sometimes no budget at all), with limited staff (if they are lucky enough to have staff).

Over the last decade, citizen oversight of the police has gained in numbers and public acceptance. Yet it remains controversial with police rank and file, and its effectiveness is often a matter of dispute. The expectations for citizen oversight bodies are high, and those expectations are too often not fulfilled. Certainly there have been failures and problems with citizen oversight of police departments, but there have been

[19] All complaints should be tracked and addressed. While there may be different levels of investigation for complaints with different levels of seriousness, officers and supervisors should not have the discretion to ignore complaints that they believe to be informal or meritless. Interviews with the complainant, witnesses, and officers should be recorded whenever possible. At the end of the investigation, the investigator should draft a report that thoroughly analyzes the evidence (reports, photos, medical evidence, interviews, etc.) and states the bases for the recommended findings.

successes too. There are a wide variety of types of citizen oversight. This makes broad pronouncements about "what works" more difficult. There are also difficulties in measuring "success," as there are multiple goals of citizen oversight, some of which may be in conflict.[20] A number of commentators have endorsed particular types of citizen review such as monitors and auditors. These may indeed be more effective than civilian review bodies in critically evaluating police practices and enhancing accountability in police investigations of misconduct. The auditor/monitor model may do less well, however, in providing a public forum for community concerns about police practices, and giving citizens with complaints an opportunity to be heard.[21] Moreover, even police auditors and monitors face difficulties in getting their recommendations adopted and obtaining adequate funding. Whichever type of oversight entity is chosen, it is important to identify factors that can lead to success, or at least contribute to its possibility.

Key factors that are critical to the success of a citizen oversight agency include: (1) ensuring sufficient authority for the agency and the organizational capacity to carry out that authority; (2) establishing the agency's credibility and impartiality; (3) managing the stakeholders' expectations of the agency; and (4) effectively conducting outreach to the public.

With a few exceptions, citizen oversight entities lack the power to discipline police officers directly. When addressing individual complaints of police misconduct, the outcomes of most citizen oversight agencies are recommendations back to the Chief of Police or City Manager on the disposition of complaints and the imposition of discipline.[22] This is true whether agencies are citizen review boards that only hear appeals from police department internal affairs divisions, oversight entities that conduct

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[20] *See*, *e.g.*, Cheryl Beattie and Ronald Weitzer, *Race, Democracy and Law: Citizen Review of Police in D.C.*, *in* CITIZEN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY AND HUMAN RIGHTS 41 (Andrew Goldsmith & Colleen Lewis eds., 2001), on the conflict between goal of impartial review of complaints and goal of representing community interests.

[21] See Merrick Bobb, Citizen Oversight of the Police in the United States, 22 ST. LOUIS U. PUB. L. REV. 151 (2003); Samuel Walker, New Directions in Citizen Oversight: The Auditor Approach to Handling Citizen Complaints, in PROBLEM-ORIENTED POLICING (Tara Shelley & Anne Grant eds., Police Executive Research Forum 1998); PolicyLink, Community Centered Policing: A Force for Change 78 (2001), at http://www.policylink.org/pdfs/ForceForChange.pdf; City of Sacramento Blue Ribbon Citizens Committee, Report of the Blue Ribbon Committee on Selected Police Practices (1998), at http://www.cityofsacramento.org/cityman/report1.html#f6.

[22] There are some Police Commissions, such as the Los Angeles Police Commission and the Detroit Police Board, where the citizen authority is the deciding entity for officer discipline. These are rare, however. While community activists often lament the fact that citizen oversight bodies do not have the authority to discipline officers directly, most academics and practitioners acknowledge that the best avenue for police integrity is a police executive who sets an ethical tone for the department and holds his or her officers to account. The ability of the Chief to impose discipline is necessary for that to occur. *See, e.g.*, Herman Goldstein, POLICING A FREE SOCIETY 174 (1977) ("Given the decentralized and dispersed nature of police organizations, it is utterly hopeless to attempt to control police conduct other than by making the administrative system work. No court or specially constituted citizen body, based outside the police agency, can possibly provide the kind of day-to-day direction that is essential if the behavior of police officers at the operating level is to be effectively controlled.").

their own investigations, or auditor/monitor models that oversee and in some cases directly participate in internal affairs investigations. Similarly, oversight entities generally do not have the power to change police department policies. Instead, they report and recommend. To accomplish their objectives, therefore, citizen oversight bodies must rely on the strength of their reputation and on their powers of persuasion.

Citizen oversight agencies are created: (1) to provide an objective review of citizen complaints, either through an initial investigation or an appeal from an investigation of the police department; (2) to make recommendations for improving police policy and practice, especially with respect to police integrity; (3) to serve as a public forum for community concerns regarding the police department; and (4) to increase public trust in the police and improve police-community relations. None of these functions can be accomplished effectively if the entity is viewed as biased (either towards police or against police), untrained or ill-informed, lacking status within the government, or ineffectual and powerless. The credibility necessary to effectively serve as a check on police misconduct depends on both the actual powers and performance of the agency, and the perceptions of the community.

There is no play-book for establishing credibility. Rather, it stems from a combination of factors: who the members of the oversight entity are, how they were selected, what powers they have, their relations with other political officials such as the mayor and council, and most importantly, what they do.

Recruitment. Police departments must also pay attention to the individuals we bring onto the police force. While the great majority of officers go into policing because they want to help people, the profession also has brought in its share of schoolyard bullies who just should not be police officers. Departments should not be looking for recruits with a "cowboy" mentality. Rather, they need officers who can connect with young people, keep a cool head, and resolve issues before they become problems. Ad campaigns that feature SWAT teams and car chases may not be the right type of recruiting tools. We may also need to adjust our selection criteria and tests, so that we can identify candidates with the broader and more complete skill sets we want – including problem solving, compassion, initiative, community involvement, and communications skills, for instance.

VII. CONCLUSION

Policing is not easy business. It is a difficult, but noble, profession. When done poorly, it can generate mistrust and anger. When done well, it reflects the best of our democratic traditions. The most effective answer to police misconduct is a renewed commitment to a vision of policing that has emerged in the last decade – community oriented policing and problem solving. To make police reform a reality, police leaders must listen to community views and "bring the community into the precinct," and they must implement the best practices that have been identified as promoting police integrity. And where they don't, the public and all levels of government, including the Federal government, must hold them accountable.