Saint Louis University Public Law Review

Volume 32
Number 1 *Control of Police Misconduct in a Post-Exclusionary Rule World: Can It Be Done? (Volume XXXII, No. 1)*

Article 4

2012

Introduction

Roger L. Goldman
Saint Louis University School of Law, goldmanrl@slu.edu

INTRODUCTION

ROGER L. GOLDMAN*

On February 24, 2012, Saint Louis University School of Law and the *Saint Louis University Public Law Review* presented a symposium titled; "Control of Police Misconduct in a Post-Exclusionary Rule World: Can it Be Done?" In recent cases like *Hudson v. Michigan*,[1] four members of the United States Supreme Court argued that excluding reliable evidence, which could result in letting guilty defendants go free, may have been necessary in 1961 when the Court imposed the exclusionary rule on the states *in Mapp v. Ohio*,[2] but times have changed. Other remedies were now effective in controlling police behavior, such as better training of police, civilian review boards, and civil suits pursuant to 42 U.S.C. § 1983. The Symposium brought together leading academics from a variety of disciplines and practitioners from the public and private sectors to discuss whether the three remedies mentioned in *Hudson* as well as other remedies are, in fact, effective in controlling police behavior.

In her article, *Stakeholder Participation in the Selection and Recruitment of Police: Democracy in Action*, Professor Kami Chavis Simmons argues that the community-policing model, involving partnership between all segments of the community and the police who serve that community, would support citizen involvement in both the recruitment and selection of police officers. The vehicle for accomplishing this goal should be pattern and practice suits brought by the Department of Justice ("DOJ") pursuant to 42 U.S.C. § 14141. Consent decrees entered into pursuant to Section 14141 currently stress the importance of community policing concepts in areas other than recruitment and hiring. And the DOJ's Office of Community Oriented Policing Services (COPS) has issued reports recognizing the value of citizen involvement in recruitment and hiring. The Author notes the existence of such efforts in various communities, including Sacramento and Detroit. She recommends that any consent decrees that include citizen involvement in recruitment and hiring should be monitored to make sure it does not lead to corruption; that all segments of the community are at the table, including those who are its most vulnerable members; and that there is an evaluation component to determine if the community benefited from the process.

* Callis Family Professor of Law, Saint Louis University School of Law.

1. Hudson v. Michigan, 547 U.S. 586 (2006).
2. Mapp v. Ohio, 367 U.S. 643 (1961).

With respect to the four federal remedies designed to deter police from constitutional violations—the exclusionary rule, civil suits under Section 1983, criminal prosecutions under 18 U.S.C. §§ 241 and 242, and pattern and practice suits under 42 U.S.C. § 14141—Professor Rachel Harmon argues that these remedies "are almost as good as they are ever going to get." Her article, *Limited Leverage: Federal Remedies and Policing Reform*, describes in detail that any improvements in these remedies will be only marginally more effective in deterring misconduct. Instead of using the stick, that is, "making misconduct unappealing relative to reform," which is what the current remedies do, she advocates using the carrot, that is, "making reform more appealing relative to misconduct." Specifically, she suggests that the DOJ could provide technical assistance to departments willing to undertake reform measures and the COPS Office could give grants to departments for programs to promote civil rights. The DOJ could also agree not to bring suits under Section 14141 if a police department would adopt reforms. Any such efforts, however, would have to be evaluated to make sure desired outcomes were achieved.

In his article, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, Professor Samuel Walker addresses a largely ignored question: once police reforms are adopted by a police department—particularly accountability-related reforms—do they become embedded in the culture or are they abandoned over time? Professor Walker discusses the failure of departments to institutionalize such reforms as anti-corruption efforts and team policing. He notes that it is uncertain whether community-oriented policing reforms will have more staying power, but there are hopeful signs that problem-oriented policing efforts will be institutionalized. With respect to accountability reform efforts, he focuses on consent decrees pursuant to Section 14141 and notes that there has been no systematic evaluation of the long-term benefits of the decrees. Professor Walker also observes that there is some hope police officers will be more receptive to accountability reform efforts than in the past because of the greater diversity among police officers in terms of education, gender, race, and ethnicity. What is more worrisome is resistance to change from police unions. Further, there may be differences among departments in terms of willingness to embrace accountability-related reforms. He focuses on one such department that has embraced reform efforts—the Charlotte, North Carolina Police Department—and uses it as a model for other departments. Finally, he recommends the use of a police auditor to monitor the continuity of reforms.

In *The Numbers Dilemma: The Chimera of Modern Police Accountability Systems*, Professor James F. Gilsinan questions the usefulness of recent attempts to bring transparency and accountability to the management of police departments. He notes six problems with these efforts to quantify criminal activities: 1) the question of what crimes should be included in the statistics; 2)

data can be manipulated for political reasons, e.g., kept low to encourage tourists, kept high to get money for more officers; 3) numbers can rise or fall easily, e.g., a crime spree might be one incident or 20 incidents; 4) context is more important than numbers; 5) measurement can hide judgment; and 6) there is pressure to produce good numbers. The adoption of programs like CompStat has not brought about better policing and has caused divisions between line officers and commanders. Various studies have shown that street officers conform to preexisting ideas of the way things ought to be. The Author notes the institutional pressures to act like other police departments—to imitate what others do rather than initiate change. Finally, the focus on data has not translated into information and knowledge, which are indispensable for real change. Paradoxically, he concludes, as these systems of accountability take root in an organization, the chance of true accountability and transparency is lessened.

In his article, *Police Training as an Instrument of Accountability,* Professor David A. Klinger suggests that training on how to avoid use of excessive force must take into account four prototypical officers: 1) those who believe they are justified in using force as they see fit; 2) those who normally wouldn't use unnecessary force, but would in certain situations, e.g., confronting a particularly heinous suspect; 3) those who do not know the rules; and 4) those who use poor tactics. Each of these prototypes must receive training tailored to their particular needs, which is not the norm in a one-size-fits-all approach. Professor Klinger concludes that there has not been enough empirical research on whether police training makes a difference on performance and recommends that given all the time and money spent on training, efforts should be made to measure its effectiveness.

In the *Hudson* case, Justice Scalia assumed that civil liability under Section 1983 for Fourth Amendment violations by police is an effective deterrent undermining the need for the exclusionary rule.[3] In his article, *Illegal Searches in Chicago: The Outcomes of 42 U.S.C. § 1983 Litigation*, Professor Mark Iris examined the results of Section 1983 suits filed in 2009 against Chicago police officers alleging unconstitutional searches of the person, car, or home—a total of 187 cases. As he notes, the City of Chicago is quite transparent in posting on its website the amount it pays out in settlements or judgments. Of the cases filed in 2009, 139 were disposed of by the time he wrote his article, either by dismissal by one of the parties, settlement, or verdict. The total amount paid by the city for federal civil rights claims, not just unconstitutional searches, for the years 2008 to 2011 was over $125 million; an additional $80 million was paid for police-related civil suits in state court during this period, mainly arising from auto accidents with a police car. The author concludes that although

3. *Hudson*, 547 U.S. at 598.

Chicago is paying a great deal of money for police officers' misconduct, it is not at all clear that these payments—made by the city rather than the officer—has a deterrent effect on the officers' future behavior.

For many years, this Author has been advocating the adoption of state laws that give a state agency the authority to revoke a police officer's license for serious misconduct in the same way states may revoke the license of members of most other professions and occupations.[4] In my contribution to this symposium issue, *A Model Decertification Law*, I describe the necessary components of a successful decertification law. Currently, forty four states have such authority. In the absence of such a law, an officer who is terminated from a police department for serious misconduct may seek employment at another department in the same state, where he is likely to repeat the conduct. First, all criminal justice officers must be subject to decertification, that is, not just police officers and deputy sheriffs, but also correctional officers and probation officers, among others. Second, the conduct that triggers decertification cannot be just criminal convictions—there must be authority to remove a license for conduct that does not result in a conviction, such as perjury by an officer whose testimony results in a defendant's being found guilty. Finally, experience has shown that some police departments—usually those that are small and underfunded—will not cooperate in reporting decertifiable conduct to the state agency. Therefore, there must be a combination of carrots and sticks to encourage their compliance. One reason for optimism that decertification laws will continue to be strengthened is that, unlike many other remedies, decertification can attract support from both the law enforcement and the civil rights and liberties communities: the former is interested in police professionalism, the latter in protecting citizens from officers whose previous conduct renders them unfit to serve.

The articles published in this issue have attempted to assess the efficacy of various approaches to dealing with police misconduct: from the earliest stages of recruitment, hiring, and training; to on-the-job efforts of bringing about transparency and accountability and institutionalizing these reforms; and finally remedies such as court-supervised consent decrees, civil damages actions for unconstitutional searches, and criminal prosecutions and license revocation. A common thread runs through the articles—that much more empirical work remains to be done to measure the effectiveness of these reform initiatives. We thank all the conference presenters, especially those presenters who also contributed to this Symposium issue, and the editors and staff of the *Public Law Review* for their tireless efforts in putting on the conference and publishing this issue.

4. *See, e.g.*, Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45 (1987).