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## CIVILIAN OVERSIGHT OF THE POLICE IN THE UNITED STATES

MERRICK BOBB\*

### INTRODUCTION

More than ten years have elapsed since the Rodney King incident where officers of the Los Angeles Police Department were recorded on a bystander's videotape beating an African-American motorist senseless with their batons.<sup>1</sup> Since then there has been wave upon wave of controversial incidents rocking the foundations of U.S. law enforcement. Events in two of the nation's most highly respected police departments, the New York Police Department (NYPD) and the Los Angeles Police Department (LAPD), serve as graphic examples. In New York, the NYPD's brutalization of Abner Louima<sup>2</sup> and the shooting of Amadou Diallo<sup>3</sup> generated strong criticism. Officers involved in the Louima case were put on trial.<sup>4</sup> In Los Angeles, the LAPD has been almost constantly subject to one investigation or another since the Rodney King beating. Recently, the LAPD suffered embarrassment and opprobrium from the Rampart scandal, where LAPD officers were shown to have planted evidence and guns and wrongfully shot young Latinos suspected of gang activity.<sup>5</sup>

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1. Patt Morrison, *Deja Vu All Over Again*, LOS ANGELES TIMES, Aug. 29, 1997, at B2, 1997 WL 2242317.

2. Morrison, *supra* note 1.

3. *Shooting by Police Sparks Protest March*, LOS ANGELES TIMES, Feb. 16, 1999, at A9, 1999 WL 2130409.

4. *United States v. Volpe*, 42 F. Supp.2d 204, 208 (E.D.N.Y. 1999); *Prosecution Closes Its Case Against 4 Cops in Torture Trial*, CHI. TRIB., June 3, 1999 at 15, 1999 WL 2879583.

5. BOARD OF INQUIRY INTO THE RAMPART AREA CORRUPTION INCIDENT, LOS ANGELES POLICE DEPARTMENT, PUBLIC REPORT (2000), [www.lapdonline.org/pdf\\_files/pc/boi\\_pub.pdf](http://www.lapdonline.org/pdf_files/pc/boi_pub.pdf); RAMPART INDEP. REVIEW PANEL, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL (2000), <http://www.ci.la.ca.us/oig/rirprpt.pdf>; ERWIN CHEMERINSKY, AN INDEPENDENT ANALYSIS OF THE LOS ANGELES POLICE DEPARTMENT'S BOARD OF INQUIRY REPORT ON THE RAMPART SCANDAL (2000), *reprinted in* 34 LOY. L.A. L. REV. 549, 551 (2001).

Events in other cities, too, have contributed to the concern over police conduct. In April 2001, there was rioting in the city of Cincinnati following the fifteenth consecutive police shooting of a young African-American male.<sup>6</sup> This past summer, television stations repeatedly aired videotape showing an Inglewood, California, police officer picking up a handcuffed, passive, young, black man; slamming him into the hood of a police car; and then punching him in the face.<sup>7</sup>

In the wake of these and other similar events, informed public opinion has expressed strong misgivings about whether law enforcement is capable of unsupervised self-regulation—whether the police can police themselves and deal appropriately with unethical conduct, be it corruption or misuse of force. This public concern has led to experimentation over the last ten years with different methods of civilian oversight and control. Before considering further how these different experiments have worked, though, it is interesting to consider some basic facts about American policing.

#### I. A BRIEF SKETCH OF AMERICAN POLICING

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 law enforcement agencies like the FBI, the Border Patrol, and the Drug Enforcement Administration, their jurisdiction is limited to defined federal crimes.<sup>8</sup> 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 to patrolling the roads and highways in the state.<sup>9</sup> The overwhelming amount of municipal street patrol and other basic police services is provided by local law enforcement agencies, including both police and local sheriff's departments. There are far more individual law enforcement agencies in the United States than one would expect.

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6. *Protest Spills Into the Streets*, CINCINNATI POST, April 10, 2001, <http://www.cincypost.com/2001/apr/10/prot041001.htm>.

7. Richard Marosi, *Use of Force Probed in Videotaped Arrest*, L.A. TIMES, July 8, 2002, at B1, 2002 WL 2488488.

8. See FEDERAL BUREAU OF INVESTIGATION, GENERAL FREQUENTLY ASKED QUESTIONS, at <http://www.fbi.gov/aboutus/faqs/faqsonline.htm>; IMMIGRATION AND NATURALIZATION SERVICES, OVERVIEW: U.S. BORDER PATROL, at <http://www.ins.usdoj.gov/graphics/lawenfor/bpatrol/overview.htm>; U.S. DRUG ENFORCEMENT ADMINISTRATION, DEA MISSION STATEMENT, at <http://www.usdoj.gov/dea/agency/mission.htm>.

9. See CALIFORNIA HIGHWAY PATROL, WHAT WE DO, at [http://www.chp.ca.gov/html/what\\_we\\_do.html](http://www.chp.ca.gov/html/what_we_do.html); NEW YORK STATE, OVERVIEW: NEW YORK STATE POLICE, at <http://www.troopers.state.ny.us/Intro/IntroOverview.html>.

Indeed, there are more than 16,000 local law enforcement agencies in the United States. Of this total, 13,524 are local police departments,<sup>10</sup> the rest are sheriff's departments.<sup>11</sup> There are about 436,000 full-time, sworn police officers in these 13,000 police departments, and about 186,000 full-time, sworn employees in the sheriff's departments.<sup>12</sup> Of the 436,000 full-time police officers, slightly more than one-third work in an agency having 1000 or more officers, even though these agencies account for only 0.3% of the total number of police departments.<sup>13</sup> While departments with 100 or more full-time police officers account for only about 4% of the total, they employ three-fifths of the full-time officers.<sup>14</sup> The great majority of the police departments, about 77% (more than 10,000), have fewer than 25 police officers, while about 52% have fewer than 10 officers.<sup>15</sup> There are only about 1300 police departments, about 10%, with more than 50 police officers.<sup>16</sup>

The largest police departments are obviously in the largest cities. But even in the largest cities, there are wide variations in the number of officers as compared with the number of residents. New York City, with a population of approximately 8 million people, has over 40,000 police officers, or 53 per 10,000 residents, one of the highest police officer-to-resident ratios in the United States.<sup>17</sup> Chicago, which has about 3 million people, has 13,000 officers, or 49 per 10,000 residents.<sup>18</sup> Los Angeles, on the other hand, with nearly 4 million people, only has about 9,000 police officers, or 27 per 10,000 residents.<sup>19</sup>

Police officers are generally well paid. The overall, average, base starting salary for a police officer in 1997 was about \$23,300,<sup>20</sup> significantly above the per capita, annual income in the United States of about \$19,200.<sup>21</sup> In the largest departments, the average starting salary was \$30,600.<sup>22</sup> By

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10. MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS 1999 1 (2001), [www.ojp.usdoj.gov/bjs/abstract/lpd99](http://www.ojp.usdoj.gov/bjs/abstract/lpd99).

11. *Id.*

12. *Id.*

13. *Id.* at 2.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. BRIAN A. REAVES & ANDREW L. GOLDBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS 1997 7 (2000).

21. BUREAU OF THE CENSUS, U.S. COMMERCE DEP'T, PUB. NO. 60-200, MONEY INCOME IN THE UNITED STATES: 1997 x (1998), <http://www.census.gov/prod/3/98pubs/p60-200.pdf>.

22. REAVES, *supra* note 20, at 7.

comparison, in the smallest departments, the chief of police had an average salary of about \$25,700, and in the largest departments, the chief had an average salary in excess of \$100,000.<sup>23</sup> In Los Angeles both the Chief of Police and the Sheriff make over \$200,000 annually.<sup>24</sup>

Police officers in the United States are moderately well educated. Eighty-three percent of all US police departments require at least a high school degree to become a police officer, while fourteen percent require at least two years of college, and one percent requires a four-year college degree.<sup>25</sup> While in large U.S. cities, police recruits undergo an average of about 1300 hours of classroom and field training, the average police officer in the United States is required to undergo approximately 1000 hours of training.<sup>26</sup> On the average, a police officer in the United States also receives about thirty hours of additional in-service training each year.<sup>27</sup>

Policing is considered a dangerous profession, but the number of police officers killed in a given year is relatively small. In the year 2000, fifty-one police officers were killed feloniously throughout the United States; and in 1999, the number was forty-two.<sup>28</sup> Of the fifty-one officers killed in 2000, thirteen were killed while responding to traffic pursuits or stops, twelve were killed while making arrests, ten in ambushes, eight while responding to disturbance calls, six while investigating suspicious persons and circumstances, and two while transporting prisoners.<sup>29</sup> In the Los Angeles County Sheriff's Department (a local law enforcement agency that I monitor), which has approximately 8000 sworn officers patrolling a population of about 2 million persons (40 per 10,000 residents),<sup>30</sup> there were seven officers killed

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23. *Id.*

24. Los Angeles County Sheriff, *in* LOS ANGELES ALMANAC, <http://www.losangelesalmanac.com/topics/Government/g103c.htm> (last visited Jan. 29, 2003) ("The Los Angeles County Sheriff earns the highest annual salary of any county employee - \$207,000."); Mariel Garza, *Mayor Introduces Nominee for Chief*, L.A. DAILY NEWS, Oct. 3, 2002, <http://www.dailynews.com/Stories/0,1413,200%7E20954%7E901835,00,htm> (candidate for police chief's job was offered "an annual salary of \$239,039, less than the \$247,000 paid to [the then current chief]").

25. REAVES, *supra* note 20, at 5.

26. *Id.*

27. *Id.*

28. FEDERAL BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 2000 28 (2001).

29. *Id.*

30. Los Angeles Sheriff's Department, History of the Los Angeles County Sheriff's Department (1849-1999), [http://www.lasd.org/about\\_lasd/history2.htm](http://www.lasd.org/about_lasd/history2.htm) (2,046,740 citizens and 8088 sworn personnel as of Dec 31, 1998).

and fifty-one wounded in the ten year period between 1991 and 2001.<sup>31</sup> Last year in that department, there was one officer killed, and two wounded.<sup>32</sup>

Encounters by residents with the police are relatively rare. In 1996, a survey showed that, of the approximately 280 million people in the United States,<sup>33</sup> an estimated 44.6 million people had face-to-face contact with a police officer during the prior twelve months.<sup>34</sup> An estimated 33% of residents who had contact with the police had either asked for assistance, or had provided it to officers.<sup>35</sup> About 32% of those who had contact with the police had reported a crime, either as a victim or a witness.<sup>36</sup> Of all persons who had contact with the police, only 1% said the police officer used force or threatened to use force.<sup>37</sup>

In a study of use of force patterns in six law enforcement agencies in connection with 7500 adult custody arrests, researchers found that use of serious force was infrequent.<sup>38</sup> According to the study, in 97.9% of the arrests the police did not use a weapon.<sup>39</sup> If a weapon was used, the most frequent was oleoresin capsicum (OC) spray, which was used in 1.2% of the arrests in the study.<sup>40</sup> The second most frequently used weapon was the flashlight, used in 0.5% of the arrests.<sup>41</sup> Batons were used in 0.2%, handguns in 0.1%, and rifles or shotguns in another 0.1% of arrests.<sup>42</sup> In contrast, however, handguns were *displayed* by the police, though not *used*, in 2.7% of the arrests.<sup>43</sup>

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31. These statistics combine information available in two sources: MERRICK J. BOBB ET AL., LOS ANGELES COUNTY SHERIFF'S DEP'T, 14<sup>TH</sup> SEMIANNUAL REP. (2001), <http://lacounty.info/mbobb14.pdf>, also available at <http://www.co.la.ca.us/bobbreports/mbobb14.pdf>; Memorandum from Karyn Mannis, Lieutenant, Internal Affairs Bureau, to William McSweeney, Commander, Office of the Undersheriff 2 (Jan. 23, 2002) (on file with author).

32. Memorandum from Karyn Mannis, *supra* note 31, at 2.

33. U.S. CENSUS BUREAU, CENSUS 2000 GATEWAY, <http://www.census.gov/main/www/cen2000.html>.

34. LAWRENCE A. GREENFIELD ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-165040, POLICE USE OF FORCE: COLLECTION OF NATIONAL DATA iv (1998), <http://www.ojp.usdoj.gov/bjs/pub/pdf/puof.pdf>.

35. *Id.*

36. *Id.*

37. *Id.* at cover page.

38. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-176330, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 31 (1999), <http://www.ojp.usdoj.gov/bjs/abstract/ufbponld.htm>. The use of force study involved police departments in Dallas, Texas; San Diego, California; Colorado Springs, Colorado; St. Petersburg, Florida; Charlotte, North Carolina; and the Sheriff's Department in San Diego County, California.

39. *Id.* at 30.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

Use of lethal force by the police is not as widespread as one might think from watching movies and television. In cities over 500,000 people, there are 0.5 persons shot by the police per 100,000 residents per year.<sup>44</sup>

Regardless of the fact that use of force is a relatively rare occurrence, there is heightened concern across the United States about the use of *excessive* force by police. Over the last ten years, it seems that a consensus has formed that law enforcement agencies rarely, if ever, confront problems of excessive force, or undertake substantial internal reform on their own. Over the same ten years, different ways to introduce more civilian oversight and control of law enforcement have been tried. Among these means, providing an outside, civilian organization with significant or exclusive responsibility for the investigation into an alleged misuse of force has become increasingly 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 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 shooting, 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 it. Finally, fellow officers may not want to see one of their peers held up to withering scrutiny.

It is useful to take an officer-involved shooting as an example of what can happen when internal affairs or homicide investigators give in to those pressures. While officers may lawfully use deadly force, a determination must be made in each instance if such use was appropriate. When the police investigate one of their own officers who has been involved in a shooting, bias may show up in many ways. For example, the investigation may be half-hearted, wherein not all relevant witnesses are interviewed or even attempted to be located, particularly those witnesses who might give testimony unfavorable to the officer. Interviews of the officer himself may be tainted:

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44. Leen et al., *D.C. Police Lead Nation in Shootings*, WASH. POST, Nov. 15, 1998, at A1.

investigators may simply pitch softball, open-ended questions to the officer, allowing him to give a narrative answer that is not given rigorous cross-examination. More troubling still, investigators, at times, may use leading questions that seem to signal to the officer what he is supposed to say in order to get off the hook: “You were in fear for your life, weren’t you?” or “You thought your partner was about to be shot, correct?” or “You saw the suspect reach for his waistband and withdraw a black, shiny object you thought was a gun, right?”

A significant number of shootings reviewed by law enforcement monitors, the federal Civil Rights Division of the Justice Department, and inspectors general have been, in one law enforcement agency’s parlance, “lawful but awful”<sup>45</sup>—lawful in the sense that they may not have been instances of intentional, criminal wrongdoing, but awful in that they involved recklessness or grossly negligent conduct, tactics, or strategy. Assuming that the officer involved in the shooting had received proper training, shootings of that kind should routinely be held to be contrary to policy. Too often, however, due to the pressures that come to bear on the investigation, they are not.

There is a natural, predictable, human impulse involved; even in the absence of external pressures, no law enforcement officer can examine an officer-involved shooting without saying at some level, “There but for the grace of God go I.” The trauma of having to kill another person, though faced by very few police officers, is, nonetheless, so great that for American police officers, in general, it is difficult for one police officer to question another’s decision that he had to do so. Who is to say that if faced with the same situation, he would not have pulled the trigger? The empathy one police officer has for another is entirely understandable. Still, it cannot be allowed to cloud one’s judgment, or cause one to reach unjust results.

Complicating the issue is the tendency of police officers to close ranks when faced with an investigation, creating what has been called the “blue wall,” enforcing a code of silence by intimidating any officer who shows any willingness to cooperate with investigators, or point the finger at a fellow officer.

A case that recently arose in New York City makes that point. A New York City police officer, while driving his patrol car, struck and killed a pregnant, twenty-four year old woman, her sixteen-year-old sister, and her four-year-old son. The woman’s unborn child died hours after being delivered by Caesarean section. The New York City police officer had been on a twelve-hour drinking binge that began outside the station house, and continued at a strip club that was off limits to officers in the precinct. During the trial of the

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45. BOBB ET AL., *supra* note 31, at 15 n.5 (“The LASD has its own colorful term for some of these kinds of shootings: ‘Lawful but awful.’”).

officer, who was convicted of manslaughter, it came to light that fellow NYPD officers suppressed vital evidence, and tried to cover up that the officer had been drinking.<sup>46</sup> A writer in the New York Times commented: “[T]he killing of a pregnant woman and two family members was . . . an unspeakable horror. But the investigation is focusing on whether any [NYPD] officers closed ranks” to help the drunk officer.<sup>47</sup>

Similarly, in the Abner Louima case, where a black man was tortured in a station house when a broken broom handle was shoved up his rectum, the police union was alleged to have conspired with certain of the police officers involved to frustrate an investigation.<sup>48</sup>

Thus, many police reform advocates conclude that police organizations are hopelessly insular, endlessly 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 those 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.

Yet, even police reformers who question the wisdom of displacing a police department’s power to investigate internal misconduct do not contend that self-policing is an inalienable right. Rather, both sides agree that the ability to police oneself is a rare privilege afforded only to certain, highly trained and disciplined professionals—be it university faculty, lawyers, doctors, or certified public accountants. 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

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46. William K. Rashbaum, *After Ex-Officer’s Conviction, Challenging the Blue Wall*, N.Y. TIMES, May 5, 2002, § 1, at 43.

47. *Id.*

48. Graham Rayman, *Code of Silence Challenge, Louima’s Lawyers Accuse NYPD, PBA*, NEWSDAY, Aug. 7, 1998, at A31.

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 an open and transparent process. In some instances, law enforcement agencies voluntarily agree to allow agency monitors previously unprecedented access to internal records. As a result, detailed information about the use of force, which heretofore had never seen the light of day, is made public. In jurisdictions where the police have been more amenable to voluntary reform efforts, the displacement of investigatory and disciplinary authority may be an unnecessary and avoidable step. 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 mechanism for demonstrating a fair and reasonable procedure that has proven least threatening to law enforcement, yet still effective, is the appointment of an independent monitor upon the acquiescence of the law enforcement agency to be monitored. Generally, these monitors make public reports on the integrity of internal police processes. There seems to be a growing view, however, that in some circumstances monitoring and reporting alone may not be enough to reduce excessive force and produce better internal police investigations. In such circumstances, police reformers advocate that the power to investigate police misconduct should be ceded by the police, in whole or in part, to qualified, independent investigative bodies. In rare circumstances, where even more stringent measures are needed to decrease the use of excessive lethal and non-lethal force, the federal government is statutorily authorized to impose, not only compulsory monitoring, but far-reaching, departmental reforms in an attempt to end these unacceptable patterns or practices.<sup>49</sup> 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.

## II. INDEPENDENT MONITORS

In the past ten years, there has been healthy experimentation with independent monitors. These individuals or groups are appointed by local government with the acquiescence of the law enforcement agency in question, and given unprecedented access to law enforcement files, records, and personnel in order to critically review and publicly comment on the performance of the police in controlling excessive force. For example, in my capacity as Special Counsel for the County of Los Angeles, I monitor and

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49. See *infra* notes 63, 65-66, and accompanying text.

oversee the Los Angeles County Sheriff's Department (LASD).<sup>50</sup> The executive branch of the county government that appointed me has guaranteed in writing that I will have unfettered access "to such confidential records of the County of Los Angeles, its departments and officers [including the Sheriff's Department] as may be material and relevant" to my investigations.<sup>51</sup> I comment every six months in written reports on the progress or lack of progress of the LASD in controlling excessive force.

During the years that I have monitored and reported on the LASD, from 1993 to the present, excessive force has been substantially curbed. Although it would be overreaching to suggest that reporting and monitoring alone achieved the downturn in the use of force, they contributed to it. The results, in any event, are impressive.

In the past ten years, a time during which the LASD has been subject to ongoing, independent, outside investigation and monitoring, the number of suspects killed or wounded by that department on a yearly basis has dropped from a high in 1991 of sixty-three persons to a low of eighteen persons in 2000, dropping by approximately seventy percent.<sup>52</sup> During the same time period, the number of law enforcement officers in the Sheriff's Department that have been killed or wounded dropped from a high in 1991 of ten to a low of three in 2001.<sup>53</sup> Important to this comparison, during the same ten-year period the number of arrests by the Sheriff's Department has remained roughly constant.<sup>54</sup>

Besides the individual injury statistics, another set of statistics that is relevant to an analysis of the use of excessive force by police relates to lawsuits filed against the agency on behalf of the victims of such force. While

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50. The LASD and the LAPD are two different law enforcement agencies. Each operates within the County of Los Angeles, a large geographic area in southern California with approximately 10 million residents. The City of Los Angeles, with approximately 4 million residents, is the largest city in the County of Los Angeles. The LAPD, with about 9000 sworn officers, is the principal law enforcement agency within the city. The LASD, with about 8000 sworn officers, is the principal law enforcement agency outside the City of Los Angeles and serves approximately 2 million county residents. Smaller municipal police departments serve the balance of some 4 million county residents. In addition to providing basic police services, the LASD also operates the Los Angeles county jail system. With an average daily inmate population of nearly 20,000, the Los Angeles county jails are the largest urban jail system in the United States.

51. Employment contract between the County of Los Angeles and Merrick J. Bobb, Contract #73890, Contract for Special Counsel (adopted by the Board of Supervisors Jan. 29, 2002) (on file with author).

52. BOBB ET AL., *supra* note 31, at 81; Memorandum from Karyn Mannis, *supra* note 31, at 2.

53. BOBB ET AL., *supra* note 31, at 81; Memorandum from Karyn Mannis, *supra* note 31, at 2.

54. BOBB ET AL., *supra* note 31, at 85, 88.

the availability of money damages in such a lawsuit is a deterrent to the use of excessive force, public reporting of the number of cases and total damage payments adds to this deterrent effect. During the past ten years of outside, independent monitoring and reporting, the total docket of excessive force cases on file against the LASD has dropped from a high of 381 cases in fiscal year 1992-1993 to a low of 70 cases in fiscal year 1998-1999.<sup>55</sup> The amounts paid out in settlements and judgments of excessive force cases dropped from a high of \$17 million in fiscal year 1995-1996 to a low of \$1.62 million in fiscal year 1997-1998.<sup>56</sup>

The public monitoring reports, which address the fundamental excessive force and integrity issues in policing, are calculated to foster a constructive, task-oriented, and 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 from the law enforcement perspective 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 makes room for a wider and more free-ranging inquiry into alternative solutions to the control of excessive force. By stripping the discussion of blame, rhetoric, 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.

Monitors are accountable to different constituencies. First, each is accountable to the law enforcement agency to provide assistance or reports calculated to focus police management on internal 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 dual responsibilities to agency and the general public, 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.

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55. *Id.* at 95.

56. *Id.* at 96.

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.

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 report frankly 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, the next topic to be considered.

### III. INDEPENDENT INVESTIGATORS

In addition to monitors, some jurisdictions have experiments afoot in which civilians from outside the law enforcement agency are empowered to oversee and direct police internal affairs investigations. In Seattle, Washington, for example, a civilian lawyer has been placed in charge of Internal Affairs within the Seattle Police Department.<sup>57</sup> She reports directly to the Chief of Police. Her title is Director of the Office of Professional Accountability (OPA). The office was created within the Seattle Police Department to receive and investigate complaints of misconduct by Seattle police officers. 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.

As another example, the Board of Supervisors of Los Angeles County created the Office of Independent Review (OIR) in 2001.<sup>58</sup> This group of six lawyers with significant civil rights experience has been empowered to direct and shape internal affairs investigations in the 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

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57. OFFICE OF PROFESSIONAL ACCOUNTABILITY, SEATTLE POLICE DEP'T, ABOUT DIRECTOR SAM PAILCA, <http://www.cityofseattle.net/police/OPA/Directorinfo.html>.

58. OFFICE OF INDEPENDENT REVIEW, COUNTY OF LOS ANGELES, WELCOME, <http://www.laoir.com>.

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. Note that with the creation of the OIR, the LASD, not only has an independent monitor (discussed in section I), but also shares with civilians the responsibility for internal investigations.

With respect to the LAPD, the power to investigate and adjudicate misconduct is shared by LAPD's Internal Affairs, a Police Commission, and an Inspector General.<sup>59</sup> The Commission, appointed by the Mayor of Los Angeles and comprised of five civilians from outside of law enforcement, is empowered to decide whether officer-involved shootings and other serious uses of force are proper or improper in light of the policies and standards of the LAPD. 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 integrity of the LAPD's disciplinary system.

The very recent experiments in Seattle with the OPA and in Los Angeles County with the OIR are among the most exciting and promising new efforts to instill accountability through civilian oversight and participation. If they work well, they could ultimately replace civilian review boards, which we consider next.

#### IV. CIVILIAN REVIEW BOARDS

Another frequently used model for police oversight is the civilian review board. These boards have been in use for many years. They are usually composed of citizens without substantial law enforcement experience or any other particular qualifications. Generally, their power is restricted to reviewing an already completed internal police investigation, and commenting on it to the Chief of Police. Citizen review boards have not been effective at causing reform, and often are co-opted by the police department whose investigations they are supposed to review. They wind up agreeing with the police department in almost all instances.

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59. See LOS ANGELES POLICE DEP'T, INTERNAL AFFAIRS GROUP, [http://www.lapdonline.org/organization/ocp/cos/iag/int\\_affairs\\_group\\_main.htm](http://www.lapdonline.org/organization/ocp/cos/iag/int_affairs_group_main.htm); LOS ANGELES POLICE DEP'T, BOARD OF POLICE COMMISSIONERS, [http://www.lapdonline.org/organization/bpc/board\\_main.htm](http://www.lapdonline.org/organization/bpc/board_main.htm); LOS ANGELES POLICE DEP'T, OFFICE OF THE INSPECTOR GENERAL, [http://www.lapdonline.org/organization/bpc/inspector\\_general/board\\_inspector\\_geneal\\_1.htm](http://www.lapdonline.org/organization/bpc/inspector_general/board_inspector_geneal_1.htm).

Newer civilian review board models provide the board with investigatory as well as review authority. Some of these models contemplate that the board will conduct parallel investigations to supplement the internal affairs investigations. In some instances, the review board will have subpoena power and can force a police officer to testify. In some jurisdictions, even more powerful civilian review boards have sole investigatory power. It is very rare, however, for a civilian review board to have the final say as to the disposition of an investigation or discipline to be imposed on an officer. These ultimate decisions generally continue to be the province of the Chief of Police. Nonetheless, all civilian review boards with independent investigatory authority seem to have the power to make recommendations to the Chief on disposition and discipline.

#### V. 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 open up a recalcitrant department and achieve the necessary reform. These federal remedies are of recent vintage. In the wake of the Rodney King incident in Los Angeles,<sup>60</sup> 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 or otherwise unlawful pattern or practice of excessive force.<sup>61</sup> If the federal investigation shows that allegations of excessive force are true, a federal court is empowered by these laws to enter an injunction compelling police reform.<sup>62</sup> While in the last five years, the Justice Department has been active in forcing police departments to be more open and to undertake significant reform, in most instances the local jurisdiction enters into a settlement agreement before the federal court issues the injunction.<sup>63</sup>

The intent of these federal investigations and decrees is to make closed and mysterious internal police processes open and transparent so that police officials can be held publicly responsible and accountable for the thoroughness, correctness, reasonableness, and fairness of their decisions. The federal remedies have been employed in several jurisdictions to date: Pittsburgh, Pennsylvania; Steubenville, Ohio; the State of New Jersey; Montgomery County, Maryland; Highland Park, Illinois; Washington, DC; Los

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60. Morrison, *supra* note 1.

61. 42 U.S.C. § 14141 (2002).

62. *Id.*

63. See *infra* note 64-67 and accompanying text.

Angeles; and, most recently, Cincinnati, Ohio.<sup>64</sup> Federal investigations are pending in a number of other major US cities, including Detroit, Michigan and New Orleans, Louisiana.<sup>65</sup>

The consent decree recognizing the agreement reached between the federal government and the City of Los Angeles concerning reform of the LAPD is a representative example.<sup>66</sup> The document details the degree to which the federal government is requiring the LAPD to undergo reform and curtail excessive force. The federal order has numerous requirements. The LAPD must collect detailed information on the use of force, and make it available to the public. The consent decree requires 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 requires the existence of the Police Commission, the Inspector General, and a monitor appointed to review and report on the LAPD's implementation of the federal order's requirements, including reports to the court if the monitor believes that the LAPD is not complying with the decree in good faith.<sup>67</sup>

#### CONCLUSION

This article has attempted to organize the differing approaches to civilian oversight of police agencies in the United States so that they may be viewed as a spectrum or continuum. If law enforcement agencies are willing to undertake reform voluntarily, to open their records to public scrutiny, allowing for the transparency of internal processes, including internal investigations; then initiation of independent, civilian monitoring, 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 after-the-fact, is a further step that may be necessary where monitoring does not succeed in curbing police misconduct. In some instances, where the law enforcement agency in question is resistant to greater

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64. SPECIAL LITIGATION SECTION, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, SETTLEMENTS AND COURT DECISIONS: CONDUCT OF LAW ENFORCEMENT AGENCIES, at <http://www.usdoj.gov/crt/split/findsettle.htm#Settlements>.

65. SPECIAL LITIGATION SECTION, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS, at <http://www.usdoj.gov/crt/split/faq.htm#howmanyPorP>. Other cities with pending investigations as of January 2003 are: Charleston, WV; Cleveland, OH; Eastpointe, MI; Miami, FL; New York City, NY (two investigations); Portland, ME; Prince George's County, MD; Providence, RI; Riverside, CA; Schenectady, NY; and Tulsa, OK.

66. 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>.

67. *Id.*

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. 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 that case, federal intervention, and consequent compulsory reform, including independent monitoring may be required.

This article is not meant to suggest 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, and only the most fitting alternative selected. In some sense, the prescription advocated here mirrors the best practice in the use of force by the police: force employed by the police should be narrowly and precisely calculated to overcome the resistance of the suspect. In some instances, that amount of force may be minimal, just enough to handcuff the suspect. In other cases, e.g., where the suspect wields a gun, the force used may need to be more severe. Just as an officer confronted with a resistant suspect needs to carefully select a level of force commensurate with the situation presented, the response to a law enforcement agency's resistance to accountability and responsibility for managing the risk of misconduct needs to be carefully measured, and overcome by the least intrusive option that works.

The various experiments in civilian oversight of police agencies that are described in this article are accomplishing much public good, and should not be feared as an inappropriate intrusion in the life of a law enforcement agency. Police departments, particularly ones tainted by scandal or corruption, cannot, and really should not, attempt to monopolize the reform process by insisting that the only path to the restoration of credibility is the trail they blaze themselves. A better approach is to ask what independent civilian oversight and review mechanisms are necessary to insure both that internal police accountability systems are truly functioning properly, and that public opinion is so informed. Civilian oversight not only corrects deficient systems, but also bolsters public confidence in the police, and thereby makes policing better and more effective.